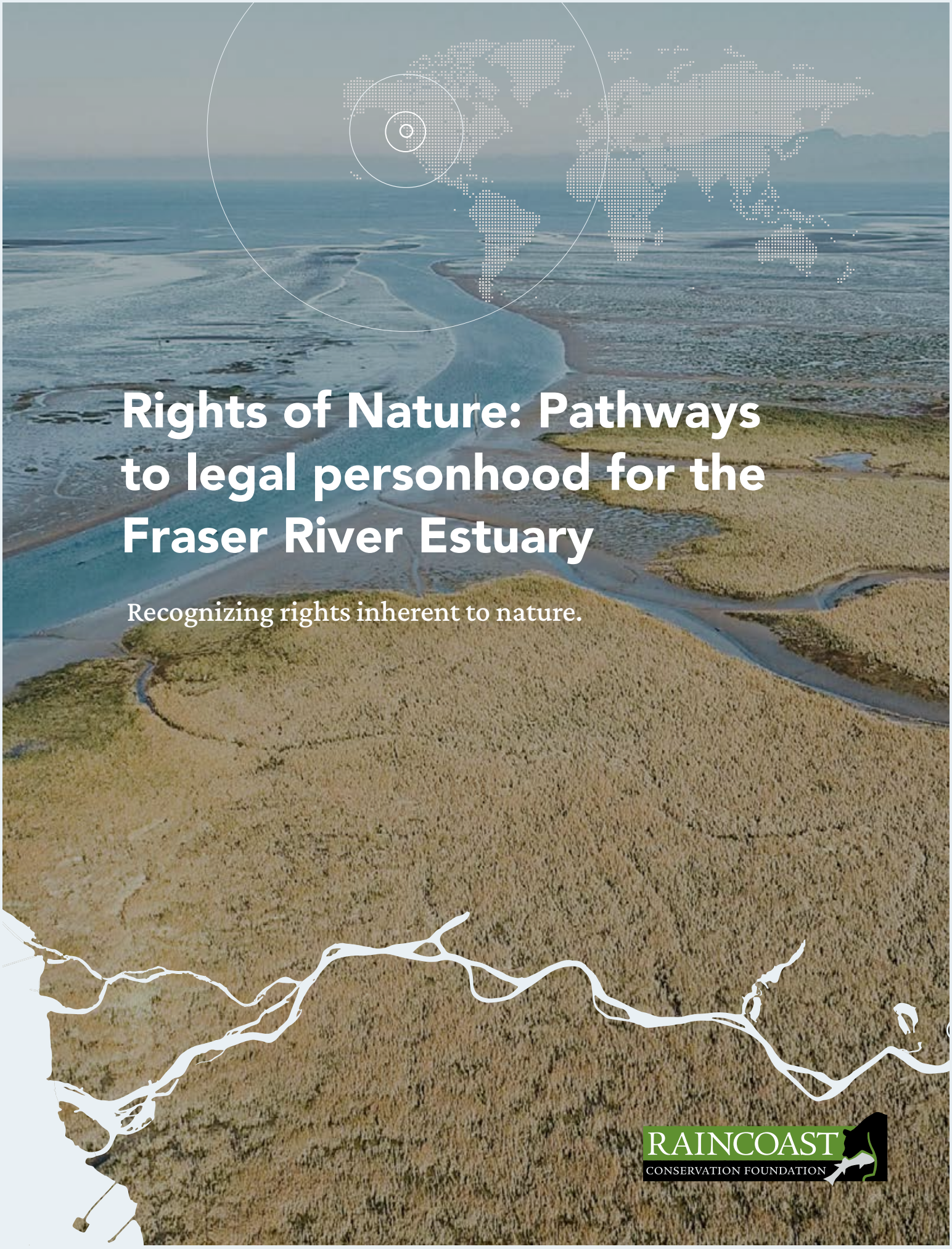

Rights of Nature: Pathways to legal personhood for the Fraser River Estuary

Recognizing rights inherent to nature.

RAINCOAST
CONSERVATION FOUNDATION

Rights of Nature: Pathways to legal personhood for the Fraser River Estuary

Recognizing rights inherent to nature.

August 2023 | ISBN 978-1-9993892-9-1

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Cover photo by Yuri Choufour.

Photos by Yuri Choufour, Alex Harris, Fernando Lessa, Pacific Northwest Kate, Ray Maichin, John McCormach, Jason Puddifoot.

Suggested citation

Pasternak, A., & Walters, K.E. 2023. Rights of Nature: Pathways to legal personhood for the Fraser River Estuary. *Raincoast Conservation Foundation*. Sidney BC Canada. ISBN 978-1-9993892-9-1. raincoast.org/reports/fraser-personhood/

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Acknowledgements

The author acknowledges that the work for this project took place on the unceded ancestral lands of the xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), Stó:lō and Səl̓ílwətaʔ/Selilwitulh (Tsleil- Waututh) Nations.

This report was produced as part of the UBC Sustainability Scholars Program, a partnership between the University of British Columbia and various local governments and organizations in support of providing graduate students with opportunities to do applied research on projects that advance sustainability across the region. This project was conducted under the mentorship of Raincoast Conservation Foundation staff.

The authors would like to acknowledge and thank Raincoast Conservation Foundation staff Misty MacDuffee, Auston Chhor, and Chris Genovali for their helpful revisions of this report.

Disclaimer

Please note that this report contains antiquated legal language when referencing provisions from Canadian legislation or direct quotes from older court cases, specifically with respect to First Nations, Inuit, and Métis people.

Several sources, specifically court documents, were made available only in Spanish, so there is potential that some sentences or findings represent a slight mistranslation or misrepresentation of the true findings or analysis of the author.

Imbuing the estuary with legal standing and personality captures the estuary's intrinsic value as a living organism, beyond what resources it can provide to support economic growth and industrialization.

Photo by Fernando Lessa.

Executive summary

As the largest river in western Canada and one of the most productive salmon-bearing rivers in the world, the Fraser River is a critically important ecosystem and economic driver for the region. The Fraser River Estuary, located at the mouth of the river where it meets Georgia Strait in the Pacific Ocean, is one of the province's most biodiverse regions, providing vital habitat for many bird, fish, and mammal species. Juvenile salmon rely on this estuary for food and protection during a critical phase of their development as they transition from a freshwater to the marine environment. However, ongoing colonization and industrialization have had devastating impacts on estuarine ecosystem health and Fraser River salmon populations.

Governance of the estuary is antiquated

The current state of Canada's environmental laws take an extractive approach to ecosystem management that fails to protect plant and animal species. British Columbia, a province whose identity is tied to its biodiversity, has no standalone protections for wildlife, such as endangered species legislation.

Regulators are unable, or unwilling, to address many of the existential threats facing species and habitats within the Fraser River Estuary. In many cases, environmental law authorizes this ecosystem's degradation by fragmenting interconnected habitats into 'natural resources' to be industrialized in the pursuit of economic growth.

The regulatory landscape perpetuates land-use, water management, and species management decisions to be made in silos, failing to account for the cumulative effects ongoing habitat destruction and degradation has on the resilience of the estuarine ecosystem. The estuary, and all the living things it supports, are not viewed as having intrinsic worth. Economic imperatives consistently override the need for ecological protection, and as a result, threaten the very existence of one of the most ecologically important regions in the province.

Rights of Nature

The Rights of Nature is a growing body of law that seeks to reframe how nature is conceptualized under the law, and subsequently how it is governed, by broadening the legal impetus for its protection. Laws granting rights to nature are not a catch-all solution, but rather a supplement to pre-existing conservation, restoration, and species recovery initiatives.

This report explores the permutations of rights of nature laws in jurisdictions worldwide and examines their compatibility within Canada's regulatory environment. It seeks to determine how granting the Fraser River Estuary legal rights and standing could produce much-needed changes to governance in the region and how those changes could accelerate conservation efforts already taking place.

A global survey of Rights of Nature laws

A global survey of Rights of Nature laws reveals the diversity of their permutations, informed by the legal system, cultural context, and political landscape in which they are enacted. They can be sorted into six distinct legal "pathways":

Constitutional law: several countries have entrenched the rights of nature in their nation's central organizing legal document, requiring all subsequent State action and legislation to respect the rights of natureNational or subnational law: national governments have granted rights to all natural ecosystems within the country as a part of broader environmental reforms.

Local law: local governments have sought to oppose industrial activity in their community by granting ecosystems legal rights and civilians the standing to enforce those rights in court.

Indigenous law: Indigenous governments have enacted rights of nature laws in attempts to codify their own laws and belief systems.

Judge-made law: in several jurisdictions, judges have unilaterally extended legal recognition and rights to nature without the government having passed legislation.

Treaty: settler governments have reached landmark agreements with Indigenous communities, some of which have included provisions that recognize specific ecosystems as legal subjects entitled to legal rights.

Each of these pathways differed in its effectiveness at achieving the purported benefits of Rights of Nature laws.

Recommendations

Based on an assessment of each pathway along several different criteria, including 1) the legal content (the law's scope and strength), 2) the form of law, and 3) the feasibility within the Canadian context – the following solutions emerged as the most compatible for according the Fraser River Estuary Rights of Nature:

- **Local laws** passed by Indigenous and local governments with jurisdiction over the region that recognize the estuary as a legal entity and rights-holder.
- **Intergovernmental agreements** among Indigenous governments that recognize the legal status of the estuary. These agreements should then be implemented through local laws that delineate the rights of the river and responsibilities owed to it in a manner aligned with each Nation's culture, worldview, and historical relationship to the ecosystem.

To be effective, the content of any Rights of Nature law must balance breadth of protections with the specificity required to implement the law and uphold the rights granted.

Elements of a robust Rights of Nature law include:

- Rights and responsibilities that are clearly identified and defined;
- Indicators to define and measure the rights accorded;
- Enforcement mechanisms to ensure these rights can be upheld;
- Provisions that allow for the ranking and resolving of competing interests.

Legal recognition of any kind must be accompanied by governance reform in the form of guardianship, management body, or co-governance model. Governance reform should be Indigenous-led and adopt a two-eye seeing approach informed by Indigenous knowledge and Western science that weaves knowledge of the lands, waters, and living things of which the estuary is composed.

Photo by Pacific Northwest Kate.

Introduction

The objective of this project is to better understand the feasibility of granting legal personhood to the Fraser River Estuary. This report seeks to provide an overview of the key legal pathways towards recognition of nature as a rights-bearing legal subject. We examine case studies from jurisdictions across the world alongside the current state of Canada and British Columbia's environmental law regime to determine which legal pathways are the most feasible to accord the Fraser River Estuary legal rights and recognition.

Project scope and methods

Case studies for each legal "pathway" were selected to provide an overview of how Rights of Nature have been accorded in legal systems across the world. Each pathway was then assessed along a range of qualitative factors that included their strength, scope, ease of implementation, enforceability, and feasibility within the Canadian legal context.

While we make recommendations on the legal pathways most compatible with the Canadian legal system and most likely to produce conservation outcomes, it does not dictate what the content of said laws should be or assign responsibility for their development or implementation. Ultimately, Rights of Nature laws are a tool to grant natural ecosystems more agency within a legal system and prompt governance reform, but are not a "one size fits all" solution. The intent of this report is to provide an overview of how other jurisdictions have implemented Rights of Nature laws, analyze these cases, and provide recommendations to policymakers about which pathways are best suited to the Canadian context and could make a meaningful impact on the governance of the Fraser River Estuary.

Decision-makers should prioritize conservation because nature has intrinsic value beyond the economic value derived from its exploitation.

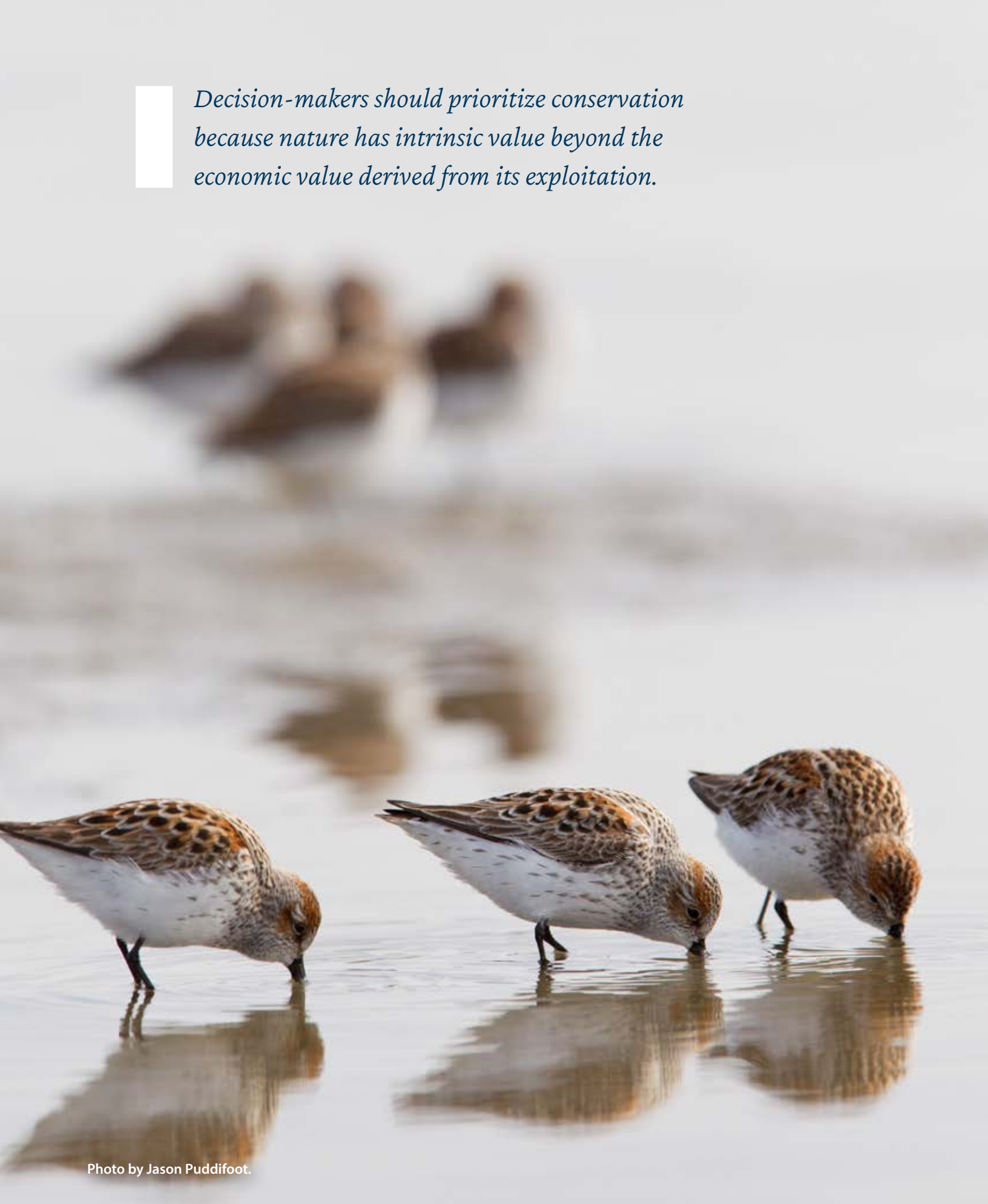

Photo by Jason Puddifoot.

Section I: About the river

Running from its headwaters in the Rocky Mountains to the northeastern Pacific Ocean, the Fraser River is the largest river on the West coast of Canada and one of the greatest salmon-producing rivers in the world.

It is an important component of Canada's economy and an integral part of the history, culture, spirituality, and legal systems of the First Nations in the region[1] who have acted as its stewards for thousands of years[2].

The Fraser River Estuary is the section of the river and adjacent floodplains that flows west through the Fraser Valley and Metro Vancouver into the delta where it meets the Salish Sea. The estuary comprises various habitats such as marsh, mud flats, and eelgrass beds, each of which provides unique habitats for a diversity of species. The Lower Fraser watershed provides important spawning and rearing habitat for more than half of the Fraser River's Chinook and chum, 65% of its coho, 80% of its pink, and significant populations of sockeye salmon.[3] Juvenile salmon rely heavily on the estuary where they feed and rapidly grow while adjusting to saline water[4]. This transition to marine life stages, is an especially vulnerable time in their development and underscores the importance of the Fraser River Estuary to young salmon.

The Fraser River has always been an important source of subsistence and culture to the First Nations who have occupied its shores for thousands of years.[5] Salmon were of particular significance to these communities' economy and culture, considered by many to be an integral part of their identity, economy, culture, and spirituality.

Fraser River salmon

Despite the critical role that the estuary plays in the development and health of salmon populations, most have experienced significant declines due to a myriad of threats. Only eight of the 54 Conservation Units (CUs)[6] of managed salmon in the Fraser are considered 'healthy' (Table 1.1). Recent years have seen a marked decline in the number of Chinook and sockeye returning to the Fraser to spawn. Habitat loss has compounded other challenges such as climate change, overfishing, mixed-stock fisheries, invasive species, pollution, interactions with hatchery fish, and increased predation that have produced this crisis in salmon population health.[7]

Table 1. Status of 46 salmon Conservation Units (and populations) in the Fraser River

Species	Lower Fraser CUs					Other Fraser CUs (and populations)				
Status	Not at risk	Threatened	Endangered	Special concern	Not assessed	Not at risk	Threatened	Endangered	Special concern	Not assessed
Chinook	0	1	1	1	1	1	3	9	0	2
Coho (Interior)							1			
Sockeye (lake-type)	2	0	1	2	0	5	1	7	3	1
Sockeye (river-type)	1	1	0	0	0					
Steelhead (Interior)								2		
Total	**3**	**2**	**2**	**3**	**1**	**6**	**5**	**18**	**3**	**3**

(Source: Raincoast Conservation Foundation (updated 2022), "Toward a vision for salmon habitat in the Lower Fraser River".)

Current and future threats

A history of habitat destruction

As European colonization began in the 1850s, the forests and wetlands that comprise the Lower Fraser land base were logged, drained, and developed to support industrialization and agriculture. By the start of the 21st century, forests and wetlands were reduced to one-tenth of their original land mass. Now more than 85% of floodplain habitat has been destroyed,[8] 20% of Lower Fraser streams have been completely lost, and the rest remain threatened or endangered.[9] Land alteration to support development was particularly devastating within the estuary, where most of the wetland habitat was drained and diked to create farmland and accommodate urbanization.

Ongoing impacts and threats

Much of the development within the Lower Fraser River watershed has adversely affected the health and resiliency of the estuary. The loss of forested riparian zones has resulted in bank destabilization, sediment runoff, higher summer temperatures, and loss of in-stream habitat complexity and invertebrate diversity. Land use and development within adjacent watersheds affects hydrology, water temperatures, food availability, vulnerability to stressors, mortality, and salmon productivity.[10,11] Construction on floodplains, channelization, and diking along the river has altered the river flow, its hydrology, and reduced water quality – even destroying some tributaries and habitats entirely. Within the estuary, jetties and causeways have created barriers to fish migration, forcing juvenile salmon into deeper, saltier waters before they have completed smoltification,[12] which can increase mortality and put them at higher risk of predation.

Pollution is yet another detrimental outcome of urbanization and industrial development. The Iona Jetty pumps an average of 557 million litres of sewage into the estuary every day, while the Roberts Bank coal port and container terminal has increased the concentrations of coal dust found in nearby mudflats. Upstream developments along Lower Fraser River, such as dredging and gravel extraction, introduce sediment and pollutants into the river stream that eventually reach the estuary. Runoff from agricultural activities in the Fraser Valley and Metro Vancouver regions further reduces water quality and introduces a suite of contaminants and pathogens into the water systems.

The degradation of the Fraser River Estuary is an important contributing factor in the decline of salmon abundances. Other threats to Fraser River salmon populations include mixed-stock fisheries, interactions with hatchery fish, and land use activities such as forestry and mining, which occur throughout the watershed. Climate change and associated freshwater and oceanographic changes further exacerbate these impacts[13].

Although the negative impacts of industrial development are already apparent throughout the Lower Fraser watershed and estuary, several other projects are underway or proposed. These projects will compound the current cumulative threats facing the estuary and the at-risk salmon populations it supports.

Why do we need conservation?

Pacific salmon are foundational species to British Columbia and are critical to the health and well-being of coastal ecosystems.[14] The health of a foundation species such as salmon has the potential to influence the health and structure of the entire ecosystem of which they are a part. For salmon to continue to contribute to the economy and culture of communities along the Fraser River, it is imperative that their populations are stabilized and recovered. Salmon recovery depends on the conservation of existing healthy fish habitat, and the restoration of degraded habitat.

Ecosystem services

Natural functions within the Fraser River Estuary provide a suite of benefits to the region, such as improved water quality, prevention of soil erosion, buffer zones for flood waters, and habitat for commercial and recreational fish species. Studies that have shown that the annual dollar value that these ecosystem services provide are significant in scale. Nearshore habitats provide flood protection and habitat worth $30 and $60 billion,[15] respectively, while land-based services such as "climate regulation, water filtration, flood protection, clean air, waste treatment, and water supply" create $5.4 billion in benefits. Considering the threat that a rapidly changing climate and corresponding extremes in precipitation events pose to Metro Vancouver cities, protecting and restoring estuarine habitats will be an investment in salmon recovery and community resiliency in the decades to come.

Intrinsic value of nature

Ultimately, decision-makers should prioritize conservation because nature has intrinsic value beyond the economic value derived from its exploitation. While evaluating the economic, social, and cultural benefits that ecosystems such as the estuary can provide for the communities it supports, it only complements the notion that protecting life is a moral responsibility. While scientific, cultural, and moral imperatives for conservation are strong, our legislative framework does not consider them equally. Instead, it prioritizes the conversion of natural systems into goods and services to pursue economic growth.

Notes and references

1 First documented sites of human occupation began appearing 10,000 to 8,000 years ago.

2 See Leah Ballantyne, Rayanna Seymour-Hourie, and Jessica Clogg, "Legal Traditions of the Peoples of the Lower Fraser River Summary Report" (2021) at 28, online (pdf), West Coast Environmental Law, <wcel.org/sites/default/files/medialib/2021-10_relaw_lffa_summary_doc_october_4_2021-compressed.pdf>; Leah Ballantyne, Rayanna Seymour-Hourie, and Jessica Clogg, "Legal Traditions of the Peoples of the Lower Fraser River Volume I: Foundational Principles" (2021) at 9, 21 online (pdf), West Coast Environmental Law, <wcel.org/sites/default/files/medialib/2021-10_lffa-relaw_project_volume_1_foundational_principles.pdf>

3 See Dave Scott, Ross Dixon and Misty MacDuffee, "Toward a Vision for Salmon Habitat in the Lower Fraser River" (2020) at 6, online (pdf), *Raincoast Conservation Foundation*, <www.raincoast.org/reports/salmon-vision/>.

4 Ibid.

5 First documented sites of human occupation began appearing 10,000 to 8,000 years ago.

6 Conservation units are defined by the Department of Fisheries and Oceans as "a group of wild Pacific salmon sufficiently isolated from other groups that, if extirpated, is very unlikely to recolonize naturally within an acceptable timeframe".

7 See Murray Ned et al, "Blueprint for restoring ecological governance to the Lower Fraser River" (2020) online (pdf), *Raincoast Conservation Foundation*, <www.raincoast.org/wp-content/uploads/2020/10/Blueprint-restoring-ecological-governance-Lower-Fraser-River.pdf>.

8 See Riley J. R. Finn et al, "Quantifying lost and inaccessible habitat for Pacific salmon in Canada's Lower Fraser River" (2021) 12:7 Ecosphere 1.

9 See Scott, Dixon, and MacDuffee, *supra* note 1 at 20.

10 Higher temperatures can also cause eggs to develop more quickly, creating a mismatch between the availability of prey sources and juvenile development.

11 The relationship between survival and temperature for ocean-captured fish was used to predict future (2010-2099) survival under simulated temperature increases in interior British Columbia rivers (Quesnel, Stellako-Late Stuart and Adams) salmon populations. A decrease of 9–16% in survival for these populations was predicted by the end of the century if the Fraser River continues to warm as predicted. Martins, Eduardo G., Scott G. Hinch, David A. Patterson, Merran J. Hague, Steven J. Cooke, Kristina M. Miller, Michael F. Lapointe, Karl K. English, and Anthony P. Farrell. "Effects of river temperature and climate warming on stock-specific survival of adult migrating Fraser River sockeye salmon (*Oncorhynchus nerka*)." *Global Change Biology* 17, no. 1 (2011): 99-114.

12 Smoltification is a stage of development where salmon undergo a series of complex physiological and behavioural changes that facilitate their transition from freshwater to seawater environments (summarized in Folmar and Dickhoff 1980).

13 Scott, MacDuffee, and Dixon, "Vision", 12.

14 See e.g. "Wild Salmon Program" (2023) online: *Raincoast Conservation Foundation* <https://www.raincoast.org/salmon/>.

The Rights of Nature movement argues that ecosystems should receive inherent rights and protections, similar to the concept of fundamental human rights.

Photo by Fernando Lessa.

Section II: Introduction to the Rights of Nature

Much of the degradation facing the Fraser River Estuary results from a Euro- anthropocentric view of nature that has permeated Western legal institutions. Informed by an economic system that prioritizes economic growth, this legal framework fragments nature – a complex, interconnected system – into resources, whose exploitation and degradation is authorized by the state. As such, environmental law in Canada functions more as a regulator of pollution and exploitation than a protector and steward of nature.

Canada's legal system is founded on a common law system of private property and ownership heavily influenced by the writings of John Locke and William Blackstone. These writers believed the moral and legal justification of private ownership was found in the sustained use and improvement of the land. To Locke, land that was not appropriated for capital accumulation through industry or agriculture was worthless.[16] As such, colonial land legislation in British Columbia authorized, even encouraged, the processes of pre-emption and homesteading,[17] which worked to systemically dispossess Indigenous Nations of lands and waters. Through pre-emption and homesteading, settlers were allowed to occupy unceded land and, upon "improving" the land by cultivation or industrial development, obtain private ownership over the land. Indigenous peoples were intentionally excluded from the land policy that allowed pre-emption,[18] were consequently forcibly placed on reserves, and further subjected to the *Indian Act.* This near-complete exclusion of Indigenous people from land legislation ensured their erasure from the colonial property regime.[19]

Contemporary Canadian property law remains centred on Locke's work, captured by the maxim *jus utendi, fruendi, abutendi* – the right to use, benefit from, and alienate the land. And while our philosophical and scientific understanding of the value of nature has evolved such that it is no longer viewed as 'waste,' the prioritization of private property rights, economic productivity, and wealth accumulation from the land remains paramount in land and water governance laws. Decision-makers prioritize resource exploitation over conservation and restoration, pursuing industrial development at the expense of ecological well-being, even when numerous studies have articulated nature's value – cultural, spiritual, even economic[20] – and the costs of ongoing ecological destruction.

This view of nature as something to be acquired, privately owned, and made 'productive' through exploitation is deeply tied to the history of colonization. Property laws and private ownership were the legal instruments that authorized the appropriation of Indigenous lands and water for the purpose of European wealth accumulation.[21] Further, settler colonialism suppressed Indigenous governance structures through the imposition of colonial water governance and land management regimes, a process that continues today within contemporary resource, land, and water policy.[22] As a result, Indigenous peoples also dispossessed of their cultural and spiritual connection with their lands and waters, a process later recognized as cultural genocide.[23] Colonial legal concepts of private property ownership and fee simple land system, still in use in Canada today, remains what Bhandar (2018) calls "the juridical expression of an economic system and philosophical worldview that posits individual private property ownership as a necessary precondition for individual and national development and progress".[24] National development and progress are synonymous with industrialization and natural resource exploitation that has ushered in the unprecedented level of ecological collapse we see today.

Overview of the philosophy

Rights of Nature is a legal doctrine that conceives of nature or natural entities as rights-bearing legal subjects. This doctrine has evolved from a philosophical or cosmological perspective into a global movement advocating for the recognition of nature as a rights-holder and for institutional reform to uphold these rights.

The contemporary Rights of Nature movement stems from a broader body of legal philosophy and governance called Earth Jurisprudence, which "argues that human systems — legal, governance, economic— should be designed to conform with the way the natural world actually works, rather than trying to force nature to conform to human will."[25] Rights of Nature then refers to a subset of Earth Jurisprudence that seeks to codify the norms of Earth Jurisprudence through legal provisions that recognize ecosystems and subjects of rights, rather than private property to be exploited. While this is certainly not the only pathway to entrench Earth Jurisprudence within political, legal, and governance systems, it is certainly the most prevalent.

Advocates argue that Rights of Nature laws can fundamentally alter how the regulatory framework conceptualizes nature. Rights of Nature provisions represent an alternative mode of relating to nature, contrary to laws that accommodate market structures that fragment nature into a set of resources to be owned and exploited. Ultimately, these laws intend to balance private property rights with the rights of all living entities to exist and thrive within a healthy, intact environment.[26] The proposed consequences are far-reaching: 1) allowing nature to have legal standing to enforce its rights; 2) giving courts greater latitude to account for scientific evidence during environmental and infrastructure-based litigation,[27] 3) providing an additional avenue for Indigenous communities to enforce their rights and integrate their value-systems within a colonial framework;[28] and 4) better entrenching ethical values of conservation and biodiversity within a jurisdiction's legal fabric.

Above all, this movement represents a paradigm shift in how nature is conceptualized under the law: from the 'objectification' of nature that accompanies an anthropocentric approach to governance, to the 'subjectification' of nature as an entity that possesses intrinsic value outside of its economic productivity.

This paradigm shift has gained increasing momentum in jurisdictions across the world. As of August 2022, at least 50 jurisdictions within 13 countries have recognized some form of natural entity as some form of rights-bearing subject.

Why do we need the Rights of Nature?

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services warns that the world cannot meet its climate change commitments without "transformative change across economic, social, political, and technological factors"[29], including legal paradigms and governance systems. The underlying philosophy and impact potential of Rights of Nature laws could be part of this necessary paradigm shift, declared a "legal revolution" by David Boyd, UN Special Rapporteur on Human Rights and the Environment.[30]

As it stands today, environmental law is woefully ill-equipped to stem the exploitation of nature. Legislation has thus far been ineffective at preventing the widespread destruction of ecosystems in the pursuit of industrial growth and profit generation. In fact, environmental law is often the legal justification that authorizes such exploitation. By failing to recognize the intrinsic value of nature, the current environmental regulatory regime privileges private property rights, perceives environmental legal disputes as a "conflict between two (often imbalanced) human interests," and ignores "the most fundamental interest" – that of the natural ecosystem.[31]

Although environmental law has long sought to protect the interests of nature and all of its elements, it is often stymied by the regulatory environment and economic system in which it operates. In some instances,

nature conservation positions itself as incidental to human rights, such as the right to a healthy environment or health and well-being. Over ninety countries[32] have recognized the human right to a healthy environment. However, most of them fail to recognize that healthy ecosystems are needed to provide the necessary conditions for human health.

Other regulatory solutions involve market mechanisms, such as carbon pricing and cap-and-trade scheme, which involve the commodification of nature and still authorize the degradation of nature, albeit in a reduced capacity. Neither of these avenues acknowledges nature as a whole, living entity with rights and interests akin to those of individuals or collective entities. Rights of Nature legislation is therefore a pragmatic tool to advance environmental protection without upending the current legal framework, while also laying the foundation for a more foundational shift that re-imagines the relationship between human and non-human entities.[33]

Legal personhood has long been accorded to entities that are not natural persons per se. Instead, legal personhood provides the basis for ascribing legal rights to an entity and can be divorced from the philosophical concept of personhood. For example, collective entities such as corporations, municipalities, and universities are ascribed the rights, protections, privileges, responsibilities, and liabilities of a natural person, which grants them legal capacity and allows them to function within the broader society of which they are a part. Therefore, it is feasible to extend the same legal recognition to non-human collective entities, such as specific species, ecosystems, or nature more broadly.

How can Rights of Nature be conceptualized?

In their book *The Politics of the Rights of Nature,* Kauffman and Martin identify two primary models for structuring Rights of Nature laws: the "Nature's Rights Model" used in Ecuador, Bolivia, and the United States, and the "Legal Personhood Model" favoured by Colombia, New Zealand, and India (see Table 2.1).[34]

However, there are several other factors to consider when surveying and analyzing the different permutations of Rights of Nature laws. These include the legal subject defined as having legal rights; the legal form that guarantees the rights; the content of the rights, and conversely, the responsibilities, duties, or prohibitions that accompany these rights; and finally, the enforcement mechanisms that ensure these rights have legal force once enacted. These factors map onto Kauffman and Martin's dualist categorization of Rights of Nature laws.

Table 2.1. Rights of Nature models

	Nature's Rights Model	Legal Personhood Model
What entity has rights?	All natural entities within the jurisdiction have rights	Only particular ecosystems or natural entities have rights
What is the content of the rights?	Unique rights for the ecosystem are recognized and specified	The same rights and liabilities of a legal person are extended to the ecosystem
Who can enforce the rights?	All civilians within the jurisdiction are entitled to enforce the rights, but not required to	Specific guardians are appointed to represent and enforce nature's rights
How are the rights enforced?	Violations must be reported and upheld	Guardians are integrated within ecosystem management systems, and nature's rights are embedded in decision-making
What jurisdictions follow this model?	Bolivia, Ecuador, United States	India, New Zealand, Colombia

Adapted from Kauffman and Martin, The Politics of Rights of Nature.

Other important considerations include which legal or legislative body granted the rights and the political and legal systems meant to recognize and uphold the rights. While less concerned with the specific enactment of nature's rights or the content of these rights, these contextual factors have implications for the future enforcement and application of the natural entities' rights. In sum, these considerations are useful to determine exactly how a Rights of Nature model could adapt to the Canadian context.

Notes and references

15 See Scott, Dixon and MacDuffee, *supra* note 4 at 49, citing Michelle Molnar, Maya Kocian, and David Batker, "Valuing the Aquatic. Benefits of British Columbia's Lower Mainland: Nearshore Natural Capital Valuation" (2012) online (pdf): *David Suzuki Foundation and Earth Economics*, <davidsuzuki.org/wp-content/uploads/2012/11/nearshore-natural-capital-valuation-aquatic-benefits-british-columbia-lower-mainland.pdf>.

16 "Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, wast [sic]; and we shall find the benefit of it amount to little more than nothing." - cited in Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018), at 48.

17 Bhandar defines pre-emption as a legal device that "allowed white settlers to stake out territory and, upon improving the land by cultivation, to obtain ownership of that land". Homesteading refers to a set of policies to encourage white settlement in Western Canada, where the government granted large plots of unceded Indigenous lands to individuals and groups, provided they made "improvements" to the land through construction and/or cultivation.

18 Indigenous people were not granted the right to pre-empt land unless through special permission. See *An Act Respecting the Land of the Crown*, RSBC 1911, c128.

19 See Bhandar, *supra* note 14 at 60.

20 See, e.g. Raincoast Value of Nature analysis

21 See Bhandar, *supra* note 14 at 4, 12.

22 See Nicole J Wilson and Jody Inkster, "Respecting water: Indigenous water governance, ontologies, and the politics of kinship on the ground" (2018) 0:0 Environment and Planning E: Nature and Space, 1 at 2.

23 See Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 3.

24 See Bhandar, *supra* note 14 at 79-80.

25 See Craig M Kauffman, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand" (2020) 27:3 Interdisciplinary Studies in Literature and Environment, 578 at 579-80.

26 Ibid at 581.

27 See Daniel P. Corrigan and Markku Oksanen, *Rights of nature: a re-examination* (London: Routledge, 2021) at 1.

28 See e.g. Jacinta Ruru, "First Laws: Tikanga Māori in/and the Law" (2018) VUWLR 49:2 211 at 220.

29 Diaz et al, "Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services" (2019) at 5, online (pdf), *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* < ipbes.net/sites/default/files/downloads/spm_unedited_advance_for_posting_htn.pdf>.

30 See David R. Boyd, *The Rights Of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017).

31 Craig Kauffman and Pamela Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future*, (Cambridge: MIT Press, 2021), at 7.

32 *Ibid* at 3.

33 See Corrigan and Oksanen, *supra* note 25 at 15.

34 See Kauffman and Martin, *supra* note 29 at 15.

Canada's regulatory landscape is antiquated. Federal and provincial legislation in Canada reflects an anthropocentric view of nature as a resource that is to be owned and exploited.

Photo by Alex Harris.

Section III: Legal landscape analysis

Canada's constitutional arrangement and division of power

Canada is a federal system with legislative powers divided between provincial and federal governments. For legislation to be considered valid, the provision must be "linked to the appropriate head of power"[35] – that is, the enacting body must be able to regulate such matters under the Canadian constitution. Canada's Constitution enshrines the nation's division of powers, identifying which matters fall under federal or provincial jurisdiction. Canada's federalist system creates a complex regulatory landscape regarding environmental issues. Courts have recognized that the environment is "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."[36]

Decisions that impact the environment, itself a nebulous concept, necessarily touch on several distinct heads of power assigned to different levels of government. Provinces own most public lands and natural resources within their territory,[37] and therefore have exclusive jurisdiction over forestry, mining, hydroelectric development, and fresh and groundwater. Conversely, the federal government has jurisdiction over fisheries, navigation, and First Nations lands and reserves.[38]

British Columbia's regulatory system is more complex because the majority of land was stolen from Indigenous Nations who never entered treaty agreements. Few historical treaties were signed within the province, and few have been finalized through the modern treaty process; therefore, most of the land within the province remains unceded and illegally occupied First Nations' territory. Environmental issues – which necessarily touch on resource development, land management decisions, water use and conservation, and property ownership – create a web of overlapping jurisdictions between the federal government, provincial government, First Nations' governments, corporations, and private landowners.[39]

Anthropocentric law

Canada's economy currently depends on the exploitation of natural resources, a reality incompatible with responding to climate change and biodiversity commitments. The tension between these competing interests – the need for climate adaptation and mitigation policies, species conservation, political commitments to a Just Transition,[40] and Canada's economic reliance on natural resource exploitation – means that environmental policy has become a politically charged issue, creating deep divides within the country. Importantly, it fails to conserve and protect endangered species, their Critical Habitats,[41] and honour Indigenous peoples' relationships with land and water, all while advancing economic development and corporate interests. These failures are particularly notable in British Columbia, which, despite being Canada's most biodiverse province, does not have provincial legislation protecting wildlife, endangered species, or their habitats.

Federal and provincial legislation in Canada reflects an anthropocentric view of nature as a resource that

is to be owned and exploited. Most legislation that regulates or references natural entities contains a provision that vests ownership in the Crown and exists to authorize exploitation, degradation, use, and pollution of nature.

Table 3.1. Provincial legislation in British Columbia related to the regulation of natural entities

The BC *Wildlife Act*: vests ownership in all wildlife in British Columbia in the government[42] and "[a] person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife."	The BC *Water Sustainability Act* vests "the property in and the right to use and flow of all the water at any time" in the government. This pertains to both freshwater and groundwater sources within the province, subject to the water licences of private landowners[43]
Under British Columbia's *Identified Wildlife Management Strategy*, wildlife conservation efforts cannot impede logging yields beyond "a limit of 1% to the allowable impact to short-term harvest levels"[44]	BC's *Government Actions Regulation to the Forest and Range Practices Act* prohibits wildlife and habitat protections that "unduly reduce the supply of timber from British Columbia's forests"[45]
The BC *Environmental Management Act* authorizes the exploitation and degradation of the environment. Any protective measures are inherently reactive, limited to circumstances where there has already been a "detrimental environmental impact" – that is, "a change in the quality of air, land or water [that] substantially reduces the usefulness of the environment or its capacity to support life."[46]	

Governance landscape of the Fraser River Estuary

Division of powers

Decisions that pertain to the governance of the Fraser River Estuary are subject to a host of environmental legislation. Located at the mouth of the Fraser River where it meets Georgia Strait in the Pacific Ocean, the estuary is subject to both federal and provincial legislation, often falling under overlapping jurisdictions.

Some areas of the estuary fall under the jurisdiction of the Vancouver Fraser Port Authority, a federal body under Transport Canada "responsible for the stewardship of federal port lands at the Port of Vancouver."[47] Under the Constitutional division of powers, different elements of the Fraser River Estuary fall under either federal or provincial competency, including tidal fish habitat (federal) and the deeper marine floor of the Strait of Georgia (provincial) (Table 3.1). Decisions are also influenced by rights-holders in the region, most notably the First Nations communities whose territories include the estuary, as well as industry groups, environmental non-governmental organizations, and civil society.

Table 3.2. Summary of the constitutional division of powers

Federal Competency	Provincial Competency
The public property, which includes public harbour, lighthouses and piers, rivers and lake improvements, and lands set apart for general public purposes[48]	The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon[49]
The regulation of trade and commerce[50]	Local Works and Undertakings[51]
Navigation and shipping,[52] both interprovincial and international trade and commerce	Generally all Matters of a merely local or private Nature in the Province[53]
All aspect of seacoast and inland fisheries, including conservation, technology, and anti-pollution[54]	Exploration for non-renewable natural resources in the province[55]
Indians, and land reserved for Indians[56]	Development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom[57]

Legislation that governs the Fraser River Estuary

Fisheries Act

In 2019, the Fisheries Act underwent several reforms intended to restore comprehensive protections for fish and habitat, strengthen the role of Indigenous decision-makers, and better integrate principles of sustainability, conservation, and restoration within the fishing industry.[58] Fish stock provisions place binding obligations on the Department of Fisheries and Oceans to sustainably manage fish stocks and implement rebuilding plan when stocks fall below their respective reference points[59]. There are prohibitions against causing the harmful alteration, disruption or destruction of fish habitat[60]

Impact Assessment Act (IAA)

Federal legislation that outlines the "process for assessing the impacts of major projects and projects carried out on federal lands or outside of Canada". A revised version of the legislation was passed in 2021, with revised provisions intended to identify important environmental issues early in the project planning phase, define whether a project can be considered within the public interest, after accounting for its impact on sustainability, "environmental effects, mitigation measures, climate change, and effects on Indigenous peoples and their rights" and provide greater transparency on important industrial and environmental decision.[61] This *Act* is key "to holding governments and industry accountable for thoroughly evaluating the environmental and community impacts of projects as well as the effects of projects on Indigenous peoples and their rights".[62]

Species at Risk Act (SARA)

Federal legislation that allows the government to designate species as either data-deficient, not at risk, special concern, threatened, endangered, extirpated, or extinct, and implement actions necessary to prevent their extinction. The purposes of this legislation are threefold:[63]

(i) to prevent wildlife species at risk from becoming extinct or extirpated from the wild in Canada,

(ii) to provide for the recovery of wildlife species at risk in Canada; and

(iii) to provide for the management of "species of concern" in order to prevent them from becoming endangered or threatened

Species listed as endangered are subject to additional protections under the law, which include:

- Prohibitions against damage or destruction of their residence[64]
- Either the Minister of Environment and Climate Change or the Minister of Fisheries and Oceans, when appropriate, must prepare a strategy for species recovery[65] and report on its implementation[66]
- Habitat of endangered species may be subject to additional protections as a "critical habitat"[67], which the public is prohibited from damaging or destroying[68]

Under *SARA*, the government created COSEWIC (Committee on the Status of Endangered Wildlife in Canada)[69] to assess the conservation status of wildlife species in Canada based on quantitative criteria; it excludes political, social, or economic factors relating to the species under consideration. Although these assessments are not legally binding, wildlife species can qualify for legal protection and recovery under SARA once assessed and recommended to be listed by COSEWIC. While many Pacific salmon populations have been assessed by COSEWIC, no Pacific salmon populations have been listed and accorded statutory protections under *SARA*.

Canada's regulatory landscape is antiquated

The ongoing and proposed threats to the well-being of the Fraser River Estuary indicate that the current governance and regulatory system is ill-equipped to ensure that the ecological integrity of the region remains intact. Despite a host of regulations that indicate prioritization of restoration and widespread Ministerial powers to curb activities known to cause ecosystem degradation, new industrial projects are approved with no indication that the estuary ecosystem can accommodate them without dire species decline and loss.

Fisheries Act

While the *Fisheries Act* contains provisions that require the Minister of Fisheries and Oceans to consider restoration objectives, there is no impetus to do so. Indeed, the Minister is welcome to prioritize economic pursuits over restoration objectives, cumulative impacts, and the deleterious impacts of habitat destruction on fish habitat and population recovery. Certainly, the Minister may take actions concerning conservation, but they are not mandated to – as long as the economic imperative outweighs environmental concerns, the Minister need not act in favour of conservation.

A recent example of this is the contentious approval of the Roberts Bank Terminal 2 project in the spring of 2023 despite damning conclusions from a federal independent review panel. The panel found that the project will have significant adverse cumulative effects on endangered Southern Resident killer whales and threatened Fraser River Chinook salmon[70]. The effects of the project would be 'permanent, irreversible, and continuous'[71] on at-risk populations, indicating that despite clear scientific evidence, economic imperatives are prioritzed over endangered species recovery and ecosystem health.

This issue of mere consideration in place of mandatory action is apparent within the newly enacted conservation and rebuilding plans. Aside from two

populations of sockeye salmon that have previous recovery plans under the National Conservation Strategy, no other threatened or endangered salmon populations have such recovery plans. Additionally, no rebuilding or sustainable management plans are in place under the fish stock provisions of the Fisheries Act.[72] The Fisheries Act also does not require Fisheries and Oceans Canada to undertake rebuilding plans at the Designated Unit/Conservation Unit identified for conservation by COSEWIC. The Fisheries Act will aggregate populations and prioritize rebuilding Stock Management Units within the context of fishery (versus population) recovery.

Further, offsetting and mitigation measures for habitat loss are insufficient. The literature has concluded that "no-net loss" policies, which allow for offsetting and mitigation projects to compensate for the destruction of fish habitat by industrial projects, are not adequate methods of conserving the remaining productive and intact fish habitat in the estuary.[73] Yet under the *Fisheries Act*, Ministerial approval of industrial projects can proceed as long as the proposal includes these offsetting measures, even without evidence to support their efficacy.

Finally, top-down federal management measures for wild salmon populations have historically had adverse cultural and socio-economic impacts on First Nations fisheries in the region,[74] who have long relied upon salmon and other fish in the estuary for cultural, ceremonial, economic, and subsistence purposes. Their right to do so is enshrined in s35 of the *Canadian Constitution Act, 1982*. The revised *Fisheries Act* does not require consultation with Indigenous communities, nor does it contain provisions that implement principles of free, prior, and informed consent; encourage Indigenous governance and stewardship; or recognize Indigenous jurisdiction over their territories and resources, despite recommendations from the Standing Committee on Fisheries and Oceans to do so.[75,76]

Species at Risk Act

Absent stronger complementary legislation, the *Species at Risk Act* is ineffective at preventing development in highly ecologically productive habitats, or even in habitats designated as 'Critical Habitat'. A report from Ecojustice identifies several shortcomings with the Species at Risk Act:

- Species are denied listing even with clear evidence that illustrates their risk of extinction: "[t]o date, 30 species have been denied legal listing under SARA, despite the fact COSEWIC has provided data that clearly illustrates their risk of extinction."[77]
- *SARA* contains no mandatory protection of habitat on provincial lands for a majority of the species listed as endangered or threatened

These shortcomings have failed to protect species at risk in the estuary in the recent past. Government actors and corporations may also try to avoid obligations and prohibitions imposed by SARA. For example, the Canadian government approved the Trans Mountain Pipeline despite overwhelming evidence about the adverse effects on the Southern Resident killer whale population (Schedule 1 under *SARA*) due to impacts on their Critical Habitat, salmon prey availability and from increased underwater noise.

Regardless, the National Energy Board initially concluded that the Trans Mountain expansion "was unlikely to cause significant adverse environmental effects" because it chose not to include the impacts of "project-related marine shipping" that carried with it the most significant impacts on the whale population. After the federal court quashed the initial approval, the National Energy Board conducted a reconsideration. This second phase found that shipping was likely to cause significant adverse environmental effects on Southern Resident killer whales. The government later re-approved the project on the basis that those effects were "justified in the circumstances".

This result indicates that the federal government may approve projects in spite of their significant adverse

effects on *SARA*-listed species. Raincoast is currently challenging the legal basis for the government's prioritization of development projects over species protection in a legal challenge to the Roberts Bank Terminal 2 Project approval.

The absence of provincial laws in British Columbia that protect endangered wildlife or their habitat further weakens *SARA* and its ability to protect at-risk species and their habitats. While there is a provincial scientific body that monitors and lists species according to risk, these classifications trigger no legal protections, even though over 43% of the province's assessed species are at risk.[78] Only four of the province's 138 "red-listed" endangered species are legally listed under the provincial *Wildlife Act* and entitled to marginal protections contained in the legislation.[79]

Impact Assessment Act

While the IAA was a marked improvement over prior impact assessment legislation, it retains several shortcomings that dilute its environmental protection potential. Although the legislation intends to "strengthen environmental protection [and] restore trust in how decisions are made," several provisions undermine these objectives. First, the statute does not include any requirements to reduce the climate impacts of proposed projects, most of which involve resource extraction or transportation of fossil fuels. Second, the Act's implementation is left to the discretion of the Environment and Climate Change Minister, the Impact Assessment Agency of Canada, and the Cabinet. As such, these bodies can allow certain projects to avoid undergoing impact assessments, violate legislation (such as SARA), and be approved without disclosing the full impact on communities and the environment.

A tale of two legal orders

Of course, colonial administration is not the only legal landscape of import. British Columbia's legal landscape is unique within Canada, as very few treaties were signed. Although the government has since developed a modern treaty process to handle outstanding land claims, few have been signed and implemented. Except for the Douglas Treaties on Vancouver Island, Treaty 8 territory in north-eastern British Columbia, and the six modern treaties that have been signed and ratified, the rest of the land within the province remains unceded First Nations territory.

The colonial administration has done much to try and dilute the significance of this legal reality. Aboriginal rights and title can only be asserted through treaty or litigation, which is time-intensive, costly, and not guaranteed to produce a favourable outcome for Indigenous litigants.[80] In 1982, the government constitutionally enshrined Aboriginal rights within Section 35 of the *Constitution Act, 1982*, which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." However, the definition of the content, scope, and strength of Aboriginal rights was to be mediated by the colonial legal system.

Indigenous claimants must meet strict legal tests set out by the Canadian courts to succeed in asserting Aboriginal rights or title. Aboriginal rights must be "a practice, tradition or custom integral to the distinctive culture" of the "pre-contact societ[y]."[81] Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes…[that] must not be irreconcilable with the nature of the group's attachment to that land."[82] Per *Tsilhqot'in*, "[t]he right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[83] To prove Aboriginal title, claimants must prove sufficiency, exclusivity, and continuity of occupation[84] of the lands to a standard determined by the colonial judicial system. Indeed, the federal courts define the scope, enforceability, and legitimacy of Aboriginal rights and title – despite their role in legitimating the dispossession of Indigenous lands in the first place. However, Canada's commitment to implementing UNDRIP may prompt a more

fulsome recognition and definition of what constitutes Indigenous rights in Canada.

As identified above, there are three avenues recognized by the colonial legal system through which Indigenous communities can exercise governance and jurisdiction over their lands and water: Aboriginal rights, Aboriginal title, and treaty rights. In British Columbia, the courts recognize, affirm, and uphold Aboriginal rights and title. However, in *Tsilhqot'in* the Supreme Court held that these rights can still be encroached if "the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982."[85] What qualifies as "justified" is broad: "development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."[86] It is important to note that these justifications must be consistent with the Crown's fiduciary responsibility[87,88] to Indigenous peoples, cannot "substantially deprive future generations of the benefit of the land,"[89] and now must be consistent with the principles of UNDRIP.

These court decisions indicate that the Crown cannot ignore Aboriginal rights and title claims, and that Indigenous Nations must be consulted and accommodated in decisions that affect their territories and ways of life. The legal landscape of Aboriginal rights and title will continue to evolve alongside the Canadian government's commitments to meaningful reconciliation. As such, the legal and moral impetus for the Crown to engage with First Nations more meaningfully on land and water governance matters. This is especially true considering the commitments made by the federal and British Columbian governments to implement UNDRIP.

Canada's changing legal landscape

UNDRIP

Despite the current state of the Canadian regulatory landscape, dominated by Eurocentric environmental regulations, Canada's commitment to implementing UNDRIP "without qualification"[90] represents a transformative potential to reimagine Canada's resource laws alongside the revitalization of Indigenous laws and self-government. Further, as Indigenous rights and title are refined in the courts and the modern treaty process continues, within the province, opportunities to strengthen the scope of Indigenous governance are increasingly prevalent. These developments have potential implications for creating novel pathways for Rights of Nature laws to be passed.

Implementing these provisions "without qualification" implies that the province's water, resource, and land governance system must be reformed. Such reform must be consistent with the laws, political systems, land tenure systems, and diverse cultural values of different Nations within the province. If the colonial administration is to implement UNDRIP's provisions in a meaningful way, the environmental regulatory landscape will need to change in the upcoming years. This period of widespread change presents the opportunity to reshape the region's environmental and water governance laws to reflect a more ecocentric legal regime that prioritizes species recovery, habitat restoration, and conservation.

Relevant provisions

Several of UNDRIP's provisions are consistent with increased Indigenous jurisdiction over their territories, which includes the Lower Fraser River Nations along the estuary (Table 3.3).

Table 3.3. List of relevant UNDRIP provisions

Article 5	Article 18	Article 19
Indigenous peoples have the right to **maintain and strengthen their distinct political, legal, economic, social and cultural institutions**, while retaining their right to[91] participate fully, if they so choose, in the political, economic, social and cultural life of the State.	Indigenous peoples have the **right to participate in decision making in matters which would affect their rights**, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions	States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to **obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them**;

Article 23	Article 26	Article 27
Indigenous peoples have the **right to determine and develop priorities and strategies for exercising their right to development**. In particular Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic social programs affecting them and, as far as possible, to administer such programs through their own institutions	1. Indigenous peoples have the **right to the lands, territories and resources** which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the **right to own, use, develop and control the lands, territories and resources.** 3. **States shall give legal recognition** and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.	**States shall establish** and implement… **a fair, independent, impartial, open and transparent process**, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to **recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources…**

Article 29	Article 32
Indigenous peoples have the **right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources**. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.	1. Indigenous peoples have the **right to determine and develop priorities and strategies** for the **development or use of their lands or territories and other resources**. 2. **States shall consult and cooperate** in good faith with the indigenous peoples… **to obtain their free and informed consent** prior to the approval of any project affecting their lands or territories and other resources… 3. States shall provide effective mechanisms for just and fair redress for any such activities, and **appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.**

UNDRIP implementation to date

FEDERAL

With the federal UNDRIP declaration coming into force in 2021, the federal government is set to advance the rights contained in the Declaration. However, that isn't to say this implementation is guaranteed to be seamless or timely. There has been heated debate amongst policymakers and activists about the term "free and prior consent" (FPIC), and whether that confers the power to veto infrastructure and resource projects to Indigenous communities whose lands will be affected. While the definition of consent, the language of the Declaration itself, and the academic community all unequivocally conflate FPIC with veto power, the Canadian government has long tried to dilute the meaning of the term. Released in 2021, the government's Principles respecting the Government of Canada's relationship with Indigenous peoples, states that the "Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources." As noted by Shiri Pasternak at the Yellowhead Institute, UNDRIP does not contain such qualifications on FPIC.

PROVINCIAL

British Columbia became the first jurisdiction to legislate UNDRIP, passing the Declaration of Rights of Indigenous Peoples Act (DRIPA) in 2019. DRIPA provides the framework for the implementation of UNDRIP in the province, mandating the provincial government align all Provincial laws with the Declaration, report annually on its progress, and pursue joint or consent-based decision-making agreements with Indigenous governing bodies, among other commitments. The province's priorities for 2022-2027 are fourfold: self-determination and inherent right of self-government; title and rights of Indigenous Peoples; ending Indigenous-specific racism and discrimination; and social, cultural, and economic well-being. Three of these four priorities intersect with opportunities to increase the presence and strength of Indigenous legal orders within the settler-colonial framework. However, it is important to note that DRIPA is high-level legislation that merely sets an intention to implement UNDRIP, and tangible changes in the form of increased statutory decision making or amendments to existing provincial laws have not occurred since DRIPA's enactment.

Notes and references

35 See *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 48 [*IAA*].

36 *Ibid* at para 47.

37 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5.

38 *Ibid* at s 91.

39 See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1 CNLR 14; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

40 Natural Resources Canada, News Release, "Canada Launches Just Transition Engagement" (21 July 2021), online: *Government of Canada*, <canada.ca/en/natural-resources-canada/news/2021/07/canada-launches-just-transition-engagement.html>.

41 The *Species at Risk Act* defines Critical Habitat as the "habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species". See *Species at Risk Act*, SC 2002, c-29, s 2(1).

42 See *Wildlife Act*, RSBC 1996, c-488, s 2(1).

43 See *Water Sustainability Act*, SBC 2014, c-15, s 5(1)(2).

44 See Ministry of Water, Land and Air Protection, *Identified Wildlife Management Strategy Procedures for Managing Identified Wildlife* (2004) at 11.

45 See *Government Actions Regulation*, BC Reg 582/2004 to the *Forest and Range Practices Act*, SBC 2002, c 69, s 2 (forestry law prohibit wildlife protections if doing so "unduly reduce[s] the supply of timber from British Columbia's forests.")..

46 See Environmental Management Act, SBC 2003, c53, s 1(2).

47 "About us", (accessed 15 June 2022), online: *Port of Vancouver*, <www.portvancouver.com/about-us/>.

48 See *Constitution Act, 1867*, *supra* note 35 at s 91(1).

49 *Ibid* at s 92(5).

50 *Ibid* at s 91(2)

51 *Ibid* at s 92(10)

52 *Ibid* at s 91(10)

53 *Ibid* at s 92(16)

54 *Ibid* at s 91(12)

55 *Ibid* at s 92A(1)(a)

56 Ibid at s 91(24)

57 Ibid at s 92A(1)(b)

58 See Fisheries and Oceans Canada, "Introducing Canada's modernized Fisheries Act" (14 April 2021), online: *Government of Canada*, <www.dfo-mpo.gc.ca/campaign-campagne/fisheries-act-loi-sur-les-peches/introduction-eng.html>.

59 See *Fisheries Act*, RSC 1985, c-F-14, 6.1

60 *Ibid* at s 35.

61 Zoryana Cherwick, "Breaking down Canada's Impact Assessment Act (7 December 2021), online: *EcoJustice*, <ecojustice.ca/breaking-down-canadas-impact-assessment-act/>.

62 *Ibid*.

63 Richard D. Lindgren, "*The Species at Risk Act*: an Overview" (2001) at 2, online (pdf), *Canadian Environmental Law Association*, <cela.ca/wp-content/uploads/2019/03/408sara.pdf>.

64 See See *Species at Risk Act*, SC 2002, c-29, s 33.

65 *Ibid* at s 37

66 *Ibid* at s 46

67 *Ibid* at s 58

68 *Ibid* at s 58 (note that the critical habitat must be on federal lands and the species listed must be aquatic per s 51(a)(1)(2))

69 COSEWIC 'is an independent advisory panel to the Minister of the Environment and Climate Change Canada that meets twice a year to assess the status of wildlife species at risk of extinction. See "About us" (accessed 2 July 2022), online: *Committee on the Status of Endangered Wildlife in Canada*, <www.cosewic.ca/index.php/en-ca/>.

70 Review Panel for the Roberts Bank Terminal 2 project. "Federal review panel report for the Roberts Bank Terminal 2 project" (2020) <https://iaac-aeic.gc.ca/050/documents/p80054/134506E.pdf>.

71 *Ibid* at 187.

72 As of April 2022, the DFO is required to develop and implement rebuilding plans for the following species: Atlantic cod, Atlantic herring, Chinook salmon, Coho salmon, Pacific Herring, American Plaice, Winter flounder, and White hake; and obligated to enact measures to maintain healthier stocks for the following populations: "Atlantic Halibut, Lobster, Northern Shrimp (4 stocks), Pacific Hake, Acadian Redfish, Sablefish, Silver Hake, Snow crab (3 stocks), and Yelloweye rockfish (outside waters). See Fisheries and Oceans Canada, New Release, "Government of Canada takes critical step to rebuilding fish stocks" (8 April 2022), online: *Government of Canada*. As of August 2023, no plans have been created or implemented for salmon. <www.canada.ca/en/fisheries-oceans/news/2022/04/government-of-canada-takes-critical-step-to-rebuilding-fish-stocks.html>.

73 See Sophus O. S. E. zu Ermgassen et al, "The ecological outcomes of biodiversity offsets under "no net loss" policies: A global review" (2019) 12:6 Conservation Letters.

74 See *Guerin v The Queen,* [1984] 2 SCR 335, 13 DLR (4th) 321.

75 A June 2021 report of the Standing Committee on Fisheries and Oceans recommend the following: "[t]hat Fisheries and Oceans Canada implement the principles of free, prior, and informed consent, consistent with the United Nations Declaration on the Rights of Indigenous Peoples, as a foundational component of the consultation and accommodation process with regards to wild salmon" (Recommendation 21); that "Fisheries and Oceans Canada collaborate more effectively with First Nations by utilizing guardian programs, Indigenous leadership and ecological knowledge experts and braid these approaches with western science and leadership" (Recommendation 22); and that "Fisheries and Oceans Canada recognize decision-making authorities of First Nations and work with them on a Nation-to-Nation basis along with other governments to plan, implement, monitor, and evaluate salmon management from egg stage to spawning phase" (Recommendation 23).

76 See House of Commons *Pacific Salmon: Ensuring the Long-term Health of WIld Populations and Associated Fisheries*: *Report of the Standing Committee on Fisheries and Oceans* (June 2021) (Chair: Ken MacDonald).

77 Sean Nixon et al, "Failure to Protect: Grading Canada's Species at Risk Laws" (2012) at 8, online (pdf), *EcoJustice*, <ecojustice.ca/wp-content/uploads/2014/08/Failure-to-protect_Grading-Canadas-Species-at-Risk-Laws.pdf>.

78 *Ibid* at para 10.

79 *Ibid.*

80 For example, the Yellowhead Institute found that First Nations seeking injunctions enjoy a 18.5% success rate, compared to a 81% success rate experienced by corporations filed against Indigenous communities by corporations. Many of these injunction requests stemmed from a duty to consult or extensive, unauthorized activities on Indigenous land, such as logging or construction. See Marc Kruse and Carrie Robinson, "Injunctions by First Nations: Results of a National Study", online, *Yellowhead Institute*, <yellowheadinstitute.org/2019/11/14/injunctions-by-first-nations-results-of-a-national-study/>.

81 See *R v Van der Peet*, [1996] 2 SCR 507 at paras 46, 62 [*Van Der Peet*].

82 See *Delgamuukw, supra* note 37 at para 117.

83 See *Tsilquot'in, supra* note 37 at para

84 See *Delgamuukw, supra* note 37.

85 See *Tsilquot'in, supra* note 37 at para 76.

86 *Ibid* at para 83.

87 In the context of Crown-Indigenous, fiduciary duty means that the Canadian government is obligated to act in the best interests of Indigenous communities when making decisions over lands and resources that are designated as reserve lands, or subject to Indigenous rights and/or title (both claimed and recognized).

88 See e.g. *Guerin*, *supra* note 72 at page 337; 389; Maria Morellato, "The Crown's Fiduciary Obligation Toward Aboriginal Peoples" (1999) at 4.1-4.2, online (pdf), *Centre for First Nations Governance*, <fngovernance.org/wp-content/uploads/2020/09/obligation.pdf>.

89 See *Tsilhqot'in*, *supra* note 37 at para 74.

90 See "Overview of a Recognition and Implementation of Indigenous Rights Framework" (10 September 2018), online: *Government of Canada*, <www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>.

To be effective, the content of any Rights of Nature law must balance breadth of protections with the specificity required to implement the law and uphold the rights granted.

Photo by Yuri Choufour.

Section IV: Rights of Nature case studies

Constitutional provisions

The broadest rights of nature legislation comes from the Constitutional level, a body of laws and organizing principles through which a state is governed. Two states have the Rights of Nature enshrined in their constitution, Ecuador and Colombia, and the realization of these constitutional rights took two distinct paths. Ecuador's constitution contains explicit Rights of Nature provisions, whereas Colombia's constitutional Rights of Nature were 'read-in' (or unilaterally recognized) by their Constitutional Court. Irrespective of these divergent pathways, both countries are leaders in developing and enforcing Rights of Nature because of the constitutional status of these laws.

Case study: paradigm shift in Ecuador

As a part of a 2008 Constitution reform, Ecuador revised its constitution and included provisions that recognized Nature, or "Pacha Mama" (an Andean term for Mother Nature), as a subject of rights. These provisions were part of a larger reform that sought to "overcome the dualism between society and nature… [and] emphasize human beings' embeddedness in and coexistence with nature".[92] Given Ecuador's status as the fifth-largest oil producer in South America (at the time of the Constitutional reform)[93], this development was particularly notable and promised significant blowback from oil companies with a vested economic interest in the country. The Ecuadorian case study illustrates the potential of the Rights of Nature to be instrumental in achieving an alternative mode of development that challenges the dominant neoliberal extractivist model.

Ecuador's constitution defines Nature as "where life is reproduced and occurs" and uses several interchangeable terms for nature throughout the text: "Pachamama, ecosystem, natural system, natural cycle, genetic asset, environment, natural wealth, environmental service, while defining it as that 'where life is reproduced and occurs".[94] Further, the rights accorded to nature were far broader than the "fundamental and inalienable rights… to exist and flourish" recognized in American municipalities. Under the Ecuadorian model, nature has the right to "exist… and to maintain and regenerate its cycles, structure, functions and evolutionary processes."[95] Although explicit enforcement mechanisms were not included, all "persons, communities, peoples and nations can call upon public authorities to enforce the Rights of Nature."[96] All Ecuadorian civilians have standing to enforce the Rights of Nature through the Constitutional Courts of Ecuador by virtue of the rights being constitutionally entrenched.[97]

Enshrining Rights of Nature within the constitutional framework has enabled Ecuadorian courts to uphold Rights of Nature consistently. Through these Constitutional Courts Ecuador has developed the most advanced jurisprudence on the Rights of Nature in the world. Since 2008, the courts have ruled on at least 38 cases[98] seeking to enforce the Rights of Nature in several contexts, such as "natural resource extraction in biologically sensitive protected areas in order to finance poverty reduction policies to support communities' and Nature's rights against agro-industry and extractivism."[99] The most successful of these have been civilians seeking to halt development on ecologically sensitive lands.

The first successful Rights of Nature ruling came in 2011, with the *Vilcabamba River* case. In this case, two civilians brought a lawsuit against the government, which approved a project to widen a road where excavated material was discarded into the river. The debris impacted water flow, which caused widespread flooding and damage to regional ecosystems. The plaintiff[100] argued that the government's actions violated the Rights of Nature. The court agreed, issuing an injunction in favour of nature against the provincial government and demanding damages for the restoration of the affected ecosystem. This case is important for establishing the first Rights of Nature precedent and laying the foundation for a more expansive application in future cases. The Court endorsed several important principles: the precautionary principle,[101] judicial recognition of nature's inherent value (described as "undeniable, elemental, and essential importance of nature, and taking into account the evident process of degradation") as opposed to its value for economic development, and the use of a constitutional injunction for remedying the damage caused to the environment.[102] These principles would go on to be foundational elements of future Rights of Nature rulings.

The second notable case was the *Cofan Sinangoe* case, which recognized the relationship between Indigenous rights, guaranteed under s57 of the constitution,[103] and the Rights of Nature. In this case, Indigenous communities in the biodiverse Sucumbios province brought a lawsuit to halt mining along the Aguarico River. Their position integrated violations of Rights of Nature with arguments about Indigenous rights to prior consultation. The Court ruled in the community's, and nature's, favour. Citing international commitments such as ILO 169, in combination with the Rights of Nature and rights of Indigenous peoples enshrined in the Constitution, the Courts ruled that mining along the Aguarico River must cease immediately.[104] Rights of Nature and Indigenous rights were treated as interwoven, creating a set of constitutionally enshrined "biocultural rights"; these "rights of territory and culture establish "the state's obligation to protect the special relationship of Indigenous peoples with their territories and the territories themselves, not just as a source of survival, but also an essential part of the way of life, culture, and spirituality, the essence of the community."[105] These biocultural rights borrow language from the Inter-American Commission on Human Rights[106] and Colombian jurisprudence[107], each of which comment on the inextricable tie of human (Indigenous) rights and Nature. This indicates that Rights of Nature developments in one jurisdiction can influence how nature is conceptualized and protected in other territories.

Case study: constitutional biocultural rights in Colombia

The Colombian case exemplifies how courts can infer Rights of Nature from other constitutional rights. In 2016, Colombia's Constitutional Court recognized a form of 'biocultural' Rights of Nature, derived from constitutional guarantees to biodiversity, cultural, and humanitarian protections.[108] Biocultural rights support sustainable development by preventing, or proactively controlling, environmental degradation and encouraging conservation and restoration.[109]

Seeking to dissolve the human-nature binary, a cornerstone of Western legal frameworks, biocultural Rights of Nature are conscious of the interdependence between ecological and human well-being. As such, the Colombian model positions the Rights of Nature as intrinsic to the realization of human rights; human rights cannot be fully realized without protections afforded to the environment in which they live. Since humans and nature do not exist in opposition, this approach reaches a new socio-legal understanding of nature that is more fully realized and does not only exist to serve human interests.[110]

These biocultural rights were first recognized in the *Rio Atrato* case, where the judge ruled that the Atrato River was a subject of rights, entitled to "protection, conservation, maintenance, and restoration".[111] Not only did the judge recognize the river as a subject of rights,

but also that the mining activities in the region had a devastating impact on the river, the surrounding ecosystems, and current and future generations of human and non-human entities that rely on the river. The ruling in this case "departs from traditional environmental protection paradigms and takes an ecocentric and biocultural approach to reinforce the protection and ensure the restoration of the Atrato River".[112] The court took note of the "interdependency relationship and deep connection we have with every other living being with whom we share our planet" and acknowledged that humankind was merely an "integral part of the global ecosystem – the biosphere – rather than as its user and simple masters".[113]

Since 2016, Colombian courts have extended these biocultural rights to several other ecosystems, predominantly rivers and water systems, as subjects of rights. Recognized entities include the Amazon River and Basin,[114] the Plata River,[115] the Magdalena River,[116] the Cauca River,[117] the Otun River,[118] the Quindio River,[119] and the Coello, Combeima, and Cocora Rivers.[120] Each ecosystem was accorded the same four intrinsic rights as the Atrato.

National law

In some jurisdictions, national governments have included Rights of Nature provisions within environmental legislation or standalone laws. Two countries, including Uganda and Panama, have passed national Rights of Nature laws, which codified[121] the Rights of Nature in 2019 and 2022, respectively.

Case study: Uganda

Uganda's revised *National Environmental Act* recognized that nature has "the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."[122] This legislation recognizes that the human right to a healthy environment, guaranteed under the Ugandan constitution,[123] cannot be achieved unless the well-being of nature itself is protected. Further, the *Act* guarantees any citizen the right to bring an action to uphold nature's rights, regardless of whether the violation harmed the civilian directly. Through these civilian suits, courts may issue an order to "prevent, stop or discontinue any act or omission detrimental to human health or the environment…require any person to take any other measures to ensure that human health or the environment do not suffer any significant aim or damage… [or] require any persons responsible for the environmental degradation to restore the degraded environment".[124]

Case study: Panama

In 2022, Panama passed a national law that recognized the Rights of Nature and the obligations that the state and the people of Panama have towards natural entities.[125] This law represents an evolution from the Ugandan legislation: rather than merely recognizing that Nature is a legal subject with rights, the legislation contains a much more comprehensive definition of what nature is, what rights it has, and the obligations of the state and civilians. Nature is defined broadly as "a collective entity, indivisible and self regulated, shaped by its elements, biodiversity and interrelated ecosystems."[126] Indigenous perspectives were influential in the development and content of the law, with the legislation acknowledging that "the cosmovision and the ancestral knowledge of the indigenous people of the country must be an integral part of the interpretation and application of the Rights of Nature."[127] Finally, the law has provisions to ensure the implementation of the Rights of Nature. Article 9 requires the Panamanian government "guarantee the full implementation and fulfilment of rights and obligations contained in this Law".[128] However, it is important to note that the law does not contain an explicit roadmap for implementation. It remains unclear how these Rights of Nature will impact resource governance or institutional decision-making.

In terms of enforcement, the law contains several interpretative principles to ensure the intrinsic value of nature is protected, and the law is interpreted in a manner most consistent with the protection and con-

servation of nature. The most notable is that the interests of Nature are deemed superior to other interests or rights that may conflict with it.

Local Law

In jurisdictions where the national government is unwilling to enact stronger environmental regulations, local governments have enacted Rights of Nature ordinances to secure the protections of ecosystems in their community. This pathway is most commonly pursued in the United States, where 36 townships have passed local laws recognizing natural communities as legal subjects. This has since spread to jurisdictions in Canada,[129] Peru,[130] and Mexico.[131] Kauffman notes two primary frameworks pursued at the local level:[132] municipal ordinances intended to protect nature from imminent harm, and the integration of Rights of Nature into city planning processes to promote sustainable governance.

Most local laws stem from community concerns about federal or state government authorizations of industrial projects, whose operation or downstream impacts threaten the health of community members, water systems, and natural communities. Communities use these ordinances to strengthen local resistance and self-governance through a community rights-based framework. Provisions recognize "natural communities" within the community as subjects with "fundamental, inalienable rights",[133] reflecting the extent to which human rights have informed Rights of Nature.[134] Granting natural communities the right to life and legal standing to enforce those rights strengthens the prohibitions against extractive activities by increasing the ways in which community members can oppose environmentally harmful activities such as fracking or wastewater dumping in their area. Community members who have not personally been negatively impacted by industrial development are empowered to bring a case forward on the prospect that the rights of natural communities have been or will be infringed.

The first municipal ordinance was passed in Tamaqua, Pennsylvania, in 2006. Since then, communities in 16 states have passed their own local laws that recognize the Rights of Nature and contain prohibitions and penalties for acts that threaten these rights. While each of these ordinances contains community-specific language, a few general provisions are common across all the laws. For example, most municipal ordinances extend legal subjecthood and rights to all natural communities as opposed to a specific ecosystem or species. Second, the rights accorded tend to be limited to the "right to exist or thrive", which appeared in laws enacted after the Tamaqua Ordinance.

State governments and corporations, whose economic interests are threatened by increased local autonomy, have levied criticism and legal challenges at these local laws adopting more stringent environmental protections. This tension will be more deeply examined within the selected case study.

Case study: enforcing the Rights of Nature in Highland Township

In response to community concerns about the impact of fracking on the community's groundwater supply, Highland Township, Pennsylvania, passed a municipal ordinance in 2013 recognizing the Rights of Nature. Specifically, this ordinance was a direct response to plans to build a wastewater injection well near the township's primary water source.[135]

The *Highland Township Community Rights and Protection from Injection Wells Ordinance* recognized the rights of "natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems… to exist and flourish within Highland Township".[136] All natural gas and fossil fuel extraction and wastewater injection were also banned.[137] Almost immediately, the ordinance was contested by Seneca Resources, the oil and gas company who had planned to build the wastewater well. They brought an action before the courts and sought to strike down the ordinance as having no

legal force or effect. Ultimately, the US District Court deemed the ordinance "invalid, unenforceable, and unconstitutional."[138]

While the court struck down the ordinance, the Town responded by further strengthening its Rights of Nature legislation. The Town Council passed a home order charter, which functions as a local constitution, that granted standing to ecosystems to enforce their rights to flourish and exist.

Case Study: integrating Rights of Nature into city planning in Santa Monica

A more proactive approach to the community-rights model is to integrate the Rights of Nature into the city planning process. While municipal ordinances grant nature the capacity to be represented in Court to enforce its rights, this approach ensures that the Rights of Nature are considered throughout all municipal decisions, accounting more holistically for how natural communities are impacted by city planning and economic activity. Informed by provisions from earlier municipal ordinances, cities such as Santa Monica, California, have sought to expand the impact of Rights of Nature by integrating them into their City Plan.

One of the guiding principles of Santa Monica's City Plan is to ensure "Sustainable Rights for its Residents, Natural Communities and Ecosystems".[139] This approach takes the ethos of earlier municipal ordinances by rooting its declaration of the Rights of Nature within the democratic principles of community self-determination present in municipal ordinances: "All residents of Santa Monica possess the right to self-governance and to a municipal government which recognizes that all power is inherent in the people, that all free governments are founded on the people's authority and consent, and that corporate entities, and their directors and managers, do not enjoy special privileges or powers under the law that subordinate the community's rights to their private interests".[140] However, it also recognizes that Rights of Nature legislation challenges vested corporate and economic interests, and accounts for the inherent weaknesses of local provisions at protecting nature when the Rights of Nature conflict with private interests.

Indigenous law

A subsection of municipal law is US Tribal Nations' recognition of the Rights of Nature within tribal law, which takes several forms, including resolutions or amendments to the Nation's constitution. These instruments have accorded legal rights to a diverse range of natural entities, from plant species to water bodies to animal species to all natural entities. With traditional municipal ordinances struck down by the courts and few cities capable (or willing) to integrate the Rights of Nature into their city planning processes, Tribal Law may be uniquely positioned to recognize and uphold the Rights of Nature. O'Donnell notes that the "unique structure of tribal sovereignty" within the United States allows Indigenous governments to promote a more diverse interpretation of Rights of Nature, one that is suited to their unique historical, cultural, and spiritual relationship with the lands and waters.[141] Three tribal laws are particularly relevant to the Fraser River Estuary: the *Resolution Establishing Rights of Manoomin*, and the legal recognition of the Klamath and Snake Rivers.

Case study: The White Earth Band of Ojibwe and the Rights of Manoomin

In response to oil pipeline construction and mining in the region,[142] the White Earth Band of Ojibwe and the 1855 Treaty Authority passed a resolution enshrining the rights of Manoomin, or wild rice. Passed in 2018, the *Resolution Establishing the Rights of Manoomin* recognizes the "inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery and preservation".[143] These rights include "the right to pure water and freshwater habitat; the right to a healthy climate system and environment free from human-caused global warm-

ing impacts and emissions, the right to be free from patenting, as well as rights to be free from infection, infestation or drift by any means from genetically engineered organisms".[144] Manoomin was also granted standing to represent itself in court in order to enforce its rights.[145]

The *Resolution* also emphasizes the parallels between nature's rights and Indigenous rights, emulating the language used in Ecuador and Colombia's conception of bio-cultural rights.[146] For example, the *Resolution* acknowledges that Manoomin is a "gift to the Anishinaabe people from the Creator or Great Spirit and an important staple of their diets for generations".[147] Additionally, the resolution protects the inherent rights of community members to sustainably harvest and use manoomin as a result of the "central element of manoomin [in] Anishinaabe culture, heritage, and history".[148]

In terms of enforcement, the resolution contains several explicit prohibitions. The law prohibits business entities and governments from any action that violates the rights contained in the law, and parties found guilty of such violations are to be punished by the maximum fine allowed under tribal law.[149] The 1855 Treaty Authority enforces the law, ensuring the community's sovereignty is not compromised. Further, the enforcement of the resolution cites the *Clean Water Act* as a mechanism that authorizes the collective rights of water. Framing the *Resolution* as complementary to the *Clean Water Act*, a federal law within the colonial administration, this resolution demonstrates "a new pathway for infusing tribal norms and cosmology into Western legal traditions".[150] In 2021, the Tribe filed an action to uphold the rights of manoomin in Tribal Court, alleging that the construction of the Enbridge Line 3 tar sands pipeline through treaty-protected lands and the authorization of the removal of 5 billion gallons of water to support the project deprives the manoomin of its inherent rights.[151] As the first case of its kind, this is an unprecedented opportunity to uphold Rights of Nature, strengthen tribal sovereignty, and revitalize Indigenous law.

Case study: The Yurok Tribe and the Klamath River

The Klamath River is a major salmon-bearing river that begins in Oregon, and empties into the Pacific Ocean in northern California. At one point, the Klamath was the third most productive salmon river in the American West, after the Columbia and the Sacramento.[152] The river, and the life it supports, is also integral to the economic, spiritual, and cultural livelihoods of several Indigenous communities along its watershed. During the 19th and 20th centuries, increased homesteading and industrialization along the river made it the location of several major damming and hydroelectric projects. The Klamath Hydroelectric Project, which consists of eight dams in the mainstem of the river, decreased water flow so greatly that over four hundred miles of the river were closed to fishing.[153] This closure had a disastrous impact on the Indigenous and non-Indigenous communities whose economic, cultural, and spiritual livelihood is dependent on the health of the river and the species it supports.

These hydroelectric projects and their associated dams contributed to the ongoing regional decline in salmon populations. Decreased water flows have resulted in 81% of juvenile salmon becoming infected with *Ceratonova shasta*, a deadly parasite that thrives when water flows are low.[154] Prevalence of this parasite among Klamath salmon populations increased to 91% by 2015.[155] While several of these dams were set to close by 2020, the river still contains "seven hundred miles of canals and twenty-eight pumping stations for the Klamath Irrigation Project, which can drain nearly half the river's water each year."[156]

In response to these ongoing threats to salmon populations and river ecosystem health, the Yurok Tribe passed the *Resolution Establishing the Rights of the Klamath River*, recognizing the Klamath as a legal subject with the rights to "exist, flourish, naturally evolve", to have "a clean and healthy environment [and] stable climate", and to be free from contamination.[157] While the degredation of the Klamath River was the impetus

for this legislation, the *Resolution* takes a much more holistic approach in its legal recognition. The Preamble acknowledges that "[a]ll native species within and dependent on the Klamath River ecosystem are vital to the cultural, legal, subsistence, and economic interests" of the tribe. As such, the Resolution extends legal recognition and rights to the "whole land" of the Yurok territory, which includes "the trees, the salmon, elk, deer," and other living things.[158]

This *Resolution* reflects a distinct approach to Rights of Nature legislation, one that draws inspiration and legitimacy from foreign sources of law. For example, the *Resolution* frames the Rights of Nature as a set of biocultural rights, encompassing the relationship between the Rights of Nature and the rights of Indigenous peoples previously expressed in Colombia and Ecuador. Further, the *Resolution* references articles 26 and 29 of the *United Nations Declaration of the Rights of Indigenous Peoples* to support the tribe's inherent rights to sustainably harvest plants and fish[159]and enact laws to protect their territory.[160] In terms of implementation and enforcement, the Yurok chose not to create a guardian council to represent the river ecosystem's interests, instead opting for a rights-based approach and granting all Yurok members the capacity to enforce the Klamath's rights in Court.[161]

Case study: The Nez Perce Tribe and the Snake River

Flowing through Wyoming, Idaho, Oregon, and Washington, the Snake River is the largest of the Columbia River's tributaries and an important watershed for salmon. The river once produced nearly half of all the spring Chinook salmon that would return to the rivers of the Columbia Basin. However, the river's size and location have also made it a major location for damming projects, which has had a devastating impact on ecosystem health and salmon populations. Since the Snake River dams were completed in 1976, fall Chinook populations have declined by 90%,[162] and spring/summer populations have never met the recovery targets set by the National Marine Fisheries Service.

In 2020, the Nez Perce Tribe passed the *Snake River Resolution*. Like the *Klamath River Resolution* before it, the law recognized that "the Snake River and all the life it supports" possesses the right to exist, flourish, evolve, flow, regenerate and be restored, in accordance with longstanding beliefs and practices of the Nez Perce tribe.[163] Several sections of the Preamble discuss the Nez Perce Tribe's long standing relationship to the river and all the life it supports – particularly salmon – and how the "onslaught of harms" such as "water pollution, over-diversion, and damming" threaten the existence of salmon and the ability of the Nez Perce tribe to exercise their treaty rights to fish, conduct spiritual and religious activities, and fulfil their obligations to the river. The Preamble also provides scathing remarks about the colonial legal system's contribution to the ecosystem's degradation through its "overarching treatment of Nature as mere human property, to be exploited for short-term economic gains".[164]

A Canadian model: blending Indigenous and municipal governance

The only legally recognized ecosystem in Canada is the Mutehekau Hipu/Magpie River,[165] which was accorded legal personhood in February 2021. This case can be categorized as a synthesis of the Indigenous law and municipal law case studies discussed above, as the river's personhood was established through joint resolutions passed in collaboration by the Innu Council of Ekuanitshit and the municipality of Minganie.[166] Mutehekau Hipu/the Magpie River flows through Northern Quebec and is an important figure to Inuit culture and spirituality. It has also been the subject of hydroelectric projects, current and proposed, which the Inuit and local environmental groups have vocally opposed. Granting the river legal personhood and legal rights is an avenue through which the river could be protected from future exploitation in a manner that reflects the Inuit's relationship to the river and strengthens their sovereignty over their territory.

While earlier Indigenous Rights of Nature laws reference colonial law to improve the enforceability

and viability of their Tribal laws,[167] the *Magpie River Resolution* is a product of direct collaboration between Indigenous and colonial governments, alongside civil society organizations. It sets an important precedent in Canada and indicates the potential for novel governance relationships that effectively integrate Indigenous law and ontologies with municipal law-making power and enforcement capacity.

Judge-made law

There are several instances where a court has unilaterally recognized natural entities as subjects of rights without legislation that explicitly entrenches the concept of Rights of Nature. Judicial recognition of the Rights of Nature is particularly potent in jurisdictions where the state government is beholden to the economic interests of extractive industries or unwilling to act on climate change. An ecocentric approach to environmental law is gaining widespread acceptance beyond academic circles, permeating law-making spaces with the capacity to recognize nature's intrinsic value and enforce the Rights of Nature even when they run contrary to private interests.

Despite the growing acceptance of the Rights of Nature among the global judiciary, there is a spectrum of how effective this pathway is at enforcing and implementing nature's rights. As previously discussed, Colombia's judicial recognition of Rights of Nature as constitutional bio-cultural rights is indicative that judge-made law is capable of recognizing and upholding Rights of Nature, absent legislative will or capacity to codify them. However, in other jurisdictions such as India, judge-made law has been less successful at enforcing the Rights of Nature, despite the civilians' effort to bring forward these cases and judges' willingness to extend legal recognition to natural entities.

Case study: judicial protections in India

India is a jurisdiction where Rights of Nature rulings have increased markedly in recent years. The Ganges and Yamuna rivers were the first two entities accorded legal rights, recognized concurrently in the case *Mohd. Salim v. State of Uttarakhand & others*. A civilian filed a complaint with the state authorities about encroachments on the banks of the Ganga River, which occurred because of illegal construction and mining conducted along the river's shoreline. The Ganga River is considered a sacred river to Hindus in the region, believed to contain divine and healing properties.[168] However, its central location meant that several cities were built along its banks and millions of civilians are dependent on it for survival. As a result, decades of industrialization and activity along the river had significantly polluted them, and the river had long been the subject of government conservation and clean-up programs.

In order to preserve the integrity of the rivers and combat the illegal industrial activities along their shore, the High Court of Uttarakhand declared the rivers legal persons "with all corresponding rights, duties and liabilities of a living person."[169] Based on these rights, the Court nominated the state to act as the legal guardian of the river and take action to promote their protection and conservation.[170] Further, the Court ordered immediate action to help restore the river, banning mining along the Ganga's river bed and flood plains and ordering those engaged in illegal mining along the shoreline to be evicted.[171]

An important note about this case is that the civilian who brought the lawsuit did not seek a declaration of the rivers as legal persons. Instead, the judge felt this was required to preserve the very existence of the rivers.[172] His decision was rooted in several precedents. First, previous Indian courts had ruled that representations of Hindu deities can be granted legal personhood states and have standing to sue. Second, the Indian constitution requires the state to "endeavour to protect and improve the environment"[173] and Indian citizens "to protect and improve the natural environment including forests, lakes, rivers and wild-life"[174]. Since neither constitutional obligation was upheld, the Court determined that the rivers, which are worshipped by Hindus and with which Hindus "have a deep and spiritual connection," should be granted legal personhood

as an urgent solution to ensure the government and the populace could better meet their constitutional obligations towards it.[175]

In the five years since, judges across India have extended legal recognition to:

- The Gangotri and Yamunotri glaciers[176]
- Sukhna Lake[177]
- Mother Nature[178]
- The Animal Kingdom[179]

Treaty negotiations in New Zealand/Aotearoa

New Zealand's Rights of Nature laws reflect a more novel approach to implementing the doctrine. As opposed to standalone legislation or court rulings, Rights of Nature have instead been instrumental features of settlement agreements negotiated between the settler administration and Māori communities across the islands. Unlike laws in Ecuador or the United States, the recognition of natural entities as legal subjects in New Zealand did not arise from a strong grassroots movement demanding such recognition. Instead, New Zealand Crown negotiators proposed legal personhood as a tool to overcome ontological differences between Māori and settler negotiators that were complicating settlement negotiations. During the 1990s, New Zealand's government committed to resolving outstanding land claims and disputes that pertained to the 1840 Treaty of Waitangi, the founding document of New Zealand's settler regime. Many Māori iwi participated in these negotiations as a means of pursuing self-determination and receiving redress from the government for breaches of their treaty obligations.[180]

Case study: Te Urewera

This tool was first proposed in negotiations between the New Zealand Crown and Tūhoe iwi to resolve the Treaty of Waitangi and outstanding claims over Te Urewera, the ancestral home of the Tūhoe iwi.[181] At the time of the negotiations, the forest was a designated national park, owned and managed by the Crown. During the negotiations, the Tūhoe demanded the return of Te Urewera and autonomy for Tūhoe management of the forest.[182] Operating under the Western concept of ownership, the Crown negotiators perceived these demands as a conflict over title and ownership. In reality, the Tūhoe sought not to own Te Urewera legally, but merely demanded the return of the Te Urewera to itself, for in the Tūhoe worldview one cannot 'own' nature.[183] As such, the negotiations culminated in the recognition of Te Urewera as a legal entity belonging neither to the Crown nor the Tūhoe iwi. This outcome achieved what both parties were unwilling to compromise: "the Crown could say it is not transferring ownership to the Māori, and the Māori could say the Crown does not own it."[184]

The New Zealand model differs from other Rights of Nature models in several respects. First, this arrangement emerged from Crown-Māori negotiations and is, first and foremost, a compromise between two nations as opposed to an ecological governance strategy designed to grant nature more agency within the legal framework. This context is important because this agreement completely re-envisioned the concept of ownership over nature. Te Urewera belongs not to the Crown nor the Tūhoe, but rather to itself. This distinction is critical, for it informs the governance regime built around the forest, indicates a paradigmatic shift in how nature is framed under the law, and demonstrates the capacity for integrating Indigenous worldviews within the law.

Second, in contrast to older Rights of Nature iterations, the *Te Urewera Act* instead recognized the ecosystem of Te Urewera as a "legal entity" with "all the rights, powers, duties, and liabilities of a legal person."[185] The *Act* purposely left the implications of the forest's legal status vague. Instead, it included provisions that recognize the Tūhoe view of the ecosystem as "a living, spiritual being with its own mana (spiritual authority) and mauri (life force)."[186] In granting status as a legal entity, as opposed to a fixed set of rights, the law allows the forest's rights and interests to be defined by the forest's

management Board. These distinctions are intentional attempts at ensuring that the Tūhoe worldview is not subsumed by the Western rights-based framework, which had historically been used as a tool of oppression against the Māori.[187] Legal personality was accepted as an "imperfect approximation" of the Tūhoe worldview that understands the forest as a whole, living, spiritual being" within a Western legal system.[188] The combination of legal recognition and Rights of Nature provisions centred on the Tūhoe relationship to the land "provided a mechanism for removing the existing Western legal framework and creating space for the Tūhoe people to restore their traditional role as kaitiaki, or guardians of Te Urewera, and begin to recover their ancestral knowledge, customs, and practices to reconnect their people to the land."[189]

Third, the *Act* created a management board to develop a unique governance system for Te Urewera. This governance model requires the Board to act as the "legal face" of the forest, develop a management plan, and represent the ecosystem in legal settings. For the first four years of operation, the Board will be composed of four Crown and four Tūhoe representatives, six Tūhoe and three Crown-appointed afterwards.[190] The Board is mandated to "provide governance" to the forest according to Tūhoe principles, which requires the Board to use "unanimous or consensus-based decision making".[191] The Board is governed by its self-drafted Te Kawa, which outlines the objectives and policies for Te Urewera that guide their decision-making. Issues of conservation and restoration are not explicitly laid out in either document, but rather left open-ended by vesting control over the issue entirely within the Board. Tănăsescu describes the significance of this governance regime: "Tūhoe ontology subverts the requirement of governance by recognizing natural entities themselves as capable of self-governance" instead of following a typical regime wherein humans manage nature for their benefit.[192] In this way, the Te Urewera case departs from the Western guardianship framework, which requires decision-making be taken away from an entity that lacks the capacity for self-governance. Instead, the Tūhoe approach focuses on observing the forest and responding with novel techniques to manage human impact on the ecosystem. Indeed, the implementation of this Rights of Nature model comes not from central sources of power such as the legislature or the courts, but rather through this new governance system tasked with governing the forest ecosystem according to Māori knowledge, values, and customs.

Ultimately, New Zealand's approach to Rights of Nature law demonstrates the room for legal innovation within the broader Rights of Nature movement. It illustrates the compatibility between Indigenous rights (such as self-governance and the preservation of culture) and Rights of Nature, as implementing this governance framework requires Māori knowledge.[193] What emerged from these negotiations created the model for legal recognition of nature in New Zealand. The same recognition has since been extended to the Whanganui River and Mount Taranaki. In each instance, not only is the entity accorded legal recognition, but a management board is also created to determine and represent the entity's best interests in governance institutions and before the court of law.

Case study: The Whanganui River

Building on the first Rights of Nature agreement, the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* is the outcome of a treaty settlement between the New Zealand Crown and the Whanganui iwi. It applies the legal recognition and management model first arrived at during the Te Urewera negotiations, with minor changes in the provisions and governance model to reflect the Whanganui iwi's unique relationship to the river. The iwi had long organized its social structures around guardianship of the river, ensuring its protection for future generations. This alienable connection with and responsibility to the river is captured by the principle of *Ko au te Awa, ko te Awa ko au*: I am the River and the River is me.[194]

Much like Te Urewera, the Whanganui River – defined in the *Act* as "an indivisible and living whole, compris-

ing the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements" – was recognized as a legal entity with "all the rights, powers, duties, and liabilities of a legal person."[195] Article 13 codifies the Whanganui Iwi's perspective of the river, the "intrinsic values that represent the essence of Te Awa Tupua", such as its spiritual significance and the longstanding obligations the Iwi have to the river.[196] Tănăsescu notes that, "[I]ndigenous conception of the river as one, in metaphysical and ethical terms, finds a direct legal translation in the unity of the legal person."[197]

Finally, the *Act* designates the Te Pou Tupua – a management board composed of Crown and Māori representatives – to act as the 'human face' of the river.[198] Members of the Te Pou Tupua are bound to act in accordance with the guiding principles of "Ko au te awa, ko te awa ko au" ("I am the river and the river is me"), recognizing the intrinsic value of the river (Tupua te Kawa).[199] As a legal entity, the river is capable of representing its interests in management decisions, allowing for all governance processes to proactively account for its rights and interests.

Notes and references

92 See Maria Akchurin, "Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador" (2015) 40:4 Law & Soc Inquiry 937 at 960.

93 See Mihnea Tănăsescu, *Environment, political representation and the challenge of rights: speaking for nature* (London: Palgrave MacMillian, 2015), at 86.

94 *Ibid* at 139.

95 Ecuador Const art 71 [Ecuador Const].

96 *Ibid*.

97 *Ibid* at art 83 § 1 ("Ecuadorians have the following duties and obligations…: To abide by and enforce the Constitution, the law and the legitimate decisions taken by the competent authority").

98 See Kauffman and Martin, *supra* note 23 at 97.

99 *Ibid* at 80.

100 The plaintiff is the party who initiates a court case against another part and seeks some form of legal intervention.

101 See Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 28 March 2018, *Wheeler v. Director de la Procuraduria General Del Estado de Loja*, No.0032-12-IS Harmony with Nature, online, pdf, <files.harmonywithnatureun.org/uploads/upload659.pdf> (The precautionary principle was defined by the Courts as follows: "until it is objectively demonstrated that the probability of certain danger that a project undertaken in an established area does not produce contamination or lead to environmental damage, it is the responsibility of the constitutional judges to incline towards the immediate protection and the legal tutelage of the rights of nature, doing what is necessary to prevent contamination or call for remedy"). See also Natalia Greene, "The first successful case of the Rights of Nature implementation in Ecuador" (21 May 2011) at 1, online (pdf): *Global Alliance for the Rights of Nature*, <www.earthlaws.org.au/wp-content/uploads/2016/07/RON_Vilcabamba-Ecuador-Case-complete.pdf>.

102 Greene, *supra* note 99.

103 See Ecuador Const, *supra* note 94 at art 57.

104 See Kauffman and Martin, *supra* note 23 at 108-9.

105 *Ibid* at 107-8.

106 See e.g. *The Environment and Human Rights (Interpretation and Scope of Arts (4(1) and 5(1) in Relation to Art 1(1) and 2 of the American Convention on Human Rights)(Colombia)* (2017) Advisory Opinion OC-23/17 (Ser A) No 23.

107 See Corte Constitucional [Constitutional Court], 10 November 2016, Expediente T-5.016.242 [T-622 de 2016] (Colombia) [*Atrato River*].

108 See Corrigan and Oksanen, *supra* note 25 at 6.

109 See Kauffman and Martin, *supra* note 23 at 197.

110 See Paola Villavicencio Calzadilla, "A Paradigm Shift in Courts' View on Nature: the Atrato River and Amazon Basin Cases in Colombia" (2019) 15:0 Law, Environment and Development Journal, 1 at 6.

111 See *Atrato River*, *supra* note 105 at at para 9.25

112 See Calzadilla, *supra* note 108 at 5.

113 *Ibid* at 6, citing *Atrato River*, supra note 105.

114 See Corte Suprema de Justicia [Supreme Court], 4 May 2018, *Dejusticia y otros c Presidencia de la República,* No. 11001-22-03-000-2018-00319-01 (Colombia).

115 See Juzgado Único Civil Municipal La Plata-Huila [Colombian Municipal Civil Court of La Plata], 19 March, 2019, *Diaz c "EMSERPLA E.S.P.*, No. 41-396-40-03-001-2019-00114-00 (Colombia).

116 See Juzgado Primero Penal del; Circuito con Funciones de Conocimiento Neiva-Huila [First Criminal Court of Neiva District], 24 October 2019, *Rodriguez y Perdomo v Ministerio de Ambiente y Desrollo Sostenible y otros,* 41001-3109-001-2019-00066-00 (Colombia).

117 See Tribunal Superior Medellin [Superior Court of Medellin], 17 June 2019, *Córdoba c Ministerio de Ambiente y otros*, No 05001 31 03 004 2019 00071 02 (Colombia).

118 See Juzgado 4° de Ejecución de Penas Y Medidas de Seguridad [Fourth Court of Execution of Penalties and Security Measures], 11 September 2019, No. 66001318700420190005 7 (Colombia).

119 See Tribunal Administrativo del Quindío [Administrative Court of Quindío], 5 December 2019, *Martinez v Nacion y otros*, No. 63001-2333-000-2019-00024-00 (Colombia).

120 See Tribunal Administrativo del Tolima [Administrative Court of Tolima], 30 May 2019, *Personería Municipal de Ibagué c Ministerio de Medio Ambiente y otros*, No. 73001–23–00–000–2011–00611-00 (Colombia).

121 In law, codification refers to the process of collecting and systematizing laws to form a legal code or statute.

122 See Republic of Uganda, *The National Environment Act, 2019*, s 4(1).

123 See *The National Environment Act, 2019* (The Republic of Uganda), Uganda Const. art 39.

124 See *National Environment Act 2019*, *supra* note 119, s 3(5)(g).

125 See Panama, Ley 287, *Por Medio de la Cual se Reconconen los Derechos de la Naturaleza, las Obligaciones de Estado Relacionadas a estos, Derechos, y se Dictan Otras Disposiciones,* (2022) [Panama Law 287].

126 *Ibid* at art 3.

127 *Ibid* at art 8(6)

128 *Ibid* at art 9.

129 Minganie Regional Country Municipality, Resolution No. 025-21, *Recognition of Legal Personality and Rights of the Magpie River – Mutehekau Shipu* (2021).

130 See District Municipality of Orurillo, Peru, *Municipal Ordinance No 006-2019 MDO/A* (26 December 2016); Provincial Municipality of Melgar, Peru, *Municipal Ordinance No 018-2019-CM-MPM/A* (2019.

131 See Mexico City, Mexico, *Constitution of Mexico City* (2018).

132 See Kauffman and Martin, *supra* note 23 at 164.

133 See e.g., Halifax, Virginia, United States, amendment to *Town Code of Halifax, Virginia* (2008)

134 See Tănăsescu, *supra* note 92 at 111-2.

135 See Kauffman and Martin, *supra* note 23 at 165.

136 See Highland Township, Pennsylvania, United States, Ordinance No 1-9, *Highland Township Community Rights and Protection from Injection Wells Ordinance* (2013) at s 3(c).

137 *Ibid* at s 4(a)

138 See *Seneca Resources v Highland Township*, 2016 WL 1213604 (WD Penn Dist Ct 2016).

139 See "Sustainable City Plan" (accessed May 30 2022), online: *City of Santa Monica*, <www.santamonica.gov/sustainable-city-plan>.

140 See City Council of Santa Monica, United States, *An Ordinance of the City Council of Santa Monica Establishing Santa Monica Municipal Code Article 12 to Create a Sustainability Code; Moving Santa Monica Municipal Code Chapter 4.75 to Article 12; And Repealing Santa Monica Municipal Code Chapters 5.16, 5.28, 5.36 and 7.08* (2019).

141 See Erin O'Donnell et al, "Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature" (2020) 9:3 Transnat'l Envtl L 403, at 416.

142 See Kauffman and Martin, *supra* note 23 at 181.

143 White Earth Band of Ojibwe, United States, Resolution 2018-05, *Resolution Establishing Rights of Manoomin* (2018) s 1(a) [*Resolution Establishing Rights of Manoomin*].

144 *Ibid.*

145 *Ibid* at s 3(e)

146 See Kauffman and Martin, *supra* note 23 at 182.

147 See *Resolution Establishing Rights of Manoomin*, supra note 140.

148 *Ibid.*

149 *Ibid* at s 3(a)

150 *Ibid*.

151 See "First "Rights of Nature" Enforcement Case Filed in Tribal Court to Enforce Treaty Guarantees" (5 August 2021), online: *1855 Treaty Authority*, <www.1855treatyauthority.org/news/manoominvdnr>.

152 See "The Klamath River" (2019), online: *Oregon Wild*, <oregonwild.org/waters/klamath/the-klamath-river>.

153 See Kauffman and Martin, *supra* note 23 at 183.

154 *Ibid* at 184.

155 *Ibid.*

156 *Ibid*.

157 Yurok Tribal Council, Resolution No 19-40, *Resolution Establishing the Rights of the Klamath River* (2019) [*Resolution Establishing the Rights of the Klamath River*].

158 *Ibid.*

159 See United Nations Declaration on the Rights of Indigenous People, GA Res 61/125, UN GAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49 (2007) at art 26 [*UNDRIP*].

160 *Ibid* at art 29.

161 See *Resolution Establishing the Rights of the Klamath River*, supra note 154 at 2-3.

162 See "Snake River" (accessed 8 July 2022), online: *American Rivers*, <americanrivers.org/river/snake-river/>.

163 See Nez Perce Tribal General Council, United States, Resolution No SPGC20-02 (2020).

164 *Ibid.*

165 Mutehekau Hipu is one of several Cree names for the River. The river is also known as Moteskikan Hipu and Pmotewsekaw Sipo.

166 Minganie Regional Country Municipality, Resolution No. 025-21, *Recognition of Legal Personality and Rights of the Magpie River – Mutehekau Shipu* (2021).

167 See e.g., *Resolution Establishing Rights of Manoomin*, supra note 140.

168 See *Mohd. Salium v. State of Uttarakhand & Others,* [2017] The High Court of Uttarakhand High Court at Nainital, No. 126 (India) at para 11 [*Mohd. Salium*].

169 *Ibid* at para 12.

170 *Ibid* at para 19.

171 *Ibid* at para 10.

172 See Kauffman and Martin, *supra* note 23 at 203.

173 See India Const, art 48 A.

174 *Ibid,* art 51A.

175 See *Mohd. Salium*, *supra* note 164 para 11.

176 See *Lalit Miglani v. State of Uttarakhand & Others*, [2017] The High Court of Uttarakhand at Nainital No. 140 (India).

177 *CWP No.18253 of 2009 & other connected petitions*, [2020], The High Court of Punjab and Haryana at Chandigarh (India).

178 *A.Periyakaruppan v The Principal Secretary to Government,* [2022] Madras High Court (India)

179 *Karnail Singh and others v State of Haryana*, [2019] High Court of Punjab and Haryana (India); *Narayan Dutt Bhatt v Union of India and Others,* [2018] High Court of Uttarakhand and Nainital (India).

180 See Kauffman, *supra* note 23 at 582.

181 See Tănăsescu, *supra* note 92 at 439.

182 See Kauffman, *supra* note 23 at 583.

183 *Ibid*.

184 *Ibid*.

185 *Te Urewera Act 2014* (NZ), 2014/51, s 11 [*Te Urewera*].

186 *Ibid,* s 3(2).

187 See Kauffman, *supra* note 23 at 579.

188 *Ibid* at 583.

189 *Ibid* at 579.

190 See *Te Urewera*, *supra* note 181, s 21.

191 *Ibid*, s 33-34.

192 See Tănăsescu, *supra* note 92 at 445.

193 See Kauffman and Martin, *supra* note 23 at 154.

194 See *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ), 2017/7, s 13(c) [*Te Awa Tupua*].

195 *Ibid,* ss 12, 14.

196 *Ibid*, s 13.

197 See Tănăsescu, *supra* note 92 at 122.

198 See Erin O'Donnell, "Rivers as living beings: rights in law, but no rights to water?" (2020) 20:4, Griffith L Rev 643 at 648.

199 Jan Darpö, "Can Nature Get it Right? A Study on Rights of Nature in the European Context", (March 2021) at 18, online (pdf): *European Parliament's Committee on Legal Affairs*, <www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf>.

Not every Rights of Nature law is equally successful. It is not enough to consider a jurisdiction passing some form of legal recognition of nature without also considering how this law will work in practice.

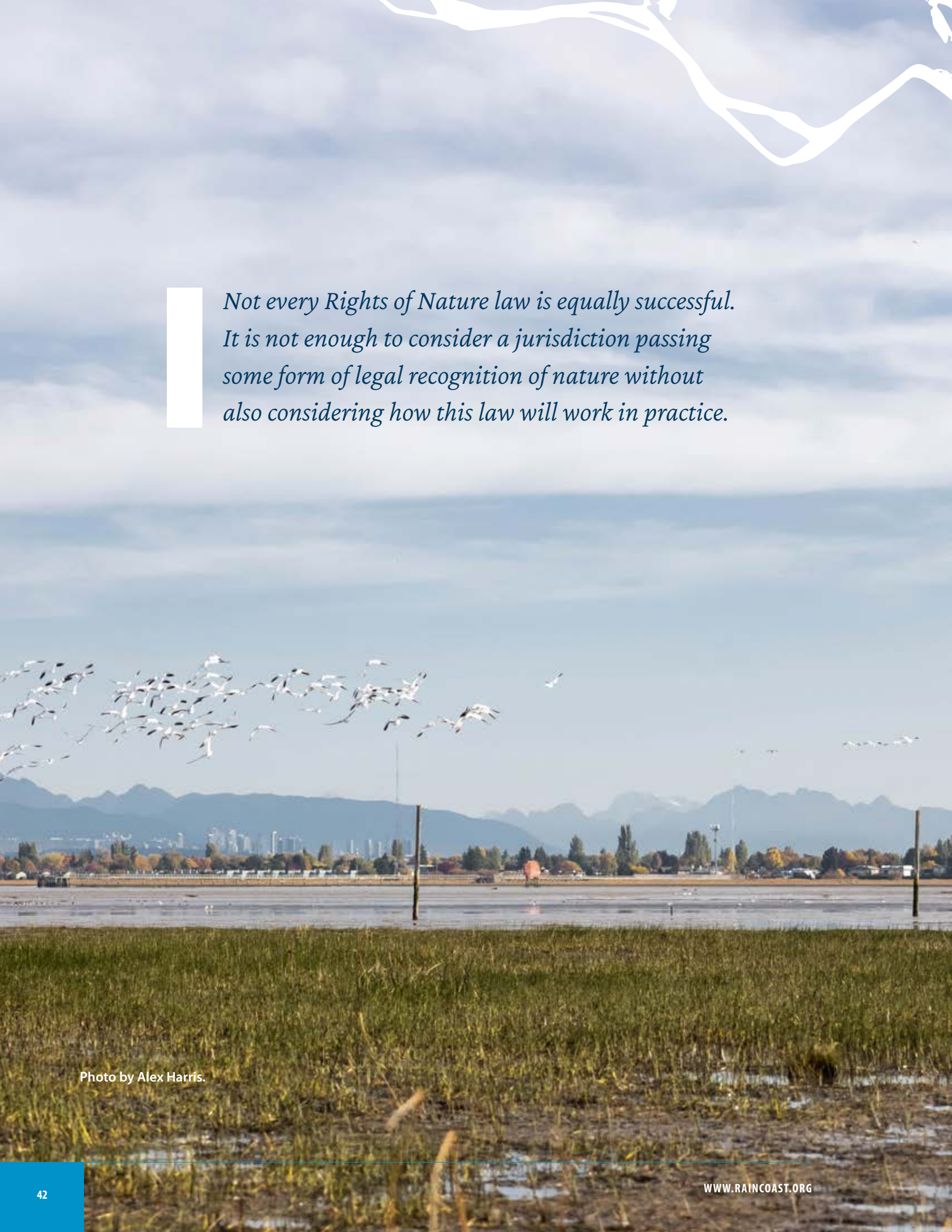

Photo by Alex Harris.

Section V: Analysis and recommendations

This section will evaluate the six discrete pathways explored in Section IV to determine which can extend the greatest protections to the Fraser River Estuary, and which are best suited to the Canadian legal context.

How can Rights of Nature be assessed?

Content of the Laws: Not every Rights of Nature law is equally successful. It is not enough to consider a jurisdiction passing some form of legal recognition of nature without also considering how this law will work in practice. Kauffman and Martin propose assessing the scope and strength of Rights of Nature laws to determine the optimal models most capable of representing and protecting nature's interests.[200] In this context, strength refers to "enforcement capacity expressed through laws' formal authority and individuals' capacity and responsibility to enforce Nature's rights."[201] Scope refers to the "range of rights afforded…how broadly these rights are applied… [and] normative implications" for how Nature is conceptualized in practice.[202]

Pathways (Form of Law): The form of law, or legal pathway through which legal rights are accorded, will also be examined. Assessment considerations include: 1) the compatibility of the rights model with the legal and regulatory landscape; 2) the level of buy-in from rights-holders whose existing rights may be impacted; 3) the alignment with the value systems, beliefs and political ideology of the legal body seeking to promote or uphold Rights of Nature; and 4) the feasibility of implementation, and the resource intensiveness required to enact the law.

Application in Canada: this area of analysis imagines how this pathway would produce legal change within the Fraser River Estuary and, more broadly, within the Canadian legal context. The aim is to assess the feasibility of enacting such a law within the Canadian political or judicial landscape and the impacts it would have on the existing regulatory scheme.

Information about each respective case study is limited to government documents and court decisions that are made publicly available. There are no quantitative indicators or data available about the success of these case studies in terms of measurable improvements to ecosystem health or conservation; in fact, defining and measuring success of Rights of Nature laws remains a significant gap in the literature.

Constitutional law

Content (scope and strength)

Given the expansive nature of Constitutional laws – they must be able to be applied to an infinite number of legal conflicts across the entire jurisdiction – Ecuador's constitution reflects a broad approach to Rights of Nature. Nature is defined broadly as "where life is reproduced and occurs," and such a broad definition allows for more sweeping protections of natural entities within the jurisdiction. Ecuador's constitution clearly defines the rights it grants to nature: the right to respect, to exist, to maintain itself, to regenerate, and to be restored.[203] These provisions have a body of jurisprudence that indicates observable, transformational "normative implications" for how nature is conceptualized.

As the supreme law of the land, these provisions are strong in terms of their enforcement capacity. The Constitution grants broad standing for civilians to bring challenges, as "[a]ll persons, communities, peoples and nations can call upon public authori-

ties to enforce the Rights of Nature."[204] Additionally, the Constitution creates explicit duties for the state to "apply preventative and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles."[205] Explicitly identifying the state as the entity accountable for implementing the Rights of Nature improves the strength of the provisions by fostering accountability: should the state fail to uphold their responsibilities, civilians have the ability to hold them accountable and enforce the Rights of Nature through the courts.

The Ecuadorian case provides evidence that protections of nature through a state's most central organizing document provides fertile ground for the development of Rights of Nature legal theory and can be an effective mechanism through which environmentally degradative projects can be halted. As the case law develops, Ecuadorian judges are expanding the scope and strength of the Rights of Nature provisions, applying to ban state-sanctioned mining projects and advance principles of sustainable development.

What is notable about these consequences is that these judges are not environmental advocates themselves, nor are they seeking to take an inherently political stance against the government. Instead, judges now have a robust set of legal theory pertaining to Rights of Nature and feel a professional responsibility to interpret and apply the constitution in its entirety,[206] which includes balancing the Rights of Nature against private property rights and state economic activity. Finally, the constitutional model allows for the synthesis of Indigenous rights and Rights of Nature into a form of biocultural rights – a concept that has been accepted in both Colombia and Ecuador. The Ecuadorian case study indicates the potential for constitutional Rights of Nature provisions to galvanize a paradigm shift in how nature is conceptualized and treated under the law, capable of overriding private property rights and economic interests or advancing Indigenous rights.

Pathway

As the supreme law of the land, constitutional laws are binding on the legislature, civilians, and corporate actors, and override all other laws that may conflict with its provisions or the rights it guarantees. However, constitutional reform did not produce changes in how Ecuadorian officials made decisions. Since the new Constitution was drafted, the Ecuadorian government authorized an unprecedented number of mining projects in ecologically sensitive regions across the country, many of which are on Indigenous territories.[207] Consequently, the Rights of Nature works more as a legal tool to oppose environmentally destructive projects than a principle that informs how Ecuador pursues economic growth.

As exciting as this unprecedented development is in Ecuador, issues still remain with the implementation and enforcement of Rights of Nature. Namely, that judicial rulings remain the only pathway through which these constitutional Rights of Nature are reliably being enforced. As of 2022, few secondary laws have been passed to enshrine the Rights of Nature. In Ecuador, while two laws mention Rights of Nature – the 2014 Penal Code and the 2018 Environmental Code – neither have explicit provisions that incorporate the Rights of Nature.[208] As such, for judges, it fails to fill the gaps regarding the application and implementation of Rights of Nature. While there has been significant progress on this front, even these rulings are not entirely reliable, for when the courts order the state to act, there is insufficient data to determine state compliance.

It is important to note that the application of the Rights of Nature doctrine has been entirely reactive in nature, a tool used to quash or halt environmentally destructive projects, some of which were state sanctioned.[209] This view of nature as a rights-holding subject has yet to permeate the decision-making within the Ecuadorian or Colombian government, who continue to issue permits to exploit and pollute ecologically sensitive land. As such, this model can be

viewed as reactive instead of proactive, which reduces the capacity for the model to truly reflect the paradigm shift imagined by Rights of Nature advocates.

Ultimately, however, Ecuador and Colombia remain leaders in Rights of Nature development and implementation, and both are exciting jurisdictions to observe how this paradigm shift can happen in real time. While progress for upholding nature's rights remains confined to the judicial system and footnotes within legislation (a more reactive approach to nature's rights), we can observe this paradigm shift in how nature is conceptualized and subsequently treated under the law as we trace the constitutional jurisprudence from 2008, when the Constitution was first created, and the first Rights of Nature cases tended to fail before the courts, to now, where there is a strong precedent for ruling in favour of nature and against extractivist economic interests of both the state and private enterprise.

Application in Canada and to the Fraser River Estuary

Extending the same level of constitutional protection to nature in Canada could have a similarly transformational impact in Canada as it has in Ecuador, albeit with the same time delay between its implementation in law and its application by the judiciary.

When applied to the Canadian context, this reactive model may not be suitable or ideal for the Fraser River Estuary. It does not create any proactive mechanisms to guarantee that the rights and interests of nature are accounted for at the project approval phase and essentially permits the government to continue to authorize development projects that threaten the health of the river and all living beings within it. The only avenue to halt the ongoing exploitation of natural systems would be through litigation, which is expensive, time-consuming, and does not allow for a systemic change in how nature is tested under law. While change within the judicial sphere is notable, it must also permeate the legislative sphere and impact how decisions are made by government officials with the power to authorize, and prevent, the ongoing exploitation of nature.

Ultimately, there is not the content to 'read in' Rights of Nature within the existing Canadian constitution, as was done in Colombia, nor is there the political impetus to undergo such radical constitutional reform, as was done in Ecuador.

Table 5.1. Application of the constitutional Rights of Nature model in Canada and to the Fraser River Estuary

Content	Pathway	Application in Canada
✓ broad geographic scope ✓ entrenched ✓ supports litigation ✓ compliments Indigenous rights	☒ facilitates development ☒ lag in implementation and enforcement ☒ difficult to monitor compliance	☒ no proactive mechanisms ☒ not applicable to Canadian Constitution

Federal or provincial law

Content (scope and strength)

Codifying laws presents several advantages. Uncertainty can be avoided through carefully worded provisions that delineate what entities are accorded legal subjecthood, what rights nature holds, what responsibilities are owed to nature, and who is responsible for fulfilling them. Further, legislation can proactively mitigate future rights conflicts by determining how to rank property rights and Rights of Nature. Additionally, legislation can better reflect a country's cultural and social attitudes if there are meaningful public consultations when drafting the law. As such, there is a greater opportunity to reflect a country's historical and cultural relationship to nature through legislation as opposed to other pathways that are more top-down/influenced by the opinions of a single lawmaker.

In terms of enforceability, codification provides an explicit legislative base for Courts to uphold the Rights of Nature. The judicial system is bound to resolve conflicts in a manner consistent with the laws of the country; if the Rights of Nature are codified, it is more likely that environmental disputes will be resolved in favour of nature, regardless of the economic incentives for exploitation. Instances in which courts have unilaterally recognized the Rights of Nature are easily overturned on appeal or in subsequent cases if they rest on unsteady jurisprudential grounds. Thus, codification provides a solid foundation for ecocentric precedents to develop in the courts, much like in Ecuador or Colombia.

Pathway

An issue with national or provincial codification is the difficulty of measuring its implementation. While this may be an issue with the availability and comprehensibility of sources, it remains that the success of national or provincial legislation has yet to be adequately measured. It is unclear whether a declaration of the Rights of Nature has a genuine impact on how nature is conceptualized and governed in the jurisdictions that have passed these laws, and whether they can withstand the influence of private transnational capital and natural resource industries that profit off the exploitation of nature. Finally, the principle of parliamentary sovereignty introduces the risk that a Rights of Nature law could be overturned or diluted by future regimes prioritizing the estuary's economic potential over its ecological well-being. Without changes to how the estuary is governed, mere legal recognition will not necessarily improve conservation and restoration efforts.

Application in Canada and to the Fraser River Estuary

Research conducted by the Centre for Law and Environment at the University of British Columbia has concluded that the provincial legislature is a more appropriate entry point for Rights of Nature laws.[210] Federal Rights of Nature laws would likely face significant backlash and legal challenges from a subset of the population, or provinces themselves, who feel it disrupts the division of powers and operates contrary to a province's economic interests. One can look to the legal challenges facing another piece of federal legislation, the *Impact Assessment Act*,[211] as an example of how federal environmental legislation could be declared invalid or significantly undermined if it prioritizes sustainability at the expense of a province's model of a growth economy.

Garrett and Wood (2020) identified three forms that legal recognition of the Fraser River Estuary could take if enacted at the provincial level:[212]

- Amendments to all existing legislation to include Rights of Nature provisions
- Create new rights-based legislation that applies strictly to natural entities
- Through a treaty-settlement process with First Nations

However, provincial law might not be the most optimal pathway for legal recognition of the estuary for several reasons. First, it does not address, and may even further exacerbate, the jurisdictional issues unique to the estuary. The ecosystem is the subject of overlapping jurisdictions, and the federal government exercises jurisdiction over some of the most economically productive elements of the estuary, such as fishing, navigation, and the Vancouver Fraser Port Authority. The federal government would likely challenge the validity if such a law undermined its authority in the region. Division of power conflicts could take years to resolve and leave the threats facing the estuary unaddressed. Second, Garrett and Woods identified several issues with using the provincial regulatory framework to pass Rights of Nature laws. Many of the existing laws that could be amended to include Rights of Nature provisions are not laws that exist to confer rights, such as the *Environmental Management Act, Clean Energy Act,* or *BC Constitution*.[213]

Creating new legislation may circumvent some of these identified issues, but the legislative process at the provincial level is time intensive and requires interests from outside the region to develop the content of the law, lessening the opportunity for local knowledge and culture to inform its content. Provincial legislation risks further undermining Indigenous self-jurisdiction over their lands if local communities are not adequately consulted and accommodated.

To conclude, while provincial law is a more appropriate legal pathway than federal law, there are still significant challenges that accompany this pathway. The two most notable drawbacks are the risks of undermining Indigenous jurisdiction over lands and waters and the risk that provincial lawmakers draft a law that is devoid of local scientific and Indigenous knowledge about the estuary, and consequently is unable to accord the estuary the requisite level of legal rights and protections needed to ensure its resilience. Because of these risks, a more localized approach is more appropriate to pursue.

Table 5.2. Application of the federal/provincial legislation Rights of Nature model in Canada and to the Fraser River Estuary

Content	Pathway	Application in Canada
✓ rights and responsibilities can reflect national context ✓ interpretive principles can resolve conflict of rights issues ✓ broad geographic scope ✓ supports litigation	☒ no proactive mechanisms ☒ does not produce change to governance ☒ often lacks implementation measures	☒ potential division of powers issues ☒ may undermine Indigenous jurisdiction over lands and waters ☒ broad scope is not tailored to unique needs of the estuary ☒ could be diluted or repealed by future governments

Local law

Content (scope and strength)

These ordinances tend to be strong in their strength and scope, as defined in the Kauffman model. Local governments have the autonomy to define the legal subject, the legal personality being granted (personhood vs. rights-bearing), and the rights it will hold. Most ordinances contain provisions for enforcement, including prohibitions against acts that violate the Rights of Nature, penalties or suggested remedies for violations, and specifications for how Rights of Nature are enforced – by whom and through which legal avenue. These ordinances may also include provisions that assist in the statutory interpretation by proactively ranking and resolving competing interests, such as private property rights.

One limitation to the scope of these ordinances is the limited geographic region to which they apply. Legal recognition only applies to natural communities within the city's jurisdiction, and it is unclear what the implications are for ecosystems under the jurisdiction of multiple neighbouring communities. As a result, the geographic scope of local ordinances is lower relative to provincial, national, or constitutional sources.

Conversely, the strength of these laws should be high because local governments have flexibility in drafting them. Uncertainty can be avoided through carefully worded provisions that delineate what entities are accorded legal subjecthood, what rights nature holds, what responsibilities are owed to nature, and who is responsible for fulfilling them. Local legislation can better reflect the cultural and social attitudes of a community. As such, there is a greater opportunity to reflect a localized, cultural relationship to nature through legislation as opposed to other pathways that are more hierarchical.

A substantial risk that constrains the strength of these ordinances is that a corporate or government entity could challenge the validity of the law. In theory, they should be easy to enforce because most of them contain explicit prohibitions, penalties, and enforcement mechanisms through which the municipality or one of its citizens can enforce the rights of natural communities. However, several case studies in the United States indicate that these laws may be challenged and overturned before citizens can enforce them. This is especially the case when these laws counter corporate and state economic interests in the area. To date, there has not been a single instance where a municipal Rights of Nature ordinance has successfully enforced the Rights of Nature in court.

Integrating Rights of Nature into city planning process increases the scope and strength of the rights. Incorporating the Rights of Nature into city planning documents creates public accountability measures to ensure the implementation of the Rights of Nature within the local governance framework. It binds decision-makers in the city to consider the legal interests of natural communities when making decisions in the realm of "resource conservation, environmental and public health, economic development, housing, human dignity, open space and land use, community education and civic participation, arts and culture, and transportation."[214] Further, the use of Rights of Nature within city planning broadens the scope of their application because the interests of natural ecosystems have a greater capacity to proactively influence ecosystem management and land-use decisions.

Pathway

Another critique of municipal Rights of Nature laws is that they are often a reactive model, existing to uphold nature's rights in the court system instead of proactively influencing land use and governance decisions. Absent the creation of a management body and secondary legislation that details how the Rights of Nature will affect the governance of the estuary, it is unlikely this pathway will have a material impact on how the estuary is governed, especially since most of the decision-making remains with the federal and provincial governments. Santa Monica's approach to integrating Rights of Nature into its city planning pro-

cesses is an excellent example of using the philosophy of Rights of Nature and ensuring it is reflected across all municipal decisions.

Application in Canada and to the Fraser River Estuary

To date, a municipal ordinance has been the only Rights of Nature pathway successfully implemented in Canada. This indicates that it could be replicable in jurisdictions in other provinces, as the law has not been struck down for being incompatible with the law-making functions of local governments. The more localized nature of the law means that it would be more efficient to secure public buy-in for such a law, especially given that Metro Vancouver has prioritized environmental issues and climate change adaptation,[215] and environmental issues have long ranked as essential issues for civilians living in the Lower Mainland.[216] 62% of British Columbians rank water issues as their largest environmental priority, with concerns being the highest among those living in the Lower Mainland.[217] Other issues cited by those surveyed include climate change and declining salmon populations[218] – both of which are addressed, either directly or as a consequence, through Rights of Nature laws.

Examining these case studies reveals that the Rights of Nature movement at the municipal level appears to transcend political boundaries.[219] Rural towns in conservative states and larger, progressive cities alike have passed laws recognizing the rights of natural communities to exist, evolve, and flourish, while empowering civilians to enforce these rights before the courts and limiting avenues for corporations and state actors to infringe upon them. If positioned correctly, an ecocentric approach to law and governance can bring together groups of diverse backgrounds to bring forward a more sustainable approach to governance.

Local ordinances' limited geographic scope has negative implications for its capacity to protect the Fraser River Estuary, which flows through several municipalities and is the subject of conflicting jurisdiction. Activities authorized in other jurisdictions impact ecosystem health, and legal recognition and protection from a subregion may be insufficient to successfully protect the ecosystem. For example, legal recognition of the estuary cannot impact upstream decisions to pollute or alter the river. In this case, this pathway will ultimately fail to achieve the objective of conserving the river ecosystem and the life it supports.

Kauffman notes that municipal ordinances tend to arise in situations where a local community is facing the deleterious effects of environmental degradation and "illustrate the application of [Rights of Nature] within a Western legal context not heavily influenced by Indigenous world views."[220] While the estuary faces ongoing degradation from heavy industrial activity, which may only intensify in the coming years, there is a risk that this pathway relies too heavily on the law-making power of colonial administrations, and will not incorporate the perspectives, rights, and interests of Indigenous communities.

Table 5.3. Application of the local law Rights of Nature model in Canada and to the Fraser River Estuary

Content	Pathway	Application in Canada
✓ supports litigation ✓ content can be adapted to suit the local context and community needs ☒ limited geographic scope ☒ limited data on enforceability	✓ potential to produce governance reform and contain proactive mechanisms	✓ aligned with local environmental concerns ☒ may be unable to impact upstream development and degradation ☒ may not influence land-use and conservation decision-making

Court rulings

Content (scope and strength)

Examining the cases of India and Colombia, it becomes clear that judicial rulings recognizing the Rights of Nature can transform how the law conceptualizes nature. Judicial attitudes and perspectives can be instrumental in facilitating change within a legal system, for they are theoretically not bound by political ideology or legislative delay. Judges rely on precedent, so recognizing nature as a legal subject sets a precedent for future decisions and could galvanize broader public support for codifying these rights in the future.

That said, court rulings are limited in their scope and strength. Courts that have extended legal recognition to Nature have done so in a limited fashion, with respect to the definition of the legal subject and the set of rights it holds. At its most limited, the entity has merely been recognized as a "legal person" with the same rights and liabilities as a natural person. In these cases, Nature has no rights that work to guarantee its protection and restoration. More robust decisions, such as those in Colombia, recognize natural entities as a "subject of rights" with a standard set of rights to "protection, conservation, maintenance and restoration." While more specific to an ecosystem's functions, these rights still lack sufficient clarity to make them easily enforced and monitored. What indicators demonstrate these rights are being upheld or violated? Since court rulings tend to follow precedent, there is limited opportunity in the future to customize the Rights of Nature to best suit the local context.

Judicial recognition has not always yielded tangible protections for the natural entities it recognizes. In some cases, the rulings have even been overturned by higher courts.[221] For example, the landmark decision granting the Yamuna and Ganges rivers legal personhood was subsequently appealed by the State of Uttarakhand and overturned by India's Supreme Court. The Supreme Court found that granting the rivers the same legal rights, duties, and liabilities as a natural person produced legal uncertainty and absurdity. A river cannot be compelled to perform duties, nor can a river be held liable for harm to a person or community.

On these grounds, the Uttarakhand government appealed the decision to grant the Ganges and Yamuna rivers legal personhood: they did not wish to be held accountable for the preservation of the rivers and did not want to bear the financial burden for civilians seeking compensation for harms caused by the river (during a flood, by example).The Indian case study indicates that a unilateral judicial ruling is not necessar-

ily indicative of the policy interests of a jurisdiction's government and can be easily overturned on appeal.

Pathway

Several implementation issues arise when the courts unilaterally grant rights to nature. Judicial orders often lack several critical features needed to operationalize the Rights of Nature. For example, the state is usually ordered to act as the legal guardian for the body, which the state usually does not have the desire or capacity to undertake. Local stakeholder groups, civil society actors, and scientists were not included in the governance body designated as the guardian of the river, which failed to allow for more integrated management of the ecosystem or species being recognized.[222] Finally, there are limited monitoring or enforcement mechanisms used by the courts to ensure the state complies with their orders. As such, this legal pathway lacks the implementation and enforcement mechanisms needed to mobilize the Rights of Nature in practice. There is no evidence to suggest that legal personhood has affected state decision-making regarding the use and conservation of the natural entities that have been granted such legal status.

Finally, these rulings are the product of years of litigation, which is time and resource intensive, and not guaranteed to produce tangible results. Legislative changes could create a more comprehensive set of protections for nature and be done so in a way that better engages public opinion and reflects the specific cultural values of the populace.

Application in Canada

Ultimately, this pathway is a ***reactive model*** that is not particularly compatible with the Canadian constitutional framework and its separation of powers. Under the Constitution, the judiciary is intended to remain completely independent from the legislature and exercise no legislative powers.[223] In Canada, the judiciary has long been cognizant of "judicial creep", whereby the judiciary oversteps its Constitutional role and intrudes into the realm of the legislature. Recognizing natural entities as legal subjects with rights, and implementing measures necessary to uphold those rights, demands legislation be passed or amended. Given the Court's longstanding position that it shall not intrude into the legislature's role, it is highly unlikely that any court in Canada would unilaterally recognize the Rights of Nature without a legislative foundation upon which to base the finding.

Table 5.4. Application of the court rulings Rights of Nature model in Canada and to the Fraser River Estuary

Content	Pathway	Application in Canada
✓ could set legal precedent to support future litigation ✓ not dependent on political priorities of the government ☒ easily challenged and overturned by the state ☒ reactive approach	☒ does not produce governance reform ☒ time and resource intensive ☒ limited monitoring capacity for compliance ☒ lacks comprehensive provisions (enforcement, interpretation, etc.)	☒ not compatible with Canada's separation of powers ☒ no precedent exists in Canada

Indigenous law

Content (scope and strength)

Authors' note: please note that we are assessing the scope and strength, and content of Indigenous laws as they interact with the colonial legal system, and from the perspective of settlers who do not have a deep understanding of Indigenous legal orders. As we are gauging Indigenous laws through this perspective, we do not want to diminish the full content and potential of Indigenous laws as they apply in any other context.

The strength of Indigenous laws within the colonial legal framework is difficult to measure, given the different degrees of autonomy and self-government colonial governments allow these communities to have. In the United States, where most of the Tribal Laws have passed, Indigenous Nations are considered sovereign. The U.S. Constitution[224] and accompanying case law recognize Indigenous governments as distinct with the capacity to regulate their internal affairs.[225] The enforcement capacity of Indigenous laws has yet to be demonstrated, but there are several cases in the court system seeking to enforce the Rights of Nature through the Tribal Court system.[226]

In terms of scope, this pathway provides the opportunity to infuse Indigenous perspectives into a Western framework, strengthening the legal foundation for Indigenous governance and stewardship over the estuary. This could transform how nature is conceptualized under colonial law while also contributing to the reconciliation of Indigenous and settler legal perspectives. Furthermore, these local laws allow each government to carefully define the legal rights of and responsibilities towards the river and estuary in a manner consistent with each Nation's culture, history, legal order, and spirituality.

Indigenous-led Rights of Nature laws are the best opportunity to avoid the risks of translating Indigenous worldviews into Western rights-based frameworks. Mistranslations can be avoided by each Nation delineating what entities are accorded legal subjecthood, what rights nature holds, what responsibilities are owed to nature, and who is responsible for fulfilling them. Regional Indigenous Nations would have the opportunity to enshrine their historical, spiritual, and cultural relationship to the estuary, which is not available in other legal pathways that are broader in scope. This is important not only to Nations whose lands are situated within the estuary, but to upriver Nations who are equally impacted by land-use decisions and habitat destruction in the estuary, as they rely on salmon populations that migrate through and rear in the estuary.

One limitation to the scope of these laws is that they would be limited to a Nation's territories. For many Nations, the issue of land and title remains contentious. Land claims have yet to be resolved in the region, with some Nations in the process of negotiating modern treaties, others seeking to prove rights and title in the court system, and others preferring not to engage with the Crown on these issues.

Regardless of each nation's approach to title and jurisdiction, it does introduce complexities into laws that regulate Indigenous lands, airs, and waters – such as a Rights of Nature law. First, many Nations' territories cover the estuary, and each Nation has a distinct legal order, relationship to the estuary, and opinion on conservation and water governance. Not every Nation will support the ethos of Rights of Nature legislation, which could substantially weaken the scope and strength of other laws. Second, Nations that choose to enact Rights of Nature laws may not have jurisdiction over the entire estuary, weakening the law's geographic scope.

Pathway

O'Donnell notes that Indigenous communities in jurisdictions around the world have made strategic use of Western legal frameworks, such as the rights-based model, to ground their rights and interests.[227] Legal recognition of the estuary, accompanied by rights and laws that incorporate Indigenous worldviews, confer

validity and enforceability upon Indigenous laws within the settler system, ultimately forcing "settler law and legal theory to include and draw on Indigenous values and traditions."[228]

Using Indigenous laws to grant greater agency to the river itself has the potential to fundamentally alter the water management regime for the estuary. As O'Donnell notes, "when rivers become 'people', this can transform settler-colonial relationships with rivers in ways that can help to centre the interests of the river in water management."[229] The absence of a centralized water management regime within the estuary has long been a source of criticism, and calls for an Indigenous-centred co-governance model have been voiced for years.[230] Rights of Nature legislation can provide the legal foundation through which a new governance model can emerge, one that respects the rights, interests, and agency of the river as a living entity, one built on and led by Indigenous principles of sustainable management.

This pathway is also aligned with the broader movement within the Canadian legal landscape regarding reconciliation, increased respect for Indigenous self-determination, and the implementation of UNDRIP. Rights of Nature laws developed, enacted, and enforced by Indigenous governments are one of many avenues through which the aims of UNDRIP can be realized, and Indigenous governments can better exert jurisdiction over their lands and waters. Article 29 states that "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources",[231] and the Canadian government is bound by the Declaration to assist Indigenous governments in the implementation of such conservation and protection measures. Additionally, Article 32 provides that "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources", and Article 26 provides that the state must "give legal recognition and protection to these lands, territories and resources."[232] Such provisions imply that any Rights of Nature law passed by Indigenous governments concerning their territory and resources cannot be cast aside by the settler administration simply because it operates contrary to their economic interests. Indeed, Rights of Nature legislation is also complementary to efforts to strengthen Indigenous rights to FPIC and self-government, providing additional legal justification for Indigenous veto of proposed development projects.

Finally, studying the Rights of Nature through Indigenous law could also be a vehicle to strengthen and broaden Indigenous rights in Canada, as defined by Section 35 of the *Constitution Act 1982*. Many Indigenous communities view water and nature as their relatives and could use Rights of Nature laws to extend constitutionally enshrined rights to nature as well – much like biocultural rights have been recognized in Colombia and Ecuador.

Application in Canada and to the Fraser River Estuary

Environmental protection laws enacted by First Nations in British Columbia imply this pathway could be consistent with the legal systems of First Nations in the region. Tsilhqot'in Nation's ʔELHDAQOX DECHEN TS'EDILHTAN ("ʔEsdilaghSturgeon River Law"), passed in 2020, outlines the relationship that the Nation has to the river and highlights their protection and stewardship responsibilities.[233] While this law does not recognize the river as a legal entity, it shares very similar language to other Rights of Nature laws passed by Indigenous and colonial governments. The Preamble acknowledges that the Nation's "culture, livelihood and governance are inextricably linked" to the lands and waters, and they possess the responsibility to ensure the river is healthy. Additionally, the law contains several prohibitions against activities that would impact river health and water quality and authorizes the government to make emergency orders to protect the health of the water.[234]

Further, this pathway builds on the work already in progress to revitalize the legal orders of Nations along the Lower Fraser through the RELAW (Revitalizing Indigenous law for Land, Air, and Water) project, led by West Coast Environmental Law in partnership with the Lower Fraser Fisheries Alliance. RELAW has captured the legal principles of Nations in the Lower Fraser region concerning the region's lands, air, and waters through story. Rights of Nature legislation could be the culmination of this work, allowing for the legal principles derived from the project to be integrated within the settler-colonial framework in a way that does not assimilate or dilute Indigenous ontologies.

There is the risk that some communities may not want to pursue the enactment of a Rights of Nature law because it may complicate existing land claims disputes.[235] Absent a collaborative effort amongst all rights-holding Nations, Indigenous laws to protect the Fraser River and Estuary may either prove to be insufficient to protect the entire mass of the river or perceived as attempts for one Nation to exercise exclusive jurisdiction over the ecosystem, as opposed to a more collaborative approach.

Table 5.5. Application of the Indigenous law Rights of Nature model in Canada and to the Fraser River Estuary

Content	Pathway	Application in Canada
✓ informed by local context ✓ incorporate Indigenous worldviews into settler law ✓ supports increased Indigenous jurisdiction over lands and waters ☒ limited geographic scope	✓ alignment with international law (e.g. UNDRIP), commitments to reconciliation and self-determination ✓ ground Indigenous rights and interests within settler legal framework ✓ accommodates governance reform and proactive measures	✓ similar laws have been enacted by First Nations In Canada ✓ aligned with projects supporting the revitalization of Indigenous laws ☒ risk of complicating ongoing land claims disputes

Treaty/Nation-Nation agreement

Content (scope and strength)

While limited in geographic scope to cover a single ecosystem, these treaty agreements allow for a more comprehensive Rights of Nature law and more stringent governance reform, because the local context informs the content of the law. Laws broader in scope tend to sacrifice specificity for breadth of application; the New Zealand model, however, prioritizes the inverse: allowing for more comprehensive reform and a localized governance model that accounts for the specific ecological needs of the region and local dynamics.

The *Te Urewera Act* and *Whanganui River Act* allow for the Rights of Nature to proactively influence ecosystem management, as opposed to reactive measures that only enforce nature's rights once violations have occurred – a more common consequence in other legal pathways. The *Whanganui Act* grants the river the capacity to represent its interests in management decisions through the "human face of the river",[236] while the *Te Urewera Act* ordered the creation of a management body specifically to govern the forest and make management decisions based on the needs and interests of the ecosystem. A broader series of land management reforms accompanied the creation of

the management body, providing funding for Tūhoe ecologists and scientists to monitor the ecosystem and provide real-time data about the well-being of the forest, which can proactively inform management decisions going forward.[237]

Pathway

Environmental and Indigenous advocates alike have lauded the New Zealand treaty model for its comprehensive approach to ecosystem conservation and Indigenous self-determination. These agreements reflect a genuine Nation-Nation approach to negotiations, restoring Indigenous governance over ecologically and culturally significant regions in a manner compatible with the settler legal and political system. These treaties are entrenched in New Zealand settler law through two avenues: they were accompanied by national legislation that codifies the agreements reached between the parties, and they resolve claims under New Zealand's founding document.

Despite these benefits, it is important to note how distinctive this approach is to New Zealand's national context and how difficult it may be to replicate anywhere else. The negotiations that produced the *Te Urewera Act* and *Whanganui Act*, the Waitangi Negotiations, have been taking place since 1993.[238] Those instruments took over twenty years to devise and legislate, following a commitment from the New Zealand Parliament in the early 1990s that they would settle all outstanding Treaty land claims from the original Waitangi Treaty signed in 1840.[239] The New Zealand government invested significant time and resources into this settlement process, creating a ministerial position to oversee negotiations and a permanent commission, Waitangi Tribunal, to investigate breaches of the Treaty and provide redress to wronged parties.[240] There has been no indication from the provincial or federal government that they intend to settle every outstanding land claim in the province or that they intend to establish anything similar to this Tribunal.

Application in Canada and to the Fraser River Estuary

As comprehensive and promising as it is, the New Zealand model would be nearly impossible to replicate in the Canadian context. A treaty agreement that extends legal recognition and protections to the entirety of the Lower Fraser River and estuary would need to involve all rights-holding Nations. Coordinating a negotiation between the Crown and over 30 Indigenous governments would be a near logistical impossibility, with no guarantee that the parties could arrive at an agreement that replicates the scope and strength of the New Zealand model. It would also be challenging for Indigenous Nations to aggregate diverse interests to present a unified position in these hypothetical negotiations. Phare summarizes this issue: "[i]n any given region, there may be multiple claims by different First Nations to the waters…[who] may have different, and competing values, ranging from conservation-oriented perspectives to development and full exploitation…[and] a different strength of claim to water rights in an area".[241]

Replicating this model is also complicated by the current state of the modern treaty process in British Columbia. As of July 2022, only about half of the rights-holding nations[242] along the estuary are engaged in treaty negotiations with the Crown. Nations not involved in the modern treaty system may instead be in the process of negotiating impact-benefit agreements or are not in any form of relationship with the Crown. Centuries of colonial oppression under the settler administration have left Indigenous governments skeptical of any form of engagement with the Crown and would prefer to remain outside the treaty system to minimize the influence of the colonial government over their affairs.

Table 5.6. Application of the Treaty/Nation-Nation Rights of Nature model in Canada and to the Fraser River Estuary

Content	Pathway	Application in Canada
✓ proactive mechanisms ✓ informed by local context ☒ limited geographic scope	✓ requires governance and land management reform ✓ Nation-Nation agreement to restore Indigenous jurisdiction over traditional lands and waters	☒ unfeasible given the current state of treaty negotiations in Canada ☒ difficult to coordinate negotiations amongst the several rights-holding parties within the estuary

An opportunity for Canadian legal innovation?

Canada's singular case study represents innovation and cooperation between colonial and Indigenous governments. Given the unique jurisdictional complexities of the estuary and the state of Crown-Indigenous relations in British Columbia, there may be the opportunity to explore novel pathways to accord the estuary legal recognition. The estuary encompasses several Indigenous Nations' territories, all considered 'rights-holders' within the estuary governance process. As such, there could be an opportunity to recognize the legal rights of the ecosystem through a series of intergovernmental agreements held between these rights-holding Nations.

This intergovernmental agreement could accord legal recognition to the ecosystem and define the rights it will hold, leaving implementation to local laws passed by each Indigenous government. A dual-level approach allows the entire ecosystem to receive legal recognition and entitles each Nation to define the rights of the river and their responsibilities towards it in ways that reflect their culture, legal orders, and storied relationship with the water. These agreements and laws could also create the impetus for a new management plan for the river that prioritizes Indigenous governance and advances the objectives of sustainability, restoration, conservation and reciprocity. Finally, this proposed agreement could circumvent issues with the division of power and jurisdictional conflict. By working these out among rights-holding nations and then implementing them through a management agreement and local laws, Nations need not aggregate potentially diverse interests.

Collaboratively recognizing the Fraser River Estuary as a legal entity by incorporating the worldviews of each respective Nation ensures the ecosystem is protected without compromising each Nation's authority. Doing so also sets the foundation for future partnerships on land use, water management, and species conservation issues. Centering the best interests of the estuary within a law or agreement removes barriers to collaborative management and conservation, while also supporting First Nation's authority over land and water in a way that does not prioritize one Nation's sovereignty over another.

Recommendations

After a global survey of Rights of Nature laws within different jurisdictions and an analysis of each law's compatibility within the Canadian political and legal context, the following pathways emerged as the most optimal for the Fraser River Estuary. It is recommended that the following legal pathways be pursued by parties interested in passing Rights of Nature legislation for the estuary:

- **Local laws** passed by Indigenous Nations and municipal governments with jurisdiction over the river, recognizing the estuary as a legal entity and rights-holder.
- **Intergovernmental agreements** among Indigenous governments that recognize the legal status of the estuary, implemented through localized laws that recognize the rights of the river and responsibilities owed to it in ways aligned with the respective Nation's culture, worldview, and historical relationship to the river and estuary.

Essential components of a Rights of Nature law

Irrespective of the pathway chosen to accord legal recognition to the estuary, the content of the law must address the scope and strength issues discussed above, balancing breadth of protection with the specificity required for operationalization. This can be done by emulating provisions from robust Rights of Nature laws found in other jurisdictions:

- Clear definition of rights-holder(s);
- Clear definitions of estuary's rights, and responsibilities required to uphold them;
- It is recommended to consult international Rights of Nature laws and Indigenous perspectives to ensure the legal content responds to the threats facing rivers and are localized to the cultural, spiritual, and environmental context of First Nations within the estuary.
- Legislation should clearly define the entity responsible for fulfilling any legal obligations towards the estuary.
- Indicators to define and measure the rights accorded, rooted in both Western scientific knowledge and Indigenous knowledge;
- Identified enforcement mechanisms; and
- Provisions that allow for the ranking of competing interests.

Underscoring the need for governance reform

Legal recognition of any kind must also entail governance reform such as guardianship, management body, or co-governance model. This governance reform must be led by Indigenous governments, informed by Western science and Indigenous knowledge about the lands, waters, and living things that make up the estuarine ecosystem.

Next steps

When examining how a Rights of Nature model would look in the Canadian context, the following key questions must be addressed:

What is the content of the rights?

- What rights does nature, or the specific natural entity, hold?
- What, if any, duties, responsibilities, or prohibitions are imposed on other legal actors?

What is the relative weight of these rights?

- How are nature's rights and interests weighed against other rights of civilians, corporations, governments, and Indigenous communities, among others?
- How are conflicts of rights to be resolved?

How are nature's rights and interests represented in the legal system?

- Who defines and represents the interests of the estuary, and how do they advocate for them within the legal system and decision-making processes?
- What are the governance implications for the natural entity/entities in question?

Notes and references

200 See Kauffman and Martin, *supra* note 23 at 14-16.

201 *Ibid*.

202 *Ibid*.

203 See Ecuador Const, supra note 91 art 71-2.

204 *Ibid.*

205 *Ibid,* art 71.

206 *Ibid,* art 81.

207 See generally, Carolina Valladares & Rutgerd Boelens, "Extractivism and the rights of nature: governmentality, 'convenient communities' and epistemic pacts in Ecuador" (2017) 26:6 Envtl Politics 1015.

208 See Kauffman and Martin, *supra* note 23 at 83.

209 See e.g., Sala de lo Civil y Mercantíl de la Corte Provincial del Azuay [Civil and Mercantile Chamber of the Provincial Court of Azuay], 26 September 2018, *Rio Blanco,* 01333-2018-03145 (Ecuador).

210 See Rachel Garrett and Stepan Wood, "Rights of Nature Legislation for British Columbia: Issues and Options" (2020) Centre for Law and the Environment Working Paper No 1/2020 at 6.

211 See *IAA, supra* note 33.

212 See Garrett and Wood, *supra* note 206 at 12.

213 *Ibid* at 16.

214 See "Sustainable City Plan", supra note 136.

215 See e.g. "Climate Change Adaptation Strategy" (2018), online (pdf): *City of Vancouver*, <*vancouver.ca/files/cov/climate-change-adaptation-strategy.pdf*>.

216 See "2021 BC Watershed Security Survey: Topline Report" (2021) at 5, online (pdf): *POLIS Water Sustainability Project*, <poliswaterproject.org/files/2021/10/2021BCWatershedSecuritySurvey.pdf>.

217 *Ibid* at 6.

218 *Ibid*.

219 See Kauffman and Martin, *supra* note 23 at 164.

220 *Ibid.*

221 See "India's Ganges and Yamuna rivers are 'not living entities'" (7 July 2017) online: *BBC*, < www.bbc.com/news/world-asia-india-40537701>.

222 See Kauffman and Martin, *supra* note 23 at 191.

223 See e.g. *NevSun Resources Ltd v Araya*, 2020 SCC 5 at para 294.

224 See US Const art I, § 2, cl 3 ("[r]epresentatives and direct Taxes shall be apportioned among the several States ... excluding Indians not taxed"); US Const art I, § 8 ("Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes").

225 See e.g. *Johnson v McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v State of Georgia*, 30 US 1 (1831); *Worcester v State of Georgia* 31 US 515 (1832).

226 See See "First "Rights of Nature" Enforcement Case Filed in Tribal Court to Enforce Treaty Guarantees", *supra* note 148.

227 See O'Donnell et al, *supra* 138 at 413.

228 *Ibid*.

229 *Ibid* at 421.

230 See Oliver M Brandes and Jon O'Riordan, "10 winning conditions for successful watershed governance in BC" (2014), online (pdf): *POLIS Project on Ecological Governance*; Ned et al, *supra* note 5.

231 See *UNDRIP*, *supra* note 156, art 29.

232 *Ibid*, art 26,

233 *ʔELHDAQOX DECHEN TS'EDILHTAN* (ʔEsdilaghSturgeon River Law), (28 May 2020) online (pdf): *Tŝilhqot'in Council of Chiefs*, <www.esdilagh.com/PDF/Esdilagh%20Elhdaqox%20Law%20Final%20Version.pdf>.

234 *Ibid* at ss 12-14, 26-29, 30-4.

235 See Rosie Simms et al, "Navigating the Tensions in Collaborative Watershed Governance: Water Governance and Indigenous Communities in British Columbia, Canada" (2016) Geoforum 73 6 at 12.

236 See *Te Awa Tupua*, supra note 190 at s 18(2).

237 See Kauffman and Martin, *supra* note 23 at 154.

238 See Maureen Hickey, "Negotiating History: Crown Apologies in New Zealand's Historical Treaty of Waitangi Settlements" (2006) 13:1 Public History Review 108.

239 *Ibid*.

240 Government of New Zealand Website.

241 Merrell-Ann Phare, "Restoring the Lifeblood: Water, First Nations and Opportunities for Change: Background Report" (2011) at 14, *Walter and Duncan Gordon Foundation*.

Legal reform that conceptualizes the estuary not as a set of discrete resources, but as an interconnected, living entity capable of bearing rights, would also demand a governance regime that is mandated to act in the entity's best interests and uphold those rights.

Photo by Alex Harris.

Section VI: Proposed benefits to conservation

Granting legal recognition to the estuary could provide the legal basis to advance the implementation of conservation efforts in the region. Fundamentally changing the law views nature has implications for its governance and perception by society at large. This could be potentially transformative for conservation and restoration efforts across the Fraser River Estuary by setting important legal precedents, altering the regulatory landscape, and providing the impetus for governance reform with sustainable funding.

Changes to the regulatory and legal landscape

Legal recognition of the estuary would produce several legislative and regulatory changes representing a more proactive approach to conservation. For example, it would increase the burden of proof that development proposals are required to meet to receive Ministerial approval. This could apply to both impact assessments and compensation and offsetting schemes. If the impacts of a proposal infringe upon the rights and interests of the estuary ecosystem, there is a legal mandate to refuse it. These consequences could deter future development proposals by introducing additional legal and regulatory risks into the approval process. Finally, granting the estuary legal rights and the standing to enforce those rights better equips environmental lawyers with legal tools to oppose future developments, which current legislation such as the *Species at Risk Act* has been unable to support.[243]

Broaden decision-making considerations

Recognizing the estuary as a rights-bearing subject could empower the representation of non-financial interests in decision-making, such as ecological and cultural considerations, and allow them to override economic incentives. In the past, legislation intended to protect at-risk species has been overridden at the managerial level – driving a species to the brink of extinction was deemed an acceptable consequence in the pursuit of economic growth. As such, laws protecting at-risk species are only binding until a Minister decides to override them in favour of political gains.

Introducing broader environmental legislation intended to protect the integrity of the entire estuary, as opposed to a narrow subset of species, could make it more difficult for decision-makers to override ecological concerns and broaden the scope of considerations. Federal decision-making could therefore become more informed by scientific consensus and community needs as opposed to top-down, national economic imperatives.

Current decision-making processes do not account for the negative externalities of development proposals, such as loss of ecosystem processes and cumulative impacts of industrial activities along the entirety of the Fraser River. The burden of proof for ecosystem harm rests with those advocating for the ecosystem's or species' health, not on the entity proposing the project. As such, the current decision-making framework prevails because it assumes that no harm will ensue unless proven to an unreasonable standard of scientific certainty.

The defragmentation of nature that informs a new governance regime

Recognizing the estuary as a rights-bearing ecosystem also provides the legal foundation for a new governance regime that treats the estuary as a living, integrated entity. Such a governance regime can better account for the cumulative effects of poor land-use decisions throughout the Fraser watershed. Since the dissolution of the Fraser River Estuary Management Program (FREMP), decision-making over the estuary has become increasingly siloed and fragmented, with federal decision-makers such as the Vancouver Fraser Port Authority clinging to power and influence to the detriment of ecosystem health. Divorcing governance from political promises of economic growth would allow decision-making to better respond to community needs, adopt a long-term strategic mindset that prioritizes sustainable management, and better resist profit incentives and industry pressures.

Legal reform that conceptualizes the estuary not as a set of discrete resources, but as an interconnected, living entity capable of bearing rights, would also demand a governance regime that is mandated to act in the entity's best interests and uphold those rights. Such reform is aligned with the Lower Fraser Working Group[244]'s "Blueprint for Restoring Ecological Governance to the Lower Fraser River"[245] and what Brandes and O'Riordan identified as the conditions for successful watershed governance in British Columbia.[246]

A new governance regime could implement a two-eyed seeing approach, where Indigenous knowledge and Western science weave together to define the essential elements of a healthy, functional estuarine ecosystem that would guide decision-making processes. Research and monitoring that is already taking place in the estuary could be used to inform the content of the ecosystem's rights (defining a threshold for what can be considered the right to water quality, for example), while Indigenous knowledge of the ecosystem could inform a new decision-making framework and increase co-governance over the region. These perspectives together are required to define the rights and interests of the ecosystem and could inform future provincial environmental policy, such as setting new limits for upstream pollutants or water withdrawals to guarantee a baseline quality of life for the Fraser River watershed.

Ultimately, Rights of Nature laws and governance reforms they encourage seek to rectify this fragmented view of nature and extractive mindset that currently guides decision-making in the estuary. It can provide the legal basis to uphold conservation and restoration objectives even when there is a profit motive to ignore them.

Challenging our economic structure

Ultimately, granting legal rights to the estuary is part of a larger societal shift towards reconceptualizing humankind's relationship with the natural world we live in and re-envisioning a more sustainable future. These laws provide the legal foundation to challenge the underlying economic dogma that legitimizes the commodification of nature and incentivizes the conversion of habitat into goods and services. It codifies the moral argument that nature has intrinsic value and humans, by virtue of being a *part* of nature as opposed to its *master*, have responsibilities towards natural entities beyond their exploitation. This kind of radical shift in how nature is conceptualized and treated under the law is needed to re-align our global economic structure to enable long-term sustainability, and is necessary to recover ecological resilience amidst a rapidly changing climate, a biodiversity crisis, and stressing natural processes beyond their limits.

Notes and references

242 "Annual Report 2021" (2021), online (pdf): *BC Treaty Commission*, <www.bctreaty.ca/sites/default/files/BCTC_Annual_Report_2021_web.pdf>.

243 See e.g., EcoJustice, Press Release, "Supreme Court of Canada refuses to hear Trans Mountain case, conservation groups react" (5 March 2020), online: <ecojustice.ca/press-release/supreme-court-of-canada-refuses-to-hear-trans-mountain-case-conservation-groups-react/>.

244 The Lower Fraser Working Group is composed of experts from the Lower Fraser Fisheries Alliance, Raincoast Conservation Foundation, Martin Conservation Decisions Lab at the University of British Columbia and West Coast Environmental Law.

245 Lower Fraser Working Group, "Blueprint for restoring ecological governance to the Lower Fraser River" (2020). <https://www.raincoast.org/reports/ecological-governance/>

246 See Brandes and O'Riordan, *supra* note 226.

An integrated management body empowered to make decisions regarding the use and conservation of the estuary in ways consistent with Indigenous knowledge and values, Western science, and the legal interests of the estuary as a legal subject can assist in the issues of overlapping jurisdiction prevalent in the region.

Photo by John McCormach.

Section VII: Critiques and risks of Rights of Nature

Defining rights, aggregating interests, and resolving conflict of rights

Critics of rights of nature laws argue that granting legal subjecthood and rights to nature does not guarantee that additional protections to nature will follow. If anything, it introduces another complexity into an already complex regulatory scheme.

Canadian courts have noted that environmental regulation encompasses many other "physical, economic and social"[247] dimensions. Guim and Livermore note that "choices about land use, pollution control, and access to natural resources have a wide range of both positive and negative effects, touching people, cultures, species, ecosystems, and landscapes in many complex ways and giving rise to considerable controversy."[248] Policymakers are inevitably required to make decisions that have adverse impacts on one or more stakeholder groups, and Rights of Nature laws only introduce additional stakeholders without necessarily equipping decision-makers with the means to reconcile diverging interests.

These challenges would only compound when there are disparate impacts on rights-holders – that is, a policy improves the condition for one natural entity while violating the rights of another. From these challenges emerge two important questions. First, how are policymakers meant to resolve conflicts of rights between rights holders who are all equal under the law? Second, how are policymakers or management boards meant to aggregate the interests of nature when there is potential to aggregate interests on a species, ecosystem, and national level?[249]

Garver remarks that operationalizing a radical idea such as Rights of Nature within the constraints of the existing legal landscape will inevitably create hierarchies within the different rights-holding entities and that "resolving conflicts between Rights of Nature and human rights, including private property rights, requires criteria that inevitably will reflect a hierarchy of normative principles and values."[250]

Right to water

O'Donnell critiques the Rights of Nature model's capacity to empower nature, specifically rivers and other water bodies, to resist threats and future harms. She argues that "[r]ather than empowering rivers in law to resist their own existential threats, these new legal arrangements may ultimately make it even more difficult to prevent the degradation and loss of rivers."[251] This is because many of the rights conferred onto rivers recognized as legal subjects do not include a *right to the water* flowing between their banks. O'Donnell's critique posits that as long as rivers do not have the right to their water, the river itself remains a resource to be exploited by those who depend on it. Laws that recognize water as a legal entity allow rights to the water to remain with entities other than the river itself,[252] such as private landowners or municipalities. Given the impact of climate change on river flow variability and its downstream impacts on salmon population health, the exclusion of a right to water has significant implications for the Rights of Nature model's capacity to support conservation and restoration within the estuary. Ultimately, O'Donnell argues that without a right to water or other legal mechanisms that allow the river's interests to influence water management

decisions, legal recognition alone is insufficient to prevent the degradation of river ecosystems.[253]

Tensions with Indigenous sovereignty

While the philosophy that informs the Rights of Nature shares many commonalities with Indigenous worldviews in many parts of the world, there have also been several criticisms levied by Indigenous leaders and activists about the potential for Rights of Nature laws, if not properly crafted and implemented, to threaten their autonomy and local power structures. The notion of rights is an inherently Western framework and attempting to translate Indigenous worldviews and ontologies into a rigid, Western model may misappropriate or warp Indigenous laws and perspectives.

Issues with Enforceability

Litigation in response

Several critiques about Rights of Nature laws centre around their enforceability. In many cases, when a subnational body passes Rights of Nature legislation, companies and other stakeholders will challenge the validity of the law in court. This poses the risk that the law will be held invalid or substantially weakened by the courts, much to the detriment of the ecosystems sought to be protected. Case studies from American municipalities such as Highland Township reflect the risk that corporations or government agencies will challenge, and ultimately overturn, these municipal ordinances.[254]

Retroactive vs proactive solution

As evidenced by the case studies examined in this report, many of the Rights of Nature pathways represent a reactive solution instead of one that is proactive. In theory, Rights of Nature is intended to influence decision-making about the authorization of exploitation but is often invoked retroactively because there were no accompanying governance reforms to ensure decision-makers account for nature's rights. Mere recognition of rights without material changes to governance and regulations limits the legal system's enforcement of the Rights of Nature.

Delay in implementation and enforceability

Although limited data is available on Rights of Nature enforceability, one observable issue is the time lag between the enactment of Rights of Nature laws and the paradigm change within the institutions designed to uphold it. Ecuador, which enshrined Rights of Nature into its Constitution in 2008, only saw its first successful case upholding the Rights of Nature in 2011.

Guim and Livermore note that, between 2008 and 2016, "every challenge to important infrastructure projects and development initiatives that invoked nature's rights ultimately failed."[255] This critique, however, only focuses on a narrow subset of Rights of Nature cases brought before the Ecuadorian courts: those driven by civil society actors.[256]

Further, Guim and Livermore's critique does not account for Rights of Nature cases between 2016-2021, when the Rights of Nature provisions were far more entrenched in the legal system. Kaufman and Martin summarize the ultimate success of Rights of Nature enforcement in Ecuador: of the thirty-eight actions, thirty-one succeeded, and the seven that failed were from the years that directly followed the enactment of the Constitution. This indicates, however, that there is a significant time lag between the creation of a Rights of Nature law and the normative shift within legal institutions to understand and uphold the law. Granting legal rights to nature does not produce immediate protections of nature's rights absent secondary laws that concurrently enact prohibitions or reform governance structures.

Law declared of no force or effect

A requisite level of specificity is necessary to give legal effect, and clarity in the language is required for the law to be implemented if passed and upheld if challenged. Several environmental laws in Canada have been struck down or substantially weakened because they lack sufficient clarity. For example, Ontario's 1993 Environmental Bill of Rights contained a preamble that stated, "the people of Ontario have a right to a healthful environment," but the Ontario Superior Court of Justice found this did not confer any legal right or benefit in a 2012 finding.[257] If provisions recognizing the estuary as a legal entity are similarly vague, it is not guaranteed that the declaration will have legal effect.

Legal absurdities

There is also the risk, as is evidenced from some case studies, that according legal rights to natural entities (specifically through the legal personhood model) will produce uncertainty, or even absurdity, that ultimately undermines the objectives of the law. This has most notably occurred following Rights of Nature decisions in India, where the state appealed the judge's ruling that the Yamuna and Ganges rivers were legal persons.

The state argued that the river could not, practically speaking, possess the same rights and liabilities as a natural person, for doing so would allow the river to be sued for damages caused to civilians, in the instance of flooding or other natural disasters.[258] As the river's guardian, this would impose a greater financial burden on the state and subject it to nearly indeterminate liability. The State of Uttarakhand was not willing to shoulder such a responsibility; their appeal was accepted by the Supreme Court of India, which ultimately overturned the legal recognition granted in the initial court ruling.[259]

Multiple interpretations and conflict over representation

Further, suppose Rights of Nature laws lack precision and clarity. In that case, the conceptual differences concerning what the Rights of Nature *are* or how those rights are defined can cause "confusion, inefficiency, and arbitrariness—without any obvious environmental benefit."[260] For example, multiple parties could derive a different understanding of what the right to thrive entails, and each claim to speak on behalf of nature's right. Alternatively, each party could have a different understanding of what is in nature's best interests, and each seeks to represent that before the court. These cases of multiple litigants pursuing fundamentally different outcomes could create unnecessary litigation and complicate an already nebulous regulatory and legal environment.

Overlapping jurisdictions

One challenge facing the implementation and enforcement of many Rights of Nature laws, especially those that pertain to specific ecosystems such as rivers, is the issue of overlapping jurisdictions. Rivers transverse national, state, and municipal boundaries, and each government may have different laws for using and conserving that section of the river. Recognizing the rights of the river in one jurisdiction does impose any obligations or prohibitions on neighbouring jurisdictions, nor does it confer rights to the river flowing within those jurisdictions. Overlapping jurisdiction introduces challenges with enforcement – how can one jurisdiction enforce the rights of the river if an upstream development project is approved, and lawfully so? With respect to the Fraser River, the sheer size of the river coupled with the number of industries and communities it supports would introduce this challenge if the estuary were accorded rights. According the estuary legal recognition, absent legislative reform regulating upstream projects and pollutants, would render the implementation and enforcement of such rights near impossible.

Mitigation Strategies

While these risks highlight several shortcomings or complications that accompany Rights of Nature laws, they also underscore the need for governance reform to accompany any form of legal recognition. This is especially true of the estuary, where a variety of stakeholders have been calling for the reinstatement of a governance body for the estuary since the Fraser River Estuary Management Program dissolved in 2013.

Concerning clarity and legal effect, designating a management body to define, represent, and uphold nature's interests removes many potential conflicts that could arise when multiple interest groups seek to define and represent nature's interests. Creating these entity-specific guardianship bodies ensures that localized knowledge of the ecosystem informs its rights and interests, and that the governance reform is practical to implement.

An integrated management body empowered to make decisions regarding the use and conservation of the estuary in ways consistent with Indigenous knowledge and values, Western science, and the legal interests of the estuary as a legal subject can assist in the issues of overlapping jurisdiction prevalent in the region. Such a governance framework can account for the multiplicity of interests in the region, foster collaborative decision-making, and better account for cumulative impacts of land-use and development decisions than the more siloed approach to governance seen today.

New Zealand and Quebec case studies indicate how this risk can be mitigated. In addition to recognizing ecosystems as legal entities, the law also created management boards with the legal powers to speak on behalf of the entity (as in the case of the Whanganui River) or make decisions for managing the ecosystem (as in the case of Te Urewera). Further, the Magpie River Resolution mandated the creation of a guardianship body to represent the river's interests at statutory and legal proceedings, composed of representatives from the Minganie Municipality and the Innu Council. This indicates that a guardianship governance model is compatible with the Canadian context and can be a fertile ground for better integrating Indigenous governance within ecosystem management. Work has already been done by environmental groups and First Nations to develop the principles and structures that should guide such a management body, such as the Lower Fraser Working Group's[261] *Blueprint for restoring ecological governance to the Lower Fraser River* and the Lower Fraser Fisheries Alliance's Coastal Restoration and Climate Adaptation Project.

Notes and references

247 See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 63, 84 Alta LR (2d) 129 [cited to SCR].

248 Mauricio Guim and Michael A. Livermore, "Where Nature's Rights Go Wrong" (2021) 107:7 Va L Rev 1347 at 1369.

249 *Ibid* at 1382.

250 See Corrigan and Oksanen, *supra* note 25 at 17.

251 See O'Donnell, *supra* note 194 at 643.

252 *Ibid* at 652.

253 See O'Donnell, *supra* note 194 at 662-3.

254 See e.g., *Seneca Resources v Highland Township*; *Drewes v Toledo*, *Pennsylvania General Energy Company LLC v Grant Township*.

255 See Guim and Livermore, *supra* note 243 at 1408.

256 Kauffman and Martin, supra note 23 at 97 ("[t]hirteen of the thirty-eight RoN applications during 2008–2020 were initiated by the state (three of which were initiated by the Galapagos National Park), all successfully").

257 Environmental Bill of Rights, s 2, 1993. <https://www.ontario.ca/laws/statute/93e28/v2>

258 See "India's Ganges and Yamuna rivers are 'not living entities'", *supra* note 217.

259 *Ibid.*

260 See Guim and Livermore, *supra* note 243 at 1352.

261 The Lower Fraser Working Group is composed of experts from the Lower Fraser Fisheries Alliance, Raincoast Conservation Foundation, Martin Conservation Decisions Lab at the University of British Columbia and West Coast Environmental Law.

Photo by Ray Maichin.

Conclusion

To conclude, it is evident that the Fraser River Estuary ecosystem is being degraded at an unprecedented rate due to a suite of cumulative effects. This degradation carries with it significant implications for the number of species that rely upon the ecosystem for shelter, fo od, and protection – including foundational species such as Pacific salmon and endangered species like the Southern Resident killer whale.

It is equally apparent that the Canadian regulatory landscape is antiquated; incapable of and unwilling to prioritize restoration and conservation over short-term financial gains, even in the face of climate change and mounting evidence of the long-term health, economic, and social costs resulting from the over-exploitation of nature. As numerous Indigenous Nations, environmental groups, and scientists have identified, urgent action is needed to restore a governance system over the estuary that prioritizes the long-term health of the ecosystem and the communities who rely upon it.

Rights of Nature embodies a legal innovation that can facilitate this much needed shift in how the estuary is conceptualized and treated under the law. Imbuing the estuary with legal standing and personality, one that reflects the longstanding relationship that Indigenous Nations have with the region, captures the estuary's intrinsic value as a living organism, beyond what resources it can provide to support economic growth and industrialization.

This global survey has demonstrated the diverse forms that Rights of Nature laws can take. A case study analysis of legal pathways indicates that there are several forms a Rights of Nature law could take if enacted to protect the estuary. Passing such a law could have a host of short, moderate, and long-term benefits to conservation and governance over the ecosystem. Ultimately, passing such a law is a necessary step to transform Canada's perspective on nature, from a set of resources to a whole, interconnected being.

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