

UNNATURAL LAW: RETHINKING CANADIAN  
ENVIRONMENTAL LAW AND POLICY BY DAVID R. BOYD  
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In *Unnatural Law*, lawyer, academic, activist and now federal government official<sup>3</sup> David Boyd demonstrates that Canada's environmental laws have largely failed to meet their objectives, and that we have much to learn from other northern industrialized countries<sup>4</sup> in better integrating economic and environmental policies. The necessary changes, he writes, must address both a series of institutional obstacles and the "root causes" of environmental degradation.

In this review I summarize and assess Boyd's approach. I generally find *Unnatural Law* to be a comprehensive and likely seminal contribution to writing on Canadian environmental law and policy reform. In the final paragraphs, I suggest some adjustments to Boyd's characterization of policy instruments, and the implications for environmental regulation.

Boyd's approach is to treat Canadian environmental law as a medical patient, subjecting both our environmental conditions and the laws meant to address them to an examination and diagnosis before sending us out the door with a prescription for reform.

In Part I, Boyd examines the record of Canadian environmental protection and conservation measures by both federal and provincial governments in four thematic areas: water, air, land, and biodiversity.

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<sup>1</sup> [*Unnatural Law*].

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<sup>3</sup> His recently reported appointment as a policy analyst in the Privy Council Office's economic and regional policy branch generated (possibly unrealistic) expectations from some environmentalists and purports to reflect some buy-in by the Prime Minister of Boyd's policy prescriptions. See Joe Paraskevas, "PM hires outspoken adviser on environment: Tory critic call's Boyd's proposals 'pie in the sky'" *Montreal Gazette* (11 March 2005), A13. Paraskevas writes that "[m]any environmentalists consider Boyd's arrival in the Privy Council Office a major victory. 'Some of us are wetting ourselves,' said a senior official in a national organization." The article continues: "[a] government source confirmed [that Prime Minister Paul] Martin 'was very impressed' by Boyd's report," leading to Boyd's appointment. The report in question is Boyd's "Sustainability Within a Generation: A New Vision For Canada," (David Suzuki Foundation, 2004), online: David Suzuki Foundation <<http://www.davidsuzuki.org/WOL/Sustainability>>. The report is also thought to have influenced federal Environment Minister Stephane Dion's thinking about a "new industrial revolution." See *infra* note 31 and Teresa Goff, "Down to Earth: Sustainability Within a Generation" (October, 2004), online: Dragon Fly Media <<http://www.dragonflymedia.com/sv/2004/sv1710/downtoearth1710.html>> .

<sup>4</sup> Readers may recall Boyd's 2001 comparison of Organization of Economic Cooperation and Development (OECD) members for their environmental performance based on a comprehensive range of indicators. See David R. Boyd, "Canada vs. The OECD: An Environmental Comparison," online: <<http://www.environmentalindicators.org>>. See also David R. Boyd, "Canada vs. Sweden: An Environmental Face-Off," online: <<http://www.environmentalindicators.org/hdocs/PDF/Report.pdf>> .

Within each topical chapter, he breaks down the challenges further (for example, the chapter on biological diversity considers parks and protected areas, endangered species, and marine biodiversity), allowing rigorously documented examinations of Canada's legislative record and its contribution to the resulting state of the environment.

Boyd integrates aspects of other policy areas that tend to be neglected in narrower treatments of environmental issues. For example, the implications for aboriginal rights of climate change, fisheries, forestry, and protected areas policies are surveyed, without any pretence that conflicts will be resolved easily or soon. Difficult economic and political realities are dealt with frankly and directly.

In Part II, the "diagnosis," Boyd considers some of the structural features of the Canadian social, economic, and political-legal landscape. Consistent with his resolve to put aside the "relentless negativity"<sup>5</sup> surrounding environmental problems and the prospect of their resolution, he first catalogues the successes of environmental law and policy, noting that many environmental protection structures have only been in place since the 1970s. The author identifies institutional advances—such as pressures exerted through multilateral fora, and the occasional progressive judicial decision—as responsible for progress, often despite the recalcitrance of Canadian governments.

Boyd's optimism is not based in naïveté. He acknowledges that Canada is a chronic foot-dragger and credibly explains some of the reasons. For example, just as Canada has followed the patterns of the United States in the design of some of our institutions, laws, and environmental non-governmental organizations, our resistance to international pressures for higher standards and our slow domestic legislative progress<sup>6</sup> often put us in the coalition of the laggards led by the United States.

The casual reader might mistakenly conclude that Boyd relies rather heavily on the U.S. system for domestic legislative solutions. Although he mourns the lack of enforceable standards and consistency among provincial regimes—due to the lack of conditional funding to provinces such as that provided by the U.S. federal government to the states—he is under no illusion that U.S. solutions can be easily repackaged and made to work here.

Boyd makes a compelling connection between the lack of separation of legislative and executive powers in the Canadian constitution,

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<sup>5</sup> *Supra* note 1 at 211.

<sup>6</sup> See *e.g. ibid.* at 226.

and the “maximum flexibility and ... minimum of mandatory duties”<sup>7</sup> that typify Canadian environmental laws.

The token supervision of the executive by parliamentary officers like the Commissioner of the Environment and Sustainable Development<sup>8</sup> or the Environmental Commissioner of Ontario, whose positions were created in the 1990s in part to address these matters, is no substitute for the mandatory provisions and enforceable standards that are more characteristic of U.S. environmental law.

I have argued elsewhere that an equally serious concern is “the imposition by central agencies like the Treasury Board and Privy Council Office of myriad policies and guidelines on regulators,”<sup>9</sup> which can impair implementation of the legislated public protection mandates of departments like Environment Canada and Health Canada.

Later in his diagnosis, Boyd makes it clear that tough environmental laws offer little promise on their own. Using the United States as an example, he details how comprehensive laws have largely failed in that country, where less than five per cent of the world’s population produces one quarter of the planet’s greenhouse gases, and a backlog of endangered species wait to be listed in order to be “saved.” Boyd notes that the United States has drawn a last-place ranking, by the OECD and others, for environmental performance<sup>10</sup> and concludes that “the US experience clearly refutes the idea that there is necessarily a positive correlation between economic growth and environmental protection.”<sup>11</sup>

Parts II and III of *Unnatural Law* merit the closest attention. Here Boyd merges his analysis of the “Obstacles to Further Progress” in chapter nine with that of the “Root Causes of Environmental Degradation” in chapter ten, then delivers the “prescription.” Among the obstacles to progress, Boyd identifies that government decision making is often dominated by economic interests and priorities. This goes a long way in explaining Canada’s poor progress in enacting and implementing progressive environmental laws. The other primary obstacles suggested by

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<sup>7</sup> *Ibid.* at 263.

<sup>8</sup> The federal Commissioner, asked recently whether her reports are “being ignored” by the Department of Fisheries and Oceans, said rather candidly: “I won’t say that they were ignored but they haven’t worked too much on it, no doubt about it.” Interview of Johanne Gélinas, Commissioner of the Environment and Sustainable Development (26 October 2004) [archived with author].

<sup>9</sup> Hugh Benevides, “Remarks to the External Advisory Committee on Smart Regulation (EACSR),” Canadian Environmental Law Association (21 July 2004), online <<http://www.cela.ca/coreprograms/detail.shtml?x=2017>>.

<sup>10</sup> *Supra* note 1 at 274.

<sup>11</sup> *Ibid.* at 275.

Boyd are: industry and labour union influence, bureaucratic inertia and regulatory capture, the trade liberalization agenda, constitutional problems, the lack of separation of powers, the concentration of power in the prime minister's and premiers' offices, and citizens' barriers to access to the courts.

Boyd isolates consumption and population as the "root causes" of environmental degradation. Using a global ecosystem approach, Boyd describes three scientific principles that represent the basis for rethinking Canadian environmental law: (1) "[n]ature cannot withstand a systematic buildup of materials extracted from the Earth's crust"; (2) "[n]ature cannot withstand a systematic buildup of anthropogenic substances"; and (3) "[n]ature cannot withstand a systematic deterioration of its diversity, productivity, or capacity for renewal."<sup>12</sup> These axioms can be further focused through the twin lenses of consumption and production as follows (where consumption is measured in GDP or energy consumption):

*Human environmental impact = Human population X Consumption of energy and resources per capita.*<sup>13</sup>

As the formula suggests, assessment of the total impact of human consumption, from resource extraction to waste generation, must be done on an aggregate basis, not merely on the level of the individual. Canada is a well-known global leader in water and energy waste (even if we are often excused because of our "long distances" and "the extremes of our weather conditions"<sup>14</sup>). Canadian *per capita* use of water in the household alone is profligate. When industrial and agricultural uses are also accounted for, our wastefulness is truly staggering.<sup>15</sup>

Boyd points out that while Canada's domestic environmental problems highlight "excessive consumption, not overpopulation,"<sup>16</sup> more pressing population challenges exist in the international context. Canada must increase overseas development assistance (ODA) aimed at reducing poverty, reduce aid tied to procurement of Canadian goods and services,

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<sup>12</sup> *Ibid.* at 278-79. In a more recent paper, Boyd elaborates on the three ecosystemic rules described above, relying on four "system conditions" for sustainability. See David R. Boyd, "Sustainability Law: (R)Evolutionary Directions for the Future of Environmental Law" (2004) 14 J. Envtl. L. & Prac. 357 at 369-70 [*Sustainability Law*].

<sup>13</sup> *Supra* note 1 at 276.

<sup>14</sup> See *House of Commons Debates*, 038 (26 November 1997) at 2115 (Hon. Ralph Goodale). The context of the debate was greenhouse gas emissions.

<sup>15</sup> *Supra* note 1 at 42-52.

<sup>16</sup> *Ibid.* at 344.

and otherwise “take a more focused approach to ODA”<sup>17</sup> by linking it more closely to human rights, the elimination of corruption, and democratic governance.

In Part III, Boyd’s “prescription,” he describes how both social goals and the legislative means for achieving them need to be re-established. Greater effort at redefining “progress” is necessary, for example by replacing gross domestic product with other measures like the emerging Genuine Progress Index (GPI). While environmental indicators for national accounts have been proposed since at least 1990, they have yet to be implemented.<sup>18</sup>

While Part III considers the proposed alternative measures of progress, like GPI, that would allow a new way of thinking, Boyd writes almost in passing that we need to “reduce consumption and achieve dematerialization and substitution *without reducing Canadians’ quality of life.*”<sup>19</sup> The notion of quality of life and how it might be reduced or changed, while generally perceived as politically untouchable, nevertheless lies at the heart of Boyd’s comparisons to the northern European examples he wishes Canada to emulate. Frank consideration of what is meant by “quality of life,” despite its challenges, is a necessary prerequisite to redefining social goals.

The next suite of prescriptions falls under the heading “economic transformation.” The various categories of subsidies (resource, financial, and infrastructure) are distinguished, and the perverse nature of many existing subsidies in Canada and internationally is described.<sup>20</sup> Similar to environmental indicators, the proposed solutions are not new yet they have been neglected. As early as 1972, OECD guidelines on the Polluter Pays Principle “were intended to discourage subsidies that could lead to distortions in trade.”<sup>21</sup>

Greater public awareness of the billions of dollars spent annually in environmentally perverse subsidies in Canada might result in pressure for change. Boyd therefore proposes the appointment of independent task

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<sup>17</sup> *Ibid.* at 340. Boyd notes on the same page that while “the Netherlands target 17 well-governed poor countries for aid, Canada currently distributes ODA to more than 130 countries.” The February 2005 federal budget signalled an intention to “reduce the number of countries to which Canada provides aid in order to increase assistance to those nations that remain on the list.” See Bill Curry, “Ottawa increases foreign aid [by] \$3.4-billion” *Globe and Mail* (24 February 2005), F2.

<sup>18</sup> *Unnatural Law, ibid.* at 311-13.

<sup>19</sup> *Ibid.* at 307-08 [emphasis added].

<sup>20</sup> *Ibid.* at 315-21.

<sup>21</sup> Gro Harlem Brundtland, *Our Common Future / World Commission on Environment and Development* (Oxford: Oxford University Press, 1987) at 221.

forces at the federal and provincial levels “in order to accelerate the identification and elimination of environmentally destructive subsidies.”<sup>22</sup> Although the independence<sup>23</sup> of expert task forces might make their recommendations more credible, their lack of power to implement those recommendations returns us to the problem of lack of separation of the legislative and executive branches, and the familiar paramountcy of economic considerations and private industry influence in decision making. Boyd is surely correct in identifying these factors as the main obstacles to progress.

Even if the obstacles are overcome, the “root causes” of environmental degradation—the basic interplay between consumption and population—remain. Both the obstacles and the root causes must be addressed by a new range of tools, according to Boyd.

A note of caution is necessary here. The regulatory reform debate tends to place the choice of policy instrument in “either/or” terms, representing a number of false dichotomies. These include the notions that: (a) policy instruments should be voluntary not regulatory; (b) regulations should be performance-based, not prescriptive or command and control; and (c) environmental regulatory measures are to be distinguished from economic measures such as tax reform.

It is a common assertion that voluntary initiatives are an alternative to regulations, rather than merely one tool in a “toolbox” of instruments in which regulations are the least dispensable. However, plenty of evidence exists suggesting that the greatest source of motivation for actors to meet well-designed environmental standards is provided by their enforceability.<sup>24</sup> Demands for purely voluntary approaches (that is, without regulatory foundation) also imply a diminished or non-existent role for government. Despite claims in newer spheres of regulation that governments may be neither at the centre nor even a significant player, successful environmental conservation and protection efforts in Canada have tended to involve government compelling the desired behaviour. That said, many other regulatory ventures have failed; *Unnatural Law* provides useful explanations.

A similar argument can be made about the second false dichotomy,

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<sup>22</sup> *Supra* note 1 at 321.

<sup>23</sup> I suggest that the seductiveness of “independence” ought to be resisted, and that we always ask “independence from what, and from whom?”

<sup>24</sup> See e.g. Kathryn Harrison & Werner Antweiler, “Incentives for Pollution Abatement: Regulation, Regulatory Threats, and Non-Governmental Pressures” (2003) 22:3 *J. Pol. Anal. Manage.* 361; *Unnatural Law*, *supra* note 1 at 244.

that so-called performance-based regulation is not prescriptive.<sup>25</sup> Chris Tollefson writes that prescriptiveness is a variable, more or less present along a continuum, that may be absent only from the most “open-ended, qualitative performance-based standards. ... [M]ost other forms of performance standard contain prescriptive elements.” Noting that the term “command and control” has taken on a pejorative connotation because of its use (largely in an American context) by neo-classical economists in contrast with market-based alternatives, Tollefson writes that command and control “properly understood ... connotes all forms of direct government regulation containing a directive that the state is legally empowered to enforce.”<sup>26</sup>

*Unnatural Law* distinguishes its prescriptions for economic transformation, including tax reform measures,<sup>27</sup> from “environmental law and policy changes” like pollution prevention or emissions cap-and-trade regimes.<sup>28</sup> This artificial distinction, made perhaps to organize the discussion, fails to justify the third false dichotomy. All of these measures—including tax measures—require traditional regulation (measures implemented by the legislature and executive) and significant administration and oversight.

In *Sustainability Law*, Boyd similarly contrasts traditional “environmental law” and an idealized “sustainability law” in a number of ways, one of which is by calling them respectively more “prescriptive” and more “results-oriented.”<sup>29</sup> And in *Unnatural Law* he quotes research claiming that “market mechanisms can achieve pollution reductions at dramatically lower costs than traditional command and control strategies,”<sup>30</sup> implicating classic environmental law questions about the public and private distribution of environmental and economic costs. Just as performance-based regulation should not be viewed as lacking prescriptiveness, market mechanisms should not be assumed to exclude either state involvement or decisions about costs.

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<sup>25</sup> See e.g. External Advisory Committee on Smart Regulation (EACSR), *Smart Regulation: A Regulatory Strategy for Canada (Report to the Government of Canada)* (Canada, 2004) at 43.

<sup>26</sup> Chris Tollefson, “Crafting the Standard” in C. Tollefson, F. Gale & D. Haley eds., *Setting the Standard: Forest Certification in British Columbia* at c. 10 [forthcoming].

<sup>27</sup> *Supra* note 1 at 313-25.

<sup>28</sup> *Ibid.* at 326-33.

<sup>29</sup> *Supra* note 12 at 365. In fairness, these labels may be intended as comparative rather than rigidly dichotomous.

<sup>30</sup> *Supra* note 1 at 314, citing Jennifer Yelin-Kiefer, “Warming up to an International Greenhouse Gas Market: Lessons from the U.S. Acid Rain Experience” (2001) 20 *Stan. Envtl. L.J.* 221.

Much current Canadian discourse about “smart regulation” and a “new industrial revolution” suggests a de-emphasis on the role of government, and says very little about the need to meet existing regulatory responsibilities.<sup>31</sup> This discourse, with its emphasis on “innovation” (implying further technological fixes for environmental problems, and continued emphasis on growth and consumption) does injustice to Boyd’s more holistic, long-term approach. The federal government’s current expenditure review process may herald a further assault on existing regulatory capacity, similar to the program review effort in the 1990s.

Reliance on false dichotomies may have important implications for the redesign of environmental laws. All of Boyd’s prescriptions will require major, mutually-reinforcing institutional and ethical changes, considerable time, and social consensus. Objectives such as replacing dirty fuels with clean fuels, and a consumer economy with a services economy—in short, dematerialization and substitution<sup>32</sup>—are distant and elusive. Boyd writes that paradigm shifts are needed in economics and ethics as well as in environmental law. I am more than sympathetic with his view that we need to strive for the changes he envisions, and I fear the consequences if we fail. But during the transition, traditional laws and the capacity to implement them need to be improved and reinforced. The traditional industrial activities that inspired these laws still dominate the Canadian economy, while emerging industries and technologies pose new ethical challenges, and further threats to the environment and human health. All indications are that “prescriptive,” government-centred responses will continue to be indispensable.

It is highly unusual that a vocal critic of prevailing practice, particularly one who speaks from an environmental sustainability perspective, should be recruited to the powerful centre of government. While a single person cannot be expected to effect the paradigm shifts that sustainability requires, his influence has the potential to be catalytic, and his hiring could signal the beginnings of significant change. On the opening page of *Unnatural Law*, David Suzuki writes: “There is a vast opportunity for improvement, but only after Boyd’s critique has been fully digested and understood.” It remains to be seen whether key institutions, particularly David Boyd’s new employer, are capable of digesting, let alone implementing, the changes suggested in the book.

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<sup>31</sup> See e.g. *supra* note 25; Hon. Stéphane Dion, “Environmental Action For Economic Competitiveness: Will Canada lead the new Industrial Revolution?” (Speech delivered in Calgary, September 2004), online: Environment Canada <[http://www.ec.gc.ca/minister/speeches/2004/041129\\_s\\_e.htm](http://www.ec.gc.ca/minister/speeches/2004/041129_s_e.htm)>.

<sup>32</sup> *Supra* note 1 at 307.