

**THE RIGHT TO A HEALTHY ENVIRONMENT: REVITALIZING CANADA'S CONSTITUTION, DAVID R. BOYD (VANCOUVER: UBC PRESS, 2012)**

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth.... Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights — even the right to life itself.<sup>1</sup>

David Boyd wears many hats in the world of Canadian environmental law. He is a leading environmental advocate, Trudeau Scholar at the University of British Columbia, a research Associate with the University of Victoria, Adjunct Professor of Resource and Environmental Management at Simon Fraser University, advisor (both domestically and abroad), author, and former Executive Director of the organization now known as Ecojustice.<sup>2</sup> If you have even so much as dabbled in Canadian environmental or natural resources law in the last decade you are likely familiar with Boyd's important critical assessment of Canadian environmental law titled *Unnatural Law: Rethinking Canadian Environmental Law and Policy*.<sup>3</sup>

I approached *The Right to a Healthy Environment: Revitalizing Canada's Constitution*<sup>4</sup> without a well-defined personal position on the efficacy or utility of an entrenched constitutional right to a healthy environment, which evidences one of Boyd's central messages: Canada has failed to successfully engage in the environmental human rights movement that has been occurring around the world for over four decades. Therefore, before progressing any further, it is important to ensure that we are all on the same page with respect to the potential form and function of the right to a healthy environment. Boyd asserts that the right to a healthy environment qualifies as a human right because it is essential, morally required, and universally held by everyone.<sup>5</sup> At its core, Boyd posits that the right to a healthy environment "is intended to ensure that everyone has access to clean air, safe water, fertile soil, and nutritious food, as well as the conservation of biological diversity and ecosystem functions."<sup>6</sup> This sort of right can be substantive (in that the state is obliged to maintain certain environmental quality) or procedural (in that citizens have the ability to engage in decision-making and have access to appropriate information), a negative liberty right (safeguarding against unnecessary state intrusion) and a positive welfare right (necessitating state action), and collectively and individually held.<sup>7</sup> Finally, it can be recognized expressly in a constitution or found implicitly within existing rights (specifically in section 7 of the *Canadian Charter of Rights and Freedoms*).<sup>8</sup> In short, it is multifaceted and complex.

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<sup>1</sup> Declaration of the United Nations Conference on the Human Environment, UNEP, UN Doc A/Conf.48/14/Rev.1 (1973) 1.

<sup>2</sup> "Biography," online: David Richard Boyd <<http://davidrichardboyd.com/biography/>>; "David R. Boyd," online: Trudeau Foundation <<http://www.fondationtrudeau.ca/en/community/david-r-boyd>>.

<sup>3</sup> David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

<sup>4</sup> David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) [Boyd, *The Right to a Healthy Environment*].

<sup>5</sup> *Ibid* at 1-2.

<sup>6</sup> *Ibid* at 1.

<sup>7</sup> *Ibid* at 2-3.

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

*The Right to a Healthy Environment* advances the case for Canadian constitutional evolution to recognize the right to a healthy environment. The goal of the work is to assert the importance of achieving constitutional protection of a right to a healthy environment as a feature that “is imperative for Canada’s future well-being.”<sup>9</sup> In stating his case, Boyd proceeds by: (1) examining the theoretical benefits and drawbacks associated with constitutionally protecting the right to a healthy environment; (2) assessing the legal and political history of Canadian constitutional reform generally and past attempts to recognize this right; (3) surveying the emergence and application of this right in other countries and in international law (which essentially represents the “data” component of this work) and indicating the impact that such reform has had; (4) hypothesizing how similar reform would impact Canadian environmental law and considering the methods of achieving the same sort of reform in Canada at the provincial or federal level; and (5) concluding that while direct amendment is not likely, there is an urgent need for some sort of progress. In the remainder of this review I guide a prospective reader’s aim and purpose, emphasize the utility of this book, and focus on some of the crucial themes and points of emphasis that make this an important read for those interested in the future of Canadian environmental law.

*The Right to a Healthy Environment* is the second book concerning the right to a healthy environment that Boyd published in 2012. It is framed as the sequel to *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*,<sup>10</sup> which is a comprehensive study into the effects of recognizing the right to a healthy environment within national constitutions. Chapters 4 and 5 of *The Right to a Healthy Environment* direct the reader to this earlier work, which is both a positive and a negative. The major detractor of this feature is likely that this condensed assessment will whet the appetite of those constitutional law buffs primarily interested in the appropriateness of considering other national analogs, but might ultimately leave them wanting more. In my opinion though, the benefit of this approach is that since Boyd’s other work covers this area in detail, the sequel is able to present this analysis in a succinct way that probably appeals to a broader audience.

As suggested above, one of the most attractive features of this work is Boyd’s ability to make a complex issue fairly accessible to a wide readership base. Each chapter sets and achieves clearly defined goals, and, considered as a whole, the work effectively crescendos towards its prescriptive contribution where both the options and chances for greening Canada’s constitution are discussed. Here, Boyd suggests that direct amendment to the constitution would proceed by way of the section 38 general amending formula and that this right could be incorporated as an addition to section 7 of the *Charter*, as a free standing addition to the *Charter*, or as a new *Charter of Environmental Rights*.<sup>11</sup> The alternative proffered by Boyd is the use of litigation to attach this right to an existing right, with section 7 of the *Charter* offering the most likely scenario.<sup>12</sup> Boyd recognizes that achieving this is limited by a number of factors, but most importantly the question as to whether section 7

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<sup>9</sup> Boyd, *The Right to a Healthy Environment*, *supra* note 4 at 4.

<sup>10</sup> David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012).

<sup>11</sup> Boyd, *The Right to a Healthy Environment*, *supra* note 4 at 170-76.

<sup>12</sup> *Ibid* at 176-85.

should be used to foist positive obligations on the state.<sup>13</sup> This question could also come before the court as a judicial reference to determine whether such a right is implicit in the *Charter*.<sup>14</sup> Finally, Boyd provides a draft *Canadian Charter of Environmental Rights and Responsibilities* that draws from the experiences of other nations but remains “uniquely Canadian” in its drafting.<sup>15</sup>

As readers have come to expect from Boyd, this book offers persuasive writing that is theoretically sound and capable of utilitarian application. *The Right to a Healthy Environment* should appeal to environmentalists and activists, environmental and constitutional lawyers, law students, and law professors, and this broad appeal opens the door to varied uses. By way of example, I can envision incorporating this book into the first year Foundations to Law course that I teach at the University of Alberta. Beyond the appeal of its environmental ethos, this work introduces and applies fundamental legal concepts including: Canadian constitutional history (including interesting political realities), human rights, federalism, justiciability, standing, and the interplay between international and domestic law. In addition, it introduces the reader to Canada’s recent trend of amending major federal environmental statutes through omnibus budget bills and some of the unresolved issues in environmental law (which are exacerbated by a paucity of recent environmental law from the Supreme Court of Canada).

In addition to a classroom application, this book should serve as a source of information and inspiration for those who are interested in advocating on behalf of environmental law reform; indeed, the book is in part dedicated to those Canadian activists working to achieve constitutional protection of our environment.<sup>16</sup> Still, Boyd recognizes that “[t]he constitutional right to a healthy environment has never been the subject of a concerted campaign by environmental groups.”<sup>17</sup> Since reading *The Right to a Healthy Environment*, I have introduced this idea of a right to a healthy environment to a grassroots conservation group in Edmonton that is interested in shark conservation and environmental sustainability more generally. We have incorporated the idea of a constitutional right to a healthy environment into part of our education mandate, meaning it is an issue we will discuss when presenting at schools or in different forums. I would encourage those individuals interested in promoting environmental law in Canada to consider utilizing this work in a similar manner.

There are a few questions that remain for me after reading the book. I agree that Canadian environmental law is in need of reform. I also agree that linking environmental interests to human rights and human health is an attractive way to convince people to care about the environment — self-interest is a powerful motivator. Still, it is noteworthy that Canada is not alone in opting not to enshrine a right to a healthy environment in its constitution; indeed, the United Kingdom, the United States, Australia, and New Zealand have also opted not to pursue this approach.<sup>18</sup> We share a similar history with many of these nations, and we also

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<sup>13</sup> *Ibid* at 178-79.

<sup>14</sup> *Ibid* at 185-88.

<sup>15</sup> *Ibid* at 197.

<sup>16</sup> *Ibid* at dedication page.

<sup>17</sup> *Ibid* at 66.

<sup>18</sup> *Ibid* at 70-71.

have well-developed federal environmental laws (notwithstanding the recent federal “rollback”).<sup>19</sup> This raises the following concerns: (1) should efforts be focused on strengthening existing environmental laws and processes or is it appropriate to essentially switch gears and focus our attention on promoting constitutional reform?; (2) what sort of historical moment or monumental event will be required to prompt this sort of paradigm shift?; and (3) is it possible to open up our constitution to include the right to a healthy environment without experiencing the “linkage” concerns that Boyd warns about, which include “Quebec’s constitutional concerns ... expanding provincial powers, reforming the Senate, recognizing social and economic rights, and addressing the aspirations of Aboriginal peoples.”<sup>20</sup>

Whether one favours strengthened federal laws or constitutional reform to enshrine the right to a healthy environment, there is one lingering obstacle that we must continue to work to overcome: translating opinion into action. Boyd observes early in this work that “Canada is blessed with an extraordinary abundance of natural wealth — vast forests, untamed wilderness, thousands of rivers and lakes, a wonderful network of parks and protected areas, and unique landscapes,” and that “[o]ur vast, beautiful, and diverse landscapes are at the heart of who we are as a people and are a source of tremendous national pride.”<sup>21</sup> Boyd references Canadian public opinion polls as evidence of the high value that we place on our environment, the services it provides, and our desire to protect it.<sup>22</sup> Accordingly, the prescriptive portion of the book could have included some more detail on how Canadians can act to help reduce this gap between idea and action to achieve the “call for recognition of the right to a healthy environment” that Boyd recognizes “should come from the people and be for the people.”<sup>23</sup>

Education is one theme that runs through the book and this book review. In chapter 9 of *The Right to a Healthy Environment*, section 8 of the draft *Canadian Charter of Environmental Rights and Responsibilities* indicates that education, at all levels, “must contribute to the implementation of the rights and responsibilities defined by this Charter.”<sup>24</sup> I would emphasize that before we can seek to educate on how such a right is implemented, we must educate current and future generations about the importance of a healthy environment; indeed, education can work to close the gap between our Canadian ideals and current Canadian action and move our society towards robust environmental protections.

Boyd eloquently and succinctly captures the legal and political issues surrounding the future of Canadian environmental law, and *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* is an accessible work that should appeal to a variety of readers. This

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<sup>19</sup> See *ibid* at 150-52 (discussing recent federal environmental law amendment).

<sup>20</sup> *Ibid* at 175.

<sup>21</sup> *Ibid* at 4-5.

<sup>22</sup> *Ibid* at 4-6, 190.

<sup>23</sup> *Ibid* at 199.

<sup>24</sup> *Ibid*.

book is a very important, and it will generate a conversation about the future of environmental law and the role of a constitutional right to a healthy environment. It is now incumbent on the reader to continue this work, and I encourage those who share Boyd's opinions to reflect on the environment that they want for themselves and for future Canadians and to act accordingly.

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