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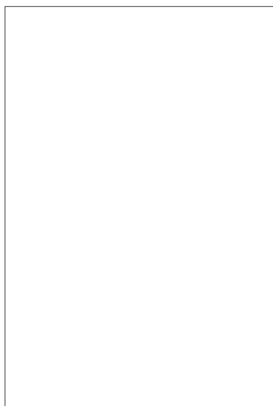

ENVIRONMENT IN THE COURTROOM II

Edited by Alastair R. Lucas & Allan E. Ingelson

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Preface

Enforcement of Canadian environmental law is a dynamic and exciting area that is playing an increasingly important role in furthering the sustainable development policies adopted by federal, provincial, and territorial governments. During the last three years, with financial support from Environment and Climate Change Canada and the Alberta Law Foundation, the Canadian Institute of Resources Law (CIRL), a federal not-for-profit organization created by the Faculty of Law at the University of Calgary in 1979, and its partners at the Université Laval and Dalhousie University, have organized national annual environmental law symposiums in Halifax, Calgary, and Quebec City as part of the "Environment in the Courtroom" national continuing legal education series. Lawyers in private practice; Crown counsel; corporate counsel; administrative lawyers; legal scholars, including those teaching environmental law at universities and colleges; lawyers employed by NGOs and industry organizations; law students; and environmental consultants in Canada and other countries reported that the invited presentations, discussion, and associated papers provided practical and valuable information on current and important environmental issues. The collection of papers in this book provides insights on the environmental law experience, leading judicial decisions, and the important procedural and theoretical aspects of environmental litigation in a variety of Canadian provinces and territories, as well as in the United States, a nation with a shared common law and civil law heritage.

The second volume of *Environment in the Courtroom* is divided into three parts that examine the following important topics in environmental law:

- protection of the marine environment
- enforcement issues in Canadian wildlife protection
- enforcement of Canadian greenhouse gas (GHG) emissions laws

Environment in the Courtroom discusses significant issues and challenges in Canadian environmental law today and is intended to be a source of relevant, current, and useful information for both Canadian and international audiences, as well as lawyers and non-lawyers. The volume contains a variety of perspectives and insights from experienced and prominent Canadian legal practitioners and scholars, but also reviews experiences in other legal systems with similar issues. Because we have had legal professionals from outside of Canada participate in the symposiums, individuals in other nations interested in comparative legal studies will also find this book a useful reference on current Canadian environmental legal issues.

It is a pleasure to thank and acknowledge the numerous contributors to the volume who have shared their knowledge and experience. In particular, we would like to thank the following individuals for their extraordinary contributions: J. Owen Saunders, Jamie Benidickson, Phillip Saunders, Paule Halley. We would like to thank the law students: Akinbobola Olugbemi, Vanessa Morton, Akindele Tawoju, Joshua Hobbs, Kathryn Owad, Ramanjeet Sohal, Adewale Ajayi, Oluwabukola Agbede, Paul Reid, Laura Hall, Temitope Onifade, Christopher Phillips, Hong Feng, David Hillier, Francco De Luca, Logan Lazurko, Alexander Crisp, Tyler Anthony, Alex Ikejiani, and the CIRL Post-Doctoral Research Fellows: Chilenye Nwapi and Ifeoma (Laura) Owosuyi for their research assistance. Finally, we would like to acknowledge the administrative assistance of Nancy Money and Jane Rowe, who have contributed to the success of the second volume of *Environment in the Courtroom*.

Introduction

The Context

This book examines the application and enforcement of Canadian environmental law. It is not about environmental law generally. It focuses on the idea of enforcement and enforcement techniques including administration of environmental statutes and enforcement of specific decisions and orders. There are two enforcement aspects. One is decisions and decision processes concerning approvals and related decisions for projects and activities involving, for the purposes of this book, marine waters, wildlife, and energy and other greenhouse gas emitting actions. This establishes the baselines for enforcement. The second is explicit actions by authorized public officials (ministers and their authorized representatives—such as the federal ministers of fisheries and oceans and transport) and tribunals (such as the Canada Energy Regulator and the Alberta Energy Regulator) to enforce the legal duties that these decisions create. This includes powers of public officials or tribunals to issue orders requiring cessation of defined activities and imposing conditions.

This second enforcement aspect includes techniques that involve enforcement proceedings before tribunals and courts. These are the "courtrooms" that are central to the book's perspective. The nature of the proceedings depends on the relevant statutory powers and processes. It is usually at the discretion of authorized public officials to develop and implement policies to guide the choice of enforcement tools in particular cases.

There are also a set of statutory offence provisions that proscribe specified conduct. These offences can be prosecuted in the courts, and guilty defendants can be penalized by fines, prescribed conduct (such as soil or water remediation), and even imprisoned.

Such offences are not pure criminal offences that require proof of intent. Rather, they are regulatory offences that require only proof of proscribed conduct and normally include a "due diligence" defence—proof that an accused took reasonable care to prevent the damage in question.

Environmental statutes also include rights of appeal. Decisions and orders by officials can be challenged in appeals to specialized appeal tribunals (such as environmental appeals boards) or directly to courts. Appeal tribunal decisions may be subject to judicial review by courts concerning procedural fairness and reasonableness of decisions.

It is in this sense that this book is about "environment in the courtroom." Decisions about environmental approvals, as well as decisions about enforcing environmental requirements, are adjudicated in tribunal proceedings that the public sees only through scattered media reports and commentary. This book is intended to provide a broader legal perspective of environmental law enforcement. Because each subject area—marine environment, wildlife protection, and GHG emissions reduction—has its own legal enforcement regime, it is helpful to consider each within broader legal enforcement principles and techniques. It is also necessary to consider unique subject based trends and emergent issues. Chapter authors bring the expertise to review and assess these enforcement regimes and offer conclusions as well as prospects for reform.

This book's three focus areas are not the only environmental law fields in which enforcement issues can be identified, but they are active areas that present challenging problems. In environmental justice terms, they are matters of restorative (or reparation) justice, concerning the fair and equitable exercise of statutory approval and enforcement powers, and participatory justice, concerning citizens' rights to participate effectively in decisions that affect them.

Content and Structure of the Book

SECTION 1: MARINE ENVIRONMENT PROTECTION

These chapters assess significant international legal regimes and the Canadian legislation that implements them. They identify apparent gaps between international obligations and Canadian legal regimes **(Lalonde)**. International law, as **Lavallée** notes in Section 3, is voluntary, leaving broad implementation scope for country governments. As ocean science and technology develops (**Wallace**), this gap theme emerges in relation to ship source pollution (**Cullen**), offshore structure decommissioning (**Watt**), liquefied natural gas (LNG) powered Arctic ships (**Pamel and Wilkins**), Arctic electricity generation and transmission (**Muir**), and tidal power (**LeBlanc and Stewart**).

Domestically, as **Moreira** shows, the federal *Fisheries Act* has been the pillar for fish and fish habitat protection. This Act has a long-established enforcement regime that has accommodated emerging Indigenous rights, though only to a minor degree. Yet, potential remains for "braiding" Canadian and international law together for fisheries management (**Nowlan, Kirby, Lloyd-Smith, and Neasloss**). **Dogra**'s chapter offers insights into the operation of the Canada-Nova Scotia Offshore Petroleum Board from a regulator's perspective.

SECTION 2: ENFORCEMENT ISSUES IN CANADIAN WILDLIFE PROTECTION

The international–domestic law gap also emerges in relation to wild animal and plant protection under the international *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (*CITES*) and Canada's *Wild Animal and Plant Protection Regulation of International and Interprovincial Trade Act* (**Bankes**). The author also identifies interpretive uncertainties in the latter's enforcement regime, exacerbated by the lack of case law guidance. **Saunders**'s discussion of the Atlantic Bluefin Tuna Management regime also reveals the international–domestic law gap.

First Nations reconciliation in relation to wildlife is a work in progress, with government and Indigenous wildlife paradigms not in alignment (**Donihee**). But actions such as buffalo reintroduction to Banff National Park show recognition of Indigenous law and tradition (**Hamilton**). **Jaremko** shows complexity resulting from multiple jurisdictions—federal, provincial, Indigenous, and municipal—in her assessment of Alberta wildlife law.

An emerging theme is the development of new non-regulatory enforcement approaches in wildlife protection law. These include market-based conservation under Alberta's *Land Stewardship Act* (**Poulton**). **Van Nes** reviews administrative monetary penalties (AMPs), which provide an efficient alternative to regulatory prosecutions. Another tack, discussed by **Kwasniak**, is private common law supported conservation arrangements such as easements and restrictive covenants.

Citizen litigation to prod governments to action has played a wildlife protection role. A good example are the lawsuits by environmental NGOs to require species listing and habitat protection under the federal *Species at Risk Act*. This is assessed by **Tuytel and Venton** in relation to West Coast killer whale protection. They show that these legal actions are in response

to statute interpretation uncertainty that enabled poor government enforcement responses.

SECTION 3: ENFORCEMENT OF CANADIAN GREENHOUSE GAS EMISSIONS LAWS

GHG law enforcement presents legal issues that will continue as governments pivot toward net-zero emission goals. Again, broad voluntary international "commitments" opened the way for both international and domestic disputes (**Lavallée**). **L'Esperance** pinpoints the necessity of this kind of country commitment to address broad scope problems like GHG emissions from international shipping. **Lavallée** shows that an important strand has been federal–provincial constitutional litigation culminating in the Supreme Court of Canada's endorsement of exclusive federal jurisdiction to legislate carbon price stringency. A major underlying factor is the significant GHG contribution from the Alberta oil sands sector (**Lucas and Almeida**). The result is federal–provincial carbon pricing agreements under the framework of the federal *Greenhouse Gas Pollution Pricing Act* (**Stewart and Carrière**), as well as federal (**Ingelson**) and provincial methane emission reduction regulations. There is also room for municipal action as **Kwasniak** points out. These issues are not relevant only to energy as **Benidickson** shows in his chapter on reducing GHG emissions from agriculture.

Trudeau assesses the Quebec cap-and-trade approach that has been recognized as equivalent under the federal price stringency scheme, along with Alberta's legislation that includes carbon-pricing and methane-reduction schemes that apply to the oil sands. **Wright**'s analysis of the Quebec–California cap-and-trade linkage agreement identifies the fragility of subnational agreements because of too easy withdrawal, as shown by Ontario's exit from the agreement.