



ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

ISBN 978-1-55238-986-7

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.

COPYRIGHT NOTICE: This open-access work is published under a Creative Commons licence. This means that you are free to copy, distribute, display or perform the work as long as you clearly attribute the work to its authors and publisher, that you do not use this work for any commercial gain in any form, and that you in no way alter, transform, or build on the work outside of its use in normal academic scholarship without our express permission. If you want to reuse or distribute the work, you must inform its new audience of the licence terms of this work. For more information, see details of the Creative Commons licence at: http://creativecommons.org/licenses/by-nc-nd/4.0/

UNDER THE CREATIVE COMMONS LICENCE YOU **MAY**:

- read and store this document free of charge:
- distribute it for personal use free of charge;
- print sections of the work for personal use;
- read or perform parts of the work in a context where no financial transactions take place.

UNDER THE CREATIVE COMMONS LICENCE YOU MAY NOT:

- gain financially from the work in any way;
- sell the work or seek monies in relation to the distribution of the work:
- use the work in any commercial activity of any kind;
- profit a third party indirectly via use or distribution of the work:
- distribute in or through a commercial body (with the exception of academic usage within educational institutions such as schools and universities);
- reproduce, distribute, or store the cover image outside of its function as a cover of this work:
- alter or build on the work outside of normal academic scholarship.



Acknowledgement: We acknowledge the wording around open access used by Australian publisher, **re.press**, and thank them for giving us permission to adapt their wording to our policy http://www.re-press.org

Contributors

PAUL ADAMS, Senior Counsel, Public Prosecution Service Canada, Halifax

NATASHA AFFOLDER, Associate Dean, Faculty of Law, University of British Columbia, Vancouver

ANDREA C. AKELAITIS, Letcher Akelaitis LLP, Vancouver

PETER BOXALL, Professor, Department of Resource Economics & Environmental Sociology, University of Alberta, Edmonton

GIORILYN BRUNO, DLA Piper (Canada) LLP

JAMES BUNTING, Davies, Ward, Phillips & Vineberg LLP, Toronto

CINDY CHIASSON, Alberta Energy Regulator, Edmonton

JOHN S.G. CLARK, Department of Justice, Vancouver

JOHN D. CLIFFE, Q.C., Cliffe Tobias, Vancouver

LYNDA COLLINS, Professor, Faculty of Law, Common Law, University of Ottawa

JACK D. COOP, Fogler, Rubinoff LLP, Toronto

CHARLES-EMMANUEL CÔTÉ, Professor, Faculty of Law, Laval University

PETER J. CRAIG, Senior Crown Attorney, Nova Scotia Public Prosecution Service, Dartmouth

PIERRE-OLIVIER DESMARCHAIS, Policy Analyst, Policy Horizons Canada, Government of Canada

ADAM DRIEDZIC, Staff Counsel, Environmental Law Centre (Alberta) Society, Edmonton

ERIN EACOTT, Public Prosecution Service of Canada, Edmonton

JENNIFER FAIRFAX, Partner, Osler, Hoskin & Harcourt LLP, Toronto

JAMES FLAGAL, Counsel, Ontario Ministry of the Environment and Climate Change, Toronto

SHAUN FLUKER, Associate Professor, Faculty of Law, University of Calgary

HADLEY FRIEDLAND, Assistant Professor, Faculty of Law, University of Alberta, Edmonton

PAULE HALLEY, Professor, Faculty of Law, Laval University

CHARLES HATT, Staff Lawyer, Ecojustice, Toronto

BRENDA HEELAN POWELL, Staff Counsel, Environmental Law Centre, Edmonton

NICHOLAS R. HUGHES, McCarthy Tétrault, Vancouver

ALEX IKEJIANI, Department of Justice, Fisheries and Oceans Legal Services, Government of Canada, Ottawa

ALLAN E. INGELSON, Associate Professor, Faculty of Law, University of Calgary

ASHA JAMES, Managing Associate, Falconers LLP, Toronto

800 Contributors

MEREDITH JAMES, Environmental Lawyer, City of Toronto

ALBERT KOEHL, Former Staff Lawyer, Ecojustice, Toronto

DAVID LAIDLAW, Research Fellow, Canadian Institute of Resources Law, Calgary

JONATHAN LEO, Former Attorney, State Bar of California

GARY A. LETCHER, Letcher Akelaitis LLP, Vancouver

ALASTAIR R. LUCAS, Q.C., Professor, Faculty of Law, University of Calgary

FRED MAEFS, Crown Counsel, Ontario Ministry of the Environment and Climate Change, Toronto

SHARON MASCHER, Professor, Faculty of Law, University of Calgary

MARC McAREE, Partner, Willms & Shier Environmental Lawyers LLP, Toronto

PAUL Mcculloch, Crown Counsel, Ministry of the Environment and Climate Change, Ottawa

HEATHER McLEOD-KILMURRAY, Professor, Faculty of Law, Common Law, University of Ottawa

SUSAN McRORY, Former Environmental Prosecutor, Specialized Prosecutions Branch, Government of Alberta, Edmonton

DANIELLE MEULEMAN, Crown Counsel, Ontario Ministry of the Attorney General, Toronto

NICKIE NIKOLAOU, Associate Professor, Faculty of Law, University of Calgary

TERRI-LEE OLENIUK, Osler, Hoskin & Harcourt LLP, Calgary

Contributors 801

MARTIN OLSZYNSKI, Associate Professor, Faculty of Law, University of Calgary

KATIA OPALKA, Senior Manager, Pratt & Whitney Canada Corp, Quebec

JEAN PIETTE, Norton Rose Fulbright, Québec

SARAH POWELL, Davies, Ward, Phillips & Vineberg, Toronto

PHILLIP SAUNDERS, Professor, Schulich School of Law, Dalhousie University, Halifax

MONIKA A. SAWICKA, McCarthy Tétrault, Vancouver

DR. DIANNE SAXE, Environmental Commissioner of Ontario, Government of Ontario, Toronto

CHERYL SHARVIT, Mandell Pinder LLP, Vancouver

ANAND SRIVASTAVA, Associate Lawyer, Willms & Shier Environmental Lawyers LLP, Toronto

BARRY STUART, Retired Judge, Vancouver

JOHN SWAIGEN, Staff Lawyer, Ecojustice, Toronto

CHRIS TOLLEFSON, Professor, Faculty of Law, University of Victoria

RONDA M. VANDERHOEK, Counsel, Public Prosecution Service of Canada, Halifax

JASMINE VAN SCHOUWEN, Faculty of Law, University of Ottawa

MICHAEL M. WENIG, Natural Resources Conservation Board, Calgary

ROBERT WOON, Associate Lawyer, Willms & Shier Environmental Lawyers LLP, Toronto

802 Contributors

Aboriginal law, 285 Aboriginal traditional knowledge, 606–27 absolute liability offences, 231, 263; corporations, 313, 323, 326, 328, 379, 724; deeming, provisions, 475; defences, 180–81, 202, 204, 231, 272, 273, 282, 286, 282, 301, 726, 736, 740, 768, 773; defined, 231; general deterrence, 365, 380, 383, 388, 394, 437, 438, 453, 456, 675, 742, 762 abuse of process, 243, 272–76, 279, 581 acts of God, 181, 740 actus reus, 177, 197, 203–4, 234, 247, 263, 350, 476–77, 720–21, 734 administrative decisions, 352 administrative derisions, 352 administrative orders, 199, 700 administrative penalties, 338–59 administrative tribunals, 81, 532, 534, 539, 547–48, 559, 593–95 administrative tribunals, 81, 532, 534, 539, 547–48, 559, 593–95 administrative orders, 199, 700 assessing environmental damages, 162–68 B balance of probabilities, 155, 198, 232, 234, 244, 263, 264, 270, 452, 473, 526, 584, 586, 591, 592, 639, 720, 721, 734, 756, 769, 773 beyond a reasonable doubt, 197, 205, 219, 226, 231–33, 244, 251, 267, 271, 452, 453, 473, beyond a reasonable doubt, 197, 205, 219, 226, 231–33, 244, 251, 267, 271, 452, 453, 473,	Α	Brundtland Report, 2, 4, 8, 94
586, 591, 592, 639, 720, 721, 734, 756, 769, 773 beyond a reasonable doubt, 197, 205, 219, 226, 231–33, 244, 251, 267, 271, 452, 453, 473, Constitution Act 1867, 143, 289	Aboriginal law, 285 Aboriginal traditional knowledge, 606–27 absolute liability offences, 231, 263; corporations, 313, 323, 326, 328, 379, 724; deeming, provisions, 475; defences, 180–81, 202, 204, 231, 272, 273, 282, 286, 282, 301, 726, 736, 740, 768, 773; defined, 231; general deterrence, 365, 380, 383, 388, 394, 437, 438, 453, 456, 675, 742, 762 abuse of process, 243, 272–76, 279, 581 acts of God, 181, 740 actus reus, 177, 197, 203–4, 234, 247, 263, 350, 476–77, 720–21, 734 administrative decisions, 352 administrative decisions, 352 administrative orders, 199, 700 administrative penalties, 338–59 administrative tribunals, 81, 532, 534, 539, 547–48, 559, 593–95 admissibility of expert evidence and costs, 516–30 assessing environmental damages, 162–68 B balance of probabilities, 155, 198, 232, 234,	C Canada National Parks Act, 46, 50, 133, 134, 135, 138, 423, 445 Canadian Charter of Rights and Freedoms, 6, 13, 72, 178, 255, 342, 344, 348, 358, 478, 666, 713, 770 Canadian Environmental Assessment Act, 14, 22, 106, 129, 161, 610, 623, 628, 631 causation and scientific certainty, 473–80 Certificates of Approval, 194 classification as strict/absolute liability offence, 180; reverse onus, 198, 719 Charter of Human Rights and Freedoms, 14, 72, 75, 77, 80, 348, 358, 360 citizen participation, 14 Civil Code of Quebec, 44 civil law, xi, 52, 144, 146, 292 class action, 56, 58, 67, 71, 190, 560, 654 classification of offenses: quasi-criminal offence, 205, 668, 726 Clean Water Act, 253, 677, 687–88, 795 climate change, 233, 144, 646–61 codes of conduct, 322
373,720	balance of probabilities, 155, 198, 232, 234, 244, 263, 264, 270, 452, 473, 526, 584, 586, 591, 592, 639, 720, 721, 734, 756, 769, 773 beyond a reasonable doubt, 197, 205, 219, 226,	climate change, 233, 144, 646–61 codes of conduct, 322 collecting essential evidence, 718–39 communications between lawyers and experts, 494–503 compliance regimes, 708–16 compliance audit, 715, 780

Constitution Act 1982, 13, 140, 186, 286, 287, 296, 609

constitutional jurisdiction, 54; federal jurisdiction, 207, 621; provincial jurisdiction, 207

continuing offences, 428, 745

control, 321, 322; ability to restrain or prevent activities, 321, 322

corporate perspective on creative environmental sentences, 391–408

corporations, liability of, 313, 323, 326, 328, 379, 724; circumstances necessary for conviction, 326, 327; corporate veil, 367; directing minds, 335, 756

cost of compliance: costs, 244, 249, 250, 294, 527, 528

creative sentences, 391, 393, 395, 406, 416–18, 422; in Australia 377–86; negotiation, 436–41; sentencing, 364–72, 377, 381, 384–85, 391–95, 406, 408, 413, 415–18, 420–21, 430, 435, 438, 439. See also corporate perspective on creative environmental sentences; nongovernmental organizations (NGOs) and creative sentencing

Criminal Code, 52, 185, 208, 214, 231, 232, 242, 245, 247–50, 366, 367, 369–70, 372, 425, 446, 692, 743, 765, 771

criminal law of the environment and defences, 272-82

customary international law, 20–21, 29, 75, 80, 102, 142–46, 149–50, 152, 157, 299

D

damages, 56–57, 59, 166–68, 316, 464 defences, 180, 181, 272, 273, 279, 282; abuse of process, 272; acts of God, 181; officially induced error, 182, 272, 274, 276

directing mind of corporations 335, 756; generally, 756; principles, 756

directors, liability of, 324, 428, 724,725, 767; statutory duty of care, 329; steps to avoid liability, 181, 723, 737

directors and officers, liability of, 324, 428, 724,725, 767; legislation imposing positive duty, 724

disclosure of defence evidence, 726, 732

discretionary decisions, 719
due diligence, 180, 181, 262–70, 353, 757;
reasonable care, whether exercised, 477,
722–24, 756–57; relationship between
due diligence defence and acts of God,
180–81; relationship between due
diligence defence and mistake of fact
defence, 180–82; relationship between
due diligence defence and necessity
defence, 272, 279; standard of care. See
standard of care

duty of care: scope, 188–91, 691 duty to notify and consult, 607, 611, 615, 619–22

Е

ecological integrity, vi, xii, 11, 46, 93, 94, 96, 98, 100, 103, 131–40,

economic instruments, 699 ecosystem management, xii, 39–51 ecosystem services, 15, 98, 444, 455, 469 employees and agents, liability of, 428–29,

788–90 employer, liability, of 200–201

endangered species, 23, 26, 33, 34, 46, 135, 165, 452, 460

Endangered Species Act, 23, 26, 112, 123, 609, 612, 613, 623, 624

entry and inspection, powers, 777 Environment and Climate Change Canada,

nvironment and Climate Change Canada, 40, 221, 296, 370, 371, 416, 418, 445, 462, 694–96, 760

environmental assessment law, 8; federal process, 74; framework, 64; future of, 8; Ontario process 64; principles and evolution, 64

environmental assessment, 8, 98–99, 134, 135, 253, 281, 552, 592, 608, 614, 620, 747

Environmental Assessment Act (Ontario), 64, 253

environmental assessment and review process, 156

environmental audit, 382–83, 642, 700, 780–81, 794

Environmental Bill of Rights (Ontario), 1993 64, 125, 256

Environmental Commissioner, 256, 802

environmental concerns, 4, 66, 167, 251, 613, 725 environmental damages, 163 environmental ethics, 61 environmental harm and economics, 443-54; 457-68 environmental impact assessments, 98, 99, 281 environmental investigations, 742-50 environmental law, 64, 65, 72, 73, 143, 144, 149, 152, 154-56, 187, 443, 445, 473, 477; component goals, 64-65, 282; international law, relevance to, 102; key components of, 224; tort law, 195, 231 environmental norms, 131 environmental prosecutions, 173 environmental protection, 227, 282, 309, 309, 325, 337, 367, 369, 416, 437, 608, 693, 742; use of compliance audits, 780 Environmental Protection Act (Ontario) 21, 205, 238, 252, 254, 273, 281, 353, 473, 652, 708, 724 Environmental Protection and Enhancement Act (Alberta), 48, 107, 212, 237, 246, 252, 394, 416, 418, 420, 609, 613, 615 Environmental Quality Act (Quebec), 724 Environmental Review Tribunal, 25, 205, 335, 478, 530, 536, 591, 597, 711–12 environmental sentencing, 66 errors of law, 182, 272, 274-77, 354, 515; generally 274-75. See also mistake of law evidence, 177-86, 203, 204, 234-23; evidence continuity 574–81; evidentiary barriers to standing 582; evidentiary issues in environmental prosecutions and hearings 471 experts, 481-92; 493-503; 532-48, 561-73; expert evidence, 516, 531, 551-59

F

federal jurisdiction, 144, 207, 621 federal v provincial Crowning, 207–17 First Nations, 137, 242, 243, 298, 608, 615. See also Indigenous peoples Fisheries and Oceans Canada, 368, 370–71, 694 Fisheries Act, 22, 26, 28, 29, 179, 183–85, 219, 222, 225, 249, 262, 269, 314, 369, 622, 694, 695
fisheries sector, 694
foreseeability, 188, 189, 193, 265, 378, 721, 757
Freedom of Information and Protection of Privacy Act (Ontario), 245
fundamental justice, 77; abuse of process, 243, 272–76, 279, 581; improper exercise of prosecutorial discretion, 176, 194, 246, 325

G

gathering expert evidence, 597–604 government action/inaction, 10, 100 government officials, liability of, 255, 354 guidelines, 108, 395, 418, 783, 788

Н

habitat loss, 199 hazardous waste, 200, 678, 730 hearsay evidence, 599 human rights and environmental law, 72

impact assessments. See Environmental

impact assessments

Indigenous legal traditions, 82

Т

Indigenous peoples, 82, 89, 137–38, 285, 286, 287, 291, 292, 295, 303, 607, 617, 621, 622, 633
initiation of action, 708–16
injunction, 6, 33, 56, 68, 298, 347, 701
inspections, 178–80, 198, 663–85, 785; inspections and searches, 178; inspections vs. investigations, 709
Intergovernmental Panel on Climate Change, 253, 646
international environmental law, 152–60
international law, 102, 142–49
intragovernmental aspects of prosecutions, 218

J

joint prosecutions, 211 judicial notice of climate change, 646–58 judicial review, 23–24, 26–27, 54, 66, 134–35, 137, 13, 153, 158, 240, 244, 592, 612, 638 judicial treatment of regulatory offences: pleabargaining, 315 jurisdiction, 201, 207, 208, 245

L

land use planning, 112, 113, 126, 615, 624, 690, 691 laws of general application, 343, 699 Law of the Sea Treaty, 36 leave to appeal, 23, 71, 186, 190, 260, 501, 591–92, 659, 750 legislative reform, 593 liability, 57, 77, 189, 194, 329, 428

Μ

marine protection: conservation areas, 608, 614; protected areas, 98, 132, 490, 617 mens rea, 231, 263, 715 mistake of law: defence of officially induced error, 182, 272, 274, 276 monetary administrative penalties, 338 Municipal Act (Ontario), 259

N

national parks, 131–39, 385. See also Parks
Canada
National Pollutant Release Inventory, 613
necessity, defence of, 279–80; defined 279–80
negligence, 55, 187
negotiating sentences, 425–35
non-governmental organizations (NGOs) and creative sentencing, 413–22
North American Agreement on
Environmental Cooperation, 148, 694, 705
nuisance, 52–59

0

Oceans. See Fisheries and Oceans Canada oil and gas, 72, 398 Ontario Municipal Board, 650 Ontario Water Resources Act, 125, 231, 247, 253, 256, 273, 327, 475, 480, 670, 677, 688, 689, 708, 716, 724, 739

Р

Parks Canada, 133-39. See also ecosystem management; national parks participation rights, 537, 589 penalties, 338-58, 684, 685 pollution prevention, 65, 220, 222, 368, 613, 694, 695 precautionary principle, 17-36, 97 preventive measures orders, 709 private actions, 58 private prosecutions, 240-56 privilege in environmental enforcement, 634-44 procedural fairness, 354, 535 prosecutions, 173-85 prosecutorial discretion, 175-85, 194, 246, 325 provincial parks, 58, 125 public interest standing, 584-87, 591, 593 public international law, 152 public lands, 45, 46 public nuisance, 52-57, 59, 584-85 public participation, 2, 5-7, 10 Public Prosecution Service of Canada, 224

Q

quasi-judicial, 352, 588, 700, 701, 702

R

R v. City of Sault Ste. Marie. See Sault Ste.
Marie (case), 365, 369, 440, 449
reasonable care, defence of, 180, 181, 353, 477,
722–24, 756–57; relationship to acts of
God, 181
reasonable person, 26, 264, 275, 333, 354
recapitulation, 752–75; 776–92

record, 85, 237
regulatory inspections, 690–98
regulatory negligence, 187–95
remedial orders, 393, 439
remedy, 53–59, 68
reporting obligations to third parties, 505–14
responsive regulation, 665–87

S

Sault Ste. Marie (case), 177, 183, 200, 244, 254, 263, 272, 336, 353, 714, 721 special damages, 56 species at risk, 155, 158, 612 Species at Risk Act, 22, 29, 65, 155, 238, 247, specific deterrence, 456 standard of care, 188, 365, 765 standard of proof, 231, 232, 234, 264, 582, 584-92 standard of review, 521, 620 standard setting, 690; enforcement 690 standing, 53, 582, 586; evidentiary barriers 582-93 statutory due diligence defences, 267 statutory interpretation, 29, 75, 139, 149, 153, strategic decisions in environmental prosecutions, 197-206 strict liability (offences), 68, 177, 197, 231, 232, 263, 720; defence of reasonable care (see reasonable care, defence of); defences, 268; errors of law, acts of God 354; generally, 263; other defences 253, 263 subsidiary, 747 substantive environmental rights, 74, 240 sustainable development, 1-10, 104; forest resources, 118, 127; intergenerational equity, 9, 64, 96, 97; oceans, 107; operationalizing 11, 92; precautionary principle, 2 sustainability, 92-127 sustainability statutes, 104-28 Sustainable Development Act (Manitoba), 10, 12, 51, 64, 99, 106, 109

Т

tort law, 195, 231

Toxic Substances List, 220
training, 382
Transportation of Dangerous Goods Act, 374, 375
treaty, 97, 103, 144–50
trespass, 67, 68, 655, 661
tribunal, 205, 336, 352; evidence, 177–86, 203, 204, 234–37; judicial review of tribunal decisions, 23, 24, 27, 54, 134, 240; natural justice, and, 619; parties, 54, 103, 231, 699; procedural fairness, and, 354, 535
Truth and Reconciliation Commission Calls to Action, 299

U

UN Declaration on the Rights of Indigenous Peoples, 298 UN Framework Convention on Climate Change, 11

V

voluntary compliance, 393, 680, 700, 742, 754, 767

W

watershed management, 42–45, 47, 49–51 wetlands, 28, 42, 328 wildlife sector. Aboriginal rights, 622; migratory birds, 155, 221 wildlife statutes: species at risk, 22, 50, 65, 155, 158, 241, 612, 616, 629 whistleblowers, 198, 636, 743, 790, 791, 797 World Commission on Environment and Development, 2, 4, 8, 94

Canadian environmental law is a dynamic and exciting area that is playing an increasingly important role in furthering sustainable development policy. Environmental law has distinctive principles and distinctive provincial and federal statutes and regulations. These must be appreciated both within the legal community and by all those who are concerned about the way that courts and tribunals resolve environmental disputes.

Environment in the Courtroom provides extensive insight into Canadian environmental law. Covering key environmental concepts and the unique nature of environmental damage, environmental prosecutions, sentencing and environmental offences, evidentiary issues in court and in hearings, issues associated with site inspections, investigations, and enforcement, and more, this collection has the potential to make a significant difference in the level of understanding and practice.

Providing perspective and insight from experienced and prominent Canadian legal practitioners and scholars, *Environment in the Courtroom* addresses the Canadian provinces and territories and provides context by comparison to the United States and Australia. No other collection of practical papers covers these topics so comprehensively. This is an essential reference for all those interested in Canadian environmental law.

ALLAN E. INGELSON is an associate professor in the Faculty of Law, University of Calgary, and Executive Director of the Canadian Institute of Resources Law. His research focuses on Canadian and international energy, mining, and environmental issues.

