

## ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

ISBN 978-1-55238-986-7

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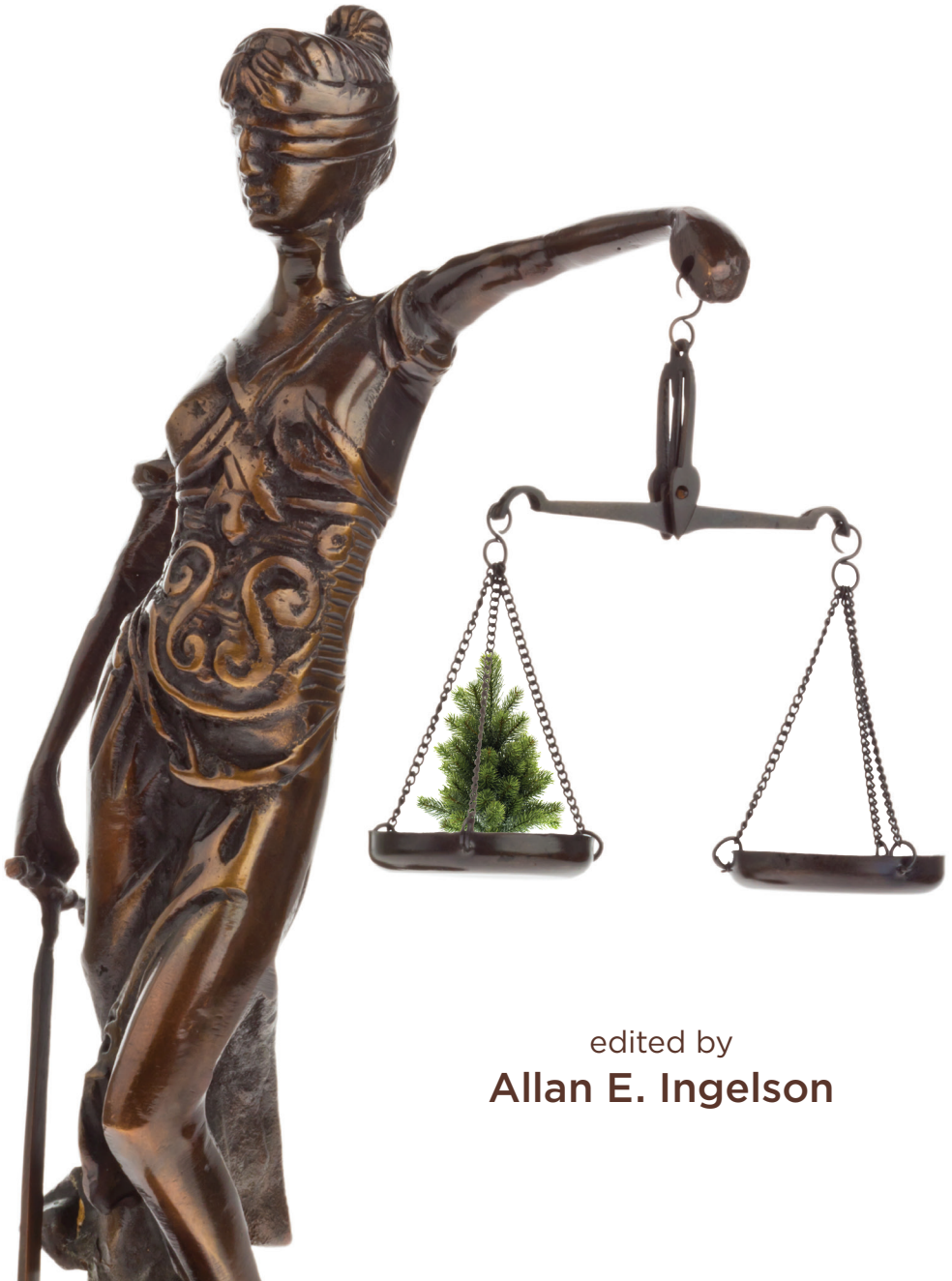
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UNIVERSITY OF CALGARY  
Press

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**Allan E. Ingelson**

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University of Calgary Press  
2500 University Drive NW  
Calgary, Alberta  
Canada T2N 1N4  
press.ucalgary.ca

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LIBRARY AND ARCHIVES CANADA CATALOGUING IN PUBLICATION

Environment in the courtroom / edited by Allan E. Ingelson.

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-1-55238-985-0 (softcover).—ISBN 978-1-55238-987-4 (PDF).—

ISBN 978-1-55238-988-1 (EPUB).—ISBN 978-1-55238-989-8 (Kindle).—

ISBN 978-1-55238-986-7 (open access PDF)

1. Environmental law—Canada. I. Ingelson, Allan, 1958-, editor

KE3619.E55 2019

344.7104+6

C2018-905874-9

KF3775.ZA2E55 2019

C2018-905875-7

The University of Calgary Press acknowledges the support of the Government of Alberta through the Alberta Media Fund for our publications. We acknowledge the financial support of the Government of Canada. We acknowledge the financial support of the Canada Council for the Arts for our publishing program.



Canada Council  
for the Arts

Conseil des Arts  
du Canada

Copyediting by Peter Enman

Cover images: COLOURBOX #1300653 and #5185681

Page design and typesetting by Garet Markvoort, zijn digital

Cover design by Melina Cusano

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# Preface

During the past seven years, the Canadian Institute of Resources Law and its partners at the University of Ottawa and Dalhousie University, the Canadian Bar Association, and the Ontario Bar Association have organized national annual environmental law symposia titled “Environment in the Courtroom.” The symposia, which were sponsored by Environment and Climate Change Canada and the Alberta Law Foundation, were held in Calgary, Ottawa, and Halifax. This book is a collection of the essays presented at the national symposia.

This book is focused on providing an overview of current environmental legal issues in Canada in three key areas: the unique nature of environmental harm, prosecution of environmental offences, and sentencing for environmental offences. The essays in this volume represent an attempt by Canadian environmental law scholars, lawyers in private practice, Crown counsel, corporate counsel, administrative lawyers, lawyers employed by NGOs and industry organizations, environmental consultants, and law students to come to grips with the challenges associated with the litigation of environmental cases in Canada. The majority of the essays represent a Canadian perspective and provide insights on the environmental law experience in a variety of Canadian provinces and territories, leading judicial decisions, and the important procedural and theoretical aspects of environmental litigation in Canada, a nation with a shared common law and civil law heritage. However, consideration of the included contributions on Australia and the United States will reveal that Canada shares similar fundamental environmental challenges with some other jurisdictions. 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 in Canada.

The book is divided into five thematic headings that reflect the issues discussed in each of the first five symposia:

- Key environmental concepts and the unique nature of environmental damage;
- Environmental prosecutions;
- Sentencing and environmental offences;
- Evidentiary issues in environmental prosecutions and hearings;
- Site inspections, investigations, and enforcement issues.

The first section of the book is intended to strengthen the knowledge of court practitioners and the judiciary about key environmental concepts from a legal perspective and to create an appreciation and understanding of the unique nature of environmental damage. The emphasis throughout this part, which contains 13 essays, is on the practical nature of environmental damage. While there is an abundance of literature on environmental law, less attention has been paid to the practical problems associated with environmental litigation in Canada, for both judges and court practitioners. Many of the key principles at the heart of modern environmental thinking have been incorporated into legislation with little definition or guidance as to how they should be applied. Similarly, the very concept of environmental damage presents practical challenges in the courtroom insofar as much of the harm may be non-pecuniary in nature and inherently subjective in perception. Indeed, there may be fundamental disagreements even over the question of what is to be incorporated into environmental damage. Concepts dealt with in this part include sustainable development, the precautionary principle, public nuisance, ecosystem management, sustainability, and ecological integrity. The practical environmental problems addressed include engagement with indigenous legal traditions, cumulative effects assessment, and environmental damage assessment.

The second section in the volume considers the major issues that can arise in the course of environmental prosecutions in Canada, beginning with the decision to prosecute and proceeding sequentially through key decision points, ending with available defences. This part consists of ten chapters that deal with a variety of issues in environmental prosecutions, including prosecutorial discretion, private prosecutions, federal and provincial jurisdiction over environmental offences, defenses to environmental offences, due diligence in environmental offences, and the interface between Indigenous legal traditions, and the Anglo-Canadian legal system in the prosecution of regulatory offences.

Section 3 comprises 11 chapters and addresses the major issues that can arise in the course of sentencing for environmental offences, including both

the basic considerations that attach to environmental sentencing and more advanced topics. A major issue considered by the authors is creative sentencing. One chapter provides perspectives from the experience of creative sentencing in New South Wales, Australia, enabling a parallel to be drawn with Canada, while another chapter provides perspectives from non-governmental organizations and a third one examines the corporate perspective on creative sentences. Other topics dealt with in the section include director and officer liability, administrative penalties, negotiating sentencing, and the law and economics of environmental harm.

Section 4 focuses on evidentiary issues that can arise in environmental prosecutions and hearings and consists of 14 chapters. Issues considered include proof of causation, the role of expert witnesses, admissibility of evidence, the question of privilege in environmental enforcement, and judicial notice of climate change in environmental litigation.

The fifth section of the book, which focuses on site inspections, investigations, and enforcement issues, consists of seven chapters that consider the frontline role played by government agencies and their “boots on the ground” in the litigation of environmental offences in Canada. There exists in both federal and provincial environmental legislation an array of powers—preventive, remedial, and punitive—that the regulated community can expect to encounter. It is difficult to detect any uniform approach throughout legislation, and as a result, the full range of legal implications arising out of such powers and orders is not always well understood by court practitioners, whether at first instance (e.g. on site) or in the context of a prosecution. Some of the issues that are addressed in this final section include the art of responsive regulation, inspections, compliance, and investigations and legal strategies for collecting evidence.

This volume is intended to be a source of relevant, current, and useful information for a wide-ranging Canadian and international audience and will be of use to both lawyers and non-lawyers. *Environment in the Courtroom* discusses significant issues and challenges in Canadian environmental law today. As we have had legal professionals and scholars from outside Canada make invited presentations and participate in the symposia via webcast, individuals in other nations interested in comparative environmental legal studies will also find this book to be a useful reference on contemporary issues in Canadian environmental law.

It is my pleasure to thank and acknowledge the organizations that have contributed to the success of the symposia, in particular Environment and

Climate Change Canada, the Canadian Bar Association, Ontario Bar Association, Centre for Environmental Law & Global Sustainability, Marine & Environmental Law Institute, University of Calgary, University of Ottawa, and Dalhousie University. In addition, I would like to thank Owen Saunders, Jamie Benidickson, Phillip Saunders, Sarah Powell, Jennifer Fairfax, Alastair Lucas, Martin Olszynski, Laura Scott, Chilenye Nwapi, Ian Holloway, Nancy Money, and Jane Rowe for their special contributions that have made *Environment in the Courtroom* such a success.

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