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Rights of Nature Legislation for British Columbia: Issues and Options

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Abstract

This paper explores how the rights of nature could be protected through legislation in British Columbia (BC). Canada is far behind other countries in protecting rights of nature. Canadian law does not currently recognize the rights of nature in any meaningful way. Numerous statutes in Canada make nature—from fisheries to wildlife, to the land itself—the exclusive property of humans, with no inherent right to exist, flourish or be restored. We explore two potential avenues for protecting the rights of nature in British Columbia: 1) amendment of existing legislation, and 2) a new stand-alone rights of nature statute. We examine trailblazing rights of nature laws in other jurisdictions to identify key elements of a rights of nature law for BC. This paper presents a preliminary annotated draft of a possible rights of nature statute, not as a proposed model law but as a starting point for discussion.

Keywords

Rights of Nature; Legislation; British Columbia

Contents

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"The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator."
English jurist William Blackstone, 1753[3]

"[W]e are all one, … everything depends upon everything else, … we are all interconnected and interdependent and our fates are inextricably interlinked."
Haida lawyer Terri-Lynn Williams-Davidson, 2016[4]

1. Introduction

Most Western legal systems elevate humans hierarchically above nature: inherently superior to the plants, animals, oceans, mountains, forests and so on that make up the natural world. Nature is treated as an object of human property rights. The British Columbia *Wildlife Act,* for example, states that "Ownership in all wildlife in British Columbia is vested in the government. … 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."[5] A similar ideology is reflected across Canada, with the Manitoba *Fisheries Act* outlining that "The property in all wild fish, including wild fish that have been unlawfully caught, is vested in the Crown, and no person may acquire any right or property

[3] William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia: JB Lippincott, 1893 [1753]) v 1, Book II, c 1 at 3.
[4] Terri-Lynn Williams-Davidson, "The Earth's Covenant" (multimedia art installation, Art Gallery of York University, 2016), *quoted in* TJ Demos, "Gaming the Environment: On the Media Ecology of Public Studio" (2018) *Harvard Design Magazine* 45 at 99.
[5] *Wildlife Act*, RSBC 1996, c 488, s. 2(1); David Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (Toronto: ECW Press, 2017) at xxviii [Boyd, *Rights of Nature*].

in such fish other than in accordance with this Act."[6] Nature is made the property of human beings – be it the Crown or individuals.

But not all legal systems view the relationship between humans and the natural world in this way. The legal systems of many Indigenous nations conceptualize this relationship not as one of property and ownership, but of interconnection and reciprocity. In 1977, the Haudenosaunee (Iroquois Confederacy) asked to represent animals at the United Nations, explaining that "We see no seat at the U.N. for the eagle … no seat for the whales, no representation for the animals."[7] John Mohawk, a Haudenosaunee scholar, finds that many Indigenous nations "accept the legitimacy of the animals, celebrate their presence, propose that they are 'peoples' in the sense that they have an equal share in this planet, and, like peoples, have a right to a continued existence."[8] Haida lawyer Terri-Lynn Williams-Davidson writes that humans and non-human nature "are all one."[9] The Ho-Chunk Nation has incorporated the rights of nature into their tribal constitution, giving ecosystems, natural communities, and species within Ho-Chunk territories "inherent, fundamental, and inalienable rights to naturally exist, flourish, regenerate, and evolve."[10] The idea of incorporating rights for elements of the natural world into a legal system is not new, and certainly not implausible.

Environmental law scholar and United Nations Special Rapporteur on human rights and the environment David Boyd has defined the rights of nature as "the rights of non-human species, elements of the natural environment, and … inanimate objects to a continued existence unthreatened by human activities."[11] Components of the natural world, such as rivers, mountains, animals and even entire ecosystems, are treated as entities with rights, rather than objects to be owned and consumed. Recognizing these non-human entities as legal subjects with rights is quite possible in Western legal systems, according to many legal scholars. Christopher D. Stone argued in 1972 that legal rights and standing have been conferred on many entities that were not previously considered to be persons, including slaves, children, women and corporations.[12] Our legal system already embraces the legal fiction of treating corporations as persons. The seemingly far-fetched idea of giving legal standing to non-human entities is already commonplace. Stone pointed out that we already have the framework in place for giving legal standing to those who cannot speak for themselves:

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[6] *Fisheries Act*, CCSM, c F90, s. 14.2(1); see also *Ward v Canada*, 2002 SCC 17, at para 41. Both sources are cited in Boyd, *Rights of Nature*, *ibid.*

[7] John Mohawk, "Animal Nations Right to Survive", (1988) 2:3 Daybreak at 2, online: <http://blogs.nwic.edu/briansblog/files/2015/04/Animal-Nations-Right-to-Survive.pdf>.

[8] *ibid* at 3.

[9] Williams-Davidson, *supra* note 4.

[10] Community Environmental Legal Defense Fund, Press Release, "Ho-Chunk Nation General Council Approves Rights of Nature Constitutional Amendment" (17 September 2018), online: <https://celdf.org/2018/09/press-release-ho-chunk-nation-general-council-approves-rights-of-nature-constitutional-amendment/>

[11] Boyd, *Rights of Nature, supra* note 5 at 137.

[12] Christopher D Stone, "Should Trees Have Standing-Toward Legal Rights for Natural Objects," (1972) 45:2 S Cal L Rev 450 at 453.

> It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems.[13]

To dismiss the idea of granting rights to nature as outlandish is to adopt, unwittingly or not, an ethnocentric position. As John Mohawk points out, "non-Western ideologies are not inherently lacking in legitimacy. It is extreme ethnocentrism to designate aboriginal ideologies about nature as 'romantic'."[14]

Many commentators have explored the arguments for and against recognizing the rights of nature.[15] This paper will not delve further into that debate. It proceeds on the assumption that the case for rights of nature has been made out, and the only question is how those rights can be implemented legislatively in British Columbia (BC). The paper proceeds as follows. Part 2 assesses the current status of rights of nature internationally and in Canada, concluding that Canadian law does not currently recognize the rights of nature in any meaningful way. Part 3 considers the possible content of rights of nature in BC law. Part 4 explores two potential avenues for protecting the rights of nature in British Columbia: 1) amendment of existing legislation, and 2) a new stand-alone rights of nature statute. Part 5 presents an annotated draft of a possible model rights of nature statute. This draft is presented only as one of many options to be considered, not as a law reform proposal to be implemented.

2. The Current State of Affairs

2.1 Rights of Nature Laws Around the World

In 2010, the World Peoples' Conference on Climate Change and the Rights of Mother Earth in Bolivia adopted the *Universal Declaration of the Rights of Mother Earth*. Although this document was not adopted by an intergovernmental agreement and is not legally binding, it is the leading global statement on the rights of nature. It declares that:

> (1) Mother Earth and all beings of which she is composed have the following inherent rights:
>
> (a) the right to life and to exist;

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[13] *Ibid* at 464.

[14] Mohawk, *supra* note 7 at 4.

[15] Boyd, *Rights of Nature*, *supra* note 5; Stone, *supra* note 12; Living Law, "Giving Nature a Voice – Legal Rights and personhood for Nature" (2018) Law and Policy Briefing; Cameron La Follette & Chris Maser, *Sustainability and the Rights of Nature,* 1st Ed (Boca Raton: CRC Press, 2017); Aurelio de Prada Garcia, "Human Rights and Rights of Nature: The Individual and Pachamama" (2014) 45:3 Rechtstheorie 355; Craig M Kauffman & Pamela L Martin, "Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand" (2018) 18:4 Glob Environ Polit 43; Leah Temper, "Blocking pipelines, unsettling environmental justice: from rights of nature to responsibility to territory" (2019) 24:2 Local Environ 94; Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics*, (Madison: University of Wisconsin Press, 1989).

(b) the right to be respected;
(c) the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions;
(d) the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
(e) the right to water as a source of life;
(f) the right to clean air;
(g) the right to integral health;
(h) the right to be free from contamination, pollution and toxic or radioactive waste;
(i) the right to not have its genetic structure modified or disrupted in a manner that threatens its integrity or vital and healthy functioning;
(j) the right to full and prompt restoration for violation of the rights recognized in this Declaration caused by human activities.[16]

A non-governmental International Tribunal on the Rights of Nature was established in 2014 to adjudicate violations of the rights of nature.[17] Like other People's Tribunals, it has no formal legal mandate from states and its pronouncements are largely symbolic.

Turning to formal international law, the International Court of Justice (ICJ) has acknowledged the rights of nature indirectly. In 1997, then-Vice-President of the ICJ, Judge Weeramantry, wrote that "Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community . . . Since flora and fauna have a niche in the ecological system, they must be expressly protected. There is a duty lying upon all members of the community to preserve the integrity and purity of the environment."[18]

While the idea of rights of nature is beginning to enter international law, it is already well established at the national level. Ecuador's 2008 constitution recognizes the rights of nature, or Pacha Mama. Bolivia has enacted rights of nature legislation. New Zealand has enacted legislation recognizing the legal personality and rights of specific natural systems. Courts in Colombia and India have recognized rivers, glaciers and entire ecosystems as legal subjects with rights.[19] Canada, however, lags behind.

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[16] *Universal Declaration of Rights of Mother Earth*, World People's Conference on Climate Change and the Rights of Mother Earth, 22 April 2010, art 2 <https://therightsofnature.org/universal-declaration/> [*Universal Declaration*].
[17] Living Law, *supra* note 15 at 13.
[18] *Case concerning the Gabčikovo-Nagymaros (Hungary v Slovakia),* Separate Opinion, [1997] ICJ Rep 88 at 110 <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf>; Joel I Colon-Rios, "Constituent Power, The Rights of Nature, and Universal Jurisdiction" (2017) 7:31 Victoria University of Wellington Legal Research Papers at 147.
[19] Living Law, *supra* note 15 at 14-23; see also James Barth & Stepan Wood, "The Ground Floor of a Global Rights Revolution: Assessing International Approaches to the Rights of Nature", Allard Centre for Law and the Environment Working Paper [forthcoming in 2020].

2.2 Rights of Nature in Canadian Law

A number of provinces and territories have enacted legislation to protect certain aspects of human environmental rights. The quasi-constitutional Quebec Charter of Rights and Freedoms includes a substantive human right to a healthy environment,[20] as does the constitution of the self-governing Inuit territory of Nunatsiavut.[21] Ontario, the Northwest Territories and Yukon have enacted primarily procedural environmental rights statutes.[22] Legislation recognizing a human right to a healthy environment has been proposed but never enacted at the federal level.[23] All these proposed and enacted laws concern human rights; they do not address rights of nature. In Canada, elements of the natural world, such as animals and the land itself, are generally treated as objects to be owned and used by humans, not as legal subjects with rights.

In Canada, animals lack legal personhood and are considered property.[24] Legislation such as the British Columbia *Wildlife Act* and the Manitoba *Fisheries Act* outline in no uncertain terms that wildlife is the property of humans. British Columbia's *Prevention of Cruelty to Animals Act* vests all rights and interests in domestic animals in their owners.[25] Land and water, too, are considered property under Canadian law. While this is true of the Canadian legal system, it is not in line with many Indigenous cultures' relationship to the land. In Gitxsan and Wet'suwet'en culture, the notion of property is viewed as more of a "series of relationships with the territory, rather that one of simple ownership as understood by Western property rights."[26] The Canadian legal system assumes the validity of the Crown's underlying title to and sovereignty over the land, putting the onus on Indigenous peoples to prove occupation to the land prior to the Crown's assertion of sovereignty.[27] This vision of land as a blank slate that can be claimed is rooted in the Western concept of property, and "diametrically opposed to how many First Nations see the land."[28] The Canadian legal system is built on a foundation that views the natural world as the property of human beings.

Given the lack of recognition of the rights of nature in Canadian law, the question is, where can we start? This paper focuses on the provincial level, and specifically British Columbia, for a number of reasons. The first is the federal division of powers. Federal legislative authority over such matters as criminal law, fisheries, navigation and shipping, combined with its residual power to legislate for peace, order and good government, give it limited

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[20] *Charter of Human Rights and Freedoms,* CQLR c C-12, s 46.1 [*Quebec Charter*].
[21] *Nunatsiavut Constitution Act,* CIL 31-12-2012 N-3, Schedule A, c 2, s 2.4.20 [*Nunatsiavut Constitution*].
[22] *Environment Act,* RSY 2002, c 76; *Environmental Rights Act*, SNWT 2019, c 19; *Environmental Bill of Rights*, SO 1993, c 28.
[23] E.g. Bill C-634, *Canadian Environmental Bill of Rights*, 2nd Sess, 41st Parl, 2014.
[24] Lyne Letourneau, "Toward Animal Liberation? The New Anti-cruelty Provisions in Canada and Their Impact on the Status of Animals" (2002) 40 Alta L Rev 1041 at 1048.
[25] *Prevention of Cruelty to Animals Act*, RSBC 1996, c 372, s 19.1.
[26] Temper, *supra* note 15 at 104.
[27] Senwung Luk, "The Law of the Land: New Jurisprudence on Aboriginal Title" (2014) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 67 at 290.
[28] *Ibid.*

and piecemeal jurisdiction over environmental issues.[29] The provinces, by contrast, have broad environmental powers by virtue of their exclusive jurisdiction over forestry, mining, hydroelectric development, civil rights within the province, and all matters of a local nature.[30] The provinces also own most public lands and natural resources within their borders. Provincial governments have passed a wide variety of environmental legislation on such subjects as water pollution, air pollution, wildlife conservation and management, mining, forestry, parks and protected areas.[31] The provincial level is therefore a good entry point for rights of nature legislation in Canada. Moreover, implementing rights of nature in one province would set a precedent for other provinces and the federal government.

Another possibility would be to start smaller, at the level of local government. Rights of nature have achieved success at this level in the United States, where dozens of municipalities have implemented local laws recognizing the rights of nature.[32] The main attractions of this approach are that local governments are closest to the people and can be more open to unorthodox proposals than state or provincial governments are. The main downsides are local governments' limited powers and geographic scope, and the need to convince dozens or hundreds of localities to enact similar laws in order to achieve substantial scale. One of the main reasons for the focus on local governments in the US has been the political impossibility of rights of nature legislation at the state or federal level. It is not clear that Canadian provinces—especially those like BC with relatively progressive governments and high public attention to environmental protection—are similarly hostile to rights of nature. So while it may make sense to start small in Canada, it may not be necessary to start as small as in the US. The provincial level appears to be a promising initial target for rights of nature legislation in Canada.

This paper focuses on British Columbia for several reasons. BC has more biodiversity than any other Canadian province or territory, and this biodiversity is in comparatively good shape but vulnerable to deterioration unless substantial changes are made to human-nature relationships.[33] BC has more species at risk than any other Canadian province or territory,[34] and its legal frameworks for protecting nature and biodiversity are seriously wanting.[35] Its current social-democratic NDP government depends on support from the Green Party and paradoxically combines policy commitments to environmental protection,

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[29] Jamie Benidickson, *Environmental Law*, 5th ed (Toronto: Irwin Law, 2019); R Cotton and AR Lucas, eds, *Canadian Environmental Law* (2nd ed, 1991) at 8-10.
[30] *Ibid.*
[31] *Ibid.*
[32] Tamaqua Borough, Ordinance No 612, *Tamaqua Borough Sewage Sludge Ordinance* (19 September 2006), s 5, 6, 7.6 <http://files.harmonywithnatureun.org/uploads/upload666.pdf>; Nottingham, *Nottingham Water Rights and Local Self-Government Ordinance* (15 March 2008), s 5.1 <https://www.nottingham-nh.gov/sites/g/files/vyhlif3611/f/uploads/waterrights.pdf>.
[33] Nature Trust British Columbia, "Biodiversity", online: <https://www.naturetrust.bc.ca/conserving-land/about-biodiversity>.
[34] Tara Martin et al, "B.C. has a whopping 1,807 species at risk of extinction—but no rules to protect them", *The Narwhal* (3 May 2019), online: <https://thenarwhal.ca/b-c-has-a-whopping-1807-species-at-risk-of-extinction-but-no-rules-to-protect-them/>.
[35] See, eg., Office of the Auditor General of British Columbia, *An Audit of Biodiversity in B.C.: Assessing the Effectiveness of Key Tools*, 2013 Report 10 (Victoria: Office of the Auditor General of British Columbia, February 2013).

resource extraction and fossil fuel development (specifically, liquefied natural gas). This paradox simultaneously underlines the urgency of and presents a potential opening for rethinking human-nature relationships. In addition, BC is the traditional, ancestral and unceded territory of hundreds of First Nations that continue to act as staunch defenders of land, water, air and non-human relations as settler governments and people move haltingly toward recognizing the continuing reality of colonial violence and dispossession. BC First Nations are far ahead of settler society in giving legal recognition to non-human relations and rights of nature.[36] All of these factors and more combine to make BC a promising candidate for reforming provincial law to protect the rights of nature.

3. What Should Rights of Nature Protections Look Like?

Proponents of rights of nature will need to consider several key elements when preparing proposed legislation, including the content, scope and limitations of nature's rights; corresponding obligations; the relation of rights of nature to human rights; roles and procedures for protecting rights of nature; and the role of Indigenous peoples and their rights in relation to rights of nature. This list is illustrative, not exhaustive.

3.1 The Content of Rights of Nature

The rights of nature must be clearly articulated in order to be effective. Environmental legislation has fallen at this hurdle before. For example, the 1993 *Environmental Bill of Rights* in Ontario outlined in its preamble that "the people of Ontario have a right to a healthful environment," yet in 2012 the Ontario Superior Court of Justice found that this language in the preamble "does not confer any legal right."[37] In order to avoid this situation with the rights of nature, it is essential to be as clear as possible.

We can look to such sources as the constitution of Ecuador, the Rights of Nature Policy of the Green Party of England and Wales (the 'Green Party Policy'), the Universal Declaration of Rights of Mother Earth (the 'Universal Declaration'), and the Bolivian Law of the Rights of Mother Earth, for examples. Ecuador's constitution states that nature has the right to "exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."[38] The Green Party Policy echoes this language with the addition of "the right to restoration," which can also be found in the Ecuadorian constitution.[39] The Universal Declaration outlines more specific rights, though along the same lines, including the right to life and to exist, the right to be respected, the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions, and

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[36] See, eg., Tŝilhqot'in Nation, *ʔElhdaqox Dechen Ts'edilhtan (ʔEsdilagh Sturgeon River Law)* (27 May 2020), online: <http://www.tsilhqotin.ca/Portals/0/PDFs/Notices/2020%2005%2028%20Elhdaqox%20Dechen%20Tsedilhtan%20%28Sturgeon%20River%20Law%29.pdf>.

[37] *Environmental Bill of Rights*, SO 1993, c 28, preamble; *Clean Train Coalition Inc v Metrolinx*, 2012 ONSC 6593 at para 13; David Boyd, "Elements of an Effective Environmental Bill of Rights" (2015) 27:2 J Env L & Prac 201 at 225 [Boyd, "Elements"].

[38] *Constitution of the Republic of Ecuador*, 20 October 2008, art 1 [*Ecuador Constitution*].

[39] Green Party of England and Wales, *Rights of Nature Policy,* 28 February 2016, at RR1000 <https://policy.greenparty.org.uk/rr.html> [*Green Party Policy*].

the right to full and prompt restoration.[40] Similarly, the Bolivian Law of the Rights of Mother Earth outlines a number of specific rights, including to life, to the diversity of life, to water, to clean air, to balance, to restoration and to live free of contamination.[41]

Three key rights of nature are central to all the leading formulations: 1) the right to life and to exist, 2) the right to maintain and regenerate its vital cycles and 3) the right to restoration for violations caused by human activities. These rights would need to be set out in the operative portion of legislation rather than in a preamble, in order to effectively implement these protections.

3.2 Scope and Limitations of Rights of Nature

To maximize clarity, which, as discussed above, may be necessary to ensure effectiveness of the legislation in practice, the inclusion of a clause outlining the scope and limitations of the included rights should be considered. Scope relates to specifying both the holders of rights of nature and the extent of their rights. Legislation would need to specify who or what holds the enumerated rights, from individual objects or organisms through to the planet as a whole. This issue is complex and can only be hinted at here.[42] As for the extent of rights, there can be value both in broad, open-ended formulations and in more narrowly formulated, politically palatable ones that are less vulnerable to objections of over-inclusion.

The Green Party Policy's approach is to defer the definition of the scope of rights to legal experts and public consultations,[43] but a more definitive approach would be needed for legislation that confers enforceable legal rights. A clause outlining scope and limitations would help to clarify how these rights would operate in practice, clarifying the legislative intent that, for example, picking a flower or mowing a lawn do not violate nature's right to life and to exist. Part of a clause in the proposed *Canadian Environmental Bill of Rights* may point towards a solution. Section 17(2) provides that legal actions may be brought only when an action or inaction has "in whole or in part resulted, or is likely to result, in significant environmental harm."[44] Such language, paired with a definition of significant environmental harm, could help to mitigate risks of over-inclusion. Narrowing the scope of rights of nature could, however, weaken the rights significantly.

3.3 Corresponding Obligations

Another issue to be considered is the obligations, if any, that flow from the rights protected in rights of nature legislation. Rights legislation typically distinguishes between obligations of the state and obligations of other persons. In our case, obligations for the provincial

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[40] *Universal Declaration, supra* note 16, art 2.
[41] *Ley de Derechos de la Madre Tierra (Law of the Rights of Mother Earth),* No. 071 (2010), Legislative Assembly of the Multi-National State of Bolivia, art 7.
[42] Boyd, "Elements", *supra* note 37 at 226; Boyd, *Rights of Nature, supra* note 5; Kauffman, *supra* note 15 at 48. See also: Robert Munro, "Realizing the Rights of Nature in a Canadian Context," Allard Centre for Law and the Environment Working Paper [forthcoming in 2020].
[43] *Green Party Policy, supra* note 39 at RR1004.
[44] Bill C-202, *Canadian Environmental Bill of Rights*, 1st Sess, 42nd Parl, 2015, s 17(1) [*Bill C-202*].

government would ensure that the government itself must defend, enforce and neither take nor permit actions that would violate the established rights.[45] David Boyd argues that governments should have a duty to take positive steps to ensure that environmental rights are fulfilled.[46] We see this reflected in the Green Party Policy, which includes the obligation for the State to "defend and enforce the rights of nature," and as well in the constitution of Ecuador, which asserts that the State must "establish the most efficient mechanisms for the restoration" and "promote respect towards all the elements that form an ecosystem."[47]

Corresponding obligations on other persons, including individuals and corporations, should also be considered. The question of whether rights are held only against the state or also against private actors is a fundamental political choice for any rights legislation. Like many human rights violations, many harms to nature are not directly attributable to the state. Imposing obligations on non-state actors to respect the rights of others therefore substantially expands the scope of activities covered by the legislation. Defining the nature and extent of these obligations—including, for example, whether individuals and corporations have a duty to protect and promote rights of nature or only to respect them—is a highly complex and contestable exercise. A minimalist approach would impose a negative obligation on individuals and corporations merely to refrain from actions that directly violate rights of nature; more extensive obligations might cover omissions, complicity, indirect violations, and positive actions to protect, fulfill or promote rights of nature.

3.4 Conflict with Other Rights

If a rights of nature law comes into tension with other laws, which should take precedence? The British Columbia Human Rights Code provides that "if there is a conflict between this Code and any other enactment, this Code prevails."[48] There is precedent for paramountcy provisions in environmental legislation as well. The *Environmental Rights Acts* of Nunavut and the Northwest Territories provide that "Where there is a conflict between the terms of this Act and the terms of any other enactment, this Act shall prevail to the extent of the conflict."[49] The inclusion of such a provision would add significant force to rights of nature legislation.

It is important, however, to contemplate how a paramountcy provision would interact with Indigenous laws and rights. For example, what would the priority rule be if rights of nature were to conflict with Indigenous rights? This issue is addressed in Part 3.6, below.

3.5 Roles and Procedures

Drafters should consider including provisions that outline the procedures for raising and deciding claims of violation of rights of nature. An example is found in the proposed

[45] Boyd, "Elements", *supra* note 37 at 226-227.
[46] *Ibid* at 227.
[47] *Green Party Policy, supra* note 39 at RR1002, RR1003; *Ecuador Constitution, supra* note 38, arts. 2-3.
[48] *Human Rights Code,* RSBC 1996, c 210, s 4 [*Human Rights Code*].
[49] *Environmental Rights Act*, RSNWT (Nu) 1998, c 83, s 2(3); Boyd, "Elements", *supra* note 37 at 249.

Canadian Environmental Bill of Rights. This proposed bill would have authorized any resident of Canada to sue in the Federal Court when the government has violated the human right to a healthy environment.[50] A similar provision in rights of nature legislation would empower British Columbians to take the provincial government to court if it violated the rights of nature. Key provisions from Bill C-202 that could be modified to serve this purpose include:

> (2) Actions [. . .] may be brought in relation to any action or inaction by the Government of Canada that has in whole or in part resulted, or is likely to result, in significant environmental harm.
>
> (3) It is not a defence to an environmental protection action [. . .] that the Government of Canada has or has exercised the power to authorize an activity that may result in significant environmental harm.[51]

The proposed Bill C-202 also includes provisions empowering residents of Canada to bring a civil action against individuals or corporations who have contravened the rights included in the bill, if that contravention has resulted in or is likely to result in significant environmental harm.[52] A similar provision could be included in rights of nature legislation to open the door for individuals to bring claims against not only governments, but also corporations and individuals for rights of nature violations involving significant environmental harm.

Several issues arise here. One is whether a court action is the appropriate avenue to assert rights of nature. Litigation is expensive, time consuming and inaccessible to many parties. It is adversarial and tends to focus on individualized rather than systemic problems and remedies. Courts tend to be non-specialized and conservative and may not be the best judges of nature's rights. As a result, court actions may not be the best vehicle to deliver access to justice for nature and its champions. Other options might include creation of a specialized administrative tribunal with quicker and less expensive processes; alternative dispute resolution processes such as conciliation, mediation and arbitration; and restorative justice processes modelled on Indigenous practices of dispute resolution.

Another issue is who has standing to bring a claim of violation of rights of nature. Environmental legislation often confers standing on any person resident in the jurisdiction to bring an action.[53] It is probably not necessary to specify that such persons have standing regardless of whether they are directly affected by the alleged violation, but a legislative drafter might do so out of an abundance of caution. Section 11 of the proposed Bill C-202, for example, provided that:

> Every resident of Canada has an interest in environmental protection and the Government of Canada may not deny, oppose or otherwise contest the standing of

[50] *Bill C-202*, supra note 44.
[51] *Ibid*, ss 17(2), 17(3).
[52] *Ibid*, s 18(1).
[53] *Environmental Bill of Rights*, SO 1993, s 84(1); *Canadian Environmental Protection Act,* SC 1999, c 33, s 22.

> any resident to participate in environmental decision-making or to appear before the courts in environmental matters solely because they lack a private or special legal interest in the matter.[54]

Another proposed *Canadian Environmental Bill of Rights* that was never enacted, Bill C-438, had a similar provision:

> 9 (2) The Government of Canada must not challenge the standing of a person residing in Canada to bring a matter regarding the protection of the environment before a court or tribunal on the sole ground that the person is not directly affected by the matter.[55]

Legislative drafters may also wish to consider whether to restrict standing to individuals or to include artificial persons such as corporations and non-governmental organizations.

Another option would be to confer standing on nature itself (whether specific objects, places, ecosystems, individuals of a species, populations or species as a whole) and to designate guardians or representatives to bring claims on nature's behalf.

Another issue regarding claims of violation of rights of nature is who should bear the onus of proof, and on what standard. Should claims be proved on an ordinary civil standard of the balance of probabilities, or a lower standard such as a *prima facie* case? Should the onus of proof rest with the claimant or be shifted to the alleged violator in certain circumstances to prove that an activity does not violate the rights of nature? Should the answers depend on whether the claim is retrospective (seeking reparation for a violation or harm that has already occurred) or prospective (to prevent a future violation or harm)? Or whether the remedy is intended to be punitive or compensatory? These are all difficult questions and all we do here is pose them.

3.6 Indigenous Peoples and Rights

The idea that nature and its components are living beings and that all members of the planetary community, human and non-human, have relationships with and rights and responsibilities to one another, has deep roots in many cultures. It resonates with the diverse worldviews and legal orders of many Indigenous peoples, who are stewards of the vast majority of Earth's remaining biodiversity and are often frontline defenders of land, air, water and living beings.

As a result, protecting the rights of Indigenous peoples, including rights to self-government and to free, prior and informed consent to activities affecting them and their territories, can be an effective way to protect the rights of nature. But it is not clear that the reverse is always true. If rights of nature laws are not designed and implemented appropriately, they could end up infringing Indigenous rights and challenging the authority of Indigenous laws

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[54] *Bill C-202, supra* note 44, s 11.
[55] Bill C-438, *Canadian Environmental Bill of Rights,* 1st Sess, 42nd Parl, 2019, s 9(2) (proposed not passed) [*Bill C-438*].

and governments. This is especially a concern in settler colonial jurisdictions like British Columbia, where Indigenous peoples have never surrendered their authority and are in the process of revitalizing their governments and laws despite the continuation of colonial violence and displacement.

Rights of nature could help to shift settler colonial society's relationship to nature from one of extraction and exploitation to one of respect for living relations. There are obvious synergies between this vision of nature and the worldviews of many Indigenous peoples, but these synergies must be carefully fostered, not taken for granted. Any rights of nature law must respect and uphold the authority of Indigenous law and governance. It must not be yet another instrument for imposition of settler colonial decisions on Indigenous peoples, lands and waters.

It may be possible to implement rights of nature in settler colonial law in a way that respects and upholds Indigenous legal orders and decision-making authority, but this can only be achieved if Indigenous peoples are a driving force alongside settler allies.

Ecuador, Bolivia and New Zealand have all implemented rights of nature protections that attempt to incorporate Indigenous perspectives.[56] The implementation of rights of nature into British Columbia law would need to acknowledge and include the diverse Indigenous peoples of British Columbia, and respect their legal authority. There are many ways to do this. For purposes of this working paper, three broad approaches can be considered: 1) inclusion of a non-derogation clause providing that rights of nature legislation shall not be construed so as to abrogate or derogate from existing Aboriginal or treaty rights; 2) creation of joint settler-Indigenous institutions to champion and implement the rights of nature, and 3) legal recognition of Indigenous governments themselves as the guardians of nature in their territories.

In light of ongoing colonial violence against Indigenous peoples, consultation and consent are necessary prior to deciding which option to pursue. More broadly, consultation and consent are necessary prior to and throughout the process of developing rights of nature legislation in British Columbia. For this reason, this paper does not seek to evaluate options at this stage. It address each of the three broad approaches listed above.

The first option would be a non-derogation clause. This was the route taken by the two *Canadian Environmental Bill of Rights* bills that have been proposed in Parliament at the federal level, but not implemented (Bill C-202 and Bill C-438). Both proposed bills included a clause that stated:

> For greater certainty, nothing in this Act is to be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.[57]

[56] *Law of the Rights of Mother Earth*, (Bolivia) Law 071, December 2010; *Ecuador Constitution, supra* note 38, arts 3, 12-34, 71; *Te Awa Tupua (Whanganui River Claims Settlement) Act* (NZ), 2017/7, s 20(1) [*Whanganui*].
[57] *Bill C-438*, *supra* note 55, s 3(1); *Bill C-202, supra* note 44 at s 4 (uses similar language to Bill C-438).

Such a clause can be considered a bare minimum of protection for Indigenous rights. All it does is direct decision-makers and courts not to apply or interpret rights of nature legislation in a manner that is inconsistent with constitutionally protected Indigenous rights.

There are several potential problems with this approach. One is redundancy. Such a clause is not strictly necessary, since those constitutional rights take precedence over ordinary legislation anyway.

A second is insufficiency. The mere inclusion of a non-derogation clause will not suffice if the law itself is bound to put settler society on a collision course with Indigenous rights, as the Anishinabek Nation recently warned about Ontario's new law aimed at protecting agriculture against animal rights activism.[58]

Third, constitutionally protected Aboriginal and treaty rights, as currently understood by settler Canadian courts, may themselves be deeply unsatisfactory. They are inventions of the settler colonial legal order and in many ways perpetuate the project of colonialism.[59]

A second option is the creation of joint settler-Indigenous institutions to represent and implement the rights of nature. Such institutions can take many forms. A leading example would be the approach taken in recent settlements of some long-standing claims of violations of the Treaty of Waitangi in Aotearoa/New Zealand. There, legislation has been enacted that recognizes certain natural entities, including a river[60] and a former national park[61] as legal persons and creates new institutions to exercise those persons' legal rights and responsibilities.

New Zealand's *Te Awa Tupua (Whanganui River Claims Settlement) Act* establishes the office of Te Pou Tupua to represent the interests and speak on behalf of the Whanganui River.[62] Creation of a similar body in British Columbia would be a novel way to give a tangible voice to nature and to represent Indigenous voices and laws at the same time. The model legislation below includes prospective language for the creation of such an office. Further consideration should be given to whether an office such as this should exist on the provincial level or consist of separate bodies established for each being or ecosystem, as is the case in Aotearoa/New Zealand.

A third option would be to defer to Indigenous governments as the sole guardians of rights of nature within their jurisdiction. So far as we know, this approach would be unprecedented in rights of nature legislation worldwide. Again, there would be many ways

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[58] Anishinabek Nation Head Office, News Release, "Bill 156, Security from Trespass and Protecting Food Safety Act, a 'recipe for disaster' says Grand Council Chief" (24 June 2020), online: *Anishinabek News* <http://anishinabeknews.ca/2020/06/24/bill-156-security-from-trespass-and-protecting-food-safety-act-a-recipe-for-disaster-says-grand-council-chief/>.
[59] See, e.g., Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019).
[60] *Whanganui, supra* note 56.
[61] *Te Urewera Act 2014* (NZ), 2014/51.
[62] *Whanganui, supra* note 56, ss 14(1), 18(2), 20(1).

to implement this approach. For illustrative purposes only, the potential model legislation below recognizes Indigenous governments' prerogative to intervene in and take over any claims of violation of rights of nature within their territories. It is important to emphasize that this is just one possibility among many and would require substantial further development.

4. Implementing the Rights of Nature in British Columbia

With the potential content of rights of nature legislation outlined above, the next question is whether such legislation should be enacted by amending existing legislation or passing a new stand-alone statute.

4.1 Amending Existing Legislation

One key benefit that has been posited for incorporating rights of nature protections into existing legislation is the opportunity for an amendment to "to colour the context and interpretation of the act as a whole and provide greater procedural and regulatory avenues for rights enforcement."[63] As well, it may be easier in some political contexts to pass a legislative amendment than to advocate for an entirely new piece of stand-alone legislation, saving time and resources.[64] However, there are substantial downsides. Robust rights of nature protections may be lengthy, as evidenced by the number of elements outlined in the above section of this paper that should be considered for inclusion. As David Boyd has pointed out, comprehensive environmental legislation can be "unwieldy" to incorporate into existing legislation.[65]

In British Columbia, three avenues stand out as holding the potential to provide a forum for such a legislative amendment: 1) the British Columbia *Constitution Act*, 2) the British Columbia *Human Rights Code* and 3) existing environmental legislation.

The word 'Constitution' in British Columbia *Constitution Act* would perhaps appear to suggest it hosts rights-giving provisions and responsibilities, but in reality the *Constitution Act* is a largely procedural document, outlining how the British Columbia government is organized—from the role of the Premier, to establishing the Legislative Assembly.[66] While the *Constitution Act* presents a detailed picture of the machinery that keeps the government of the province working, it makes no reference to rights. Unlike the federal *Constitution Act* and *Charter of Rights and Freedoms*, the British Columbia *Constitution Act* is not paramount over other provincial laws. It is in all senses an ordinary statute that can be amended or repealed through normal legislative processes.[67] While this makes it undoubtedly an easier document to amend than Canada's Constitution, it also makes it an

[63] Barth, *supra* note 19 at 7.
[64] Boyd, "Elements", *supra* note 37 at 212.
[65] *Ibid.*
[66] Campbell Sharman, "The Strange Case of a Provincial Constitution: The British Columbia Constitution Act" (1984) 17:1 Canadian Journal of Political Science 87 at 97.
[67] Boyd, "Elements", *supra* note 37 at 208; *Constitution Act*, RSBC 1996, c 66.

odd fit for rights of nature. In many other nations, such as Argentina, Mexico and the United States, sub-national Constitutions protect human even environmental rights.[68] In Canada, Quebec and Labrador have *Charter*-type quasi-constitutional laws that enshrine rights, including some environmental rights.[69] However, British Columbia's *Constitution Act* lacks this same quasi-constitutional status, paramountcy and rights-giving nature that would make it relevant to rights of nature incorporation. As David Boyd has noted, provincial constitutions "barely dwell in the world of the [Canadian] subconscious. They are too opaque, oblique and inchoate to rouse much interest, let alone passion."[70]

The next option to be discussed is the incorporation of rights of nature protections into the British Columbia *Human Rights Cod*e. The purpose of this law is "to promote a climate of understanding and mutual respect where all are equal in dignity and rights."[71] In this context the word 'all' refers to humans, but an amendment could broaden it to include nature. This could serve the dual purpose of opening up the legislation to make it relevant to rights of nature, while also simultaneously putting aside the question of whether human rights or rights of nature are paramount and instead placing human rights and rights of nature on equal legislative footing. It is also notable that the responsibilities assigned to the Human Rights Commissioner in the *Human Rights Code* include "promoting compliance with international human rights obligations." [72] This could provide an opening for arguments that rights of nature obligations are sufficiently attached to the international human rights sphere so as to be relevant under this provision and incorporated therein. It may be useful that courts have interpreted human rights legislation in a generous manner and have frequently used international law to inform those interpretations.[73] However, given the lack of recognition of the rights of nature by international bodies such as the United Nations, this argument may be seen as weak. As with the British Columbia *Constitution Act*, the *Code* can be amended and repealed in the same way as other statutes in British Columbia.

The *Code* also includes a paramountcy clause, stating that "If there is a conflict between this Code and any other enactment, this Code prevails."[74] As has been discussed in the above section of this paper, a paramountcy clause is may prove useful in effecting enforcement of the rights of nature. Equally however, the presence of a paramountcy clause may pose a barrier to amendment proposals, given its signal of the strength of the legislation and corresponding precaution required when assessing potential amendments. Should this

[68] Boyd, "Elements"*, supra* note 37 at 209; *Constitution of Michigan of 1963*, s 35; *Massachusetts Constitution,* art XCVII.
[69] *Quebec Charter, supra* note 20, s 46.1; *Nunatsiavut Constitution*, *supra* note 21, s 2.4.20.
[70] Boyd, "Elements", *supra* note 37 at 210, citing Nelson Wiseman, "Clarifying Provincial Constitutions," (1995) 6 NJCL 269 at 270.
[71] *Human Rights Code, supra* note 48, s 3(b).
[72] *Ibid,* s 47.12(i).
[73] See: *Baker v Canada*, [1999] 2 SCR 817; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44. See also: *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (where the SCC for the first time held clearly that customary international human rights law is automatically part of Canadian common law).
[74] *Human Rights Code, supra* note 48, s 4.

barrier be able to be surpassed, the difficulty of amending the *Human Rights Code* could prove to be a strength in protecting rights of nature from future repeal.

Another benefit of the *Code* is that it applies to non-governmental actors, meaning that governments, individuals and corporations alike could be held accountable for violations of the rights of nature.

One significant barrier is that all rights currently recognized in the *Code* are exclusive to humans and not necessarily flexible to the addition of rights of nature. However, the advantage of amending the *Human Rights Code* to include rights of nature would be the access it would provide to the corresponding processes and institutions in place for defending the current rights enshrined in the Code, such as the Human Rights Tribunal.[75]

Environmental scholars including David Boyd have expressed skepticism at the ability of human rights laws in Canada to incorporate environmental rights, finding them "narrow in scope" and thus "ill-suited for comprehensive protection of environmental rights."[76]

A third option would be to incorporate rights of nature protections into existing environmental legislation in British Columbia, such as the *Environmental Management Act* or the *Clean Energy Act*.[77] Though these statutes lack the paramountcy provision that the *Human Rights Code* offers and thus any rights of nature contained therein would not be considered paramount to other legislation, they undoubtedly involve a level of relevance to the environmental sphere that the legislation discussed above lacks. However, these statutes are ultimately regulatory and lack any concrete rights-giving provisions. It has been posited that "the tethering of the rights of nature to regulatory procedure may diminish the radical shift its proponents seek away from the anthropocentric domination of nature by humanity."[78] Nevertheless, rights language is arguably not entirely extraneous to these regulatory regimes, as they contain some level of rights, such as rights to exploit nature in accordance with permits, or rights of appeal. While not being strictly rights-giving, it is arguable that rights are not in opposition to the overall purposes of these statutes.

Ultimately, there are benefits and disadvantages to the potential incorporation of rights of nature into any of the above pieces of legislation through an amendment, but it is still necessary to assess whether the creation of a new stand-alone piece of legislation would be a better option.

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[75] *Ibid,* s 31.
[76] Boyd, "Elements", *supra* note 37 at 212.
[77] These are just two of many existing environmental acts that could be amended to include rights of nature. Another possibility would be to incorporate rights of nature into the province's proposed endangered species law. The province promised such legislation in 2017 but development stalled. See British Columbia, "Legislation for Species at Risk" (last visited 29 June 2020), online: <https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/species-ecosystems-at-risk/legislation>; Sarah Cox, "BC Stalls on Promise to Enact Endangered Species Law," *The Narwhal* (19 April 2019), online: <https://thenarwhal.ca/b-c-stalls-on-promise-to-enact-endangered-species-law/>. Exploring these other legislative avenues is beyond the scope of this working paper.
[78] Barth, *supra* note 19 at 7.

4.2 Enacting Stand-Alone Legislation

A new stand-alone piece of legislation to protect the rights of nature in British Columbia would have a number of benefits. It would allow for more comprehensive articulation of the elements for the rights of nature outlined earlier, without the constraints of shoehorning new rights and procedures into an existing legislative scheme. Notably, this is the route that has been taken in many other provinces with regard to environmental rights in general, though not yet with regard to the specific rights of nature. Ontario, the Northwest Territories and Nunavut have all enacted standalone environmental rights legislation, and environmental bills of rights have been proposed in BC,[79] Nova Scotia[80] and at the federal level.[81] There is a precedent for enacting new legislation in the environmental sphere that could well be expanded into the rights of nature context. New rights-based legislation has also been enacted in provinces across Canada outside of the environmental context in the last few decades, with Ontario enacting a *Victims Bill of Rights* in 1995, and Alberta enacting a *Personal Property Bill of Rights* in 2000.[82] Even in British Columbia, a new *Patients' Bill of Rights* Regulation was passed in 2010.[83]

In consideration of the potential strength of choosing to create stand-alone rights of nature legislation rather than amending existing legislation, the next section of this paper will bring together the key elements described in Part II of this paper in a proposed draft of language to use in prospective rights of nature legislation. Language borrowed or modified from other existing or proposed legislation is referenced in footnotes.

It is important to reiterate once again that the language that follows is not a law reform proposal. It is a preliminary exploration of some—and only some—possible options for implementing rights of nature in settler colonial legislation in British Columbia. It is incomplete in many respects and contestable in all respects. It is intended only as a starting point for conversation.

5. Preliminary Draft Model Legislation

AN ACT TO ESTABLISH THE RIGHTS OF NATURE IN BRITISH COLUMBIA

Preamble[84]

Whereas British Columbians share a deep concern for the natural world and recognize its inherent value;

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[79] A provincial environmental bill of rights was proposed as early as the 1970s and most recently in 2016: Bill M 236, *Environmental Bill of Rights Act*, 5th Sess, 40th Parl, 2016.
[80] Nova Scotia NDP Environment Committee, 2012, *Environmental Policy Recommendations*, Volume I, p 50.
[81] *Bill C-438*, *supra* note 55; *Bill C-202*, *supra* note 44.
[82] Boyd, "Elements", *supra* note 37 at 213; *Victims' Bill of Rights*, SO 1995, c 6; *Alberta Personal Property Bill of Rights,* RSA 2000, c A-31.
[83] Boyd, "Elements", *supra* note 37 at 213; *Patients' Bill of Rights Regulation,* BC Reg 37/2010.
[84] Language modified from proposed federal *Bill C-202*, *supra* note 44.

Whereas British Columbians understand that a healthy and ecologically balanced environment is inextricably linked to the health of individuals, families and communities;

Whereas British Columbians have an individual and collective responsibility to protect the natural world for the benefit of present and future generations;

Whereas British Columbians want to assume full responsibility for their environment, and not to pass their environmental problems on to future generations;

Whereas British Columbians understand the close linkages between a healthy and ecologically balanced environment and Canada's economic, social, cultural and intergenerational security;

And whereas the Government of British Columbia is the trustee of British Columbia's environment within its jurisdiction and is, therefore, responsible for protecting the right of nature for present and future generations of Canadians.

Short title

1. This Act may be cited as the *Rights of Nature Act*.

Part 1 – Interpretation

Definitions

2. In this Act,

"Indigenous governing body" means an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.[85]

"Indigenous peoples" has the same meaning as aboriginal peoples in section 35 of the *Constitution Act,* 1982.[86]

"nature" is a unique, indivisible, self-regulating community of interrelated and interdependent components that sustains, contains and reproduces life on Earth, and includes, without limitation:

(*a*) air, land and water;
(*b*) all layers of the atmosphere;
(*c*) all organic matter and living organisms, human and non-human;
(*d*) biodiversity within and among species; and
(*e*) the interacting natural systems that include components referred to in (*a*) to (*d*).[87]

"significant harm" includes, but is not limited to, harm the effects of which are long lasting, difficult to reverse or irreversible, widespread, cumulative, or serious.[88]

[85] Language taken from the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2016, c 44, s 1.
[86] Language taken from the *Declaration on the Rights of Indigenous Peoples Act*, *ibid*, s 1.
[87] Language taken in part from proposed *Bill C-202*, *supra* note 44, s 2.
[88] Language taken from proposed *Bill C-202, ibid*, s 2.

Rights of Indigenous peoples

3. Nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of Indigenous peoples by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*, and in the British Columbia *Declaration on the Rights of Indigenous Peoples Act*.[89]

Purposes

4. The purpose of this Act is to: [90]

(*a*) safeguard the rights of nature;

(*b*) affirm the Government of British Columbia's public trust duty to protect the rights of nature within its jurisdiction.

Paramountcy

5. If there is a conflict between this Act and any other enactment, this Act prevails.[91]

Part 3 – Rights and Obligations

Rights

6. Nature has the following rights:

(a) the right to life and to exist;

(b) the right to maintain and regenerate its vital cycles, structures, functions and evolutionary processes;

(c) the right to water as a source of life;

(d) the right to clean air;

(e) the right to good health;

(f) the right to be free from contamination or pollution; (g) the right to full and prompt restoration for violation of the rights recognized in this Act caused by human activities.[92]

Scope and limitations

7. The rights outlined in this Act are guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

8. The rights outlined in this Act are violated if the contravention has resulted in or is likely to result in significant harm to nature.[93]

Obligations of the Government

9. (1) The Government of British Columbia is trustee of nature within its jurisdiction and has an obligation, within its jurisdiction, to protect and enforce the rights of nature.[94]

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[89] Language taken in part from proposed *Bill C-202*, *ibid*, s 4, and *Bill C-438*, *supra* note 55 s 3.
[90] Language taken in part from proposed *Bill C-202, ibid*, s 6.
[91] Language taken from the British Columbia *Human Rights Code*, *supra* note 48, s 4.
[92] Language taken in part and reworked from *Green Party Policy*, *supra* note 39 at RR1000, as well as *Ecuador Constitution*, *supra* note 38, art 1 and *Universal Declaration*, *supra* note 16, art 2.
[93] Language partially taken and reworked from s 17 of the proposed *Bill C-202*, *supra* note 44, and from the preamble of the proposed *Bill C-438*, *supra* note 55.
[94] Language taken in part from proposed *Bill C-202*, *ibid*, s 9(3).

(2) If the rights of nature are violated, the Government of British Columbia shall establish effective and efficient mechanisms to achieve restoration, and shall adopt adequate measures to prevent future violations on the rights of nature.[95]

Obligations of Persons

10. A person must not violate the rights outlined in this Act. All persons have an obligation to respect the rights outlined in this Act.

Obligations of Indigenous governing bodies

11. Indigenous governing bodies have the authority and obligation, within their jurisdiction, to protect and enforce the rights of nature to the extent provided for and consistent with the Indigenous laws in force in their jurisdiction.

Part 4 – Rights of Nature Action

Legal action against the government

12. (1) Any two persons resident in British Columbia may bring an action in the Supreme Court against the Government of British Columbia for failing to fulfill its obligations under this Act or for any action or inaction by the Government of British Columbia that has violated, or is likely to violate, the rights of nature.[96]

(2) It is not a defence to an action under subsection (1) that the Government of British Columbia has the power to authorize an activity that may violate the rights of nature.[97]

Legal action against a person

13. (1) Any two persons residents in British Columbia may bring an action in the Supreme Court against any person, other than an Indigenous governing body, whose action or inaction has violated or is likely to violate the rights of nature.

(2) It is not a defence to an action under subsection (1) that the activity was authorized by an Act or a regulation or other statutory instrument unless the defendant proves that

(*a*) the violation of the rights of nature is or was the inevitable result of carrying out the activity permitted by the Act or the regulation or other statutory instrument; and

(*b*) there is no reasonable alternative that would have prevented the violation of the rights of nature.[98]

(3) No action shall be brought under this section against an Indigenous governing body.

Notice to Indigenous governing body

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[95] Language taken in part from *Green Party Policy*, *supra* note 39 at RR1002, and from *Ecuador Constitution*, *supra* note 38, art 2.
[96] Language taken in part from proposed *Bill C-202*, *supra* note 44, s 17(1).
[97] Language taken in part from proposed *Bill C-202*, *ibid*, s 17(3).
[98] Language taken in part from proposed *Bill C-202*, *ibid*, s 18(1)(2)(3).

14. Where an action under Section 12 or 13 is brought by a person other than an Indigenous governing body, in relation to nature that falls within the jurisdiction of that Indigenous governing body, notice of commencement of the action shall be served on that Indigenous governing body as if it were a party to the action.

Indigenous governing body right to intervene

15. Where an action under Section 12 or 13 is brought in relation to nature falling within the jurisdiction of an Indigenous governing body, that Indigenous governing body has the right to intervene in and assume the conduct of an action under Section 12 or 13, including the right to continue or discontinue the action.

Remedial provisions

16. Despite remedial provisions in other Acts, if the court finds that the plaintiff is entitled to judgment in an action under Section 12 or 13, the court may

(a) grant declaratory relief;
(b) grant an injunction to halt or prevent the contravention;
(c) order the parties to negotiate a restoration plan in respect of the significant harm resulting from the contravention and to report to the court on the negotiations within a fixed time;
(d) order the defendant to establish and maintain a monitoring and reporting system in respect of any of the activities that may violate the rights of nature;
(e) order the defendant to restore or rehabilitate any part of nature;
(f) order the defendant to take specified preventive measures;
(g) order the defendant to prepare a plan for or present proof of compliance with the order;
(h) order the appropriate Minister to monitor compliance with the terms of any order;
(i) order the defendant to pay compensatory or punitive damages, or both; and
(j) make any other order that the court considers just.[99]

Terms of an order

17. (1) In making an order under this Act, the court may issue

(*a*) a clean-up order;
(*b*) a restoration order; and
(*c*) an order to pay a fine that directs moneys to go to programs to protect or monitor nature. [100]

(2) In making an order relating to an action arising under section 12 or 13, the court shall retain jurisdiction over the matter so as to ensure compliance with its order.

18. If the court finds that the plaintiff is entitled to judgment in an action under section 13, the court may

(a) suspend or cancel a permit or authorization issued to the defendant or the defendant's right to obtain or hold a permit or authorization;

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[99] Language taken in part from proposed *Bill C-202*, *ibid*, s 22.
[100] Language taken in part from proposed *Bill C-202*, *ibid*, s 23.

(b) order the defendant to provide financial collateral for the performance of a specified action;
(c) order the defendant to pay an amount to be used for the restoration or rehabilitation of the nature harmed by the defendant; and
(d) order the defendant to pay an amount to be used for the enhancement or protection of nature generally.

Part 5 –Office of Nature[101]

Establishment, purpose, and powers of the office of nature

19. (1) The Office of Nature is established.

(2) The purpose of the Office of Nature is to represent the interests of nature and act in its name.

(3) The Office of Nature has full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with this Act.

Functions of the Office of Nature

20. (1) The functions of the office of nature are:
(a) to act and speak for and on behalf of nature;
(b) to promote and protect the health and well-being of nature;
(c) to take any other action reasonably necessary to achieve its purpose and perform its functions.

(2) Without limiting subsection (1), the Office of Nature, in performing its functions,
(a) must act in the interests of nature;
(b) must develop appropriate mechanisms for engaging with, and reporting to, the Indigenous populations of British Columbia with interests relating to specific elements of nature on matters relating to those interests;
(c) may engage with any relevant agency, other body, or decision maker to assist it to understand, apply, and implement the rights of nature, including by developing or reviewing relevant guidelines or policies:
(d) may participate in any statutory process affecting nature, in which nature would be entitled to participate under any legislation.

Appointments to the Office of Nature

21. (1) The Office of Nature comprises 2 persons appointed by the nominators as follows:
(a) 1 person nominated on behalf of the Crown by the Minister of Environment and Climate Change Strategy; and
(b) 1 person nominated on behalf of the Indigenous peoples of British Columbia by [nominating entity to be determined in consultation with BC First Nations].

[101] Language taken in part and reworked from *Whanganui, supra* note 56, s 14(1), 18(2), 20(1).

6. Conclusion

This paper has assessed various potential avenues for pursuing implementation of the rights of nature in British Columbia law, looking into both amending existing legislation and creating new stand-alone legislation. Analysis of existing rights of nature protections across the world on the national and international scale revealed the following key components of effective rights of nature legislation: substantive rights for nature protecting the right to life, to exist, to maintain and regenerate vital cycles, and the right to restoration; a clearly defined scope of these rights; correlative obligations on the province to guarantee these rights; a paramountcy provision; a legal right to bring a claim of violation of the rights of nature; and Indigenous inclusion.

Analysis of potential existing legislation that could be amended, including the British Columbia *Constitution Act*, the British Columbia *Human Rights Code*, and existing environmental legislation such as the *Environmental Management Act* or *Clean Energy Act*, revealed that the piece of legislation that may be best suited for a rights of nature amendment is the British Columbia *Human Rights Code*. However, given the substantial drawbacks of relying on an amendment to effectively enshrine the rights of nature in British Columbia, this paper suggested that creating a new stand-alone piece of legislation may be preferable, and presented a draft of model legislation as a starting point.

Enacting legislation to protect the rights of nature would not only take strides towards protecting the natural world in the age of climate change, but would also challenge deeply rooted anthropocentric and ethnocentric worldviews of humans' relationship to nature. To some, this may seem an unthinkable leap from the reality of today's political and legal climate. But, as Christopher Stone would say, every successive extension of rights to a new entity in legal history has been "a bit unthinkable."[102] Perhaps it is time to embrace this new "unthinkable."

[102] Stone, *supra* note 12 at 453.