

Book Review—*Environment in the Courtroom* by Allan E Ingelson

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E*nvironment in the Courtroom*, edited by Allan Ingelson (Associate Professor at the University of Calgary and Executive Director of the Canadian Institute of Resources Law), is a recent addition to the literature on Canadian environmental law. The book is a collection of 54 essays that have been presented at national environmental law symposia titled “Environment in the Courtroom” that have been convened on an annual basis in various cities in Canada (specifically, Calgary, Ottawa, and Halifax) over the past seven years.¹ A hefty tome of 807 pages, the volume features contributions from 58 authors, which include some of Canada’s leading names in environmental legal academia and practice. On the academic side, this includes scholars like Martin Olszynski, Chris Tollefson, Natasha Affolder, Lynda Collins, and Heather McLeod-Kilmurray, all of whom are professors at faculties of law across the country, and are widely and regularly cited as authorities on a range of environmental issues.

The book is organized into five thematic sections that are meant to reflect the issues discussed during the eponymous symposia.² As the Preface notes, the focus of the book is “on providing an overview of current environmental legal issues in three key areas: the unique nature of environmental harm, prosecution of environmental offences, and sentencing for environmental offences.”³ This choice of focus is unique, and sets the book apart from the

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¹ Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at xi.

² *Ibid.*

³ *Ibid.*

existing literature in terms of the emphasis it places on the application of environmental laws in the context of the courtroom, as opposed to a more theoretical or doctrinal discussion of key concepts in Canadian environmental law and policy. Most of the contributions represent a specifically Canadian perspective, though a small minority take a comparative approach, bringing the United States and Australia into the book's ambit. Each Section will be briefly discussed below, followed by some thoughts and impressions about the volume as a whole, and how it is positioned vis-à-vis other similar books.

Section 1, which addresses “Key Environmental Concepts and the Unique Nature of Environmental Damage”, 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.”⁴ In addition to emphasizing the practical problems in establishing, quantifying, and assessing environmental damage, familiar concepts in environmental law, like sustainable development, the precautionary principle, and ecosystem management are also addressed. Within this section, Hadley Friedland’s paper on “Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions”⁵ deserves special mention: it is an excellent primer on the topic. Friedland makes the point that “serious and sustained practical engagement with Indigenous legal traditions by legal practitioners is important and possible”,⁶ including in the context of environmental issues, and suggests some methods for engaging with Indigenous legal traditions in a substantive way. This intellectual project is especially significant given the Truth and Reconciliation Commission’s calls to action for those who work in the law and in legal education to become better versed in Indigenous law, Aboriginal-Crown relations, and the place of law in our settler-colonial state at large.⁷

Arguably, Section 1 as a whole is among the most valuable in the book, especially since the importance of judicial education for sustainability is receiving growing attention.⁸ Although judicial education originally focused on “ensuring that judges were up to date with recent decisions and substantive legal issues, over the past few decades, improving judicial competence with regards to awareness of social context has become much more common. Yet, there are few programs for judges that focus on environmental sustainability.”⁹ The papers included in Section 1 of *Environment in the Courtroom* can help contribute to a more robust and nuanced understanding on the part of the judiciary when it comes to the myriad issues at play in environmental law, environmental litigation, and issues relating to sustainability more broadly.

⁴ *Ibid* at xii.

⁵ Hadley Friedland, “Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 82-91.

⁶ *Ibid* at 82.

⁷ Truth and Reconciliation Commission of Canada, “Truth and Reconciliation Commission of Canada: Calls to Action” (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online (pdf): *Truth and Reconciliation Commission of Canada* <trc.ca/assets/pdf/Calls_to_Action_English2.pdf> at 3, 7-8 (especially calls to action 27, 28, 57, and 62).

⁸ See e.g. Laurel Besco, “Judicial Education for Sustainability” (2018) 14:1 MJSDDL 1.

⁹ *Ibid* at 7.

The papers in Section 2 deal with various aspects of “Environmental Prosecutions”, from the decision whether or not to prosecute to defences available when it comes to environmental offences. On the latter topic, there is a paper devoted specifically to the defence of due diligence, one of the most common defences advanced in regulatory prosecutions, written from the perspective of a lawyer familiar with the defence in the context of federal regulatory prosecutions.¹⁰ Most of the papers in this section will be of greatest interest, relevance, and value to current or aspiring practitioners of environmental law, whether as prosecutors or as defence counsel. However, there are also some papers in this Section that provide a more theoretical take, such as Heather McLeod-Kilmurray’s contribution on the relationship between science and advocacy in the context of environmental prosecutions.¹¹

Section 3 tackles “Sentencing and Environmental Offences”. There is a particular emphasis on creative sentencing, with several papers presenting various perspectives on the topic, including the corporate perspective¹² and the perspective of environmental non-governmental organizations.¹³ Professor Sharon Mascher’s paper offers a comparative account by looking at the experience with creative sentencing in New South Wales, Australia and discussing the possibilities and challenges associated with implementing restorative justice processes in addressing environmental offences.¹⁴

Section 4 covers “Evidentiary Issues in Environmental Prosecutions and Hearings”. Here, the topic of expert witnesses is prominently considered. Other topics discussed in this section include proof of causation, evidentiary barriers to standing, and the challenges in using Aboriginal traditional knowledge in the courts. This section also includes a paper that provides an overview of judicial notice of climate change, which is an important and relevant topic given the growing body of climate litigation in Canada and elsewhere in the world.¹⁵ Brenda Heelan Powell, Staff Council with the Environmental Law Centre in Edmonton, briefly discusses the state of climate change litigation in Canada, the United States, and internationally, concluding that “while judicial notice of climate change science may not be appropriate in all circumstances, the courts should remain alert to the fact that significant scientific consensus on the existence, mechanisms, and impacts of climate change is already reasonably established.”¹⁶ The judiciary’s treatment of climate change science and acknowledgement of the enormous environmental and human impacts of climate change is highly significant in terms of the evidentiary burden

¹⁰ Ronda M Vanderhoek, “Due Diligence in Environmental Offences” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 262-271.

¹¹ Heather McLeod-Kilmurray, “Science and Advocacy” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 230-239.

¹² Allan E Ingelson, “Creative Environmental Sentences: The Corporate Perspective” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 391-412.

¹³ Cindy Chiasson, “Environmental Non-Governmental Organizations and Creative Sentencing: Perspectives and Roles” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 413-424.

¹⁴ Sharon Mascher, “Creative Sentencing: The Experience “Down-Under”” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 377-390.

¹⁵ Brenda Heelan Powell, “Judicial Notice of Climate Change” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) 646 at 649.

¹⁶ *Ibid* at 659.

placed upon litigants, and it will be interesting to see in what direction Canadian courts take in future cases.

Section 5 turns to “Inspections and Enforcement Issues: On-site and in Court”. The papers in this section—largely representing the perspectives of lawyers working in private practice and for the government—are decidedly less theoretical in nature than in any of the previous sections, and focus more closely on practical and procedural aspects of environmental investigations, inspections, and enforcement. For example, Jack Coop’s contribution provides an overview of recommended best practices, from a practitioner’s perspective, when it comes to the effective management, control, collection, evaluation, and presentation of evidence for environmental investigations and prosecutions.¹⁷ Again, this section will be most relevant and useful to a specific audience—namely, those professionals who regularly contend with regulatory investigations, inspection, and enforcement.

Given the breadth of the contributions and the contributors, it is difficult to evaluate the work as a whole, on a substantive basis. The approach and tone of the papers range widely, and few readers will find that they are the target audience for all of the contributions. Some of the papers, particularly those written by experienced practitioners and judges, present best practice tips and comments in an informal manner, and are sparsely referenced. Others have copious notes and citations and read much more like traditional academic articles. Certainly, the book will have something of value for anyone working in, studying, or even just interested in Canadian environmental law, but one could also make the case that in being something of a jack-of-all-trades, it is a master of none. To say that not all contributions will be of equal value to all readers is not a condemnation of the volume, but rather a reminder that readers should temper their expectations accordingly.

Though the book makes for a useful reference text, there are certain features relating to its form that hinder its suitability for this purpose. For one, there is no generally adhered-to format for the contributions—while some have clear introductions and pithy conclusions, many of them do not, which makes it challenging to quickly narrow down whether or not a particular piece will provide the information that a reader is looking for. A short précis of each paper at the start, accompanied by a conclusion summarizing the most salient takeaways, would make this substantial volume significantly more approachable.

Information about the contributors would also have been welcome at the start of each chapter, as vague or passing references to a specific author’s personal experience are difficult to contextualize without more detailed information about the position from which she or he is writing. The experience and perspective of a private sector lawyer is very different from the experience and perspective of a lawyer working in the public sector, for example. It goes without saying that academics, judges, and representatives from environmental non-governmental organizations are also positioned differently from practitioners, as each generally tends to think and work within their own paradigmatic frames of reference. What an author considers to be most important or relevant bears heavily on her or his choice of what is discussed or emphasized in a relatively short contribution, but someone who is differently situated may

¹⁷ Jack D Coop, “Collecting Essential Evidence for Environmental Investigations and Prosecutions: Approaches to Legal Strategy and Associated Issues” in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 718-741.

not feel the same issues are as significant, or may have an entirely different take altogether. The list of contributors at the end of the book provides limited information, often only noting the author's institutional affiliation.

Furthermore, the Index is not as robust as it could be, especially relative to the amount of content. For example, the only case that is indexed is *R v Sault Ste Marie*,¹⁸ although there are numerous other cases that are referred to in multiple contributions, such as *R v United Keno Hill Mines Ltd.*¹⁹ and *R v Hydro-Québec*.²⁰ A separate Table of Cases would have been useful as a reference point, in order to be able to quickly get a sense of the body of relevant case law and refer to the primary sources as necessary. Additionally, there are some materials like charts and tables that are reproduced as part of individual contributions; to name just one, Natasha Affolder's contribution includes a table that comprehensively sets out all references to sustainable development in Canadian legislation.²¹ Regrettably, these kinds of materials are not tabulated or listed anywhere in the text as a whole, either as part of the preliminary matter or at the end. As a result, it is impossible to make use of or even be aware of them without flipping through the entirety of the text. The use of endnotes rather than footnotes is also a personal peeve in virtually all contexts, but especially cumbersome in a volume of this size.

To be sure, *Environment in the Courtroom* makes a commendable effort to provide an overview of some salient developments when it comes to environmental litigation. The dynamism and fast-changing nature of environmental law is part of the reason it is so interesting, while simultaneously being an aspect that makes it challenging to study, practice, teach, and write about. Keeping up with new legislative and regulatory developments requires constant vigilance, and the unfortunate reality is that the ground can shift from underneath you even as you are working on or researching a particular issue. To this end, it would have been useful to have a sense of when individual papers were originally drafted, presented, and/or updated, especially since the book is based on papers that were presented over the course of the past seven years. Though some authors provided this information on their own initiative, there are many instances where the reader is left unsure whether the material they are being presented is up-to-date, and if so or if not, as of when.

Additionally, while the book engages with several current environmental issues that arise in the context of the courtroom, there is some unevenness in the topics that are discussed. Given the book's focus on the unique nature of environmental harm, prosecution of environmental offences, and sentencing for environmental offences, some important contemporary issues

¹⁸ *R v Sault Ste Marie*, [1978] 2 SCR 1299.

¹⁹ *R v United Keno Hill Mines Ltd* (1980), 10 CELR 43 (Y Terr Ct).

²⁰ *R v Hydro-Québec*, [1997] 3 SCR 213.

²¹ Natasha Affolder, "The Legal Concept of Sustainability" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) 92 at 104-128.

like climate change litigation,²² carbon pricing and policy,²³ environmental rights,²⁴ and environmental justice²⁵ receive scant coverage, though they have spawned growing bodies of literature elsewhere. By contrast, as previously mentioned, the issues of creative sentencing and expert evidence have multiple contributions devoted to them.

There is also an imbalance when it comes to geography, with certain jurisdictions being discussed with much more frequency than others. Notably, there is limited discussion of the territories. This type of imbalance is, unfortunately, inevitable, based on the relative populations of the Canada's provinces and territories alone, but it bears mentioning all the same, as readers of less represented jurisdictions may find themselves disappointed by the relative lack of coverage. Resources that are more specialized may be more appropriate for those who are seeking information about environmental legal practice in such places.

Generally, the majority of the papers in the book do not take a critical approach to the environmental law paradigm as it currently exists in Canada. For example, in the two contributions addressing "The Law and Economics of Environmental Harm",²⁶ the normative basis of the practice of ecosystem valuation is not fundamentally problematized, which represents a classical law and economics approach. In addition, the Preface states that "[e]nvironmental law is a dynamic and interesting area that is playing an increasingly important role in furthering the sustainable development policies adopted by federal, provincial, and

²² For a private firm's perspective on climate change litigation in Canada, see e.g. Maureen Killoran, Colin Feasby & Matthew M Huys, "Climate change litigation arrives in Canada", *Osler* (5 February 2019), online: <<https://www.osler.com/en/resources/regulations/2019/climate-change-litigation-arrives-in-canada>>. For perspectives on climate change litigation in Canada presented in academic journals, see e.g. Dustin W Klaudt, "Can Canada's "Living Tree" Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31:3 JELP 185; Cameron Jefferies, "Filling the Gaps in Canada's Climate Change Strategy: "All Litigation, All the Time...?" (2015) 38:5 *Fordham Int'l LJ* 1371; Andrew Gage, "Climate Change Litigation and the Public Right to a Healthy Atmosphere" (2013) 24 JELP 257; Julia Schatz, "Climate Change Litigation in Canada and the USA" (2009) 18:2 *Review of European Community & International Environmental Law* 129.

²³ See e.g. Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019) 50:2 *Ottawa L Rev* 197; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

²⁴ See e.g. David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012).

²⁵ See e.g. Julian Agyeman et al, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2010); Andil Gosine & Cheryl Teelucksingh, *Environmental Justice and Racism in Canada: An Introduction* (Toronto: Emond Montgomery Publications Ltd, 2008); Dayna Nadine Scott & Adrian A Smith. "'Sacrifice Zones' in the Green Energy Economy: Toward an Environmental Justice Framework" (2017) 62:3 *McGill LJ* 861; Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step is Admitting We Have a Problem" (2016) 29 JELP 305.

²⁶ Martin Olszynski & Peter Boxall, "The Law and Economics of Environmental Harm: A Primer and Update for Environmental Sentencing (Parts I and II) in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) 443-456; Peter Boxall & Martin Olszynski, "The Law and Economics of Environmental Harm: A Primer and Update for Environmental Sentencing (Parts III, IV, and V)" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, University of Calgary Press, 2019) at 457-469.

territorial governments in Canada.²⁷ Given the arguably fraught status of the concept of “sustainable development” as an overarching guiding framework for environmental law,²⁸ the omission of, at the very least, a single standalone contribution that challenges the systemic biases embedded in this type of discourse is regrettable. Many have lambasted the concept of sustainable development on numerous grounds, including that it is vague and unworkable at best and contradictory and regressive at worst.²⁹ Exemplifying the latter position, Canadian legal scholar Annie Rochette has asserted that “[t]he main flaw of sustainable development lies in its failure to challenge the fundamental assumptions of the dominant development model that it seeks to replace, as well as its dependence on the global market economy.”³⁰ Granted, the book makes no grand claim to grapple with critical perspectives in any significant fashion. However, it would have been enriched if it engaged to some degree with existing critiques of Canadian environmental law,³¹ including arguments for a shift towards an ecological law paradigm.³²

In terms of content, there is some degree of overlap with some of the other popular books in this space, namely, Meinhard Doelle and Chris Tollefson’s casebook, *Environmental Law: Cases and Materials*,³³ now in its third edition, Jamie Benedickson’s comprehensive introductory text, *Environmental Law*,³⁴ now in its fifth edition, and Paul Muldoon et al’s *An Introduction to Environmental Law and Policy in Canada*,³⁵ now in its second edition. However, *Environment in the Courtroom* can also be distinguished on its merits. Rather than serving primarily as a beginner resource for students who are being introduced to environmental law for the first time, experienced practitioners and judges will also find something to take away from this volume.

²⁷ Ingelson, ed, *supra* note 1 at xi.

²⁸ See generally Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2d ed (New York: Routledge, 2017).

²⁹ For summaries of some of the main criticisms, see e.g. Sharachandra M Lélé, “Sustainable Development: A Critical Review” (1991) 19:6 *World Development* 607; John Robinson, “Squaring the Circle? Some Thoughts on the Idea of Sustainable Development” (2004) 48:4 *Ecological Economics* 369 at 373-377.

³⁰ Annie Rochette, “Stop the Rape of the World: An Ecofeminist Critique of Sustainable Development” (2002) 51 *UNB LJ* 145 at 150.

³¹ See e.g. Michael M’Gonigle & Louise Takeda, “The Liberal Limits of Environmental Law: A Green Legal Critique” (2013) 30:3 *Pace Envtl L Rev* 1005; Michael M’Gonigle & Paula Ramsay, “Greening Environmental Law: From Sectoral Reform to Systemic Re-formation” (2004) 14 *JELP* 333 (arguing that environmental law is inherently embedded within many of the assumptions of the modern, Western, developed, democratic world and its associated problems, and thus requires much more systemic inquiries into the nature of law and legal change itself if we are to effect a transformative change towards sustainability). See also David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

³² Geoffrey Garver, “The Rule of Ecological Law: The Legal Complement to Degrowth Economics” (2013) 5:1 *Sustainability* 316.

³³ Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 3d ed (Toronto: Thomson Reuters, 2019).

³⁴ Jamie Benedickson, *Environmental Law*, 5th ed (Toronto: Irwin Law, 2019).

³⁵ Paul Muldoon et al, *An Introduction to Environmental Law and Policy in Canada*, 2d ed (Toronto: Emond Montgomery Publications Ltd, 2009).

Minor quibbles aside, the book mostly lives up to its promise to “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.”³⁶ The uniquely practical advice from lawyers and judges on a comprehensive range of topics is among the book’s greatest strengths, and will be invaluable to students and practitioners of all levels of experience.

Rather than being seen as a textbook or a casebook, *Environment in the Courtroom* is best categorized as a proceedings, representing an important compendium of environmental law thought at a particular moment in time in Canada. Indeed, in order to think more deeply about where environmental law is going or should go in the future, it is important to know where environmental law has been. As we currently face a global environmental crisis of unprecedented proportions, questions about the role of law in worsening or mitigating environmental harms will be more significant than ever, and this volume ultimately contributes to a deepening of the understanding of both the underlying problems and of potential solutions in the Canadian context.

³⁶ Ingelson, ed, *supra* note 1 at xi.