200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

MEMO

TO: Twitter Moot Participants and Judges

FROM: Andrew Gage, Twitter Moot Administrator

DATE: 23 Oct 2012

RE: Twitter Moot Problem and Assignments

Congratulations on being selected to participate in the world's second ever Twitter Moot. The Twitter Moot, to be scheduled for November 20th, 2012, will focus on a reference made to the Supreme Twitter Court of Canada (STCC) by the government of Canada concerning its obligations to the public in relation to greenhouse gas emissions ("GHGs") and Climate Change.

The purpose of this memo is to define the scope of the issues to be argued in the Moot and identify the parties that the Twitter Moot Participants will be representing.

Scope of the Appeal

Please refer to the Twitter Moot Rules for information on how the Twitter Moot will be conducted. The Twitter Moot Rules will uploaded to the Twitter Moot web pages at the same time as this memo.

Under Canada's Supreme Court Act, the government of Canada may pose a reference question to the Supreme Court of Canada. This question may relate to "any important matters of law or fact concerning any matter." For the purposes of the Twitter Moot, assume that the Government of Canada has posed the following two reference questions to the Supreme Twitter Court of Canada:

1. Does the common law of Canada recognize the existence of a public right to a healthy global atmosphere?

Counsel should limit themselves to submissions related to this issue and not address issues falling outside the scope of these two questions.

A brief summary of some key arguments in favour of the existence of such a right may be found at Appendix A of these rules. Participants are encouraged to do additional legal research to

support or oppose the existence of the public right, but we presume that the legal arguments advanced in the Appendix will be central to the Twitter Moot.

The existence of a public right to a healthy atmosphere raises broad public policy implications about the role of the law and courts in constraining GHGs. Counsel are encouraged to discuss the broader public policy issues in their submissions.

To the extent that the Participants wish to make factual assertions about climate change and the global atmosphere, they may assume that the parties have adopted the 2007 Fourth Synthesis Report of the Intergovernmental Panel on Climate Change (IPCC) as an agreed statements of facts. The Synthesis Report is available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm.

The Parties

In a Supreme Court reference, the court generally hears from a range of interested interveners. The Twitter Moot Teams have been assigned to represent the various parties at random.

The parties in the Atmospheric Right Reference, and the order of appearance, will be:

- The **Government of British Columbia** – The Government of British Columbia, a party to the reference, will argue that there is a public right to a healthy atmosphere, but that its implications are largely political, rather than legal. The Government of British Columbia will be represented by @TheRyborg and @canadajon from York University (Osgoode Hall Law School).
- The **Government of Canada** – The Canadian government, a party to the reference, will be taking the position that there is no legally recognized public right to a healthy global atmosphere. The Government of Canada will be represented by @jaymichi and @cjalbinati from Thompson Rivers University Law School.
- The **Centre for Indigenous Environmental Resources (CIER)** – CIER – a national, First Nation-directed environmental non-profit organization – is intervening in the reference. CIER will provide the Team representing it with direction as to specific issues it wishes raised in relation to the Reference. West Coast Environmental Law thanks CIER for providing that direction and for its involvement in the Twitter Moot. CIER will be represented by @tankersnothanks and @orangepipsies of the University of Alberta Law School.
- The **Canadian Institute of Petroleum Companies (CIPC)** – CIPC, an intervenor in the reference, will argue that there is no common law right to a health atmosphere. CIPC will be represented by @Baaarbora and @Willhorne of Dalhousie University (Schulich Law School).
- The **Environmental Coalition** – The Environmental Coalition, a Coalition of a number of prominent environmental groups, is intervening in the reference to argue that there is a common law right to a healthy atmosphere, and that recognition of such a right is an important piece of the legal response to climate change. The Coalition will be represented by @adamharris09 and @Gradsen of the University of Ottawa Law School.

Appendix A – Summary of Arguments in favour of a public right to a healthy atmosphere

By Andrew Gage, West Coast Environmental Law Staff Lawyer

Public rights in respect of the environment

The term "public right" refers to legally recognized rights that are held not by the government, but by the public at large. G.V. La Forest explains:

> By public rights is not meant rights owned by government, whether federal, provincial or municipal. These bodies may own land and water rights ... in the same way as private individuals, in which case they are, in a manner of speaking, public rights. But what is here called public rights are those vested in the public generally, rights that any member of the public may enjoy.[1]

The Supreme Court of Canada in 2004 affirmed the existence of such rights in respect of the environment in the ground-breaking decision in *Canadian Forest Products v. BC*. The case concerned whether the province of British Columbia could recover damages for non-financial environmental harm suffered as a result of a forest fire negligently caused by Canadian Forest Products. The Supreme Court, after a discussion of the law of public nuisance, pointed out:

> The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law. ... Indeed, the notion of 'public rights' existed in Roman law...:
>
> > By the law of nature these things are common to mankind — the air, running water, the sea . . . .
>
> (T. C. Sandars, *The Institutes of Justinian* (1876), Book II, Title I, at p. 158)
>
> A similar notion persisted in European legal systems. According to the French *Civil Code*, art. 538, there was common property in navigable rivers and streams, beaches, ports, and harbours. A similar set of ideas was put forward by H. de Bracton in his treatise on English law in the mid-13th century (*Bracton on the Laws and Customs of England* (1968), vol. 2, at pp. 39-40):
>
> > By natural law these are common to all: running water, air, the sea and the shores of the sea . . . . No one therefore is forbidden access to the seashore . . . .
> >
> > All rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public by the *jus gentium* . . . .

---

[1] G. La Forest, Water Law in Canada- The Atlantic Provinces (Ottawa: Information Canada, 1973) at 178. Although written in the context of public rights arising from navigable waters, the definition is more generally applicable.

> By legal convention, ownership of such public rights was vested in the Crown, as too did authority to enforce public rights of use. According to de Bracton, *supra*, at pp. 166-67:
>
> > (It is the lord king) himself who has ordinary jurisdiction and power over all who are within his realm. . . . He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. (By the *jus gentium*) things are his . . . which by natural law ought to be common to all . . . . Those concerned with jurisdiction and the peace . . . belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown.
>
> Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable "public rights" in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.[2]

On the basis of these rights, the Supreme Court affirmed that the Crown has an ability, at common law, to claim for environmental damages – independent of any financial or other more conventional damages suffered. It seems obvious that climate change damages include both property/financial damages and this type of environmental damage.

A public right to a healthy atmosphere?

While the Supreme Court may have endorsed the idea of public environmental rights in general, and the recovery of damages arising from a violation of those rights, we must consider whether the right to a healthy atmosphere is one which is, or could be, recognized by the courts. Needless to say, there is little case law directly on point, as the ability of the atmosphere to appropriately absorb and reflect solar radiation has been taken for granted until comparatively recently.

However, there are three strong arguments to support the recognition that the public has rights in relation to the health of what has been described as the atmospheric commons.[3]

First, such a right might be viewed as an extension of the public rights in respect of air.

Second, the public may have acquired such a right from its reliance on the healthy functioning of the atmosphere from time immemorial.

Third, air, and the global atmosphere, is of such public importance, and has such a peculiarly public nature, that it belongs to everyone.

Each argument will be considered in turn.

---

[2] *Canadian Forest Products Ltd. v. BC*, [2004] 2 S.C.R. 74, 2004 SCC 38 at pp. 111-116.

[3] M. Woods. Atmospheric Trust Litigation Around the World in Ken Coghill, Charles Sampford, Tim Smith, (eds). *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Australia: January 2012), at p. 172.

Public right to air

As we have seen, the *Institutes of Justinian* and *de Bracton*, cited with approval in the Supreme Court of Canada decision in *Canfor*, both refer to the public's rights in respect of air (in addition to running water and the sea). There are several other early authorities which adopt similar language:

> Flowing water, as well as light and air, are, in one sense, *publici juris*. They are a boon from Providence to all, and differ only in their mode of enjoyment.[4]

In the mid- to late- 1800s the English courts began to move away from the view that the public had a general right in respect of water, owing to "the greater demand for water for manufacturing purposes"[5] associated with the industrial revolution.

However, there was no similar shift in the case law related to air, and Tim Bonyhady, in *Laws of the Countryside*, writes (in a very short chapter on air):

> In Roman law air was classified as *res communes* which meant that it was regarded as subject to public use but was thought to be incapable of ownership. … [I]t is probably still appropriate to regard air as res communes since it remains open to public use and, in its ordinary state, is not the subject of property rights. …
>
> When air is "at large" in the atmosphere, it is not the subject of property rights. Regardless of the rights which a landowner has to control the use of the space above his land, his interest in the actual air is no greater than that of any other member of the public. On account of its superabundance there are no restrictions on the quantity or circumstances in which anyone may take air. As stated by the Earl of Haslbury in *Colls v. Home and Colonial Stores Ltd.*(1904), air "is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none."[6]

In addition to the cases which reference a stand-alone public right in respect of air, there are a large number of cases in which public nuisance law has been used to claim injunctive relief or damages related to air pollution. Since a public nuisance is sometimes defined as an "an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of … a

---

4 *Wood v. Waud*, 3 Ex. 775, per C.J. Baron Pollock; See also *R. v. Meyers*, 3 U.C.C.P. 305; Black's commentaries, 2 Bl. Comm. 14: "[T]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an *usufructuary* property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water …"; *Liggins v. Inge* (1831), 7 Bing 682, per Tindal, C.J. at p. 692-693: "Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light and air, were considered as some of those things which had the name of *res communes*, and which were defined "things, the property of which belong to no person, but the use to all."

5 *Ormerod v. Tormorden Mill Co.* (1883), 31 Weekly Reporter 759 at 760-61, per Cave J. (Q.B.D.).

6 T. Bonyhady, p. 197, citing *Colls v. Home and Colonial Stores Ltd.* (1904), [1904] A.C. 179 at 182-3.

right belonging to him as a member of the public,"[7] some commentators have relied on these cases in support of a public right in respect of "unpolluted" or "untainted" air.

> Examples of rights common the all members of the community, the interference with which has been held to constitute a public nuisance, include rights of public health, morals and safety, rights of passage on navigable waters, rights to untainted air, and clean water, rights to fish in public waters and right created under statute, although rights associated with highways are most commonly litigated.[8]

Against this line of authority, there does not appear to actually be any authority rejecting the idea that the public has a right to "untainted air."

For a court looking for direction on whether or not there is a public right in respect of the global atmosphere, it may not be a huge leap to conclude that a right in respect of one small piece of the atmosphere (a local airshed) should extend to a right in respect of the atmosphere as a whole, when it is the atmosphere as a whole which is at risk.

Use from time immemorial

Second, while public rights can be acquired in several different ways, one important way is the use of land or a resource from time immemorial. As the Judicial Committee of the Privy Council explained in relation to the public right to fish in Canada:

> [T]he subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity, the Crown as *parens patriae* no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the courts.[9]

---

7 *Williams v Aristocratic Restaurants*, [1951] SCR 762 at p. 770, quoting Clerk and Lindsell on Torts, 10th Ed. p. 544; See also *Robinson v. Adams* (1924), [1925] 1 D.L.R. 359 per Middleton J. at p. 366 (Ont. C.A.), referring to a public nuisance as an "injury to the 'property of mankind'", quoting *Attorney General v. Sheffield Gas Consumers Co.* (1853), 3 DeG. M. & G. 304, 43 E.R. 119, at p. 320.

8 L. Rainaldi, (ed). Remedies in Tort (1987) Thomson Reuters, 1987, updated to 2011, at p. 17-42.8; M. Faieta. Environmental Harm: Civil Actions and Compensation (Toronto: Butterworths, 1996) at pp. 46-47; *Talbot v Northwest Territories (Commissioner)*(1997), 5 Admin. L.R. (3d) 102, 1997 CanLII 4520 (NWTSC): "Interference with the rights of public health and safety, the right to untainted air and clean water and the right to fish in public waters have all been held to constitute public nuisance."

9 *British Columbia (Attorney General) v. Canada (Attorney General)* (1913), 15 D.L.R. 308 (JCPC) at p. 315; adopted in *R. v. Tweedie*, 15 Ex. C.R. 177 and *R. v. Leamy*, 15 Ex. C.R. 189.

This principle has also been used to find in favour of the existence of public rights in respect of rights of way over land[10] and water[11] that have been used from time immemorial:

> The path or roadway with which we are concerned is unquestionably a public right of way and has been such, as far as anyone is aware, from "time immemorial." Indeed, it is admitted by the appellants that Martha Hynes does not own it. Thus members of the general public had a right to pass over it and did so.[12]

The common law recognizes that customary rights,[13] franchises and liberties[14] and private rights[15] may all derive from use from time immemorial. In the context of customary rights, the courts have explained:

> [W]here-ever there is an immemorial usage, the court must presume everything possible, which could give it a legal origin.[16]

And it is in this context that the principle is best known in Canadian law, having been referenced in a number of the cases concerning Aboriginal Title and Rights, although obviously those rights now have a constitutional dimension with the enactment of s. 35 of the *Constitution Act, 1982*.[17]

---

[10] *Mann v. Brodie* (1885) 10 Ap.. Cas. 278 at p. 385 (H.L.), cited with approval in *R. v. Oxfordshire County Council and ors.*, UKHL 28; Lord c. St. Jean (1921), 61 S.C.R. 535.

[11] *R. v. Meyers*, above at note 4, summarizing the English rules for creation of public rights over navigable waters. The court subsequently found that the "time immemorial" test would inappropriately restrict public rights in relation to the recent settler public of Canada; [2000] 1 AC 335; *Roland v. the Environmental Agency*, [2003] EWCA Civ 1885; Wills Trustees v Cairngorm Canoeing & Sailing School Ltd 1976 SC (HL) 30;

[12] *Hynes v. Hynes* (1989), 79 Nfld. & P.E.I.R. 86 (C.A.); interestingly, the judge implies that long-standing use of a road in Canada may involve use from time immemorial, although he does not address what this would mean.

[13] Halsbury's Laws of England (4th Ed), Vol 12(1): Custom and Usage, paras. 601-602.

[14] Ibid., para. 603. Halsbury's explains that "a custom is distinguished from a franchise in that a franchise lies in grant, whereas a custom runs contrary to the common law and therefore cannot be derived from a Crown grant. A custom, on the other hand, may not derogate from the royal prerogative in the way that a franchise necessarily does."

[15] Ibid., para. 604. At common law private rights may be acquired by prescription, which generally is for long usage, but may be up to and including time immemorial usage.

[16] *Cocksedge v. Fanshaw* (1779), 1 Dougl. 119 at p. 132, 99 E.R. 80 (K.B.); for an exhaustive discussion of the common law's approach to customary usage in the Commonwealth, see R.D. Peskelvits. *Customary Law, the Crown and the Common Law (Thesis)*, (Unpublished, 2002), available-on-line at https://circle.ubc.ca/handle/2429/12160, last accessed 23 July 2012; see also Halsbury's, ibid, at para. 620: "It is not incumbent upon a person seeking to establish an alleged custom to show how it originated. Provided the custom is immemorial, certain, and reasonable in itself, and conforms to the requirements already mentioned, it unnecessary to trace it to its origin, or to show how it might have had a legal origin otherwise than by an Act of Parliament."

[17] Note, however, that while "time immemorial" has often been mentioned in aboriginal rights and title cases, the courts have generally not articulated the test for aboriginal rights and title in this way. Thus the BC Court of Appeal notes that rights need not be established from time immemorial, but rather from "a sufficient length of time to become integral to the aboriginal society": *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), at para. 41, per MacFarlane J. The Supreme Court of Canada, in *R. v. Van Der Peet*, [1996] 2 S.C.R.

The courts have occasionally noted the difficulty of applying a "time immemorial" test in relation to customary rights to Canada's non-Aboriginal population, suggesting that the standard might be relaxed in Canada.[18] However, if there is any situation in which Canada's non-settler population can claim a right from time immemorial, it would be in relation to the atmosphere. The ability of the atmosphere to moderate the sun's radiation is what makes life possible, and humans in every part of the world, and governed by every government, have relied upon the atmosphere to provide this service (even while taking it for granted) since time immemorial. There is only one atmosphere, and where-ever our ancestors come from, they have made use of it, and we continue to do so.

Opponents of the idea of a public right in respect of the atmosphere might argue that there is a difference between the active use of the seas for fishing and similar uses, and the passive (although considerable) benefit that the atmosphere provides to the public.[19] Further judicial direction may be required as to whether or not this is a legally relevant distinction, but it is worth noting that many public rights include elements of conservation. For example, the public right to fish has often been used to protect fish habitat, and not only the physical act of taking fish.[20] And in *Canfor* the Supreme Court of Canada affirmed the idea that the public's rights in respect of the environment may be protective in nature.[21]

While our reliance on the atmosphere is probably less obvious than the public's use of fish or navigable waters, it is no less real, and the consequences of being deprived of it are greater. Indeed, a wide range of rights, both public and private, up to and including the right to life itself, will be compromised by a failure to protect the planet's atmosphere. With so many public and private rights depending upon the continued health of the global atmosphere, it seems overly technical to maintain that we have not made active use of our atmosphere.[22]

507, while referring positively to cases that use time immemorial language (see p. 544, para. 37), itself describes the test as whether or not the Aboriginal rights claimed "have continuity with the practices, customs and traditions which existed prior to contact." (p. 554).

18 *R. v. Meyers*, above, note 4, at pp. 346-48; *Frank Georges Island Investments v. Nova Scotia (Attorney General)*, 225 N.S.R. (2d) 264 (N.S.S.C.) at p. 277, para. 44; *Hynes*, above, note 12 (holding that a Canadian road had been used from time immemorial); Time immemorial in the English case law dates to 1189.

19 Due to the nature of air, and the difficulty in owning it the courts have generally held that it is not possible to acquire a private right to air through its longstanding use, although, interestingly, such a right can be acquired if you have built and used a window or other ventilation system: *Cable v. Bryant*, 1906 C.D. 259 at 264: "both the right to light and the right to air through a particular aperture in a house or building on the dominant tenement is capable of being acquired through prescription." However, this case law does answer the question of whether the public's general enjoyment and reliance upon a healthy global atmosphere is capable of forming the basis of a public right.

20 For example, *R. v. The Ship "Sun Diamond" et al.*, [1984] 1 F.C. 3 (T.D.); *McRae v. British Norwegian Whaling Co. Ltd.*, [1927-31] Nfld. L.R. 274; *AG v. Harrison*, 12 Gr 466.

21 *Canfor*, above, note 2.

22 Customary rights, in order to be legally recognized, must, in addition to existing from time immemorial, also demonstrate that "(2) it must be reasonable; (3) it must be certain in its terms and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to affect; and (4) it must have continued as of right and without interruption since its immemorial origin.": Halsbury, above, note 13, para. 606. It is not clear whether these criteria apply equally to the establishment of common law public rights, but if they do, then I would suggest that the public right to a healthy atmosphere qualifies. It is reasonable that something essential to

The Nature of the Atmosphere

There is some case law in support of the view that certain resources – air and water among them – are inherently incapable of being owned and essential to the public, and therefore are the subject of public rights.

Thus the pivotal decision in *R. v. Meyers*, which found that public rights of navigation extend to all navigable waters in Canada, and not only (as is the case in the English law) to tidal waters, referenced to a large degree on the public nature of water. The court used language which applies equally to air and the atmosphere:

> I find water treated as a transient element, not capable of specific grant or proprietorship, except as a temporarily or partially monopolized in the exercise of the lawful right thereto. I find the original right to running water, in both a public and private point of view, *jure naturoe* [natural rights], and not accruing from occupation and as a consequence that such a right is *publici juris* [a public right] wherever the stream is capable of general and common use as a highway by water. ... [I]t should depend on the fact of natural *capacity*, and not the fact of usage.[23]

As noted above, the Roman law related to air also emphasized this type of incapacity of ownership.

Similar arguments have been identified in U.S. literature as the basis for the public trust doctrine (the idea that certain lands and resources owned by the state must be managed for the benefit of the public):

> The approach the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs. It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. ...
>
> An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. ... Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.[24]

---

so many other legal rights (and, ultimately, to life itself) should receive legal protection. While there are legal questions about the limits that the public right to a healthy atmosphere might place upon government and private actors, the global atmosphere is clearly defined (at any rate, as clearly defined as the high seas, which is where the public rights to fish and navigate first became established). And the atmosphere has been relied upon continuously from time immemorial.

[23] *R. v. Meyers*, above, note 4, at pp. 347-48.

[24] J. Sax. *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*. 68 Michigan L.R. 473, pp. 484-85.

While judges might prefer a more solid grounding of a public right to the global atmosphere, the central importance of the atmosphere to all living things and its essential unownability, provide further support to the idea that the public should, and does, have such a right. The exercise of a great many other rights, including Canfor style public environmental rights, and including other public, private, Aboriginal and other rights, are dependent upon the continued health of the atmosphere.

Legislative authority over the public right

One of the obvious limitations of the public's right to a healthy atmosphere is that they are based in the common law. As such, if even if they are established, they could presumably be removed or limited by legislation.

Before examining constitutional arguments, it is important to note that the common law has a presumption that legislation is not intended to interfere with or eliminate existing legal rights. As a result, even if a Legislator is able to extinguish such rights, any intention to eliminate legal rights should not be lightly inferred and must be clear and plain. As explained in my article, *Public Rights and the Lost Principle of Statutory Interpretation*:

> There is … authority that where legislation is intended to interfere with public rights, it will only do so to the extent "rendered necessary by what the act authorizes." Even where there is valid interference with rights, then, such rights should not be presumed to be extinguished.
>
> On the basis of such authority, it appears that legislation must be "express" and "unequivocal," demonstrating a clear and unambiguous intention to restrict or extinguish public rights before such rights will be extinguished. … [T]here is a strong presumption that statutory provisions should be interpreted as not interfering with public rights. Legislation will only authorize interference with public rights where the legislator's intention to do so is clear and unambiguous on the face of the legislation or where an intention to negatively affect public rights is the unavoidable consequence of the operation of the Act. [25]

If the courts were to insist upon a high level of clarity, this might discourage legislation intended to constrain the public right to a healthy atmosphere – one imagines that a government enacting legislation expressly eliminating the public's right to a healthy atmosphere might face considerable political fall-out.[26]

However, should a government enact legislation which indicates a clear intent to extinguish or restrict the public right to a healthy atmosphere, there are at least two constitutional arguments which could come into play:

---

[25] Gage, A. *Public rights and the lost principle of statutory interpretation*. 15 J. Env. L.Practice 107 (Spring 2005), pp. 124-5.

[26] A similar presumption of statutory interpretation arising under Massachusetts' public trust doctrine requires that an express intention to extinguish a public trust is required before the courts will hold that the legislation has such an effect: *Gould v. Greylock Reservation Committee*, 215 N.E. 2d at 126. See Gage, A. *Fish Lakes and Tailings Ponds*, 22 J.E.L.P. 1 at pp. 33-35 for further discussion of this case law.

(a) The relationship between Aboriginal Rights and the public right; and
(b) The limits of sovereignty and the division of powers.

Aboriginal Rights and the public right

The public right to a healthy atmosphere has huge implications for the Aboriginal and Treaty Rights exercised by Canada's First Nations. Many of these Aboriginal Rights – from hunting and fishing rights to rights to use their lands as formerly – may be in part dependent upon the continued health of the global atmosphere.

In Canada the test for an Aboriginal Right is whether "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[27] Rising global temperatures may undermine many such practices, customs or traditions, thereby directly impacting such Aboriginal Rights. While as a general rule First Nations culture presumably used and relied upon the global atmosphere in a manner similar to every other culture, a great many distinctive rights depend upon the continued health of the global atmosphere – including Aboriginal Title – and the right to the maintenance of the atmosphere might be considered to be incidental to such Rights.

The right to a healthy global atmosphere is clearly integral to First Nations cultures – in the sense of being necessary, and it seems quite open to a court to hold that legislation that undermines the right to a healthy global atmosphere, upon which other Aboriginal Rights depend, would be constrained by section 35 of the *Constitution Act, 1982*.[28]

Limits on Sovereignty and the Division of Powers

It is difficult to overstate the impact that climate change will have on Canada, and the Canadian provinces, if the global rise in greenhouse gases is not checked. While it is not possible to determine precisely how catastrophic climate change might unfold, it is not an overstatement to claim that the actions and inaction of current global governments could result in rapid global temperature changes, with the associated geoclimatic, environmental, population and other stresses, that might, in a worst case scenario, literally undermine the continued existence of Canada as a nation, and at a minimum will see major harm suffered by each of the provinces and by the country as a whole. James Hansen, one of the world's leading climate scientists, advise that the possibility that the planet might be rendered unliveable is not outside of the realm of possibility.[29]

The law is not accustomed to dealing with human activities with such dire potential consequences, but this reality may suggest a limit on the authority of the Crown itself.

Lawyers developing the theories behind atmospheric trust litigation – cases based on the view that the government is a co-trustee of the global atmosphere (along with other governments) –

---

[27] *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para. 46.

[28] The *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 1, s. 35.

[29] J. Hansen. *Storms of My Grandchildren. (Bloomsbury: 2009), at Chapter 10 (pp. 223-236).*

have argued that there are certain actions that no legislator can undertake because they "would compromise a future legislature's ability to exercise sovereignty on behalf of the people."[30]

Academics sometimes explain the public trust doctrine as accepting that there are certain trust resources that are so essential to civilization itself, and to sovereignty, that a legislator cannot divest themselves of, or destroy, those resources.

> The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs.[31]

In the context of the huge potential impacts of the climate crisis, this argument seems still more compelling. As noted, the actions of today's legislators in relation to the public right to a healthy atmosphere may determine whether we continue as a nation.

Canadian law recognizes the principle that the current Parliament cannot legislatively bind subsequent Parliaments.[32]

> The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.[33]

That being said, the principle has not, so far as we have been able to determine, been applied in Canada to prevent or require action of the current Legislator, so as not to compromise the ability of the future Legislator to exercise sovereignty. Rather, the Canadian, and English, cases seem to relate exclusively to the ability of current Legislators to repeal provisions enacted by past Legislators which purported to be irrevocable.

However, the idea that the global atmosphere might be so essential to the continued existence of the Crown in Canada that Parliamentary Sovereignty demands that it receive pro-active protection is very consistent with basic principles of inter-generational equity, and with the reality of climate change.

A closely related argument relates to the division of powers, under Canada's *Constitution Act, 1867*. There is nothing in the *Constitution Act, 1867* that sets out which level of government regulates the global atmosphere, and provinces and the federal government are jointly responsible for addressing, and affected by, climate change. (Mary Wood would refer to them as

---

30 Wood, above, note 3, at her footnote 47, referencing Grant. *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 48 Ariz. St. L.J. 849 (2001) at p. 851. Wood ties this concept to a well recognized idea in public trust theory that the trust obligations are "an inherent attribute of sovereignty.": p. 169, quoting the Hawaii Supreme Court in *In re* Water Use Permit Applications, Waihole Ditch Combined Contested Case Hearing, 9 P.3d 409, 432-22 (Haw. 2000).

31 Sax, above, note 24 at p. 484.

32 P. Hogg, Constitutional Law of Canada. (5th Ed Supplemented) (Toronto: Carswell, 2007), p. 12-8 to 12-9.

33 *Ellen Street Estates, Ltd. v. Minister of Health*, [1934] 1 K.B. 590 (C.A.), at 597.

"co-tenants" of the global atmosphere.)[34] The case law to date suggests that both levels of government play a key role in regulating greenhouse gas emissions.[35]

As a result, it may be that one level of government cannot unilaterally eliminate the public's rights, and the Crown's duties, in respect of the atmosphere. This is doubly true if, as discussed above, the continued health of the atmosphere is an essential precondition for the continued sovereignty of both levels of government.

If these arguments seem shocking, perhaps it is because we are not used to admitting the possible consequences of climate change for our civilization, or the role that our governments play in leading us towards that worst-case scenario.

Conclusion

For as long as there have been humans, we have depended on the global atmosphere to protect us, and moderate our climate. Now that that protection is in jeopardy, it is time to ask what, if any, status the global atmosphere, and our reliance upon it, has in law.

There is good authority suggesting that the public can and should assert a right to a healthy atmosphere, free from human interference which would undermine its ability to provide a stable climate. There is little authority to the contrary, and it is difficult to believe that any government would want to be in a position of publicly arguing that no such public right exists.

---

34 Woods, above, note 3.

35 See Hsu, S.L. and R. Elliot. *Regulating Greenhouse Gas Emissions in Canada: Constitutional and Policy Dimensions,* 54 McGill L.J. 463 (2009), pp. 479-80.