Summary of Contents

Volume 1

- Chapter 1. Constitutional and Administrative Law Considerations
- Chapter 2. Environmental Regulation: Using the Legislative Framework in Ontario as an Example
- Chapter 3. Hot Calls: Inspections and Investigations
- Chapter 4. Procedure and Evidence

Volume 2

- Chapter 5. The Defence of Due Diligence in Environmental Offences
- Chapter 6. Corporate and Personal Liability
- Chapter 7. Sentencing Principles

Appendices

- Appendix A. Sentencing Powers Fine Ranges
- Appendix B. Key Ontario and Federal Laws on Notification of Environmental Events
- Appendix C. Sample Notice to Inspector/Investigator
- Appendix D. Legal Counsel's Plant Checklist for Inspections/Investigations
- Appendix E. Checklist of Questions Likely to be Asked by Investigators
- Appendix F. Checklist for Due Diligence for Hazardous
 Waste Haulers
- Appendix G. Checklist of General Areas which Must be Covered as Part of Due Diligence
- Appendix H. Sound Business and Operational Practices in the Petrochemical Industry
- Appendix I. Safety Culture

PROSECUTION AND DEFENCE OF ENVIRONMENTAL OFFENCES

Appendix WP. Words and Phrases

Table of Added Cases

Table of Cases

Index

Table of Contents

Volume 1

CHAPTER 1. CONSTITUTIONAL AND ADMINISTRATIVE LAW CONSIDERATIONS

I. GENERAL PRINCIPLES OF PROVINCIAL AUTHORITY

- § 1:1 Introduction
- § 1:2 Jurisdiction Over Water
- § 1:3 —Federal Jurisdiction: Section 91(1)(a) Constitution Act, 1867—Public Property
- § 1:4 —Federal Jurisdiction: Section 91(10) Constitution Act, 1867—Navigation and Shipping

II. GENERAL PRINCIPLES OF FEDERAL AUTHORITY

- A. INTRODUCTION; PEACE, ORDER AND GOOD GOVERNMENT: THE NATIONAL CONCERN TEST
- § 1:5 Introduction
- § 1:6 Peace, Order and Good Government: The National Concern Test
 - B. CRIMINAL LAW: S. 91(27) OF THE CONSTITUTION ACT, 1867; WORKS OR UNDERTAKINGS FOR THE GENERAL ADVANTAGE OF CANADA: S. 92(10) OF THE CONSTITUTION ACT, 1867
- § 1:7 Criminal Law: s. 91(27) of the Constitution Act, 1867
- § 1:8 Works or Undertakings for the General Advantage of Canada: s. 92(10)(c) of the Constitution Act, 1867

C. INTERJURISDICTIONAL IMMUNITY

§ 1:9 Introduction

§ 1:10	Interjurisdictional Immunity and the Necessary
	Impairment of the Federal Jurisdiction

D. DEFINING THE CORE FEDERAL JURISDICTION; THE RELATED SUBJECT OF FEDERAL ENCLAVES

- § 1:11 Defining the Core Federal Jurisdiction
- § 1:12 The Related Subject of Federal Enclaves

E. REGULATION OF SPECIFIC ACTIVITIES AND WORKS

§ 1:13	Regulation	of International	and	Interprovincial
	Trucking			

- § 1:14 Regulation of International and Interprovincial Waste Disposal
- § 1:15 Regulation of PCBs and Other Toxic Substances
- § 1:16 Regulation of Interprovincial Pipelines
- § 1:17 Spills into Interprovincial Waters
- § 1:18 Regulation of Habitat Conservation and Protection of Migratory Birds
- § 1:19 Regulation of Fishing
- § 1:20 Regulation of Railways
- § 1:21 Regulation of Ships
- § 1:22 Regulation of Nuclear Energy
- § 1:23 Regulation of Non-renewable Resources

III. PARAMOUNTCY; MUNICIPAL ENVIRONMENTAL BY-LAWS

- § 1:24 Paramountcy
- § 1:25 Municipal Environmental By-Laws

IV. JURISDICTION OVER ABORIGINALS

- § 1:26 "Indians"
- § 1:27 "Lands Reserved for the Indians"
- § 1:28 Concurrent Operation of Environmental By-laws under the *Indian Act* and Provincial Law
- \S 1:29 Incorporation by Reference: Section 88 of the *Indian* Act
- § 1:30 Aboriginal Rights
- § 1:31 Interfering with Aboriginal Rights General Principles
- § 1:32 Linkage to Aboriginal Group
- § 1:33 Aboriginal Title to Land

TABLE OF CONTENTS

- § 1:34 Application of Hunting and Fishing Rights
 Established by Practice, Custom and Tradition to
 Environmental Prosecutions
- § 1:35 Application of Treaty Rights to Environmental Prosecutions

V. CROWN IMMUNITY

- § 1:36 Application of Immunity to Federal and Provincial Crowns
- § 1:37 Crown Agents and Servants
- § 1:38 One Government Ministry Charging Another
- § 1:39 Naming the Defendant
- § 1:40 Conflict of Interest

VI. THE CARRIAGE OF A PROSECUTION

- § 1:41 Federal, Provincial or Private
- § 1:42 Private Applications for Public Investigations of Offences—Environmental Bill of Rights (Ontario)
- § 1:43 —Canadian Environmental Protection Act (C.E.P.A.)

CHAPTER 2. ENVIRONMENTAL REGULATION: USING THE LEGISLATIVE FRAMEWORK IN ONTARIO AS AN EXAMPLE

I. THE ENVIRONMENTAL PROTECTION ACT

- § 2:1 Introduction
- § 2:2 Pollution—Pollution Prohibition
- § 2:3 —Compliance with Other Regulations or Sections

II. DISCHARGE; CONTAMINANT

- § 2:4 Discharge
- § 2:5 Contaminant

III. "CAUSE OR PERMIT"; NATURAL ENVIRONMENT

- § 2:6 "Cause or Permit"
- § 2:7 Natural Environment

IV. ADVERSE EFFECTS

§ 2:8 Introduction

§ 2:9	"Likely" to Cause Adverse Effect
§ 2:10	No Multiple Convictions for Various Adverse Effects
§ 2:11	Impairment of the Quality of the Natural
	Environment for any Use that Can be Made of it
§ 2:12	—Relevance of the Precautionary Principle
§ 2:13	Damage to Property
§ 2:14	The Relevance of Regulatory Standards in Assessing
	Injury or Property Damage
$\S 2:15$	—Policies, Guidelines and Standards Not
	Incorporated into Licences or Legislation
§ 2:16	Material Discomfort
§ 2:17	Loss of Enjoyment of Normal Use of Property
§ 2:18	Character of Neighbourhood
§ 2:19	Normal Farm Practice as a Defence to Nuisance
§ 2:20	Interference with the Normal Conduct of Business
§ 2:21	Continuing Consequences
-	

V. CONSTITUTIONALITY OF THE DISCHARGE OFFENCE: VAGUENESS AND FREEDOM OF EXPRESSION; APPLICATION OF DE MINIMIS NON CURAT LEX — THE COURT DOES NOT CONCERN ITSELF WITH TRIVIALITIES

- § 2:22 Constitutionality of the Discharge Offence: Vagueness and Freedom of Expression
- § 2:23 Application of de minimis non curat lex The Court does Not Concern Itself with Trivialities

VI. POLLUTION NOTICE

§ 2:24 Introduction
§ 2:25 Constitutional Validity of Offence of Failing to Give Notice of Discharge into the Environment
§ 2:26 Immediate Notice
§ 2:27 Degree of Fault Required
§ 2:28 Other Preconditions for Triggering Notice
Requirement, e.g., Reports, Stationary Sources and
Adverse Effects

VII. SPILLS

§ 2:29 Generally

VIII. ABATEMENT OF SPILL AND RESTORATION OF THE NATURAL ENVIRONMENT

§ 2:30 Introduction

Table of Contents

§ 2:31	Owner of the Pollutant
§ 2:32	Person Having Control of the Pollutant
§ 2:33	Defined Terms 'Pollutant', 'Spill' and 'Out of a
Ü	Structure'
§ 2:34	Prevention and Remediation of Spills
T37 /	ADDOMAL DECLIDEMENTS
IX. A	APPROVAL REQUIREMENTS
§ 2:35	Generally
§ 2:36	Constitutionality: Void for Vagueness
§ 2:37	Defined Terms "Extend" and "Construct"
§ 2:38	Defined Term: "Good Working Order"
§ 2:39	Point at which Approval is Required
§ 2:40	Retroactivity of Certificates of Approval
§ 2:41	Exceptions to Approvals Requirements
§ 2:42	Routine Maintenance
§ 2:43	Required Level of Fault for Approvals Offences
§ 2:44	Existence of Other Permits No Defence
§ 2:45	—Site Specificity of Approvals
§ 2:45.5	v 11
§ 2:46	Required Level of Fault for Approvals Offences— Liability of Individuals where Business
	Operated in Name of Company
§ 2:47	—Liability of Contractors and Design
5 2.11	Consultants
§ 2:48	—Scope of Approvals: Background Documents
§ 2:49	Scope of Approvals, Activities Not Explicitly
Ü	Authorized
§ 2:50	Required Level of Fault for Approvals Offences—
	Permit Shielding
x. w	
A. W	
\mathbf{A}	INTRODUCTION
§ 2:51	Generally
\mathbf{B}	DESIGNATION OF WASTES
§ 2:52	Introduction
§ 2:53	Designated Waste Exemptions
§ 2:54	—Used Tires
§ 2:55	—Agricultural Waste
§ 2:56	—Inert Fill
§ 2:57	—Excess Soil
§ 2:57.5	The Connection to Contaminated Soil
§ 2:58	Designated Waste Exemptions—Municipal Waste

	1 ROSECUTION AND DEFENCE OF ENVIRONMENTAL OFFERC
§ 2:59 § 2:60	—Hazardous Waste Recyclable Waste
C.	CONSTITUTIONAL VALIDITY OF WASTE PROVISIONS VOID FOR VAGUENESS; WASTE: INTERACTION OF "OPERATING" OFFENCES (S. 27) AND "DEPOSITING AND STORING" OFFENCES (SS. 40-41)
§ 2:61	Constitutional Validity of Waste Provisions Void for Vagueness
§ 2:62	Waste: Interaction of "Operating" Offences (s. 27) and "Depositing and Storing" Offences (ss. 40-41)
D.	LIABILITY OF WASTE GENERATORS ENGAGING UNLICENSED HAULERS
§ 2:63	Introduction
§ 2:64	Operating a Waste Management System Without a Certificate of Approval
§ 2:65	Operating Waste Disposal Site Without a Certificate of Approval
§ 2:66	Waste Disposal Site
§ 2:67	Multiple Convictions for Operating Waste Management Site and Depositing Waste at the Site
§ 2:68	Waste Generated on Site
§ 2:69	Definition of Waste "Operator"
§ 2:70	Obligations of Carriers and Receivers
§ 2:71	Federal/Provincial Enforcement Agreements for Handling and Transport of Dangerous Goods and Hazardous Waste
§ 2:72	Transportation and Storage of PCBs Under Federal Law
E.	ONTARIO WASTE MANAGEMENT SYSTEMS — MORE SPECIFIC RULES
§ 2:73	Introduction
§ 2:74	Generator Registration—Manifests for Subject Waste
§ 2:75	—"Prompt" Delivery of Waste
§ 2:76	Dispose of or Otherwise Manage PCB Waste (Regulation 362)
§ 2:77	—Proper Storage of PCB Waste
VI I	ITTERING

§ 2:78 Generally

XII. ORDERS

- § 2:79 Enforcement
 § 2:80 Collateral Challenges to Orders: R. v. Consolidated
 Maybrun Mines Ltd.
- § 2:81 —Trial
- § 2:82 —General Division
- § 2:83 —Court of Appeal
- § 2:84 —Supreme Court of Canada
- § 2:85 Level of Fault to Constitute an Offence of Failing to Comply with an Order
- § 2:86 Economics as a Defence
- § 2:87 Health Problems
- § 2:88 Compliance with Control Order Offers Immunity from Prosecution for Subject-matter of Order
- § 2:89 Filing Reports
- § 2:90 Enforcement against the Ministry
- § 2:91 Breach of Probation Orders Imposed by Court

XIII. OBSTRUCTING A PROVINCIAL OFFICER IN THE COURSE OF HIS OR HER DUTIES; FURNISHING FALSE INFORMATION; AND REFUSAL TO FURNISH WITH INFORMATION

- § 2:92 Introduction
- § 2:93 Charter Considerations
- § 2:94 False or Misleading Information
- § 2:95 Obstruct, Hinder or Fail to Assist

XIV. PARAMOUNTCY AND DUPLICATION OF ENVIRONMENTAL LAW OVER HEALTH AND SAFETY LAW

§ 2:96 Generally

XV. OFFENCES RELATING TO WATER

- § 2:97 Definition of Waters and Watercourses
- § 2:98 Water Taking
- § 2:99 Sewage Works
- § 2:100 General Pollution Prohibition and Notification in Ontario Water Resources Act

XVI. CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 (CEPA)

§ 2:101 Generally

XVII. FISHERIES ACT

Δ	IN	$\Gamma R \ell$	JD.	UC'	$\Gamma \Gamma C$	M

- § 2:102 Generally
 - B. INTERPRETATION OF THE ACT
- § 2:103 Introduction
- § 2:104 Fishing with an Unregistered Vessel Contrary to the Maritime Provinces Fisheries Regulation and s. 78 of the Fisheries Act
- § 2:105 Unlawfully Selling or Offering to Sell Fish
- § 2:106 Unlawful Retention of Fish: Fisheries Regulation
- § 2:107 Seizure of Vessel, Vehicle, Fish or Other Thing (s. 51)
 - C. WORKS OR UNDERTAKING; FISH, FISHERIES AND FISH HABITAT
- § 2:108 Works or Undertakings
- § 2:109 Fish, Fisheries and Fish Habitat
 - D. HARMFUL ALTERATION, DISRUPTION OR DESTRUCTION
- § 2:110 Generally
 - E. IMPAIRMENT OF RECEIVING WATER: FISHERIES ACT VERSUS PROVINCIAL ENVIRONMENTAL STATUTES
- § 2:111 Fisheries Act
- § 2:112 Provincial Legislation
 - F. THE DEGREE OF IMPAIRMENT OF WATER QUALITY; IMPAIRMENT OF WATER WHERE LICENCE/APPROVAL SETS EFFLUENT LIMITS
- § 2:113 The Degree of Impairment of Water Quality
- § 2:114 Impairment of Water where Licence/Approval sets Effluent Limits
 - G. CONSTITUTIONAL VALIDITY: VOID FOR VAGUENESS; APPLICATION OF DE MINIMIS NON CURAT LEX
- § 2:115 Constitutional Validity: Void for Vagueness

§ 2:116 Application of de minimis non curat lex — The Court does Not Concern itself with Trivialities

XVIII. TOXIC SUBSTANCES AND CONTAMINANTS

§ 2:117 Asbestos § 2:118 Gasoline, Benzene, Naphthalene, Ethanol, Toluene, Vinyl Chloride and Methyline Chloride § 2:119 Leachate § 2:120 Metals Natural Substances § 2:121 § 2:122 PCBs§ 2:123 Single Use Plastics § 2:124 Raw, Untreated Sewage § 2:125 Total Suspended Solids pH Levels § 2:126

XIX. LIMITATION PERIODS

§ 2:127	Introduction
§ 2:128	Limitation Periods for Issuing Administrative Monetary Penalties
§ 2:129	Limitation Period Under the Fisheries Act
§ 2:130	Limitation Period Under the Canadian Environmental Protection Act, 1999
§ 2:131	Limitation Period Under the Species At Risk Act
§ 2:132	Limitation Period Under the Nuclear Safety and Control Act
§ 2:133	Limitation Period Under the Canada Shipping Act, 2001
§ 2:134	Limitation Period Under the E.P.A., O.W.R.A. P.A. and the Nutrient Management Act, 2002
§ 2:135	Limitation Period Under the Conservation Authorities Act, R.S.O. 1990, c. C.27
§ 2:135.30	Limitation under British Columbia's Environmental Management Act, S.B.C. 2003, c. 53
§ 2.135.50	Limitation under Alberta's Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12
§ 2.135.70	Limitation under Quebec's Environment Quality Act, CQLR c. Q2
§ 2:136	Lakes and Rivers Improvement Act, R.S.O. 1990, c. L.3 (LRIA)
§ 2:136.50	Endangered Species Act, S.O. 2007, c. 6 (ESA)

XX. THE PESTICIDES ACT

§ 2:137 Generally

XXI. THE NIAGARA ESCARPMENT PLANNING AND DEVELOPMENT ACT

- § 2:138 Introduction
- § 2:139 Prescription Period Under the Niagara Escarpment Planning and Development Act

XXII. OTHER HABITAT PROTECTION LAWS — MIGRATORY BIRDS CONVENTION ACT, 1994

- § 2:140 Generally
- § 2:141 Endangered Species (Provincial) and Species At Risk (Federal)

CHAPTER 3. HOT CALLS: INSPECTIONS AND INVESTIGATIONS

I. INTRODUCTION

§ 3:1 Generally

II. QUESTIONING BY THE AUTHORITIES/ COMPELLING INFORMATION

A. INTRODUCTION

§ 3:2 Generally

B. THE POWERS OF ENVIRONMENTAL OFFICERS

- § 3:3 Introduction
- § 3:4 Controlling Who May be Present During an Interview
- § 3:5 Confidentiality of Investigation and Sharing Information between Agencies
- § 3:6 Inspection Orders where Access to Site is Denied
- § 3:7 Orders Granting Investigative Techniques—Generally
- § 3:8 —Interview Sessions

C. SUSPECT'S RIGHTS

§ 3:9 Right to Identification of Authority and Explanation of the Purpose of the Exercise of any Power

TABLE OF CONTENTS

- § 3:10 Right to Counsel
- § 3:11 Right to Remain Silent

D. PARTICULAR INSTANCES WHERE THE RIGHT TO REMAIN SILENT DOES NOT ARISE

- § 3:12 Suspicious Circumstances with Other Possibilities
- § 3:13 Stopping a Vehicle to Confirm a Suspicion
- § 3:14 Conscripting Corporate Officers against the Corporation

III. STATEMENTS — VERBAL AND WRITTEN

A. VIDEO AND AUDIO TAPES

§ 3:15 Generally

B. R. V. FITZPATRICK: STATUTORILY COMPELLED INFORMATION AND SELF-INCRIMINATION

1. In General

- § 3:16 Introduction
- § 3:17 Background Facts and the Decisions of the Trial Court and the Court of Appeal
- § 3:18 The Reasoning of the Supreme Court of Canada
- § 3:19 Guiding Principles in the Decision

2. Implications for Future Cases

- § 3:20 Routine Demands for Information
- § 3:21 Random Demands for Information, e.g., "Sting" Operations
- § 3:22 Commencement of the Adversarial Relationship
- § 3:23 Corporate Defendants
- § 3:24 Obstruction Charges

IV. EMPLOYEE INTERVIEWS

A. IN GENERAL

- § 3:25 Employee Interviews: Summary of To-do Items for Counsel Retained by the Corporation
- § 3:26 Corporate Counsel's Presence During Interviews
- § 3:27 American Law on Excluding Corporate Counsel
- § 3:28 General Principles of Conflict of Interest Applicable to Employee Interviews

B. THE EFFECT OF A WAIVER OF SOLICITOR-CLIENT PRIVILEGE ON CONFLICT

- § 3:29 Introduction § 3:30 R. v. Laidlaw § 3:31 —Background Facts § 3:32 —Court's Decision
- § 3:33 —Peripheral Applications § 3:34 Post-Laidlaw Developments in Conflict of Interest Law

V. INSPECTIONS VERSUS INVESTIGATIVE SEARCHES

§ 3:35 Generally

VI. HISTORICAL BACKGROUND ON INSPECTIONS VERSUS INVESTIGATIONS

- § 3:36 The Evidentiary Approach
 § 3:37 —The Inco Case
 § 3:38 The Intent of the Visit and the Contextual Approach
 Weighing Alternative Approaches to Warrantless
 Searches against the Evidentiary Approach
- § 3:39 A More Detailed Review of the Contextual Approach § 3:40 The Current Test for Distinguishing when Prior
 - Judicial Authorization is Required R. v. Jarvis and R. v. Ling
- $\S~3:41$ Case Law after Jarvis and Ling
- § 3:42 The Admissibility of Warrantless Searches: Some Remaining Issues—Warrantless Searches Initiated by Complaints
- § 3:43 —Section 24(2) of the Charter
- § 3:44 —On-site Interrogations

VII. RECOGNIZED STATUTORY AND COMMON LAW EXEMPTIONS TO PRIOR JUDICIAL AUTHORIZATION

- § 3:45 Vehicle Stops and Inspections
- § 3:46 Exigent Circumstances
- § 3:47 Implied Licence to Enter Land
- § 3:48 Open Fields Doctrine in Canada
- § 3:49 Consensual Searches
- § 3:50 Reasonable Expectation of Privacy
- § 3:51 Criminal Code: Production Orders against Third Parties

VIII. JUDICIAL AUTHORIZATION OF INSPECTIONS/INVESTIGATIONS

§ 3:52	Lawyer Wishes to be Present During Search
§ 3:53	Access to Search Warrant Documents
§ 3:54	Reviewing the Grounds on which the Search Warrant was Obtained
§ 3:55	Photocopies
§ 3:56	Execution of the Search and Selection of Documents
§ 3:57	Execution of the Search and Computer Data
§ 3:58	Obstruction
§ 3:59	Plain View
§ 3:60	Searches of Third Party Premises
§ 3:61	Search Warrants for Vehicles
§ 3:61.50	Detention of Things Seized

IX. SOLICITOR-CLIENT AND RELATED PRIVILEGES

- A. SUMMARY; CORPORATE EMPLOYEES WHO MAY ENGAGE IN PRIVILEGED COMMUNICATIONS
- § 3:62 Summary
- § 3:63 Corporate Employees who may Engage in Privileged Communications
 - B. THE CONSTITUTIONALITY OF LAW OFFICE SEARCHES; WAIVER; COMMON INTEREST PRIVILEGE
- § 3:64 The Constitutionality of Law Office Searches
- § 3:65 Waiver
- § 3:66 Common Interest Privilege
 - C. THIRD PARTY COMMUNICATIONS: SOLICITOR-CLIENT VERSUS LITIGATION PRIVILEGE
 - 1. Introduction; Litigation Privilege Dominant versus Substantial Purpose of Communications
- § 3:67 Introduction
- § 3:68 Litigation Privilege Dominant versus Substantial Purpose of Communications

2. Environmental Audits and Confidentiality

- § 3:69 Introduction
- § 3:70 Accessing Factual Information through Confidential Communications in Audit Reports
- § 3:71 Access to Communications Between Counsel and the Consultant/Expert
- § 3:72 The Public Policy Debate on Using Audited Information for Regulatory Purposes

D. ONTARIO POLICY AND GUIDELINES ON ACCESS TO ENVIRONMENTAL EVALUATIONS

- § 3:73 Policy
- § 3:74 Access Guidelines—Abatement Inspections
- § 3:75 —Investigations
- § 3:76 —Emergencies
- § 3:77 Protection from Use in Prosecution
- § 3:78 Scope
- § 3:79 Compatibility with Federal Policy

CHAPTER 4. PROCEDURE AND EVIDENCE

I. ABUSE OF PROCESS

- § 4:1 General Principles
- § 4:2 Judicial Review of Crown Discretion
- § 4:3 Judicial Review of Public and Private Prosecutions
- § 4:4 The Remedy of a Stay
- § 4:5 The Remedy of Introducing Otherwise Inadmissible Evidence

II. EXAMPLES OF CASES WHICH CAN CONSTITUTE ABUSE

- § 4:6 Reasonable Reliance on the Regulator
- § 4:7 Repudiation of the Crown's Undertakings
- § 4:8 Existence of Administrative or Other Alternative Remedies to Prosecution
- § 4:9 Singling Out Individuals or Companies for Prosecution
- § 4:10 Resort by Investigators to Deception
- § 4:11 Entrapment
- § 4:12 Civil Proceedings as a Motive in Pursuing a Prosecution

Table of Contents

§ 4:13	Prosecution Threats
§ 4:14	Prosecution Inducements
§ 4:15	Double Jeopardy
§ 4:16	Withdrawal of Charges
§ 4:17	Preparation of Crown Witnesses for Trial
§ 4:18	Change in Trial Tactics
§ 4:19	Non-Disclosure

III. DISCLOSURE AND PRODUCTION BY THE CROWN

§ 4:20	Professional Duties
0	
§ 4:21	The Stinchcombe Decision
§ 4:22	Electronic Disclosure
§ 4:23	The Burden of Proving Relevance
§ 4:24	Relevant Information in the "Crown's Possession"
§ 4:25	Disclosure through Freedom of Information or Access to Information Acts
§ 4:26	Implementing Disclosure, Recommendations in the Martin Report and Subsequent Case Law
§ 4:27	Privileges and Disclosure—Informant's Privilege
§ 4:28	—Prosecution and Investigative Work Product
§ 4:29	—Plea Negotiation Privilege
§ 4:30	—Medical Privilege
§ 4:31	—Proprietary Information
§ 4:32	—The Innocence at Stake Exception
§ 4:33	Remedies
§ 4:34	—Failure to Preserve or Make Notes
§ 4:35	—Failure to Pursue and Preserve Evidence
§ 4:36	—The Scope of Cost Awards and the Jurisdiction to Issue Them
§ 4:37	—Damages for Constitutional Breach
§ 4:38	—Impact of Late Disclosure
§ 4:38.50	Disclosure Remedies on Appeal

IV. UNREASONABLE TRIAL DELAY UNDER S. 11(B) OF THE CHARTER

§ 4:39 Generally

V. CALLING WITNESSES

§ 4:40	Introduction
§ 4:41	Material Witnesses—Jurisdiction to Quash
	Witnesses' Subpoenas
§ 4:42	—Materiality of Evidence

VI. THE INFORMATION

A. CHALLENGING THE VALIDITY OF THE INFORMATION

- § 4:43 Swearing the Information § 4:44 Essential Ingredients of the Information § 4:45 Relevance of Evidence Outside of the Charge § 4:46 Deleterious Substances/Waste/Property Harmed Place of the Offence § 4:47 § 4:48 Federal Charges: The Validity of the Information when Multiple Offence Days are Included in a Single Count § 4:49 Provincial Charges: Multiple Offence Days in a Single Count
- § 4:50 Duplicity

B. PARTICULARS

- § 4:51 Introduction
- § 4:52 Time
- § 4:53 Location and Injury/Damage
- § 4:54 Parties, Officers and Directors
- § 4:55 —Implications for Criminal Negligence Charges Post-2004
- § 4:56 —Other Regulatory Charges
- § 4:57 Means of Commission and Nature of Deleterious Substance

C. AMENDMENTS

- § 4:58 Introduction
- § 4:59 Misdescription of Offence
- § 4:60 Misdescription of Location
- § 4:61 Misdescription of Deleterious Substance
- § 4:62 Amendment re: Time
- § 4:63 Misdescription of Defendant
- § 4:64 Expiry of Limitation Period

D. PROOF OF CONJUNCTIVE ALLEGATIONS; JOINDER OF DEFENDANTS ON ONE INFORMATION

- § 4:65 Proof of Conjunctive Allegations
- § 4:66 Joinder of Defendants on One Information

E. JOINDER OF INFORMATIONS AND/OR COUNTS; LESSER INCLUDED OFFENCES

§ 4:67 Joinder of Informations and/or Counts

§ 4:68 Lesser Included Offences

VII. PROOF OF FACTS ALLEGED IN THE CHARGE

- § 4:69 Facts Agreed On
- § 4:70 Statements Verbal and Written—Statements against Interest
- § 4:71 —Voluntariness
- § 4:72 —Verbatim Notes

VIII. BURDEN OF PROOF

- § 4:73 Introduction
- § 4:74 Due Diligence and Other Defences
- § 4:75 Authorizations, Exceptions or Qualifications (s. 47(3) of the P.O.A.)
- § 4:76 —Inapplicability of the Presumption of Authorization, etc.

IX. EVIDENCE

A. DIRECT EVIDENCE; CIRCUMSTANTIAL EVIDENCE; HEARSAY

- § 4:77 Direct Evidence
- § 4:78 Circumstantial Evidence
- § 4:79 Hearsay

B. OPINIONS, EXPERIMENTS, ANALYSIS AND DEMONSTRATIONS

- § 4:80 Lay Witness Opinions
- § 4:81 Distinguishing Fact from Opinion
- § 4:82 General Principles regarding Experts
- § 4:83 The General Sanctity of Experts' Records
- § 4:84 Reasons for Rejecting an Expert
- § 4:85 Qualifications
- § 4:86 Independence of the Expert: Impact on Admissibility and Weight of Testimony
- § 4:87 Cross-examination of Experts on Findings of Other Courts and Tribunals on Their Qualifications and Reliability
- § 4:88 Absence of First-hand Knowledge
- § 4:89 Weight of Expert Evidence
- § 4:90 Prior Notice of Expert's Evidence
- § 4:91 Disclosure of Foundation of Crown's Expert Opinion

§ 4:92	Ontario and Canada Evidence Acts — Number of Experts
§ 4:93	Reconstruction and Courtroom Demonstration
C.	JUDICIAL NOTICE; ADMISSIBILITY OF A JUDGMENT IN A PRIOR CIVIL OR CRIMINAL CASE; PHOTOGRAPHS AND VIDEOTAPES
§ 4:94 § 4:95	Judicial Notice Admissibility of a Judgment in a Prior Civil or
§ 4:96	Criminal Case Photographs and Videotapes
D.	DOCUMENTS
§ 4:97	Introduction Description to Administration
§ 4:98 § 4:99	Preconditions to Admissibility
§ 4:99 § 4:100	Notice Usual and Ordinary Course of Business
§ 4:100 § 4:101	Contemporaneousness of Record and Transaction Recorded
§ 4:102	Hearsay, Opinion and Potentially Self-Serving Statements
§ 4:103	Electronic Records
§ 4:104	Proof of Official Appointment
§ 4:105	The Best Evidence Rule
E.	PROCEDURE FOR INTRODUCING DOCUMENTS INTO EVIDENCE AND GENERAL POWER OF TRIAL JUDGE TO CONTROL PROCEDURE
§ 4:106	Generally
F.	ADMISSIBILITY OF EVIDENCE OBTAINED IN ANOTHER COUNTRY; EVIDENCE OF BAD CHARACTER
§ 4:107	Admissibility of Evidence Obtained in Another Country
§ 4:108	Evidence of Bad Character
Y N	ON-SHITS

A. NON-SULLS

§ 4:109 Generally

XI. PROVISIONS IN ENVIRONMENTAL LEGISLATION DISPENSING WITH PROOF OF ELEMENTS OF ENVIRONMENTAL OFFENCES

§ 4:110	Proof of Analysis of Samples and their Custody
§ 4:111	Impeaching Environmental Analysis
§ 4:112	Preservation of Samples
§ 4:113	Departure from Analytical and Sampling Protocols
§ 4:114	Proof of Approvals, etc.
§ 4:115	Proof of Service
§ 4:116	Proof of Reception or Issuance

XII. RULE AGAINST SPLITTING CASE; REBUTTAL

§ 4:117 Generally

XIII. CROSS-EXAMINING WITNESSES; MISTRIALS

- § 4:118 Cross-Examining Witnesses
- § 4:119 Mistrials

XIV. WITHDRAWAL OF GUILTY PLEA

- § 4:120 Introduction
- § 4:121 Enforceability and Admissibility of Undertaking to Plead Guilty

XV. REOPENING THE CASE

§ 4:122 Generally

XVI. THE FORUM FOR TRYING ENVIRONMENTAL OFFENCES

- § 4:123 Federal Fisheries Act
- § 4:124 Provincial Environmental Offences
- § 4:125 Electing Provincial Judges

XVII. JURISDICTION OVER THE INFORMATION OR OFFENCE AND OVER THE OFFENDER

- § 4:126 Introduction
- § 4:127 Bias: Trial Judge's Familiarity with the Defendant
- § 4:128 Appeals

XVIII. EXTRATERRITORIALITY

- § 4:129 Introduction
- § 4:130 Service Outside Canada
- § 4:131 Extradition

Volume 2

CHAPTER 5. THE DEFENCE OF DUE DILIGENCE IN ENVIRONMENTAL OFFENCES

I. INTRODUCTION

§ 5:1 Introduction

II. THE STANDARD OF PROOF OF DUE DILIGENCE

- § 5:2 Introduction
- § 5:3 Ascertaining Legal Obligations
- § 5:4 Explaining How an Offence Occurred

III. THE SCOPE OF DUE DILIGENCE

- § 5:5 Introduction
- § 5:6 Degree of Due Diligence for Ongoing Spills

IV. FACTORS TO BE CONSIDERED

A. INTRODUCTION

- § 5:7 Generally
 - B. GENERAL STANDARD OF CARE COMMON TO THE BUSINESS ACTIVITY IN QUESTION
- § 5:8 Introduction
- § 5:9 Farm Practice
 - C. THE GRAVITY OF POTENTIAL HARM
- § 5:10 Generally
 - D. ALTERNATIVES AVAILABLE TO THE DEFENDANT
- § 5:11 Introduction

Τ	ABLE OF	Contents
8	5:12	Preventative Systems
		Follow-up
_		Training
		New Technology
		Best Available Technology
	5:17	Corporate Culture
_	5:18	Length of Time Required to Address Perceived Problems
Ş	5:19	Communication with Regulatory Authorities
§	5:20	Economic Considerations as Affecting the Reasonableness of the Alternatives
	E.	GOVERNMENT DUE DILIGENCE; LIKELIHOOD OF HARM
Ş	5:21	Government Due Diligence
_		Likelihood of Harm
	F.	DEGREE OF KNOWLEDGE OR SKILL EXPECTED OF THE DEFENDANT
Ş	5:23	Introduction
8	5:24	Standard of Care Expected on Offence Date
_	5:25	Dependence on the Supplier's Knowledge and Expertise
§	5:26	Dependence on the Knowledge and Expertise of Experts
	5:27	Dependence on the Knowledge and Expertise of Employees
§	5:28	Dependence on the Knowledge and Expertise of the Regulator
§	5:29	Size as a Factor in the Necessary Knowledge and Expertise
	G.	ABILITY OF THE DEFENDANT TO CONTROL THE IMPUGNED CONDUCT
§	5:30	Introduction
§	5:31	Remediator of Last Resort
§	5:32	Acts of God
	5:33	Pandemics as Acts of God: The Experience with COVID-19
§	5:34	Contracting Out the Work
§	5:35	—Owner/Constructor Contracts
§	5:36	—The Relevance of Specific Instructions by Hiring Party

Prosecution and Defence of Environmental Offences

§ 5:37	Contractor's Obligation to Obtain Dormits and/on
8 9:91	—Contractor's Obligation to Obtain Permits and/or
	Comply with Permits and Licences
§ 5:38	—The Relationship between the Contractor and the
	Subcontractor
§ 5:39	—The Relationship between the Supplier and a
	Common Carrier
§ 5:40	—Cases where those Hiring Contractors have been
_	Exonerated
§ 5:41	Landlord's Responsibility for and to Tenants
§ 5:42	Delegating Responsibility to Employees

V. THE RELEVANCE OF COINCIDENCE IN TIME BETWEEN FAILURE TO EXERCISE DUE DILIGENCE AND THE UNLAWFUL ACT

§ 5:43 Generally

VI. DEFENCES RELATED TO DUE DILIGENCE

§ 5:44	Mistake of Fact
§ 5:45	Mistake of Law
§ 5:46	Officially Induced Error
§ 5:47	Compliance with Orders, Permits and Approvals
§ 5:48	Conformity with Regulatory Standards
§ 5:49	Conformity with Aboriginal Treaty/Rights
§ 5:50	Complicity by Regulator in Breach
§ 5:51	Necessity and Impossibility

VII. APPEALS ON QUESTIONS OF DUE DILIGENCE

§ 5:52 Generally

CHAPTER 6. CORPORATE AND PERSONAL LIABILITY

I. CORPORATE ENVIRONMENTAL CRIME AND THE SIGNIFICANCE OF CORPORATE AND EXECUTIVE RESPONSIBILITY

6:1	Introduction
6:2	Common Nuisance
6:3	Criminal Negligence
6:4	—Individual Liability for Criminal Negligence
6:5	Mischief
6:6	Common Law Criminal Contempt

II. OFFICERS' AND DIRECTORS' LIABILITY

- § 6:7 The Duty of Reasonable Care
- § 6:8 Authorizing, Permitting and/or Acquiescing in Unlawful Conduct
- § 6:9 Identifying Officers and/or Directors
- § 6:10 Constitutionality of Directors' and Officers' Liability
 Provisions
- § 6:11 Burden of Proof
- § 6:12 Standard of Directors' Duties

III. PERSONAL LIABILITY OF MANAGERS; SHAREHOLDERS' LIABILITY; LIABILITY AS A PARTY

- § 6:13 Personal Liability of Managers
- § 6:14 Shareholders' Liability
- § 6:15 Liability as a Party

IV. LIABILITY OF THE CORPORATION ITSELF

- § 6:16 Engaging Corporate Liability in Strict and Mens Rea Offences Prior to 2004
- § 6:17 Engaging Corporate Liability in Strict and Mens Rea Offences Today
- § 6:18 The Disappearance of the Directing Mind Requirement in Strict Liability Offences
- § 6:19 Identifying the Directing Mind of the Corporation for Non-criminal Offences Requiring Mens Rea or Guilty Knowledge
- § 6:20 —2004 Criminal Code Amendments re: Corporate Criminal Liability
- § 6:21 —Impacts of Corporate Criminal Liability Changes on Environmental Prosecutions
- § 6:22 —Directing Mind Still Relevant for Federal Strict Liability Offences
- § 6:23 Application of the Deeming Provisions Attributing the Employees' Actus Reus to the Employer
- § 6:24 Constitutionality of Corporate Liability for Employee Actions
- § 6:25 Joint Liability of Corporations and their Directors and Officers
- § 6:26 Responsibility of Agents Independent of the Principal
- § 6:27 Calling a Corporate Officer as a Witness against the Corporation: Constitutional Considerations

V. WHISTLEBLOWER PROTECTION

- § 6:28 Introduction
- © 2022 Thomson Reuters, Rel. 2, 4/2022

VI. SERVICE OF OFFENCE NOTICES AND SUMMONSES ON CORPORATIONS; CORPORATE REPRESENTATION AT TRIAL
§ 6:32 Service of Offence Notices and Summonses on Corporations
§ 6:33 Corporate Representation at Trial§ 6:34 Lifting the Corporate Veil
VII. PARTNERSHIPS; AMALGAMATED CORPORATIONS
§ 6:35 Partnerships § 6:36 Amalgamated Corporations
CHAPTER 7. SENTENCING PRINCIPLES
I. GENERAL PRINCIPLES
A. THE SIGNIFICANCE OF PUBLIC WELFARE OFFENCES
§ 7:1 Generally
B. THE APPLICABLE FACTORS
 Introduction; Deterrence/Denunciation; Failure to Assist Authorities
§ 7:2 Introduction
§ 7:3 Deterrence/Denunciation § 7:4 Failure to Assist Authorities

Criminality of Conduct

The Importance of Characterizing the Offence —

3. Effect of Pollution on the Environment

Proof of a Causal Link between Reprisal and

•

2.

Generally

Introduction

Introduction

Marine Pollution

4. Previous Record

§ 7:5

§ 7:6

§ 7:7

§ 7:8

§ 6:29

§ 6:30

§ 6:31

The Prohibited Activity

The Protected Activity

Protected Activity

- § 7:9 The Relevance of a Previous Record of Non-Compliance in Securing an Environmental Approval/Licence
 - 5. Municipal Corporations and Other Government Defendants
- § 7:10 Generally
 - 6. Non-compliance with Permit Requirements and Other Legal Instruments; Record Keeping and Failure to Comply with Information Requests
- § 7:11 Non-compliance with Permit Requirements and Other Legal Instruments
- § 7:12 Record Keeping and Failure to Comply with Information Requests
 - 7. Quantifying the Penalty
- § 7:13 The "Polluter-Pays" Principle
- § 7:14 Uniformity of Fines
- § 7:15 Disparity of Sentence
- § 7:16 Per Diem Fines
- § 7:17 Fines Determined by the Number of Affected Victims
- § 7:18 Totality
 - 8. Tax Deductibility of Fines and Penalties; Bankruptcy and Insolvency
- § 7:19 Tax Deductibility of Fines and Penalties
- § 7:20 Bankruptcy and Insolvency
 - 9. Mitigating Factors
- § 7:21 Remorse
- § 7:22 Accounting for Restoration of the Environment and Preventative Measures in Assessing the Penalty
- § 7:23 Status as Aboriginal Person
- § 7:24 Recognition of Technological and Economic Realities
- § 7:25 Government Condonation and Contributory Negligence
- § 7:26 Excessive Government Standards
- § 7:27 Test Cases
- § 7:28 Varying Minimum Fines
- § 7:29 The Means of Corporate and Individual Offenders
- § 7:30 Mistake of Law

II. EVIDENCE AND PROCEDURAL ISSUES

- § 7:31 Admissibility at Sentencing Hearing of Settlement Discussions
- § 7:32 Crown and Defence Joint Sentence Submissions
- § 7:33 Third Party Status in Sentencing Proceedings
- § 7:34 Burden of Proof
- § 7:35 —Aggravating Factors
- § 7:36 —Mitigating Factors
- § 7:37 Relevance of Offences Other than Those Charged
- § 7:38 The Application of the Kienapple Principle
- § 7:39 —Different Elements in an Offence
- § 7:40 —Different Offence Occurrence Dates
- § 7:41 —Corporations and Individuals Charged with Same Delict

III. JAIL

- § 7:42 Introduction
- § 7:43 Cases where Jail was Not Considered Appropriate
- § 7:44 Conditional Sentence: Serving the Sentence in the Community under s. 742.1 of the Criminal Code

IV. HIGHER PENALTY RANGES

- § 7:45 Maximum Penalties Available by Law
- § 7:46 Statutory Penalty Increases
- § 7:47 Applicable Tariff when Sentence Increases after the Offence Date but before Sentencing
- § 7:48 Subsequent Offences
- § 7:49 —Notice of Higher Penalty
- § 7:50 —Mandatory Minimum Sentences and Relief Therefrom

V. ADMINISTRATIVE OR CIVIL PENALTIES

- A. INTRODUCTION; FEDERAL ADMINISTRATIVE MONETARY PENALTIES
- § 7:51 Introduction
- § 7:52 Federal Administrative Monetary Penalties

B. ONTARIO ENVIRONMENTAL (CIVIL) PENALTIES

- 1. Introduction; Concurrent Prosecution and Administrative Processes; Onus of Proof
- § 7:53 Introduction

TABLE OF CONTENTS

§ 7:54	Concurrent	Prosecution	and	Administrative
	Processes			

- § 7:55 Onus of Proof
 - 2. Appeal Periods; The Charter and Administrative or Civil Penalties
- § 7:56 Appeal Periods
- § 7:57 The Charter and Administrative or Civil Penalties

3. Specific Charter Challenges

- § 7:58 [Deleted]
- § 7:59 Maximum Available Penalties for Separate Infractions
- § 7:60 [Deleted]
- § 7:61 Reversing the Onus of Proof for Elements of Contravention Other than Due Diligence
- § 7:62 Inspections Leading to Environmental Penalties
- § 7:63 Availability of Due Diligence and Officially Induced Error as a Defence

C. CALCULATING THE PENALTY

1. In General

- § 7:64 Introduction
- § 7:65 The "Monetary Benefit"
- § 7:66 Multiple Days
- § 7:67 The Gravity Component
- § 7:68 The Modifiers
- § 7:69 Settlement Agreements
- § 7:70 Absence of Foresight of Harm and Acknowledgment
- § 7:71 Relevance of Delay in Giving Notice of Administrative Penalty
- § 7:72 Classification of Gravity of Offence
- § 7:73 BC Administrative Penalties
- § 7:74 Quebec Administrative Penalties under s. 115.13 of the Environment Quality Act, CQLR c. Q.-2
- § 7:75 Alberta: Administrative Penalties under the Administrative Penalty Regulation, Alta. Reg. 23/2003
- § 7:76 to 7:77 [Deleted]

VI. TICKETING

§ 7:78 Generally

VII. DIVERSION

§ 7:79	The Federal	Criteria	for	Determining	when	to
	Prosecute					

- § 7:80 The Criteria for Determining when to Prosecute and when to Divert under the C.E.P.A.
- § 7:81 Alternative Measures Agreements under the Fisheries Act [S.C. 2019, c. 14]
- § 7:82 Enforcement Policy under the Nuclear Safety and Control Act
- § 7:83 Enforcement Policy under the Fisheries Act
- § 7:84 The Provincial Criteria for Determining when to Prosecute—Ontario Ministry of the Environment Compliance Policy: Applying Abatement and Enforcement Tools
- § 7:85 Crown Discretion on Proceeding with Charges on a Plea of Guilty

VIII. CREATIVE SENTENCING OPTIONS

A. INTRODUCTION; GENERAL PRINCIPLES

- § 7:86 Introduction
- § 7:87 General Principles

B. DISCHARGES—ABSOLUTE AND CONDITIONAL; SUSPENDED SENTENCES; COMMUNITY SERVICE

- § 7:88 Discharges Absolute and Conditional
- § 7:89 Suspended Sentences
- § 7:90 Community Service

C. VARIATION OF ORDERS; RETROACTIVITY OF COURT ORDERS

- § 7:91 Variation of Orders
- § 7:92 Retroactivity of Court Orders

D. FORFEITURE OF MONETARY BENEFIT AND PROPERTY

- § 7:93 Introduction
- § 7:94 Constitutionality of Forfeiture Orders

Ε.	ORDERS PROHIBITING INDEMNIFICATION
	OF CORPORATE EMPLOYEES;
	RESTITUTION; REMEDIATION AND
	RESTORATION

- § 7:95 Orders Prohibiting Indemnification of Corporate Employees
- § 7:96 Restitution
- § 7:97 Remediation and Restoration

F. IRREVOCABLE LETTERS OF GUARANTEE; PROHIBITING THE CARRYING ON OF A BUSINESS OR ACTIVITY; LICENCE SUSPENSIONS

- § 7:98 Irrevocable Letters of Guarantee
- § 7:99 Prohibiting the Carrying on of a Business or Activity
- § 7:100 Licence Suspensions

G. TRUST FUNDS AND SCHOLARSHIPS FUNDING ENVIRONMENTAL PROGRAMS; CHARITY

- § 7:101 Trust Funds and Scholarships Funding Environmental Programs
- § 7:102 Charity

H. PUBLICATION ORDERS; PUBLIC APOLOGY

- § 7:103 Publication Orders
- § 7:104 Public Apology
- § 7:104.50 Using a Statutory Violation to Obtain Injunctive Relief

I. COURT-ORDERED CHANGES TO INTERNAL PROCEDURES

- § 7:105 Training
- § 7:106 Air Monitoring
- § 7:107 Spill Response Program
- § 7:108 Installation, Dismantling and Removal
- § 7:109 Proper Storage, Transportation, Collection and Disposal
- § 7:110 Cautions against Property Used as Waste Disposal Site
- § 7:111 Notification of Directors and Officers or

PROSECUTION AND DEFENCE OF ENVIRONMENTAL OFFENCES

Shareholders of Corporations of Conviction and Sentence

- § 7:112 Upkeep and Record Keeping of Upkeep
- § 7:113 Studies, Reports, Approval Applications, etc.
- § 7:114 Environmental Audits
- § 7:115 ISO/CD 14001 Certification Program

IX. CONTEMPT

- § 7:116 Criminal Contempt of Court
- § 7:117 Civil Contempt

X. ENFORCEABILITY OF FOREIGN JUDGMENTS

§ 7:118 Generally

XI. SENTENCING APPEALS

- § 7:119 Introduction
- § 7:120 Stays of Sentence Pending Appeal

APPENDICES

- Appendix A. Sentencing Powers Fine Ranges
- Appendix B. Key Ontario and Federal Laws on

Notification of Environmental Events

- Appendix C. Sample Notice to Inspector/Investigator
- Appendix D. Legal Counsel's Plant Checklist for

Inspections/Investigations

Appendix E. Checklist of Questions Likely to be Asked by

Investigators

Appendix F. Checklist for Due Diligence for Hazardous

Waste Haulers

Appendix G. Checklist of General Areas which Must be

Covered as Part of Due Diligence

Appendix H. Sound Business and Operational Practices

in the Petrochemical Industry

Appendix I. Safety Culture

Appendix WP. Words and Phrases

Table of Added Cases

Table of Cases

Index