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Environmental Law and Business in Canada & Business Guide to Environmental Law

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BOOK REVIEWS

Environmental Law and Business in Canada

Geoffrey L. Thompson, Moira L. McConnell,
& Lynne B. Huestis, eds.

Aurora, Ont.: Canada Law Book, 1993, 599 pp.

Business Guide to Environmental Law

David D. Estrin

Scarborough, Ont.: Carswell, 1992, looseleaf.

Reviewed by Ian C. Whan Tong†

Environmental issues were once on the fringes of corporate concern—tree huggers were little more than pests to be pacified, and a corporate environmental policy equalled a public relations statement. Times have changed, as La Forest, J. suggests in the Supreme Court of Canada's most recent environmental decision: "The protection of the environment has become one of the major challenges of our time."¹ Spurred on by the politics of the environmental movement, legislatures in all provinces and Parliament have been active hives promulgating and revising environmental laws. The *Canadian Environmental Protection Act*,² which regulates toxic chemicals in Canada, came into effect in 1988. The Ontario *Environmental Protection Act*³ was revised substantially in 1990.⁴ Alberta and British Columbia have strengthened their environmental protection statutes,⁵ while Nova Scotia is in the process of con-

† A.B. (Princeton), M.P.A. & LL.B. anticipated 1994 (Dalhousie).

¹ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, at 16.

² R.S.C. 1985, c. 16 (4th Supp.), as amended.

³ R.S.O. 1990, c. E. 19, as amended.

⁴ *Environmental Protection Statute Law Amendment Act, 1990*, S.O. 1990, c. 18.

⁵ In Alberta, see for example, *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3. In British Columbia, see *Waste Management Act*, S.B.C. 1982, c. 41, as amended by the *Waste Management Amendment Act, 1990*, S.B.C. 1990, c. 74, and *Waste Management Act, 1992*, S.B.C. 1992, c. 26.

solidating its own environmental legislation.⁶ Given the relative infancy of many environmental statutes, it is not surprising that judicial interpretation of many provisions remains sparse.

Two new books attempt to make some sense of the myriad of new developments in environmental law. *Environmental Law and Business in Canada* is a compilation of essays written by leading practitioners and academics. The *Business Guide to Environmental Law* is written mostly by David Estrin, a leading environmental lawyer based in Toronto, with considerable input in certain chapters from his colleagues. The two books differ little in their bias, characterization, and analysis of this area of environmental law. Estrin notes that "environmental regulation is not just a passing fad but requires positive actions and foresight to avoid onerous duties and liabilities,"⁷ while the editors of *Environmental Law and Business* state that "environmental law, long an isolated area of public interest or regulatory practice, is now an integral part of business decision-making."⁸

The books tend to duplicate each other in substance. Indeed, they both contain excellent analyses of the law of personal liability, environmental assessment, real property transactions, and lender liability. In certain areas, both books give practical guidance on how companies may best meet the challenges presented by new and changing environmental laws. Personal liability and officers and directors is one such topic.

In *R. v. Bata Industries Ltd.*,⁹ the shoe-maker giant was charged with, *inter alia*, unlawfully discharging hazardous waste and unlawfully operating a waste management system. The case gained notoriety because of the charges against three directors of the company. Thomas G. Bata, Jr. (Chairman of the Board and a director), Douglas Marchant (President and a director), and Keith Weston (an officer and director), were each charged with failing to take all reasonable care to prevent an unlawful discharge, contrary to s. 194

⁶ Nova Scotia Department of the Environment, Press Release, "New Environment Act" (January 14, 1993).

⁷ D. Estrin, *Business Guide to Environmental Law*, (Scarborough: Carswell, 1992), at v [hereinafter *Business Guide*].

⁸ G. Thompson, M. McConnell, & L. Huestis, *Environmental Law and Business in Canada*, (Aurora: Canada Law Book, 1993) at xxvi [hereinafter *Environmental Law and Business*].

⁹ (1990), 9 O.R. (2d) 329 (Prov. Div.).

of the Ontario *Environmental Protection Act*,¹⁰ and s. 116(1) of the *Ontario Water Resources Act*.¹¹ At trial, Thomas Bata was acquitted, while Marchant and Weston were fined \$12,000 each. The company was ordered not to indemnify its directors. Although the fines against these two directors were halved on appeal,¹² of greater importance to the business community was the court's affirmation that the company could not indemnify its directors. The Ontario Ministry of the Environment successfully argued that directors should be personally exposed to large fines in order to ensure that their companies comply with the law.

In a chapter in *Environmental Law and Business*, Dianne Saxe, who is particularly known for her work on environmental offences, places in context the importance of the *Bata* decision and others as they relate to personal liability:

[I]t is now routine for corporate directors, officers and employees to be held personally responsible if their corporations pollute. If a business has a spill which isn't reported, everyone from the person on the spot to the president 500 miles away could be prosecuted and/or ordered to use their personal assets to pay for the clean up.¹³

Saxe interprets the factors that led to the conviction of Bata and its directors, including an analysis of the definition of due diligence.¹⁴ Of direct practical application for business in Canada are her sections on "Management for Compliance"¹⁵ and the "Basic Components of a Green Plan,"¹⁶ which systematically prescribe the elements necessary to erect a successful due diligence program. Clear and sound environmental policies, planning and reporting, environmentally conscious equipment design, maintenance, and staff selection and training are indispensable for corporate environmental compliance.

Estrin's *Business Guide* similarly provides a practical tour of the personal liability of officers and directors, and the due diligence

¹⁰ *Supra* note 3.

¹¹ R.S.O. 1990, c. O.40, as amended.

¹² *R. v. Bata Industries Ltd.* (1993), 14 O.R. (3d) 354 (Gen. Div.) [hereinafter *Bata*].

¹³ *Supra* note 8 at 291.

¹⁴ *Ibid.* at 306.

¹⁵ *Ibid.* at 310-314.

¹⁶ *Ibid.* at 315-325.

defence.¹⁷ Indeed, the chapter entitled "Proactive Environmental Management: More Than Staying Out of Jail,"¹⁸ written by Madeleine Donahue, provides an excellent reference not only for those organizations which want to comply with environmental regulations, but also for "corporations, government departments and institutions, large or small, on the path of converting environmental problems into environmental opportunities."¹⁹

The significant differences between these two books does not lie in their substance or approach to environmental law. Rather, they differ in their accessibility to the business reader. Both books claim to be written for the environmental practitioner, but in its format and presentation, *Environmental Law and Business* is best suited for students and scholars, perhaps because it counts among its contributors a number of prominent academics. Practitioners new to the field of environmental law will also find this volume a lucid introduction to the complexities of environmental law. The *Business Guide*, however, will be of greater value to its intended audience.

The *Business Guide* is published in binder format so that it can accommodate changes in the law with supplements and deletions. Indeed, since it was first published, the guide has been updated three times. A chapter on the transportation of dangerous goods (including appendices of classification and safety marks, and a guide for the completion of a Dangerous Occurrence Report) and a further appendix of the most important statutes have been added. *Environmental Law and Business* is available as a hardbound edition; this is clearly a disadvantage to practitioners in a field of law that seems to change weekly.

One of the aims of *Environmental Law and Business* is to offer environmental practitioners a broad, inter-disciplinary approach to environmental law.²⁰ Clearly, a comprehensive background on the political landscape will prove useful to many environmental lawyers as they give long-term counsel to clients. As an immediate reference for current environmental law, however, chapters on "Environmental Groups and the Courts," "International Environmental Law," and "Environmental Law and the Greening of the Government: A Cynical Guide" advance the interests of academia

¹⁷ *Supra* note 7 at 2-1 to 2-50 and 4-19 to 4-85.

¹⁸ *Ibid.* at Chapter 4.

¹⁹ *Ibid.* at 4.

²⁰ *Supra* note 8 at xxvii.

more than the urgent needs of a practicing lawyer. As Dr. McConnell states, in her chapter entitled "International Trade and Environmental Law," "[t]he challenge is to devise a useful introductory discussion of a relatively rarefied practice area."²¹ McConnell meets admirably the challenge set out before her by demonstrating the impact of international treaties on domestic law, but one wonders why a chapter about a "relatively rarefied practice area" is included in what is supposed to be a publication of widespread, practical application.

Moving from the general to the specific, *Environmental Law and Business* offers a sectoral analysis of environmental concerns as they affect transportation, mining, pulp and paper, fishing, and oil and gas. Although a few chapters offer concise analyses of the law as required by practitioners, such as the chapters on pulp and paper and fishing, other chapters include material that is too general. Half of the chapter on mining, for example, addresses the environmental impacts of mining—an area which the practitioner should already be familiar with.

The *Business Guide* is not organized around sectoral concerns *per se*. Instead, the book analyzes environmental law as it may apply generically to business. Estrin thus presents, plainly and factually, those aspects of environmental law relating to taxation (drawing heavily on the United States experience, given the relative inexperience in Canada); insurance and compensation schemes (including private and government compensation programs); packaging and labelling; and to the transportation of dangerous goods.

One minor criticism of both books concerns their method of citation. The *Business Guide* lists a case once, with all subsequent references, perhaps dozens of pages later, going to the original cite with a "supra." This is not an inconsequential irritant for the reader. A preferred method would follow the example in Peter Hogg's *Constitutional Law of Canada*²² which repeats the case name or cite if the previous citation is not on that page. In *Environmental Law and Business*, endnotes are used instead of footnotes. This, too, is an irritant for those who need to use the references.

With only a few exceptions, neither *Environmental Law and Business* nor the *Business Guide* advance the substantive debates sur-

²¹ *Ibid.* at 343

²² P. W. Hogg, *Constitutional Law of Canada*, 3d. ed. (Scarborough: Carswell, 1992).

rounding environmental law in Canada. Neither book claims to be a treatise on the subject matter; their contributions lie in drawing together, into one reference edition, the burgeoning field of environmental law. It might be a mistake to try to read through the *Business Guide*. It is intended to be a reference source for the practitioner. *Environmental Law and Business*, on the other hand, offers the non-specialist or academic insight into a field of law, policy, and economics that has become one of the major challenges of our time.