1. INTRODUCTION

In the fall of 2009, I set out to read and review one of the latest casebooks on Canadian environmental law and policy, Meinhard Doelle and Chris Tollefson’s *Environmental Law: Cases and Materials.* Having co-edited and co-authored three editions of a leading environmental law casebook during the preceding fifteen years, I am perhaps reasonably well-qualified—albeit at risk of bias—to comment on such a manuscript. My experience has led me to think very much about the book in its historical context, which in turn has led me to examine its place amongst educational literature on environmental law more generally. I therefore begin with a potted history of environmental law in Canada, before turning to the task of developing a preferred list of teaching materials for the subject and situating this new casebook solidly on that list. I do have a caveat: while an activist, practitioner, or businessperson might develop a different list of favorites, my views stem from a position in the ivory tower, where my central

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enterprises are finding ways to instruct and inspire students in law and in environmental studies, as well as doing some public legal education along the way.

2. HISTORY

Where to begin? “Who has made the decision,” asked Rachel Carson,5 “that sets in motion these chains of poisoning, this ever-widening wave of death that spreads out, like ripples when a pebble is dropped into a still pond?” Her answer: “The decision is that of the authoritarian temporarily entrusted with power; he has made it during a moment of inattention by millions to whom beauty and the ordered world of nature still have a meaning that is deep and imperative.” As a scientist, Carson’s work focuses primarily on the chemistry, ecology, and health implications of pesticide pollution, rather than on the regulatory system that permits the usage of these chemicals. Yet she was bluntly critical of the general acceptance of this status quo, and (as she quotes Paul Shepard) of the thinking that “idealizes life with only its head out of water, inches above the limits of toleration of the corruption of its own environment.”7 By way of prescription, she called upon the general public to take control:

The choice, after all, is ours to make. If, having endured much, we have at last asserted our ‘right to know,’ and if, knowing, we have concluded that we are being asked to take senseless and frightening risks, then we should no longer accept the counsel of those who tell us that we must fill our world with poisonous chemicals; we should look about and see what other course is open to us.8

Her call to action was the spark that lit the torch of environmentalism in North America, burning through the social fabric of the time along with the peace, civil rights, feminist, and animal welfare movements.

Activist groups formed throughout the continent and inevitably the notions of public “rights” and the importance of public participation in decision-making brought concerned citizens to examine the role of law. Citizen groups and, in modern parlance, non-governmental organizations (NGOs) formed across the country, such as Pollution Probe (1969) and the Canadian Environmental Law Association (CELA, 1970). Legislative bodies enacted the first wave of regulatory statutes throughout the 1970s and Environment Canada and its provincial counterparts become permanent government departments in the first half of that decade. Universities established the first Faculties of Environmental Studies during the same era.9

One early organization, founded in 1970, was the Canadian Environmental Law Research Foundation (CELRF), now known as Canadian Institute for Environmental Law and Policy (CIELAP). In 1974, it published David Estrin and John Swaigen’s Environment on Trial,10

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6 Ibid.
7 Ibid. at 12, citing Paul Shepard, “The Place of Nature in Men’s World” (1958) 13 Atlantic Naturalist 85 at 85-89.
8 Ibid. at 277-278.
10 David Estrin & John Swaigen, eds., Environment on Trial (Toronto: CELA & CELRF, 1974).
intended as a citizens’ manual promoting public intervention in environmental decision-making. A second edition in 1978 was expanded to become a broader reference text for students, teachers and legal practitioners, with a primary focus in Ontario environmental law. By the time I became a student of environmental law in the early 1980s, and even as a junior professor in the latter part of that decade, this was virtually the only available general Canadian environmental law textbook. Particularly outside of Ontario, most students and educators worked with photocopied cut-and-paste collections of readings in order to study the cases, regulatory statutes, and literature on the subject.

Then, in 1990, Professor Al Lucas snagged my in-house “casebook” for use in a seminar. At the end of the semester he arrived on my doorstep with colleague Dr. William Tilleman in tow and said “we should publish this.” *Environmental Law and Policy (ELP)* was thus born in 1993 and quickly became the leading (and only) national environmental law casebook in Canada, with the substantially expanded third edition of *Environment on Trial* emerging the same year—still the only real textbook on the topic.

By this time the second wave of environmentalism was well underway in Canada. The Brundtland Report on sustainable development was published in 1987, major new federal statutes were enacted (such as *CEPA 1985*), revised provincial statutes were seeking to plug loopholes in “first generation” enactments, and the subject was well established in universities and colleges across the country. The sole law report series on topic, the *Canadian Environmental Law Reports* (initiated in 1978 by CELRF), was renewed in a new series in 1987; the first (and only) academic journal devoted to the topic, the *Journal of Environmental Law and Practice*, was first published in 1990. On the textbook front, by the time the second and third editions of *ELP* were published in 1998 and 2003 respectively, a number of new competitors had made their way onto the market.

### 3. THE TOP TEN

All this brings me to my “top ten list.” Not only have I taught law students in domestic environmental law and policy, but also in natural resource management, international environmental law, and animal welfare regulation. I have also instructed engineering, agriculture, and environmental studies undergraduates, as well as engaged in public legal education. While I am certainly not aware of every existing resource, I have identified a good number of favorites. Below, then, is my list of best reference materials, starting with two I have already mentioned:

- **Best Law Report Series:** *Canadian Environmental Law Reports*, 3d ed. (Toronto: Carswell). The volume contains all the main case law, useful case comments and notes, and is now in its third series.

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15 *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.).
• **Best Academic Journal**: *Journal of Environmental Law and Practice* (Calgary: Carswell & University of Saskatchewan College of Law). The publication provides insightful analysis and coverage of current issues, even after twenty years.

• **Best Public Legal Education**: David Boyd, *Unnatural Law* (Vancouver: University of British Columbia Press, 2003). This is an accurate yet accessible description of the law, its failings, and the ways it could be changed. While it is getting a bit dated, it still creates an understandable map through the chaos of the environmental law and policy landscape.

• **Best Undergraduate Studies Textbook (Law)**: Paul Muldoon, Alastair Lucas, Robert Gibson and Peter Pickfield, *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery, 2009). The twenty-first century replacement for *Environment on Trial*, this text simplifies the legal system generally, and environmental law specifically, into a concise and useful overview that introduces non-law students and the layperson to the subject.

• **Best Undergraduate Studies Textbook (Policy)**: Debora VanNijnatten and Robert Boardman, editors, *Canadian Environmental Policy and Politics*, 3d ed. (Don Mills: Oxford University Press, 2009). This is an excellent overview of important policy considerations that shape environmental regulation in a modern context, with a number of interesting resource and environmental case studies to illustrate the concerns.

• **Best International Environmental Law Textbook**: Lakshman D. Guruswamy, *International Environmental Law in a Nutshell*, 3d ed. (St. Paul, MN: Thompson West, 2007). While this is not a Canadian tome (there is no Canadian equivalent), it is concise, readable, and well structured. It introduces the manner in which international law has developed to address environmental concerns, both describing and evaluating the legal response to the major global issues of our time. There are more detailed, comprehensive, and expensive texts for more advanced studies, but this book is a superior starting point.

• **Best Law Textbook**: Jamie Benidickson, *Environmental Law*, 3d ed. (Toronto: Irwin Law, 2008). Designed for law students, and others who know a tort is not a chocolate cake, this text provides a solid overview of the core topics in domestic environmental law in textbook format.

• **Best Collected Readings (Policy)**: Allan Greenbaum, Ron Pushchak and Alex Wellington, editors, *Canadian Issues in Environmental Law and Policy* (Concord, ON: Captus Press, 2009). One of the best collections of readings on environmental law and policy, it engages key issues such as the use of science and the concept of sustainability in real depth.

• **Best Natural Resources Readings**: A tie between Michael Howlett and Keith Browney's, *Canada's Resource Economy in Transition* (Toronto: Emond Montgomery, 2008); and Bruce Mitchell's, editor, *Resource and Environmental Management in Canada*, 4th ed. (Don Mills, ON: Oxford University Press,
While there is no good general survey of natural resource management law in Canada (although there are individual books on specific resource topics such as forestry), both of these policy texts are excellent. Howlett and Brownsey focus on the idea of resource development in a post-staples economy, while Mitchell concentrates on globalization and conflict resolution. Both tomes therefore offer useful yet very different approaches to the topic.

- **Best Collected Readings (Law):** Meinhard Doelle and Chris Tollefson, *Environmental Law: Cases and Materials* (Toronto: Carswell, 2009). Last but not least, overtaking the charts, is the book subject to the present review, about which I must now say more in order to demonstrate why it is making my list as the best environmental law “casebook” out there—to the point that, in my mind, it relieves me of any need to create a fourth edition of my own casebook, *ELP*.

## 4. THE REVIEW

Doelle and Tollefson’s treatise is in a classic “casebook” format, containing edited excerpts from cases and articles framed with enough explanatory material to guarantee the reader’s understanding and continuity, including notes and questions after each excerpt. In Chapter 1, the book starts by setting up international environmental law as the framework that increasingly shapes our domestic law over time, especially as the scale of environmental problems continues to expand. The next five chapters cover core domestic environmental law concerns and approaches: use of the common law, jurisdictional issues, regulatory legislation, enforcement and compliance issues, and judicial review. The remaining chapters focus on four more discrete topics: environmental impact assessment, parks and protected areas, species protection, and climate change. Additional references are listed at the end of each chapter, providing helpful direction to those looking for further information on each topic. Perhaps the only missing structural element is an index (online or otherwise), leaving the reader to rely solely on the table of contents when trying to locate materials on specific subjects.

Given the authors’ choice to set up international developments as a backdrop for the modern direction of Canadian environmental law, I was somewhat disappointed by the first chapter. It does contain a good overview of the sources and history of international environmental law (IEL), its relevance to domestic law via treaty implementation, and its use as an interpretive tool by the courts. In particular, it features a very good section on the precautionary principle as a specific influence in the domestic landscape. Nevertheless, the authors’ choice of “key” areas to watch seemed somewhat lacking. They discuss biodiversity, yet without addressing biotechnology; transboundary hazardous waste, without mention of recent treaties such as the POPs and PICs conventions; and trade and investment, without delving into freshwater and looming water scarcity issues, both of critical interest to Canada. The authors also entirely leave out the issue of oceans (another key Canadian interest) and deferred any discussion of climate change to the end of the book.

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The second chapter, on the use of the common law for environmental protection, is stronger, providing an excellent review of current concerns in this area. It contains, *inter alia*, interesting discussions on ways to tackle proof of causation in light of scientific uncertainties, standing, and the obstacles to certification of class actions; SLAPP suits\(^\text{18}\) and the need for anti-SLAPP legislation; as well as a section on public environmental rights (public nuisance, public trust, and the potential importance of the SCC’s recent *Canfor* decision).\(^\text{19}\) The third chapter, on jurisdiction, is another solid “core” section. It covers not only the basic constitutional division of powers within the context of the desire to preserve federalism, but also what the authors term the “practicalities” of federalism, including such key policy concerns as the lack of national leadership and the dominance of unenforceable collaborative intergovernmental approaches.

The authors also include a very good overview of the emerging aboriginal jurisdiction, including some of the cases and arguments most relevant to natural resource managers. Their discussion of municipal jurisdiction was thinner, and an expanded and more detailed look at some key issues (such as brownfields and land-use planning) would have been welcome. They might well have also touched upon Quebec’s unique interests here, given both its critical role in the potential success of most cooperative federalism initiatives and some of the unusual features of the civil law that can be used to address environmental concerns in that province.\(^\text{20}\)

The fourth chapter is a useful overview of the central concepts governing the current approach to environmental regulation. As the latter is also our “main” approach to pollution control, it is of critical concern. Starting with a brief history of the regulatory approach, the authors then use Michael M’Gonigle *et al*.’s paper “Taking Uncertainty Seriously”\(^\text{21}\) as a mechanism to critique the current direction of environmental law, examine the merits of incremental reform, and advocate broader “structural” reforms via preventive action. There is an interesting review of the ongoing debate over standard-setting and the relative merits of technology-based, performance-based, and management-based standards. We also find an exploration of emerging approaches (including cooperative approaches, voluntary self-regulation, market mechanisms, and “smart” regulation) used to examine the role of “command and control” statutes in a modern “mixed” regulatory policy. The focus here is largely on national (federal) examples. While the authors do bring in some NAFTA-related toxicity issues, they could have perhaps done more at this point to return to their international framework in order to examine its many current pressures on regulatory development (for example, in areas such as fisheries, coastal management, biotechnology, energy scarcity, and fresh water).

Chapter Five begins with an overview of compliance policies and enforcement tools, including a brief history of compliance efforts and recent deregulation. The authors examine some traditional debates (cooperative vs. adversarial approaches, criminal vs. administrative enforcement) and key developments (sentencing factors, directors’ and officers’ liability, the use of administrative monetary penalties). They also touch on the potential of under-utilized

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\(^{18}\) A “strategic lawsuit against public participation” or “SLAPP”.


\(^{20}\) Lorne Giroux & Paule Halley, “Environmental Law in Quebec” in Hughes, Lucas & Tilleman, *supra* note 4 at 133.

tools such as citizen suits, environmental bills of rights, and private prosecutions. In my mind, however, this chapter was too brief of an examination of these many compliance issues. Given the number of issues raised, a fuller exploration seems warranted. In addition, as the book lacks a discrete section on theoretical approaches, there was perhaps room here to address a variety of theoretical perspectives about the objectives of environmental law generally (is it merely compliance?) and, perhaps, more specifically (e.g. creative sentencing). Overall, the fifth chapter seemed to be one of the weaker sections of the book.

Chapter Six pertains to judicial review and rounds out the “core” environmental law chapters of the casebook. After an introduction outlining how administrative law generally operates, the authors examine some of the leading environmental law cases on the standard of review of government regulatory decisions (correctness vs. reasonableness) as well as the grounds for such review. They then turn to a useful overview of a number of specific issues of great interest to public interest lawyers, including those practicing environmental law. In this, they focus on public interest standing, the importance of injunctions as a remedy, and the question of costs as a barrier to access to justice.

The remainder of the book is made up of four chapters that examine specific aspects of environmental law in more detail. The first of these analyzes the potential to prevent environmental harm via the procedural vehicle of environmental impact assessment (EIA). Using the federal process as a primary example, the authors cover the objectives, history, and application of the EIA process, with a focus on the key issue of the scope of the review. They then engage in an interesting look at the many challenges that lie in the future of EIA, including current concerns over aboriginal and public participation, and the need for “strategic” EIA of policy initiatives. The chapter concludes with some very interesting excerpts from Robert Gibson’s work on sustainability assessments, which suggests a potential shift away from assessing the significance of adverse effects of projects, toward the question of whether the net impact of a project contributes to sustainability. The authors do not engage, however, in any comparative consideration of alternatives to EIA, such as other land use planning approaches, as possible procedures to prevent environmental harm.

Chapter Eight examines landscape and habitat protection using parks and other types of protected area designations, including a brief history of parks, a discussion of their objectives, as well as a survey of the relative merits of federal vs. provincial action. I found this section was also overly brief. The authors could have added detail on some of the legal obstacles to parks creation and their role in a spectrum of approaches to the conservation of lands. Instead, the main focus is on a series of current challenges, including the unique difficulties of establishing marine protected areas, the need to network protected areas together, how to prioritize ecological integrity over human use, and how to partner with First Nations peoples in parks operations to reconcile conservation objectives with aboriginal rights. They conclude by looking at the new Ontario parks legislation as a model, and also examine the idea of the public trust doctrine as an alternative mechanism to achieve land conservation. They do not include,

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however, anything on adaptive management as a policy approach\textsuperscript{24}–which seems surprising in a modern context–nor do they discuss the substantive laws of private conservancy, land use planning, and zoning,\textsuperscript{25} particularly important conservation tools in the urban landscape.

The next chapter focuses on species protection and begins with an overview of the scope and the importance of the problem. The authors then engage in a comparison of Canada’s federal statute with its American counterpart on several key factors. The chapter then looks at federal-provincial jurisdictional issues and cooperative solutions, with a limited discussion of the provincial role and Ontario’s new Act.\textsuperscript{26} While the authors do look at two critical policy questions (first, whether focusing on species only after they become endangered is the right approach; second, whether we need to focus more on habitat and species outside protected areas), they again could have brought back their international framework in more detail by examining issues such as threats to bio-security from biotechnology.

The final, lengthy chapter in the tome is on climate change, and it is really only here that the authors re-engage the international framework in any detail, using the topic as a case study through which to integrate the various themes from the book: jurisdiction, regulation, the impact on endangered species, the impact on indigenous peoples, and the need for reform. Included are sections on domestic failures (Kyoto Protocol implementation), carbon trading as an option, federal-provincial conflict, and a number of law and economics ideas as alternatives to the regulatory approach (e.g. carbon taxes). The authors also link back to various ideas from earlier chapters, such as whether the common law could be used to impose liability for harmful climate change impacts, or how to ensure systematic consideration of climate change as a significant potential impact in all EIA procedures. They also touch upon the question of whether adaptation to climate change (rather than prevention) is a viable approach. If there is a weakness here, it is, again, that the international framework itself is perhaps underestimated in both scope and urgency. In an era of fossil fuel reductions and resource exhaustion, with limited clean energy alternatives, and with burgeoning global population and energy demands, energy scarcity now looms as an emerging crisis, as well as an enormous threat to sustainable development.\textsuperscript{27}

In the end, \textit{Environmental Law: Cases and Materials} emerges as a solid set of teaching materials with more strengths than weaknesses. At 535 pages, it is a substantial work with good detail that avoids becoming so long as to be impractical to use for a single course. While it suffers from a lack of passion of the sort that Rachel Carson would have imbued, it remains positive in tone, leaving the reader with a sense that engagement with the legal process and its reform is a useful enterprise, outlining enough prescriptions for action to leave a sense that steady and ongoing legal progress is yet possible.

\textsuperscript{24} Bram F. Noble, “Applying Adaptive Environmental Management,” in Mitchell, see “Best Natural Resources Readings,” above, reference in the text body.

\textsuperscript{25} Arlene J. Kwasiak, “Municipal and Land Use Planning,” in Hughes, Lucas & Tilleman, \textit{supra} note 4 at 521.


\textsuperscript{27} Lakshman D. Guruswamy, see “Best International Environmental Law Textbook,” above, reference in the text body, at 640-644.