

IN THE SUPREME TWITTER COURT OF CANADA

IN THE MATTER OF SECTION 53 OF THE *SUPREME COURT ACT*, RSC, 1985 C S-26

IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING THE
EXISTENCE OF A PUBLIC RIGHT TO A HEALTHY GLOBAL ATMOSPHERE

FACTUM OF THE INTERVENER
THE ENVIRONMENTAL COALITION

Adam Harris and Abhishek Joshi
University of Ottawa Law School
Ottawa, Ontario
Twitter: @adamharris09 and @gradsen
Counsel for the Environmental Coalition

@TheRyborg and @canadajon

York University (Osgoode Hall Law School)
Counsel for the Government of British Columbia

@jaymichi and @cjalbinati

Thompson Rivers University Law School
Counsel for the Government of Canada

@tankersnothanks and @orangeipsies

University of Alberta Law School
Counsel for the Centre for Indigenous Environmental Resources (CIER)

@Baaarbora and @Willhorne

Dalhousie University (Schulich Law School)
Counsel for the Canadian Institute of Petroleum Companies (CIPC)

INDEX

	<u>PAGE NO.</u>
PART I - STATEMENT OF FACTS	4
PART II - POINTS IN ISSUE	4
PART III - THE ARGUMENT	4
PARTY IV - CONCLUSION	5
PART V - ORDER REQUESTED	5
PART VI - TABLE OF AUTHORITIES	7

PART I - Statement of Facts

1. Anthropogenically created greenhouse gases (GHGs) cause climate change and pollution.¹ Mitigating climate change and maintaining a healthy atmosphere are critical to preserving the overall health, wellbeing and future of Canadians. Therefore, it is critical that the existence of a public right to a healthy global atmosphere must be acknowledged.

PART II - Points in Issue

2. Can a public right to a healthy global atmosphere be recognized via common law?

PART III - The Argument

3. It is our position that the recognition of a right to a healthy global atmosphere is a crucial aspect of the legal response to climate change. This would “ensure a substantive right to environmental quality and a suite of procedural safeguards to ensure that it is fulfilled.”² More importantly, it is likely to establish a corresponding obligation on the government to “respect, protect and fulfill it.”³

4. We contend that recognition of such a right would not only be consistent with existing jurisprudence, but, also, will be consistent with the “right to life, liberty, and security of the person” as enumerated in Section 7 of the *Canadian Charter of Rights and Freedoms*.⁴ Jurisprudence has recognized that “[t]he protection of the environment has become one of the major challenges of our time.”⁵

5. The Supreme Court of Canada has chosen to read in environmental rights in various cases. This Court has unequivocally stated that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment,” and, further, recognized that “[n]ot only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in [various] legislative provisions”⁶. The Court has further recognized public environmental rights.⁷ The tort of public nuisance requires the maintenance of clean air in a local airshed,⁸ which could be extended globally.

6. As of 2012 “more than three-quarters of the world’s constitutions (147 out of 193) include explicit references to environmental rights and/or environmental responsibilities.”⁹ Unfortunately, Canada remains a laggard. The time is now ripe for the Supreme Court of Canada to recognize the right to a healthy atmosphere in Canada’s Constitution. While the *Charter* does not explicitly recognize the right to a healthy atmosphere, the interveners contend that this Court has the jurisdiction to ‘read in,’ and recognize such a right at common law through Section 7 of the *Charter*.

¹ Intergovernmental Panel on Climate Change, “2007 Fourth Synthesis Report of the Intergovernmental Panel on Climate Change” online: <http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm> at 36.

² David R Boyd, *The Right To A Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press, 2012) at 2 [Boyd].

³ *Ibid.*

⁴ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11* [Charter].

⁵ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.

⁶ *Canadian Pacific Limited v Her Majesty The Queen in Right Of Ontario*, [1995] 2 SCR 1031 at 55.

⁷ *British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 74 [Canfor].

⁸ *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 32, cited with approval in *Canfor*, *supra* note 6.

⁹ Boyd, *supra* note 2 at 68.

7. Climate change and pollution are impacting the health of Canadians, and, the health of the interconnected ecosystems on which humanity relies. This directly interferes with the right to life, liberty and security of the person of Canadians. The *Charter* applies to government actors and, the government is responsible for approving, regulating and reducing GHG levels. Government policy should be guided by the precautionary principle.¹⁰

8. This Court has stated that “s. 7 may be interpreted to include positive obligations”¹¹ and that the Canadian *Charter* must be viewed as “a living tree capable of growth and expansion within its natural limits.”¹² Furthermore:

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to **guarantee adequate living standards**.¹³

9. In the alternative, the interveners submit that the right to a healthy atmosphere constitutes a principle of (customary) international law, and, as such, Canada is bound by it. Failure to domestically recognize such a right undermines the rights of the citizens of Canada, and violates Canada’s international legal obligations.¹⁴ Furthermore, two Canadian provinces and three territories already recognize environmental rights.¹⁵

PART IV - Conclusion

10. Protecting environmental rights, especially constitutionally, has shown to empirically reduce pollution in various other countries.¹⁶ Canada stands at the apex, and needs to decide if it is willing to recognize and enshrine the right to a healthy atmosphere upon its citizens, with the eventual goal of mitigating GHG emissions.

11. When the *Charter* was drafted, and the constitution was repatriated, there were attempts, albeit unsuccessful, to enshrine environmental rights within the Constitution.¹⁷ With the rise of GHG emissions and increasing effects from global warming, the time is now ripe to recognize a right to a healthy atmosphere via the common law. More importantly, public polling suggests that there exists popular support for such an endeavor.¹⁸

12. Canada, in accordance with its responsibility to its citizens, and its international obligations, must immediately recognize the common law right to a healthy atmosphere at this crucial turning point.

¹⁰ 114857 *Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, [2001] 2 SCR 241.

¹¹ *Gosselin v Quebec (AG)*, [2002] 4 SCR 429 at para 82 [Gosselin].

¹² *Edwards v Attorney-General for Canada*, [1930] AC 124 (P.C.) at 136. Also see *ibid*.

¹³ Gosselin, *supra* note 10 [emphasis added].

¹⁴ Boyd, *supra* note 2 at 141-145.

¹⁵ See for example *Environmental Bill of Rights*, SO, 1993, C 28. Also Quebec, Nunavut, Northwest Territories and Yukon.

¹⁶ See generally, Boyd, *supra* note 2.

¹⁷ See Boyd, *supra* note 2, specifically, Chapter 1 and Chapter 3.

¹⁸ *Ibid*.

PART V - Order Requested

13. The Environmental Coalition requests that the Honorable Court recognize the existence of a common law right to a healthy atmosphere.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2012.

Adam Harris and Abhishek Joshi

PART VI - Table of Authorities

Note 1: Photo, online: <http://www.bioindustrialparksarnia.com>

Note 2: Ecojustice, Chemical Valley Charter Case, online: <http://www.ecojustice.ca/cases/chemical-valley-charter-case>

Note 3: David R. Boyd, *The Right To A Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at pg, 69.

Case, Articles, Texts and Reports, Statutes and Declarations, Polls

114857 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), [2001] 2 SCR 241.

Canadian Pacific Limited v Her Majesty The Queen in Right Of Ontario, [1995] 2 SCR 1031

Canadian Forest Products Ltd v British Columbia, [2004] 2 SCR 74, 2004 SCC 38.

David R. Boyd, *The Right To A Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012).

Ecojustice, Chemical Valley Charter Case, online: <<http://www.ecojustice.ca/cases/chemical-valley-charter-case>>.

Edwards v Attorney-General for Canada, [1930] AC 124 (PC)

Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3.

Gosselin v Quebec (A.G.), [2002] 4 SCR 429.

Intergovernmental Panel on Climate Change (IPCC), "2007 Fourth Synthesis Report of the Intergovernmental Panel on Climate Change" online: IPCC <http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm>.

Lynda M. Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 WJSLI 7.

Ryan v Victoria (City), [1999] 1 SCR 201.