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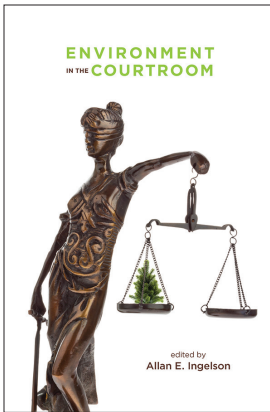
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## ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

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## The Incorporation of an Environmental Ethic in the Courtroom

HEATHER McLEOD-KILMURRAY

### Introduction: Ethics in Law

In “a discipline deeply influenced by positivism, any inquiry into the moral underpinnings of a field of law tends to be regarded with no small degree of suspicion.”<sup>1</sup> Yet ethics are present in law:

[L]aw and ethics support each other. Ethical standards are a means of criticizing the law, revealing its unstated value judgments. Uncertainties and conflicts in the law can often be traced to the absence of common ethical ground. A convincing ethical justification helps to make a law or a court’s decision respected. Legal regulation, particularly if it allows negotiation between regulator and regulated, may help to shape ethical attitudes. Ethical arguments can be used as ammunition in litigation.<sup>2</sup>

How can judges make use of, and interpret, concepts of environmental ethics in environmental law and policies? Environmental ethics can help courts be aware of the underlying ethics in legislation or common law rules, and in the arguments of the parties.<sup>3</sup> They can help judges to be more explicit about ethics that may influence their analyses and conclusions. This is important because environmental judgments are essential to the evolution of cultural perceptions and priorities in environmental protection.<sup>4</sup> This chapter will briefly outline the field and main strands of environmental ethics, point to several

environmental ethics in environmental legislation, and conclude by analyzing some cases in which judges have made use of and interpreted concepts of environmental ethics.

## **Environmental Ethics**

The field of environmental ethics (EE) is defined as “a relatively new field of philosophical ethics concerned with describing the values carried by the non-human world and prescribing an appropriate ethical response to ensure preservation or restoration of those values.”<sup>5</sup> This suggests EE can help in the judicial tasks of both describing the values in a given case and prescribing possible solutions. The field of EE addresses several important concepts and has different branches.<sup>6</sup>

### **CRITERIA FOR BEING VALUABLE**

This philosophical question arises in environmental and animal rights law, but also in the evolution of human rights. Who is deserving of, and capable of enjoying, rights, and why? Potential criteria for being valuable include sentience, ability to feel pain, or mere existence. Just as the class of those deemed capable of holding rights has expanded in law, from propertied white males to all men, women, and other groups, some environmental ethicists argue that this evolution will progress to include higher primates, all animals, and eventually trees,<sup>7</sup> rocks, and ecosystems.

### **ANTHROPOCENTRISM VS. ECOCENTRISM**

Anthropocentrism regards nature as a tool for human consumption and need fulfillment; ecocentrism views humans as one element of nature. Strong anthropocentrism takes a utilitarian view, while weak anthropocentrism<sup>8</sup> sees a fuller range of human benefits, such as spiritual, cultural, and other, less economic goods. Some argue that weak anthropocentrism is sufficient to produce legal rules that protect nature, particularly where “humans” is understood to include future generations. Others say that only a shift to ecocentric thinking can lead to environmentally sustainable laws and policies.

### **INDIVIDUALISM VS HOLISM**

This dichotomy asks: is it the individual or the whole that is the priority? Is it the interrelationships that are essential? For example, human rights are often regarded as individual, yet their protection also benefits the community. An environmental example is the debates around culling individuals for the

protection of the herd or of other species coexisting within the particular ecosystem. Where certain collective environmental interests are preferred over individual ones, critics have made accusations of “ecofascism.”<sup>9</sup>

### ALTERNATIVE/RADICAL APPROACHES

Deep ecologists<sup>10</sup> argue that a complete overhaul of human–ecological relations is necessary to achieve environmental protection. Our economic, political, legal, and social structures are the causes of the ecological crisis, and each needs to be completely altered in order to truly address the problem; tinkering with existing laws will not suffice. Both ecofeminism<sup>11</sup> and social justice strands of EE will be more familiar to jurists. Ecofeminism mirrors the main strands of feminism, arguing that the same social and economic concepts and structures that undervalue and disempower women have undervalued and disempowered the environment. The struggles against dichotomies, exploitation, and hierarchies that will renew respect for and empower women will also generate a greater understanding of the value and rights of the environment. Similarly, social ecology emphasizes that it is not humans *per se* but our current structures of domination, hierarchies, and discrimination that hurt some humans but also the environment we live in. A more egalitarian, democratic society would be more respectful of nature.

Environmental justice,<sup>12</sup> a related yet distinct movement, began in the 1970s in the United States. It investigates the issues of ecoracism, such as why environmentally harmful facilities are more often located in lower-income or racialized neighbourhoods, and why some disadvantaged groups bear disproportionate environmental burdens without enjoying the related benefits.

### ECOLOGICAL JUSTICE

Bossleman<sup>13</sup> argues that just as justice is a core principle of law, ecological justice should be a core element of environmental law. Ecological justice consists of three elements: (i) intergenerational justice; (ii) intragenerational justice; and (iii) interspecies justice. Intergenerational justice refers to the rights of future generations. Intragenerational justice argues that within the current generation, the environmental harms and goods should be distributed equitably (e.g. a crucial aspect of climate justice). Interspecies justice suggests that anthropocentrism is a kind of speciesism, and another form of discrimination. This is sometimes raised by advocates of a plant-based diet, not only for the non-human animals who are the first victims of meat-eating, but also for present and future generations of human animals who suffer the pollution and

climate change harms resulting from these practices. We turn now to investigate the environmental ethics in Canadian environmental statutes.

## Ethics in Canadian Legislation

Mickelson and Rees argue that “environmental law in Canada reflects the current dominant scientific and ethical perspective of industrial cultures everywhere, but there is nothing ‘natural’ ... about that perspective.” Freyfogle observes that environmental law has viewed pollution as an isolated problem, and focused on human utility, on effects rather than causes and on isolated spheres such as air, water, or land. Environmental ethics concepts such as no net loss, long-term thinking, precaution, and prevention are relevant to the evolution of legislative and judicial lawmaking. EE can justify treating the environment not as a separate consideration or special “interest” but as an element in all policy and decision making.<sup>14</sup> Environmental legislation requires interpretation, and some statutes contain preambles or purposes with principles and ethics intended to guide their application. Since ethics are part of environmental legislation, they should also be part of environmental adjudication.

In Ontario, the purpose of the *Environmental Assessment Act*<sup>15</sup> is “the betterment of the people of ... Ontario by providing for the protection, conservation and wise management ... of the environment.” This reflects an anthropocentric, instrumentalist perspective. By contrast, the *Environmental Bill of Rights, 1993*<sup>16</sup> provides that “[t]he people of Ontario recognize the inherent value of the natural environment [... and] have a right to a healthful environment,” and that they “have as a common goal the protection ... of the natural environment for the benefit of present and future generations.” This refers to the inherent value of nature, the deontological creation of a right to a healthful environment, and the duties of intergenerational equity. It refers to community benefits and values, not just individual concerns. There is no mention of competing interests such as development. The *Environmental Protection Act*<sup>17</sup> contains no preamble, but its declared purpose “is to provide for the protection and conservation of the natural environment.”<sup>18</sup>

In Quebec, section 6 of the *Sustainable Development Act*<sup>19</sup> lists 16 principles of sustainable development. The first is “health and quality of life,” a highly anthropocentric principle, while the second is “social equity and solidarity,” which means that “development must be undertaken in a spirit of intra- and inter-generational equity and social ethics and solidarity,” emphasizing two of the three branches of ecological justice. Even its most ecocentric principles are

closely tied to human interests: principle 12 addresses biodiversity preservation because “[b]iological diversity offers incalculable advantages and must be preserved for the benefit of present and future generations.” However, it emphasizes “respect for ecosystem support capacity” to “ensure the perenniality of ecosystems,” which is more ecocentric.

Federally, the preamble to the *Canadian Environmental Protection Act, 1999 (CEPA)*<sup>20</sup> includes virtually all leading environmental law principles: sustainable development, pollution prevention, ecosystem approach, the precautionary principle, the polluter pays principle, biological diversity, and “short- and long-term human and ecological benefits.” The Act recognizes the intrinsic value of biodiversity and creates enforceable legal duties of precaution, considering the environment for its own sake, and an ecocentric approach.<sup>21</sup> The preamble to the federal *Species at Risk Act*<sup>22</sup> is perhaps the most clearly ecocentric, explicitly providing that “wildlife, in all its forms, has value in and of itself,” and that “the Government of Canada is committed to conserving biological diversity.” Both individuals (s. 32) and species (s. 6) are protected.

The idea that environmental ethics play a role in environmental law-making has also been embraced by the Canadian judiciary, as the following cases will illustrate.

## **Ethics in Canadian Environmental Case Law**

### **ENVIRONMENTAL JURISDICTION: *HYDRO QUEBEC***<sup>23</sup>

Hydro Quebec, charged with dumping PCBs, argued that *CEPA*<sup>24</sup> was *ultra vires* in regulating toxic substances. The majority held this was a valid exercise of the federal criminal law power, while the dissent disagreed because pollution was merely regulated, not prohibited. First, the division of powers in Canada itself presents a challenge to the holistic or ecosystem perspective, revealing an anthropocentric perspective by putting politics above environmental realities. Secondly, different ethics may explain the divided reasons. La Forest J., for the majority, emphasized that environmental protection is “a public purpose of superordinate importance.”<sup>25</sup> This led him to reason that courts “must be mindful that the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated. Given the pervasive and diffuse nature of the environment, this reality poses particular difficulties in this context.”<sup>26</sup> He further held that “stewardship of the environment is a fundamental value of our society and ... Parliament may use its criminal law power to underline that value. The

criminal law must be able to keep pace with and protect our emerging values.”<sup>27</sup> Notably, the legislation is used both to achieve practical environmental protection and in its educational, norm-creating role of “underlining” values.

Finally, a weak anthropocentric perspective is endorsed in the phrase “[h]umanity’s interest in the environment surely extends beyond its own life and health.”<sup>28</sup> The provisions of *CEPA* dealing with toxic substances<sup>29</sup> themselves separate environmental protection from concerns for human life and health, indicating an ecocentric approach: “Parliament’s clear intention was to allow for federal intervention where the environment itself was at risk, whether or not the substances concerned posed a threat to human health and whether or not the aspect of the environment affected was one on which human life depended.”<sup>30</sup> Yet this ecocentrism was the problem because it took the legislation away from the health branch of the criminal law power. This is an example of how EE may conflict with deeply embedded anthropocentrism in dominant legal frameworks.

#### **INTERPRETING ADMINISTRATIVE RULES: *IMPERIAL OIL***

Justice LeBel applied environmental ethics in *Imperial Oil*.<sup>31</sup> “Although the appeal heard by the Court raises an environmental law issue in the context of an application for judicial review, the question relates to an environmental protection problem in Quebec.”<sup>32</sup> The decision starts from a very broad view of environmental concerns and the goals of the Quebec regulation, mentioning “the collective desire to protect [the environment] in the interest of the people” and of “an emerging sense of inter-generational solidarity and acknowledgement of an environmental debt to humanity and to the world of tomorrow.”<sup>33</sup> The court applied the polluter pays principle in finding that conflict of interest rules applied differently in the context of enforcing environmental statutory discretion, and were powerful enough to legitimize retroactive liability. Judges can therefore bring environmental ethics and principles to bear in the interpretation of broader rules such as administrative conflicts of interest.

#### **ENVIRONMENTAL SENTENCING: *VAN WATERS***

Another example of applied EE is in the environmental sentencing in *Van Waters*.<sup>34</sup> The judge quoted at length from the Law Reform Commission paper *Sentencing in Environmental Cases*:<sup>35</sup>

[I]n environmental cases ... the effect of the principle that the protection of society is paramount is to underline the serious nature of the



offence.... It supports the use of strong deterrents and punishments even in the absence of serious harm to individuals or the environment. Perhaps its importance lies in supporting an environmental ethic which holds that the “various elements of the community of earth [have] an intrinsic value rather than an instrumental or utilitarian one,” and consequently, “decisions have become more significant because of the vastly increased capacity of human beings to influence the nature of their environment, seen most graphically in pollution of the air, water, sea, and land.”<sup>36</sup>

The court cites the report specifically referring to judicial ecological consciousness:

Environmental cases put the courts in the difficult position of having to impose a sentence in the context of uncertainty about the degree of risk inherent in the offence or the amount of damage caused.... In the face of this uncertainty, some courts are willing to impose substantial sentences, while others hold out for proof of substantial risk or harm. The difference ... lies in the ecological consciousness of the judge. Ecological consciousness is an ability to see past the obvious and immediate conflicting interests.... It requires an understanding that everything in the environment is interdependent, and that harm to one aspect of the environment, no matter how insignificant it might seem or how unrelated to human concerns it might appear, has the potential to accumulate and ultimately to diminish the diversity and strength of the ecosystem. Some judges have this consciousness; some do not.<sup>37</sup>

The fact that the court would go to such lengths to include lengthy excerpts such as these shows that it felt that these environmental ethics should guide environmental sentencing.

#### **COMMON LAW PRINCIPLES**

Environmental ethics can also be relevant in applying common law rules. In recent class actions such as *Hollick*,<sup>38</sup> *Hoffman*<sup>39</sup> and *Pearson*,<sup>40</sup> the courts have appeared reluctant to broaden common law causes of action such as nuisance, trespass, and strict liability to tackle the new types of harm in environmental cases. In some cases, there is a preference for competing ethics. In *Hoffman*,

where organic canola farmers sought class certification to sue genetically-modified (GM) canola manufacturers for harm, the court held that merely marketing GM canola is not direct enough to constitute a trespass,<sup>41</sup> and nuisance may be difficult to make out because it is possible that the prevalence of GM canola farming has made organic canola farming an “overly sensitive” use of land and the seeds did not come directly from the manufacturers but through the intermediary farmer. The court also held that the case was not appropriate for class certification because each defendant experienced different levels of harm, so individual issues would outweigh common issues. The court seemed to be more influenced by the traditional ethics of common law rules such as individual harm, economic damages, and the bipolar structure of litigation than the collective, ecosystem-based harm that was arguably the true nature of the problem.<sup>42</sup>

By contrast, in *Ciment St. Laurent*,<sup>43</sup> the court interpreted the civilian concept of “troubles de voisinage,”<sup>44</sup> similar to common law private nuisance, in an environmentally protective way. It held that environmental nuisance is a strict liability offence, ensuring that the polluter pays, and held that private law prevails even against regulatory authorization of the undertaking.<sup>45</sup> These contrasting cases show that different environmental perspectives and ethics can affect how common law principles are interpreted and applied. The Supreme Court of Canada itself has said that “there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection.”<sup>46</sup>

## REMEDIES

In *Canadian Forest Products (Canfor)*,<sup>47</sup> the Supreme Court of Canada was asked to assess damages resulting from a forest fire. The court was willing to consider arguments about the “inherent value” of the forest as well as its public interest value, not just its utilitarian timber value. The court held that if it was given “the tools to quantify the ‘ecological or environmental’ loss,”<sup>48</sup> which could include such things as “use value, passive use or existence value, and inherent value,”<sup>49</sup> it was willing to consider these, yet the parties failed to provide such tools in this case.

## PROCEDURAL RULES

In a procedural context, the court in *Platinex*<sup>50</sup> was asked to halt exploratory mining on claimed Aboriginal land. One part of the test for an injunction is

whether the refusal to grant it would cause irreparable harm to the applicant. The court held that

irreparable harm may be caused to KI [Kitchenuhmaykoosib Inninuwug First Nation] not only because it may lose a valuable tract of land..., but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss... Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.<sup>51</sup>

These ethical strands influenced the court to grant the interlocutory injunction. The fact that judges are called upon to hear evidence of these varying ethical perspectives shows the utility of environmental ethics in understanding the positions of the parties and in resolving the dispute.

## Conclusion

To what extent can courts incorporate environmental ethics? VanderZwaag suggests that one role of the courts is to develop and enforce principles until other branches begin to do so effectively: “[J]udges may play a backstop role in pushing societies in the direction of sustainable development. Not simply guided by personal philosophical passions or class ideology, judges might explicitly refer to the evolving international principles as a checklist for deciding whether the public trust is infringed.”<sup>52</sup> The same can be argued of environmental ethics. Familiarity with these concepts can help judges identify, assess, and express competing interests and perspectives in environmental cases more clearly and fairly, leading to better environmental protection.

## NOTES

- 1 K Mickelson & W Rees, “The Environment: Ecological and Ethical Dimensions” in EL Hughes, AR Lucas & WA Tilleman, eds, *Environmental Law and Policy*, 2d ed (Toronto: Edmond Montgomery, 1998) 1 at 17.
- 2 J Alder & D Wilkinson, *Environmental Law and Ethics* (Hampshire, UK: MacMillan Press Ltd, 1999) at 10–11.
- 3 ET Freyfogle, “The Ethical Strands of Environmental Law” (1994) 4 U Ill L Rev 819.

- 4 Flournoy argues that the lack of clarity in identifying and justifying the values in environmental laws, both as written and as interpreted, impedes democratic accountability, as it prevents the evolution of environmental laws to reflect social priorities and achieve societal goals. A. Flournoy, “Building an Environmental Ethic from the Ground Up” (2003–2004) 37 UC Davis L Rev 53.
- 5 A Light & H Rolston III, “Introduction: Ethics and Environmental Ethics” in A Light & H Rolston III, eds, *Environmental Ethics: An Anthology* (Malden, MA: Blackwell, 2003) at 1.
- 6 Detailed analyses and references for these various branches can be found in the excellent JR Desjardins, *Environmental Ethics: An Introduction to Environmental Philosophy*, 2d ed (Belmont, CA: Wadsworth, 1997).
- 7 C Stone, “Should Trees Have Standing? Toward Legal Rights for Natural Objects” (1972) 45 S Cal L Rev 450.
- 8 Bryan G Norton, “Environmental Ethics and Weak Anthropocentrism” in Light & Rolston III, eds, *supra* note 5 at 163; and Eugene Hargrove, “Weak Anthropocentric Intrinsic Value” in Light & Rolston III, eds, *ibid* at 175.
- 9 E.g., T Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983), as referred to in Clare Palmer, “An Overview of Environmental Ethics” in Light & Rolston III, eds, *ibid* at 25.
- 10 E.g., Arne Naess, “The Shallow and the Deep, Long Range Ecology Movements: A Summary” (1973) 16 Inquiry 95, and *Ecology, Community and Lifestyle*, translated by David Rothenberg (Cambridge: Cambridge University Press, 1989).
- 11 See references in H McLeod-Kilmurray, “An Ecofeminist Legal Critique of Canadian Environmental Law: The Case Study of Genetically Modified Foods” (2009) 26 Windsor Rev Legal Soc Issues 129.
- 12 See sources in H McLeod-Kilmurray, “Does Preserving the Environment Advance or Conflict with Social Justice and Human Rights?” in S Rodgers & S McIntyre, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat?* (Markham: LexisNexis Canada, 2010) at 466.
- 13 K Bosselman, “Ecological Justice and Law” in BJ Richardson & S Wood, *Environmental Law for Sustainability* (Oxford: Hart, 2006) at 146.
- 14 “We are naïve if we assume that the environment is one choice among others. Instead, it is time that we paid heed to the fact that the environment constitutes the very sustenance of all life. ‘The environment’ is the inescapable condition of the possibility of the emergence of other sectoral priorities.” IL Stefanovic, *Safeguarding Our Common Future: Rethinking Sustainable Development* (Albany: State University of New York Press, 2000) at 42.
- 15 RSO 1990, c E.18, s 2.
- 16 SO 1993, c 28.
- 17 RSO 1990, c E.19.
- 18 Section 2. For analysis of the policy objectives in legislation from other provinces, see the Introduction in J Benidickson, *Environmental Law*, 3d ed (Toronto: Irwin Law, 2009).
- 19 RSQ, c D-8.1.1.
- 20 SC 1999, c 33.
- 21 See s 2(1).
- 22 SC 2002, c 29.
- 23 *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*].
- 24 SC 1999, c 33.
- 25 *Hydro-Québec*, *supra* note 23 at 266.
- 26 *Ibid* at 267.
- 27 *Ibid* at 297.
- 28 *Ibid* at 300.
- 29 Section 11. See also s 35(1).
- 30 *Ibid* at 247.
- 31 *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624, 2003 SCC 58.
- 32 *Ibid* at para 18.
- 33 *Ibid* at para 19, citing 114947 *Canada Ltée (Spraytech Société d’arrosage) v Hudson (Town)*, 2001 SCC 40.

- 34 *R v Van Waters & Rogers Ltd*, 1998 ABPC≈55.
- 35 John Swaigen & Gail Bunt, *Sentencing in Environmental Cases*, Protection of Life Study Papers (Ottawa: Law Reform Commission of Canada, 1985), online: <<http://www.lareau-legal.ca/Sentencing.pdf>>.
- 36 *Supra* note 34 at para 23, citing *ibid* at 9.
- 37 *Ibid* at para 27.
- 38 *Hollick v Metropolitan Toronto (Municipality)* (1998), 27 CELR (NS) 48 (Ont Ct Gen Div); rev'd (1999), 28 CELR (NS) 198 (Ont Ct Gen Div), aff'd (2000), 32 CELR (NS) 1 (Ont CA), aff'd (2001), 205 DLR (4th) 19 (SCC).
- 39 *Hoffman v Monsanto Canada Inc*, 2005 SKQB 225, aff'd 2007 SKCA 47, leave to appeal refused [2007] SCCA No 347 [*Hoffman*].
- 40 *Pearson v Inco Ltd* (2001), 42 CELR (NS) 273 (Ont Sup Ct J), aff'd (2002), 45 CELR (NS) 317 (Ont Sup Ct J, Div Ct), rev'd (2005), 261 DLR (4th) 629 (Ont CA); costs award (2006), 146 ACWS (3d) 600 (Ont CA); application for leave to appeal dismissed with costs (without reasons) [2006] SCCA No 1.
- 41 *Hoffman*, *supra* note 39 at para 131.
- 42 H McLeod-Kilmurray, "Hoffman v Monsanto: Courts, Class Actions and Perceptions of the Problem of GM Drift" (2007) 27:3 Bull Science, Techn & Soc 188.
- 43 *Ciment St. Laurent c Barette*, 2008 SCC 64 [*Barette*].
- 44 *Civil Code of Quebec*, SQ 1991, c 64, art 976.
- 45 *Barette*, *supra* note 43 at para 80.
- 46 *British Columbia v Canadian Forest Products*, 2004 SCC 38.
- 47 *Ibid*.
- 48 *Ibid* at para 137.
- 49 *Ibid* at para 138.
- 50 *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 DLR (4th) 727 (Ont Sup Ct J).
- 51 *Ibid* at paras 79–80, varied (2007), 29 CELR (3d) 116.
- 52 DL VanderZwaag, "The Concept and Principles of Sustainable Development: 'Rio-formulating' Common Law Doctrines and Environmental Laws" (1993) 13 Windsor YB Access Just 39 at 66.