

MJS DL
McGill Journal
of Sustainable
Development Law



R D D D M
Revue de droit
du développement
durable de McGill

VOLUME 15 (1 & 2) | VOLUME 15 (1 & 2)
2019-2020

McGILL UNIVERSITY, FACULTY OF LAW
3644 PEEL STREET, ROOM 305
MONTREAL, QUEBEC
H3A 1W9, CANADA

UNIVERSITÉ MCGILL, FACULTÉ DE DROIT
3644, RUE PEEL, BUREAU 305
MONTRÉAL (QUÉBEC)
H3A 1W9, CANADA

www.mcgill.ca/mjsdl/
mjsdl.law@mcgill.ca
ISSN: 2561-0589

Editorial Board
Équipe de rédaction
2019-2020

MJSDL Volume 15: Issues 1 & 2 / RDDDM Volume 15: Numéros 1 & 2

Editor-in-Chief – Rédacteur en chef

Kimia Towfigh

Executive Editors

Rédactrices en chef adjointes

Arsalan Ahmed

Linda Muhugusa

Managing Editor

Rédactrice administrative

Annafaye Dunbar

French Editor

Rédactrice francophone

Jean-Philippe Lemay

Book Review Editor

Rédacteur aux recensions

Michelle Pucci

Case Comment Editor

Rédacteur des chroniques de jurisprudence

Verity Thomson

Senior Editors

Rédacteurs/Rédactrices

Erica Trenson

Jenna Topan

Kevin Nicholls-Dempsey

Larissa Parker

Sophie Lee

Management

Administration

Amanda Bowie-Edwards

Beatrice Mackie

Chukwubuikem Nnebe

Eva Monteiro

Reeve Kako

Gagandeep Singh (Summer Layout Manager)

Emma Walsh (Summer Office Manager)

Associate Board

Comité adjoint

Zackary Goldford

Dena Kia

Kendra Landry

Corrine Tansowny

Stewart Wiseman

Emma Sitland

Emma Walsh

Cassandra Betts

Léonie Bourdeau

Andrew Hamilton

Alice Wang

Jay Lu

Mehlka Mustansir

Mélanie Thivierge

Jeremy Wiener

Stefania Vlachou

Elise Mallette

Ling Chen (Special Editor)

Faculty Advisor – Conseiller pédagogique

Prof. Richard Janda

In addition, we are sincerely grateful to the Volume 14 team for their assistance in this edition of the MJSDL.

Editor-in-Chief

Rebecca Schur

Executive Editors

Patrick Kanopoulos
Dorna Zaboli

Managing Editor

Alexander McGillivray

Associate Managing Editors

Anafaye Dunbar
Catalina Karam
Michelle Pucci
Eva Monteiro
Diana Stepner
Delana Tavakol
Verity Thomson

Case Comment Editor

Linda Muhugusa

French Language Editor

Caroline Rouleau

Book Review Editor

David Powell

Summer Office Manger

Kathleen Olds

Senior Editors

Sophie Kassel
Nicole Spadotto
Kimia Towfigh
Julien Tremblay-Gravel
Flora Yu

Associate Editors

Adelise Lalande
Arsalan Ahmed
Brandon Lewis-Tremblay
Brett Howie
Erica Trenson
Genevieve Westgate
Jean-Philippe Lemay
Jenna Topan
Katrina Bland
Larissa Parker
Martina Kneifel
Natalia Back Gosende
Natalia Koper
Nathaniel Reilly
Prudence Erkin
Raghad Isam Sadiq
Sophie Eva Gagné-Landmann
Sophie Lee

Special Editors

Rachel Ruoying Li
Seyed Hossein Chavoshi

Faculty Advisor

Prof. Richard Janda

Advisory Board Members

Membres du comité consultatif

Prof. Natasha Affolder

*Associate Professor, University of British Columbia
Faculty of Law; Former Director, Centre for
Environmental Law, University of British Columbia*

•
*Professeure adjointe, Faculté de droit de l'Université de la
Colombie-Britannique; Ancienne directrice, Centre for
Environmental Law, Université de la Colombie-Britannique*

Dr. Sumudu Atapattu

*Lead Counsel, Human Rights and Poverty, Center
for International Sustainable Development
Law; Associate Director, Global Legal Studies
Center, University of Wisconsin Law School*

•
*Conseillère principale, Droits de la personne et
de la pauvreté, Centre de droit international du
développement durable; Directrice adjointe, Global Legal
Studies Center, Faculté de droit, Université du Wisconsin*

Prof. Marie-Claire Cordonier Segger

*Fellow, Lauterpacht Center for International
Law, Cambridge Faculty of Law*

•
*Chargée de recherche, Centre Lauterpacht pour le droit
international, Faculté de droit de l'Université de Cambridge*

Dr. Mario Prost

Senior lecturer, Keele University School of Law

•
Maître de conférences, Faculté de droit de l'Université Keele

Prof. Sandrine Maljean-Dubois

*Directrice de recherche, Centre national de la recherche
scientifique (CNRS); Directrice, Centre d'études
et de recherches internationales et communautaires
(CÉRIC) de la Faculté de droit et de sciences politiques,
Université Paul Cézanne Aix-Marseille III*

•
*Director of Research, National Center of Scientific Research;
Director, Centre d'études et de recherches internationales
et communautaires (CÉRIC) of the Faculty of Law and
Political Science, Université Paul Cézanne Aix-Marseille III*

Mc Martin Valasek

*Partner, Norton Rose Fulbright; Former
policy advisor at Environment Canada*

•
*Associé, Norton Rose Fulbright; Ancien conseiller en politiques
à Environnement Canada*

Jessica Magonet

MJSDL Editor-in-Chief (Volume 10)

•
Rédactrice en chef de la RDDDM (Volume 10)

Michelle Toering Sanders

MJSDL Editor-in-Chief (Volume 1)

•
Rédactrice en chef de la RDDDM (Volume 1)

To be cited as: (2019) 15:1 MJSDL and (2020) 15:2 MJSDL, respectively
Mode de référence: (2019) 15:1 RDDDM et (2020) 15:2 RDDDM, respectivement

Indexed in – répertorié dans:
Centre d'accès à l'information juridique

Online – Banques de données:

EBSCO
Gale LegalTrac
HeinOnline
Lexis/Nexis Quicklaw
Informit
JSTOR
Persée
ProQuest
SOQUIJ
SSRN
StradaLex
WestlawNext

www.mcgill.ca/mjsdl/journalonline

Printed in Canada – Imprimé au Canada

About the MJSDL

The MJSDL is a student-run, peer-reviewed, bi-annual academic journal mandated to provide a forum for critical analysis on the intersecting themes of economics, society, human rights, and the environment, and the resulting implications for sustainable development law. The MJSDL is affiliated with the Faculty of Law at McGill University and is fully bilingual.

Submissions

Submissions on all topics related to sustainable development law are accepted. Submissions may discuss the problems, debate solutions, or review the impact of laws and policies within the field. The focus of submissions may be either domestic or international. The MJSDL is pleased to accept submissions in English and French.

Submissions should be between 10,000 and 15,000 words in length. Footnotes should conform to the *Canadian Guide to Uniform Legal Citation*, 9th ed (Toronto: Carswell, 2018). Abstracts and tables of contents accompanying articles are required. As a student-run journal, the MJSDL also promotes student scholarship and invites student submissions on any topic related to issues of sustainable development law and policy.

Subscriptions

Region	Rate
Canada	60.00 CAD
United States	60.00 USD
UNEP Zone A International	70.00 CAD
UNEP Zone B International	40.00 CAD

Zoning is based on UNEP classification. For example, subscription requests from Europe, Australia, and New Zealand are included in the "Zone A" rate. All rates include postage. Cheques and international money orders are accepted.

Advertise in the MJSDL

Size of Advertisement	Price
¼ Page	75.00 CAD
½ Page	150.00 CAD
Full Page	250.00 CAD
Full Page (Inside Back Cover)	300.00 CAD

Contact Information

McGill Journal of Sustainable Development Law
McGill University, Faculty of Law
3644 Peel Street, Room 305, Montreal, QC, H3A 1W9, Canada
Tel: +1.514.398.6965
Fax: +1.514.398.8197
mjsdl.law@mcgill.ca

La RDDDM

La RDDDM est une revue académique biannuelle gérée par des membres du corps étudiant et évaluée par les pairs, qui se veut une tribune pour la réflexion, l'analyse critique et le dialogue sur les diverses relations entre le droit, l'environnement, l'économie et la société à l'échelle nationale et internationale. La RDDDM est une publication bilingue affiliée à la Faculté de droit de l'Université McGill.

Contributions

La RDDDM accepte les contributions sur tous sujets reliés au droit du développement durable. Les textes soumis peuvent explorer des problématiques, débattre de solutions possibles ou étudier l'impact de politiques et de lois qui concernent le développement durable. Les manuscrits peuvent traiter des aspects tant nationaux qu'internationaux du développement durable. La RDDDM accepte les manuscrits rédigés en français et en anglais.

Les articles d'au moins 10 000 mots et d'au plus 15 000 mots sont favorisés. Les références doivent correspondre aux règles du *Manuel canadien de la référence juridique*, 9^e éd, Toronto, Carswell, 2018. Toute soumission doit contenir un résumé du texte et une table des matières. En tant qu'initiative étudiante, la RDDDM veut promouvoir la recherche académique parmi les jeunes universitaires. Les étudiants du premier et du second cycles sont invités à soumettre un texte traitant de tout sujet lié au droit du développement durable.

Abonnement

Région	Prix
Canada	60,00 CAD
États-Unis	60,00 USD
PNUE Zone A International	70,00 CAD
PNUE Zone B International	40,00 CAD

Les tarifs d'abonnement à la RDDDM varient en fonction des zones géographiques selon la classification du Programme des Nations Unies pour l'environnement (PNUE). À titre d'exemple, les demandes d'abonnement provenant de l'Europe, de l'Australie et de la Nouvelle-Zélande relèvent de la zone A. Les tarifs incluent les frais d'expédition et de manutention. La RDDDM accepte les chèques et mandats-poste.

Tarifs publicitaires

Surface	Prix
¼ page	75,00 CAD
½ page	150,00 CAD
Pleine page	250,00 CAD
Pleine page (couverture arrière intérieure)	300,00 CAD

Coordonnées

Revue de droit du développement durable de McGill
Université McGill, Faculté de droit
3644, rue Peel, bureau 305, Montréal (Québec) H3A 1W9, Canada
Téléphone: +1.514.398.6965
Télécopieur: +1.514.398.8197
mjsdl.law@mcgill.ca

Table of Contents – Table des matières



Volume 15:1

Feature—Brief on Environmental Rule of Law: In Need of Coherence in Contested Terrain	David W. Wright	1
Brief on The World Trade Organization's Dispute Settlement Body and the Sustainable Development Goals	Alexandra R. Harrington	23
Book Review— <i>Environment in the Courtroom</i> by Allan E Ingelson	Angela Lee	44
NIRB's Inchoate Incorporation of Inuit Qaujimajatuqangit in Recommendation- Making Under Nunavut's Impacts Assessment Regime	Daniel Dylan & Spencer Thompson	54

Volume 15:2

A Performance Analysis of the International Environmentally Sound Technology Transfer Framework in Africa	Adebayo Majekolagbe	87
Book Review— Natural Resources and Human Rights: An Appraisal	Dwight Newman	127
The Inhabitants of an Imagined Body: The Crown's Duty to Consult and Accommodate Indigenous Communities in the Arctic Adversely Affected by Climate Change	Tyler Paquette	136
Contractual Carbon Fees: A Proposal	Steve Lorteau	173

Editor's Note

Note de la rédaction

Kimia Towfigh

Editor-in-Chief / Rédactrice en chef (2019-2020)

The McGill Journal of Sustainable Development Law (MJSDDL) is proud to complete its fifteenth year of publication. Since 2004, the MJSDDL has provided a multidisciplinary forum for scholars, practitioners and students to exchange ideas on the intersection between law, development, the environment, economics and society. In recent times, an even greater deal of attention has been directed at the climate crisis and the overwhelming evidence of anthropocentric impacts to the world's climate.

Undeniably, this phenomenon has united the world on a global scale. In September 2019, a series of international strikes took place in 150 countries across 4,500 locations, demanding urgent action to address the climate crisis and combat environmental harms.

Here in Montréal, youth activist Greta Thunberg led an estimated crowd of over 500,000 people in the global march for climate justice—later acknowledged as the largest protest in the province's history. From the Sir Georges-Étienne statue at Mount Royal to the southern tip of Robert-Bourassa Boulevard, an effervescent crowd listened intently to Thunberg's message, which urged world leaders to act on current science and mitigate environmental harms. While the Commission de scolaire de Montréal cancelled classes to allow all elementary and secondary students in the district to attend, 92% of students at the McGill Faculty of Law voted to strike in support of the march—an initiative spearheaded by our Senior Editor, Larissa Parker. Overall, the rapid mobilization of the climate strike worldwide has highlighted a global shift in discourse and a growing determination to confront the intensifying realities of the climate crisis.

This year, in adherence to its mandate, the MJSDDL continued to offer a forum to foster pertinent and meaningful contributions to sustainability discourse. In March 2019, we were pleased to host Lisa DeMarco, Christopher Barrington-Leigh and Jean LeClair in a timely discussion of the reference before the provincial courts of appeal in Ontario and Saskatchewan challenging Prime Minister Trudeau's carbon tax. By highlighting the viability of federal and provincial policy to combat climate change, this panel discussion engaged students, faculty and members of the community.

In partnership with the Centre for International Sustainable Development Law (CISDL), the MJSDDL also co-hosted a legal roundtable on international contributions to SDG 16 (peace, justice and inclusive governance) in June 2019. The event featured notable guest speakers and engaging legal roundtable discussions regarding law, policy, and governance contributions to the achievement of inclusive institutions. The MJSDDL is grateful for the CISDL's ongoing support and looks forward to a continued partnership.

Turning to our current publication, on behalf of two diligent editorial boards, I am thrilled to present our 15th volume relating to innovations in governance. This double issue features a broad range of stimulating and cutting-edge pieces from legal scholars, practitioners and students.

In Volume 15:1, David Wright provides a critical and topical analysis of environmental rule of law as an emerging concept within the contested landscape of law theory and practice. As Wright suggests, there exists a risk that environmental rule of law diverts valuable time, resources and institutions from political and economic choices that ground development policy-making and international development initiatives.

The next issue brief prepared by Alexandra Harrington examines the ways in which the World Trade Organization's (WTO) dispute settlement body has considered and applied tenets of the 2015 Sustainable Development Goals (SDGs). In this insightful and novel piece, Harrington also identifies recently filed complaints at the WTO that will allow for further application of the SDGs and their overt validation as interpretative tools of law.

Angela Lee provides a succinct and insightful book review of *Environment in the Courtroom* edited by Allan E Ingelson, a recent addition to the literature on Canadian environmental law. In her contribution, Lee discusses each section of the book in detail and provides a critical analysis about the volume as a whole.

Daniel Dylan and Spencer Thompson's comprehensive article provides an overview of the Nunavut Land Claims Agreement (NCLA), and the Nunavut Planning and Project Assessment Act (NUPPAA) which came into force in 2014. The authors' rigorous analysis demonstrates that there is an inchoate incorporation of traditional knowledge—Inuit Qaujimajatuqangit (IQ)—into Nunavut Review Board (NIRB) processes, and ultimately concludes that IQ must be further integrated into decision and report-making processes.

In Volume 15:2, Adebayo Majekolagbe meticulously highlights transfer channels such as the Clean Development Mechanism, the Poznan strategy and other non-state initiatives that have followed the international climate change regime's environmentally sound technology framework. Majekolagbe questions the effectiveness of the current framework, and ultimately concludes that the current mechanism features flaws that have undermined the effectiveness of previous initiatives.

Dwight Newman offers a compelling review of Jérémie Gilbert's *Natural Resources and Human Rights: An Appraisal*, noting the integration of rights-based approaches focused on natural resource issues. In his analysis, Newman highlights the complex dilemmas that arise within rights-based frameworks and encourages readers to rethink assumptions about the relationships between Indigenous rights and international rights norms.

Tyler Paquette examines how Indigenous communities in the Canadian Arctic can ensure their inclusion in climate change-related governance. In particular, Paquette analyzes whether the Crown owes a duty to consult and accommodate to Indigenous communities in the Arctic, whose rights recognized and protected under section 35, of the *Constitution Act*, 1982 are adversely affected by the impacts of climate change. This engaging and topical piece posits whether Canadian law has the capacity to advance climate justice.

As our final piece, Steve Lorteau proposes the "contractual carbon fee" as a novel governance instrument to guide non-state climate change mitigation efforts in his award-winning essay. At its core, the contractual carbon fee is a privatized carbon tax: one contracting party agrees to pay a fee on its greenhouse gas emissions, while another agrees to enforce the commitment to pay the contractual carbon fee. This innovative article provides guidance on how to draft an enforceable contractual carbon fee under Canadian common law and concludes that the contractual carbon fee may be beneficial to self-interested economic actors.

We wish to extend our gratitude to all of our contributors who have made this publication possible, including our student editors, external peer reviewers, and our faculty advisor, Professor Richard Janda. We also acknowledge the Young Canada Works program for financing our editorial work during the summer months. Thank you to our authors for generously sharing their expertise and for selecting the MJSDL as a viable venue for their research. Finally, thank you to our readers, whose investment has allowed us to offer an outlet of informed and focused commentary on sustainability. We sincerely hope that this volume provides a breadth of insight and sparks inspiration for future research.