

Table of Contents

<i>Preface</i>	v
<i>List of Contributors</i>	ix

Chapter 1 The Evolution and Jurisprudence of Canadian Environmental Law

Alastair R. Lucas and William A. Tilleman

1. Introduction.....	1
2. The Early Cases.....	2
3. Environmental Law in the Supreme Court of Canada	3
4. Environmental Assessment.....	4
5. Aboriginal Law and Environment	5
6. Environmental Cases and Policy Development.....	7
(a) Public Inquiries	7
7. Environmental Appeal Tribunals	8
8. Public Participation and Involvement.....	9
(a) Standing	9
(b) North American Agreement on Environmental Cooperation ..	9
(c) Private Prosecutions	10
(d) Environmental Bills of Rights	10
9. Spaces and Species Protection	11
10. Public Trust	12
11. Climate Change	15
12. The Chapters	16

PART I: INTERNATIONAL AND CONSTITUTIONAL LAW – PUBLIC INQUIRIES

Chapter 2 Promoting Precaution: The *Hudson (Spraytech)* Case at the Supreme Court of Canada

Jerry V. DeMarco

1. Case and Context.....	27
2. Intervention.....	28
3. The Precautionary Principle	31
4. The Supreme Court Decision – Intervention Impact.....	32
5. The Influence of International Law	34
6. Conclusion.....	36

Chapter 3 Nuclear Liability Act Challenge: *Energy Probe v. Canada (Attorney General)*

<i>Theresa McClenaghan with input from David Poch</i>	
1. Origins and Impetus of the Case	39
2. Legal Theory and What Clients and Counsel Hoped to Come of it	41
3. Interim Proceedings	42
4. Standing	44
5. Reasonable Cause of Action	46
6. Action	48
7. Section 7	50
8. Section 15	53
9. Canadian Bill of Rights	53
10. Costs	54
11. Appeal	55
12. Conclusion; Resolution?	56

Chapter 4 Citizen Complaints to the North American Commission for Environmental Cooperation

<i>Katia Opalka</i>	
1. Introduction	60
2. The Kathryn Spirit	60
3. Politics and Environmental Protection	61
4. Manure	63
5. Lead	64
6. Acid Mine Drainage	65
7. Vehicle Exhaust	66
8. PCBs	66
9. Conclusion	67

Chapter 5 The Berger Inquiry and the Committee for Justice and Liberty Case

<i>Alastair R. Lucas</i>	
1. Introduction	69
2. Chapter Scope and Theory – The Inquiry's Legal Legacy	72
3. Preamble to the Inquiry	73
4. Preliminary Hearings and Rulings	75
5. The Hearings	77
6. Key Inquiry Recommendations	78
7. The Inquiry's Environmental Law Legacy	79
(a) Public Participation – Standing and Intervenor Funding	79
(b) Environmental Assessment	81
(c) Environmental Protection and Conservation	82

(d) Aboriginal Land Claims	83
8. The National Energy Board and the Marshall Crowe Case	83
(a) Federal Court of Appeal Reference	86
(b) The Crowe Case in the Supreme Court of Canada	87
9. Conclusions	89

**Chapter 6 Tragedy on Tap: Representing Concerned Walkerton
Citizens at the Walkerton Inquiry**

*Theresa McClenaghan, Paul Muldoon, Rick Lindgren,
Ramani Nadarajah and Fe de Leon*

1. Origins of the Case: Crisis	91
2. Canadian Environmental Law Association's (CELA) Involvement	91
3. Concerned Walkerton Citizens	93
4. Inquiry Launched	94
5. CELA Team Participation in the Inquiry	95
6. Key Issues for CELA's Clients, the Concerned Walkerton Citizens	96
7. The Walkerton Inquiry Hearings Process	99
8. Results of Part 1 of the Walkerton Inquiry	101
9. Part 2	103
10. Law Reform Following the Inquiry	105
11. Conclusion	107

PART II: INDIGENOUS RIGHTS

Chapter 7 Haida Nation – The Origins of the Haida Litigation

Greg McDade

1. Background	111
2. The Haida Petition	113
3. The Original Petition	115
4. The Second Petition	117
5. The Aftermath Post-Haida	121

**Chapter 8 Tsilhqot'in Nation: A Territorial Land-Use Concept of
Aboriginal Title and Environmental Governance**

Nicole Schabus

1. Introduction	127
2. History of the Case	129
3. Use-based Territorial Approach	132
4. Underlying Issues	138
5. Justification of Infringement	144
6. Conclusion	147

PART III: ENVIRONMENTAL REGULATION**Chapter 9 Leave to Appeal Under Ontario's *Environmental Bill of Rights*: *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)****Joseph F. Castrilli and Richard D. Lindgren*

1. Introduction.....	151
2. Background to the Development of the <i>Environmental Bill of Rights</i>	153
3. Key Provisions of the Act	154
4. The Development of Environmental Review Tribunal Jurisprudence on Leave to Appeal Applications.....	155
5. The Lafarge Alternative Fuels Project, Ministry of the Environment Approvals, and the Leave to Appeal Applications	157
6. The Tribunal Decision: <i>Dawber v. Ontario (Director, Ministry of the Environment)</i>	159
7. The Divisional Court Decision: <i>Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)</i>	161
8. Impact of Lafarge on Environmental Decision-Making in Ontario	164
9. Conclusions	171

Chapter 10 Protecting and Expanding the Scope of Environmental Legislation: *Castonguay Blasting Ltd. v. Ontario (Environment)**Joseph F. Castrilli and Ramani Nadarajah*

1. Introduction.....	173
2. Background	175
(a) The Facts.....	175
(b) The Charge	176
(c) The Issue	177
3. Arguments Before the Courts.....	177
(a) Appellant company	177
(b) Respondent Crown.....	178
4. Judicial History of the Case.....	178
(a) Ontario Court of Justice.....	178
(b) Superior Court.....	178
(c) Ontario Court of Appeal	179
(i) The majority holding	179
(ii) The dissent	179
5. Supreme Court of Canada – Decision and Reasons of the Court.....	180

TABLE OF CONTENTS

xix

(a) Overview: When in Doubt, Report	180
(b) Parsing the Section 15 Reporting Requirement	181
(c) Discharge of Contaminant	181
(d) Discharge into Natural Environment	182
(e) Discharge Out of the Normal Course of Events	182
(f) Discharge Causing or Likely to Cause An Adverse Effect	182
(g) Interpretation Based on the Precautionary Principle	184
(h) Summary	185
6. Analysis: Not Just Another Rock Blasting Case	186
7. Impact of <i>Castonguay</i>	188
8. Conclusions	189

**Chapter 11 The Alberta Disadvantage on Public Participation:
Martha Kostuch v. Ken Kowalski***Shaun Fluker*

1. Introduction	191
2. The Prelude: Oldman River Dam	194
3. The Cement Plant	199
4. The Aftermath	210

Chapter 12 The Ekati Story – Canada’s First Diamond Mine*David H. Searle*

1. The Diamond Discovery	215
2. Environmental Assessment	217
3. Impact and Benefit Agreements	219
4. Approvals	220
5. Outcomes and Comment	221

PART IV: ENVIRONMENTAL IMPACT ASSESSMENT**Chapter 13 Friends of the Oldman River: The Veterinarian, the
Environment, and the Constitution***Judith B. Hanebury, Q.C.*

1. Introduction	227
2. The Road to a Federal Role in Environmental Impact Assessment	228
3. The Development of Opposition to the Oldman River Dam	231
4. Friends of the Oldman River at the Federal Court	233
5. The Federal Court of Appeal Decision and its Aftermath	234
6. The Appeal to the Supreme Court of Canada	237
(a) The Constitutional Question	238
(i) Policy aspects of the constitutional question	238
(ii) Legal aspects of the constitutional question	240

(b) The Hearing.....	242
7. The Supreme Court of Canada Decision	243
(a) The Assessment Trigger	245
(b) Scope of the Project	245
(c) Factors to be Assessed	246
(d) Mitigation Measures	247
(e) Conclusion on the Constitutional Question.....	247
8. The Panel Report Under EARPGO.....	248
9. Epilogue	249

**Chapter 14 The Project Scoping Fights: Revisiting the Cases in
*Sunpine, TrueNorth and Mining Watch***

Martin Ignasiak and Jackie Johnson

1. Introduction.....	253
2. The Legal Framework under CEAA	254
3. The Project Scoping Fights	256
4. The Aftermath.....	264

**Chapter 15 Reconsidering Red Chris: Federal Environmental
Decision-Making After *MiningWatch Canada v.*
*Canada (Fisheries and Oceans)***

Martin Z. Olszynski

1. Introduction.....	267
2. Analysis.....	271
(a) Decision-Making vs Legislating	271
(b) Deconstructing Federal Cost-Benefit Analysis	273
(c) Federal Decision-making in the Public Interest.....	278
3. Conclusion.....	282

**Chapter 16 Nothing (Significant) to See Here: The Kearl Cases
and the Growing Mess in the Alberta Oil Sands**

Sean Nixon and Melissa Gorrie

1. Introduction.....	283
2. The Kearl Project and Oil Sands Mining Generally	284
3. The Environmental Assessment of the Kearl Project	285
(a) Cumulative Landscape Effects of Oil Sands Development ..	286
(b) Assessing Effects on Species at Risk.....	287
(c) Greenhouse Gases and Climate Change	288
(d) Panel Report	289
4. The First Kearl Case	291
(a) Cumulative Landscape Effects	295
(i) Assessing Effects on Species at Risk	297
(b) Effects of the Project's Greenhouse Gas Emissions.....	297

TABLE OF CONTENTS

xxi

5. The Second Kearl Case	298
6. Implications of the Kearl Cases	299
(a) Duty to Give Reasons in Environmental Assessment	299
(b) Mitigation and Adaptive Management	300
(c) Fast-tracked Approval for the Kearl Project.	301
7. Oil Sands Decision-making Post-Kearl.	302
(a) Cumulative Landscape Effects	303
(b) Assessing Effects on Species at Risk.	305
(c) Assessing Climate Impacts	307
(d) Mitigation Measures and Adaptive Management	308
(e) Moving Beyond the Mess	310
8. Recommendations	312

PART V: SPACES AND SPECIES PROTECTION**Chapter 17 Ecological Integrity in Canada's National Parks***William A. Tilleman*

1. Introduction.	317
2. Ecological Integrity Legislation	318
3. Case Law Interpreting Ecological Integrity as “First Priority”	320
4. Parks Canada Development Policy: Commercial and Residential Leaseholders	322
5. Indigenous Peoples: From Exclusion to Partnership.	326

**Chapter 18 Legal Efforts to Protect Species at Risk in Canada:
A Case Study of the Greater Sage-Grouse***Devon Page and Melissa Gorrie*

1. The Federal <i>Species at Risk Act</i> : Assessing Opportunities For Protection.	329
2. Taking Action to Protect Species at Risk: Early Litigation Under SARA	331
3. The Poster Child: Sage-Grouse	333
(a) Going to Court to Protect the Sage-Grouse: Round 1	334
(b) Setting the Stage for Round 2: The Need For Further Action to Protect the Sage-Grouse	336
(c) Going to Court to Protect the Sage-Grouse: Round 2	338
(d) Challenging the Government’s Claim of Cabinet Confidence	339
(e) Success at the Federal Court of Appeal	341
(f) Establishing Important Precedents	342
(g) New Challenges for Sage-Grouse	343
4. Looking Forward: Incremental Victories	344
5. Conclusion.	344

PART VI: ENFORCEMENT**Chapter 19 The Syncrude “Ducks” Trial: How Interagency Cooperation Helped Solve the Problem of the “Mega File”***Susan McRory and Tim McRory*

1. Introduction.....	347
2. History	349
(a) First Suncor Prosecutions.....	349
(b) The Western Co-operative Fertilizers Incident	351
(c) 1995	353
(d) Wabumun 2005	354
3. 2008 – Syncrude.....	356
4. The Creative Sentencing Projects from the <i>Syncrude</i> File	361
5. Closing Thoughts.....	363

Chapter 20 The Suncor Saga: Transforming Alberta Environmental Law Enforcement*David Estrin*

1. Introduction.....	365
2. Saga Highlights	366
3. The Suncor Saga in Context: Alberta Environment’s First 18 Years: “Work with industry . . . settle our differences through technical discussions”.....	370
4. Beginnings of the Suncor Saga.....	374
5. My Introduction to the Suncor Saga	378
6. The Suncor Trials, Part 1: October, 1982 <i>Clean Water Act</i> Charges for Excessive Contaminant Discharges Dismissed; and Start of <i>Fisheries Act</i> Trial.....	380
7. The Suncor Trials Part 2: the January, 1983 <i>Fisheries Act</i> Trial (Continued).	382
8. The Suncor Sentence and its Aftermath	386
9. Why did Suncor Become a <i>Cause Célebre</i> ?.....	389
10. 1983-1986: Vacillating Towards Environmental Law Enforcement	393
11. 1987-1991: Alberta Environment Enters the Environmental Enforcement Era	406
12. Further Progress 1991-2016	415
13. Environmental Compliance for Energy Sector Projects – the Role of the Alberta Energy Regulator	421
14. Concluding Reflections.....	429