Constitutionalizing the Rights of Nature:
The Case of Canada's Old-Growth Forests in Comparative Perspective

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We acknowledge and respect the Kanien'kehá:ka peoples on whose traditional territory the university stands. We respect the continued connections with the past, present and future in our ongoing relationships with Indigenous and other peoples within the Montreal community.

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ABSTRACT

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This paper explores what the inclusion of constitutional environmental rights (CERs), specifically the rights of nature (RoN), could look like in Canada and their potential impact on the protection of endangered old-growth forests in British Columbia (BC). BC is home to some of the last remaining old-growth forests in Canada. While deemed essential by the province to the forestry industry, intact higher productivity old-growth forests hold significant cultural, social, and economic values, and play critical ecological functions on which BC's biodiversity depends. Despite this, old-growth logging persists in the province, culminating in Canada's largest act of civil disobedience: the Fairy Creek Blockades. Reflective of recurrent trends in BC's forestry practices from Clayoquot Sound's "War in the Woods," this mobilization demands the need for stronger environmental regulations and oversight in Canada. Though CER provisions positively correlate with environmental outcomes, these rights hierarchize human property over nature's right to exist, flourish, or be restored. I explore a potential avenue for protecting the rights of old-growth forests in BC: the stand-alone rights of nature in the Canadian Constitution. By examining rights of nature laws in Ecuador, Bolivia, and New Zealand, I will investigate what the constitutional RoN could look like in Canada. These rights might not only ensure the sustained protection of old-growth ecosystems in BC but incorporate Indigenous worldviews and legal orders into Canada's dominant legal system.

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Chapter 1: Introduction

There is a growing consensus amongst today's scientific community that humans are causing the planet's sixth mass extinction. We have entered the Anthropocene, a geological epoch representing the most recent period in Earth's history where human activity has significantly disrupted the earth's climate and environment. These activities have resulted in the overconsumption of natural resources, the threatening of entire ecosystems, and depletion of planetary boundaries to meet the needs of rising populations and a growing world economy.[1]

The United Nations' Intergovernmental Panel on Climate Change (IPCC) reports that human activities have contributed to the planet's warming by 1.1°C from pre-industrial times. With recent surges in global annual temperature, it is assessed that the world will likely surpass the 1.5°C threshold before 2040, causing irreversible climate change impacts.[2] Outside of huma land use, climate change is a primary driver of biodiversity loss, and the loss of biodiversity accelerates global warming by hindering nature's ability to store carbon dioxide.[3] Together, biodiversity loss and climate change represent some of the greatest threats facing humanity today.[4] While existing environmental laws are seen as tools for facilitating sustainable practices, they are predicated on "growth-insistent" economic models, which separate humans from the natural world and treat nature as a commodity to be exploited.[5] Modern legal systems and industrial society

[1] Pedro Conceição and United Nations Development Programme (UNDP), *The Human Development Report 2020: The next frontier: human development and the Anthropocene,* (New York: UNDP, 2020) 51-53. https://hdr.undp.org/system/files/documents/hdr2020overviewenglishpdf_1.pdf; Katherine Richardson et al., "Earth Beyond Six of Nine Planetary Boundaries," *Science Advances* 9:37, (2023).
[2]Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022 – Impacts, Adaptation and Vulnerability: Summary for Policymaker: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,* (Cambridge: Cambridge University Press, 2023) 10.
[3]United Nations, "Biodiversity – our strongest natural defense against climate change," *United Nations* https://www.un.org/en/climatechange/science/climate-issues/biodiversity (Accessed November 8, 2023).
[4] United Nations Climate Change, "What is the Triple Planetary Crisis?", *United Nations*, April 13, 2022, https://unfccc.int/blog/what-is-the-triple-planetary-crisis (Accessed November 8, 2023).
[5]Geoffrey Garver*, Ecological Law and the Planetary Crisis: A Legal Guide for Harmony on Earth*, (London: Routledge, 2021) 11.

encourage sustained economic development, emphasizing private property rights and endless consumption at the expense of the natural environment.[6] These structural failures are seen in Canada's own legal framework, that underlines the ownership, privatization, and exploitation of resources over the preservation of healthy ecosystems.[7]

Canada's Environmental Record

An early signatory to the 1997 Kyoto Protocol, Canada once held a leading position in the global environmental movement. Despite Canada's promise to reduce greenhouse gas (GHG) emissions by 6% between 2008 and 2012, its GHG levels increased by more than 30%, resulting in its withdrawal from Kyoto in 2011.[8] Renewing its commitment to reduce GHGs by 30% from 2005 levels by 2030, Canada ratified the Paris Agreement in 2016.[9] Canada has since enhanced its emission reduction target, shifting from 40% to 45% below 2005 levels by 2030.[10] Acknowledging global threat of biodiversity loss, Canada adopted the biodiversity conservation targets set out in COP15, agreeing to protect at least 30% of its lands and water by 2030.[11] Despite these

[6] *Ibid*, 57.
[7] David R. Boyd, *Rights of Nature: A Legal Revolution that Could Save the World*, (Toronto: ECW Press, 2017) xxviii.
[8] Bill Curry and Shawn McCarthy, "Canada formally abandons Kyoto on climate change," *The Globe and Mail*, December 12, 2011, https://www.theglobeandmail.com/news/politics/canada-formally-abandons-kyoto-protocol-on-climate-change/article4180809/ (Accessed June 25, 2022).
[9] Catherine Cullen, "Justin Trudeau signs Paris climate treaty at UN, vows to harness renewable energy," *CBC News*, April 22, 2016, https://www.cbc.ca/news/politics/paris-agreement-trudeau-sign-1.3547822 (Accessed June 25, 2022).
[10] Environment and Climate Change Canada, *2030 Emissions Reduction Plan – Canada's Next Steps for Clean Air and a Strong Economy*, Government of Canada, https://www.canada.ca/en/environment-climate-change/news/2022/03/2030-emissions-reduction-plan--canadas-next-steps-for-clean-air-and-a-strong-economy.html. (Accessed June 25, 2022).
[11] The Canadian Press, "Biodiversity agreement to protect planet reached at UN conference in Montreal," *CBC News*, December 19, 2022, https://www.cbc.ca/news/science/cop15-montreal-biodiversity-agreement-1.6690667 (Accessed May 11, 2023).

international commitments and Canada's recent noted improvement amongst OECD countries for its environmental performance,[12] national and provincial policy still fall short.

In Canada, environmental law and regulatory frameworks are enacted by the federal government, provinces, and northern territories. No single government has exclusive jurisdiction over the environment; the responsibility for environmental protection is shared, with the Canadian Constitution assigning a majority to the provinces and territories. Each jurisdiction maintains their own primary environmental protection laws and environmental assessment regimes accordingly.[13] The federal government, under the regulatory authority of Environment Canada, enacts laws protecting the natural environment, specifically the *Canadian Environmental Protection Act*, *1999* (CEPA). The CEPA, Canada's keystone environmental law, provides the nation-wide legislative framework for protecting the environment, human health, and preventing pollution.[14]

Having been without amendment for over 20 years, the CEPA was modernized in June 2023 with the passing of Bill S-5, *Strengthening Environmental Protections for a Healthier Canada Act*.[15] While MPs rejected many amendments that would have further reinforced Canada's environmental protections, the bill recognized Canadians' right to a healthy environment for the first time under federal law. This amendment requires that government uphold principles of environmental justice, intergenerational equity, and non-regression in existent environmental protections.[16] The revised Act also considers the cumulative effects of toxic pollutants and risks on vulnerable populations. Although Canada's recognition of the right to a healthy environment

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[12] Elmira Aliakbari and Julio Mejia, *Environmental Rankings for Canada and the OECD: 3rd Edition*, Fraser Institute, 2023, https://www.fraserinstitute.org/sites/default/files/environmental-ranking-for-canada-and-the-oecd-3rd-edition.pdf.
[13]See Penny Becklumb, *Federal and Provincial Jurisdiction to Regulate Environmental Issues* (Background Paper), Ottawa: Library of Parliament, Revised October 29, 2019, https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2013-86-e.pdf.
[14] *Canadian Environmental Protection Act, 1999*, SC 1999, c.33.
[15] Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Ac*t, 1st Sess, 44th Parl, 2023.
[16] *Ibid*, cl 2(1).

marks a meaningful step toward meeting leading international environmental and human right standards, it does not guarantee immediate environmental progress. Worded broadly and without an effective remedy, it is unclear what outcome these provisions will have until further established by the federal executive. Another limitation on the right to a healthy environment, involve its need to be "balanced with relevant factors such as social, health, economic and scientific considerations."[17] It is uncertain, especially given Canada's reliance on the resource sector, whether these rights will hold up against economic rights, or other human rights.

Canada's Primary Sector

A critical portion of Canada's economic wealth comes from the primary sector and commodification of natural resources. Leading industries within this sector include mining, oil and gas, and forestry, and have historically contributed from 5% to 10% of Canada's total yearly economy.[18] This sector has increased in recent years, with natural resources directly accounting for 13.7% of Canada's nominal GDP in 2023.[19] The annual revenue derived from these industries from 2016 to 2020 averages $14.8 billion.[20] The economic strength of the extractive sector has therefore significantly influenced how Canada frames environmental policy and approaches its environmental targets. As a result, government policy has minimized the practice of – and even

[17] Environment and Climate Change Canada, "UPDATE – Strengthening the Canadian Environmental Protection Act, 1999 and recognizing the right to a healthy environment," *Government of Canada*, https://www.canada.ca/en/environment-climate-change/news/2023/02/update--strengthening-the-canadian-environmental-protection-act-1999-and-recognizing-a-right-to-a-healthy-environment.html.
[18] Statistics Canada, *Primary Industries*, Ottawa: Statistics Canada, modified June 26, 2006, https://www150.statcan.gc.ca/n1/pub/11-402-x/2006/1664/ceb1664_000-eng.html.
[19]Statistics Canada, *Gross domestic product (GDP) at basic prices, by industry, annual average (x 1,000,000)*, Table 36-10-0434-0*3*, Ottawa: Statistics Canada, February 29, 2024, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610043403.
[20] Government of Canada, *10 Key Facts on Canada's Natural Resources – 2023*, Ottawa: Government of Canada, modified February 7, 2024, https://natural-resources.canada.ca/science-and-data/data-and-analysis/10-key-facts-on-canadas-natural-resources/2023-10-key-facts-on-canadas-natural-resources/25653.

directly violated – international environmental agreements like Kyoto, in order to prioritize Canada's resource sector.[21] Controversial national policy issues involving the environmental assessments of resource projects have, as a consequence, been left to the discretion of the provinces.[22] Even with recent promises made by the Trudeau federal government for climate action, Canada's dependence on the primary sector constrains policy makers' ability to address both the climate and biodiversity crises.[23] These tensions are visible in BC, where the province faces ongoing pressure to protect old-growth forests while maintaining a primary economic driver.

Forestry plays an foundational role in BC's economy through the global exportation of lumber, pulp and wood products, local job generation, and through government revenue derived from stumpage fees.[24] In 2021, the province reported that the forest sector provided over 55,000 jobs, generated $1.9 billion in government revenue, and contributed $5.9 in Gross Domestic Product (GDP).[25] The forest industry is especially important to remote communities in non-metropolitan areas which rely on logging as their major or only economic source, and to a growing number of Indigenous communities.[26] Of the trees harvested, those in old primary forests hold the

[21] Anne McIlroy, "Canada's promise is more hot air," *The Guardian*, September 23, 2002, https://www.theguardian.com/environment/2002/sep/23/worlddispatch.climatechange, (Accessed June 24, 2022); CBC News, "Harper's letter dismisses Kyoto as 'socialist scheme'," *CBC News*, January 30, 2007, https://www.cbc.ca/news/canada/harper-s-letter-dismisses-kyoto-as-socialist-scheme-1.693166, (Accessed June 24, 2022).
[22] Chantal Hébert, "Provinces increasingly ignoring Stephen Harper to go their own way: Hébert," *Toronto Star*, December 10, 2014, https://www.thestar.com/news/canada/2014/12/10/provinces_increasingly_ignoring_stephen_harper_to_go_their_own_way_hbert.html, (Accessed December 3, 2022).
[23] CBC News, "House of Commons declares climate emergency ahead of pipeline decisions," *CBC News*, June 18, 2019, https://www.cbc.ca/news/politics/climate-emergency-motion-1.5179802 (Accessed December 1, 2022).
[24]Doug Donaldson et al., *A New Future For Old Forests: A Strategic Review of How British Columbia Manages for Old Forests Within its Ancient Ecosystems, 2020:* 28.
[25] Government of BC, *2021 B.C. Forest Sector – Statistics Summary*, Government of British Columbia, https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/forest-industry-economics/economic-state/2021_bc_forest_sector_-_statistics_summary.pdf (Accessed November 23, 2022).
[26] BC Council of Forest Industries, "Study confirms BC forest industry's foundational economic impact," *Canadian Forest Industries*, April 3, 2019, https://www.woodbusiness.ca/study-confirms-bc-forest-industrys-foundational-economic-impact/, (Accessed November 23, 2022); See Mike Harris et al., *British Columbia's Forest Industry and the Regional Economies*, (PWC, 2019) https://www.cofi.org/wp-content/uploads/FINAL-COFI-Regional-Economic-Impact-Study_Final_March2019-2.pdf.

highest timber value. This has resulted in a forest management approach within the province that has prioritized old-growth logging and timber supply over other non-timber forest values.

Old-Growth Forest Ecosystems

The province of British Columbia defines old-growth trees according to age. In wetter coastal and interior wet belt regions, old-growth is considered 250 years or older. In drier interior forests, the age is set to 140 years or more. While age criteria provide a baseline for defining forest ecosystems, it does not consider a tree's structural variety, productivity, or its ecological processes. These characteristics are noted of increasing importance, especially when determining a tree's timber quality, as well as a forest's intrinsic societal values and ecosystem functions.[27]

Forest biodiversity and healthy ecosystem functions are largely dependent on large, productive old-growth trees, which deliver a variety of human services including timber, fuel and medicine, provide recreational and tourist use, and hold traditional cultural and spiritual values.[28] These forests also serve as stable carbon reservoirs and mitigate community climate risks by preventing flooding, landslides, the frequency and severity of seasonal wildfires and heat waves, and by securing quality water resources.[29] The latter is of increasing importance, given the recent rise in extreme weather events in BC, from heat domes, to atmospheric rivers, flooding, landslides, and wildfires.[30] Notwithstanding the evidence demonstrating the value of intact old-growth forests,

[27] Karen Price et al., "BC's Old Growth Forest: A Last Stand for Biodiversity," *Sierra Club BC*, https://sierraclub.bc.ca/wpcontent/uploads/bcs-old-growthforest-a-last-stand-for-biodiversity-report-2020.pdf, (2020): 16.
[28] *Ibid*, 12; J. Bradley Cardinale et al., "Biodiversity loss and its impact on Humanity," *Nature* 486 no. 7401(2012): 62.
[29] Peter Wood, "Intact Forests, Safe Communities: Reducing community climate risks through forest protection and a paradigm shift in forest management," *Sierra Club BC*, (2021): 5; Price et al. 12-13, 15-16; Donaldson, Gorley and Merkel, 27.
[30] Simon Little, "B.C. declares state of emergency amid 'worst wildfire season in our province's history'," *Global News,* August 18, 2023, https://globalnews.ca/news/9905688/bc-wildfire-provincial-update-august-18-2023/ (Accessed November 9, 2023); Simon Little, "Flooding, fires and heat: A year of unprecedented weather extremes

the logging of old trees continues in the province. These unsustainable practices have also continued despite the findings released by a BC government appointed independent panel in 2020, calling for a new approach to forestry management that protects old-growth ecosystems.[31] While the NDP government promised to implement all 14 of the Old-Growth Strategic Review's (OGSR) recommendations within a three-year timelines, none have been implemented to date.[32] Delayed government action has led to increased public pressure and social mobilization against old-growth logging, that reminisce the Clayoquot Sound protests in the 1990s.

From the "War in the Woods" to the Fairy Creek Blockades

Tensions over BC's old-growth logging practices first garnered international media attention in 1993, when over 12,000 people mobilized to protest old-growth logging in Clayoquot Sound, located on Tla-o-qui-aht territory, on the coast of Vancouver Island. Known as the "War in the Woods," over 800 protestors were arrested during a series of blockades against logging company MacMillan Bloedel, becoming Canada's largest act of civil disobedience at the time. Spanning months, the region of Clayoquot Sound was eventually protected and placed under First Nation stewardship. All tree farms licenses in Clayoquot Sound were handed over to five Nuu-chah-nulth First Nations, who shifted to ecosystem-based forest management. By 2014, the Tla-o-qui-aht territory was protected by four tribal parks that are overseen by a Guardians program.[33]

in B.C.," *Global News*, December 26, 2021, https://globalnews.ca/news/8438007/bc-year-in-review-weather-extremes/ (Accessed November 9, 2023).

[31] See Donaldson et al.

[32] *CBC News*, "B.C. government hasn't fulfilled promise to revise forestry practices, conservationists say," *CBC News*, September 12, 2023, https://www.cbc.ca/news/canada/british-columbia/old-growth-deadline-passes-1.6963461 (Accessed November 9, 2023).

[33] Steph Kwetásel'wet Wood, "How Clayoquot Sound's War in the Woods transformed a region," *The Narwhal*, August 28, 2021, https://thenarwhal.ca/clayoquot-sound-tofino-after-war-woods/#:~:text=In%20the%20years%20following%20the,and%20the%20Tranquil%20River%20Watershed. (Accessed November 10, 2023); Steph Kwetásel'wet Wood, "'Legacy of bold resistance': how the Tla-o-qui-aht

Despite these victories, old-growth logging has persisted throughout the province, resulting in Canada's current largest act of civil disobedience: the Fairy Creek Blockade.

Old-growth logging within and surrounding the Fairy Creek Watersheds, located on Pacheedaht territory on southwestern Vancouver Island, gained public attention in August 2020. A part of the Tree Farm License (TFL) 46, these areas hold some of the last remaining intact old-growth forests, outside of protected provincial parks in the region. They also represent the homes to several endangered animals, including the Western screen owls. Available for logging, the forestry company Teal Jones received government approval to log a smaller cut-block of the predominantly old-growth forests. This resulted in a series of protests and moving blockades led under the directive of the activist group the Rainforest Flying Squad, to prevent harvesting operations in the area. Seen as fight for all remaining unprotected old-growth forests in the province, the protests rapidly gained public support and international recognition.[34] Close to 1,200 arrests were made over the course of the protests, resulting in the BC government's announcement to defer old-growth logging within the area for two years at the request of First Nations. This deferral has since been extended until February 2025, to provide First Nations more time to develop an effective resource-stewardship plan.[35]

declared 100% of their territory protected," *The Narwhal*, March 16, 2023, https://thenarwhal.ca/first-nation-guardians-war-in-the-woods/ (Accessed November 10, 2023).

[34] Justine Hunter, "Fairy Creek blockade: What you need to know about the anti-logging protest in B.C.," *The Globe and Mail*, May 27, 2021, https://www.theglobeandmail.com/canada/british-columbia/article-fairy-creek-blockade-2021-what-you-need-to-know-about-the-anti-logging/ (Accessed March 5, 2022).

[35] The Canadian Press, "B.C. extends deferral of old growth logging in Vancouver Island's Fairy Creek watershed," *CBC News*, June 2, 2023, https://www.cbc.ca/news/canada/british-columbia/fairy-creek-defer-old-growth-logging-extension-1.6864569 (Accessed November 10, 2023).

Fairy Creek, like Clayoquot Sound, reflects the government use of illegal injunction zones, the restriction of press freedoms,[36] recurrent instances of RCMP brutality,[37] and harm to Indigenous land defenders.[38] It further exemplifies the recurrent failure of provincial environmental policy to protect Canada's biological diversity or adequately consult with First Nations amidst recent forestry management policy recommendations**.** While sustained acts of civil disobedience, use of blockades, and international media attention, led the BC government to announce its commitment to work with First Nations and defer logging within 2.6 million hectares of large old-growth, these promises have fallen short of concrete action.[39] Even as the Fairy Creek watershed remains protected by temporary deferral, some of the most at-risk old-growth forests in the province continue to be logged.[40] According to the 2020 report, *BC's Old Growth Forests: A Last Stand for Biodiversity*, only 2.7% to 3% of the province's 13.2 million hectares of remaining old forests support large trees.[41] Recent data further reveals that the annual cut of old-growth trees have actually increased, despite statements made by the BC government that the province has experienced record lows.[42] Without a new forest management approach in sight, industry continues to log without regard for the long-term ecological and economic consequences.

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[36] Bethany Lindsay, "Judge ends injunction against Fairy Creek protests, citing 'substantial infringement of civil liberties," *CBC News*, September 28, 2021, https://www.cbc.ca/news/canada/british-columbia/b-c-fairy-creek-court-civil-liberties-injunction-1.6192827 (Accessed March 5, 2022).
[37] Cherise Seucharan, "Episode 713 – Violence At Fairy Creek," Interview by Jesse Brown, *CANADALAND*, September 20, 2021, Podcast, 31:02, https://www.canadaland.com/podcast/713-violence-at-fairy-creek/.
[38] Olivia Bowden, "Arrests of media covering Indigenous rights are part of a continued effort to silence land defenders, legal experts say," *Toronto Star*, November 21, 2021, https://www.thestar.com/news/canada/2021/11/21/arrests-of-media-covering-indigenous-rights-are-part-of-a-continued-effort-to-silence-land-defenders-legal-experts-say.html (Accessed June 13, 2022).
[39] Lindsay Byers, "Government taking action on old-growth deferrals," *BC Gov News*, November 2, 2021, https://news.gov.bc.ca/releases/2021FLNRO0068-002088 (Accessed June 25, 2022).
[40] Ziona Eyob, "New evidence shows logging and cutting permits in proposed old growth deferral areas," *Stand.earth*, April 12, 2022, https://www.stand.earth/latest/forest-conservation/primary-forests/new-evidence-shows-logging-and-cutting-permits-proposed (Accessed Jun 25, 2022).
[41] Price et al., 6.
[42] Sierra Club BC, "Review of B.C. data shows annual old-growth logging has gone up, not down," *Sierra Club BC*, October 4, 2023, https://sierraclub.bc.ca/review-of-b-c-data-shows-annual-old-growth-logging-has-gone-up-not-down/ (Accessed November 4, 2023).

This recurrent trend in BC's forestry management practices lead one to wonder: how can it be happening again? Although democracy has spoken, everyday Canadians find themselves resorting to acts of civil disobedience as recourse against a government that fails to follow through on its promises. To understand the complexities behind BC's forestry management plans, attention must be made to prevailing forestry policy.

Government Regulation of Forestry in BC

BC's forest resource management involves various players from non-government organizations to private industry, with the majority of the responsibility falling to the provincial government. Compared to the rest of Canada, BC's public land, or provincial Crown land, comprises a substantial 94% of the province.[43] The leading pieces of legislation governing forestry on public land in BC are the *Forest Act* and *Forest and Range Practices Act* (FRPA). Ratified in 1912, the *Forest Act* controls the rights to log public timber and the rate of timber harvesting, while the FRPA regulates forest and range operational planning, including road building, logging, and reforestation.[44]

Introduced in 2004, the FRPA replaced the 1994 *Forest Practices Code*, resulting in a period of deregulation within the forestry sector that reduced government's role. Industry was subsequently given broad resource-management objectives that they could decide on how they would follow. Rather than government ensuring industry compliance, oversight was outsourced to

[43] Ministry of Forests, Lands and Natural Resource Operations, *Crown Land: Indicators and Statistics Report*, (Province of British Columbia, 2011), iii, https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown_land_indicators__statistics_report.pdf.
[44] *Forest Act*, RSBC 1996, c 157; *Forest and Range Practices Act*, SBC 2002, c 69; Association of British Columbia Forest Professionals, *Forest Legislations and Policy Guide 2015*, (Vancouver: Association of BC Forest Professionals, 2015) 4-8.
http://member.abcfp.ca/WEB/abcfp/Files/sd84js_nwp455/abcjfpRefGuidte_20f15_web.pdf

forestry professionals hired by logging companies.[45] These professionals developed forest stewardship plans without releasing the particulars of those units, including where roads would be built, or where harvesting would occur. The BC government's deference to foresters on land-management decisions, and outdated forest steward management guidelines, culminated in Teal Jone's eventual logging of old-growth within the Fairy Creek watershed. After years of requests asking to remedy these policy difficulties, Bill 23, the "Forest Statutes Amendment Act," was passed in November 2021. While these changes are meant to increase government's role in resource management and promote collaboration with Indigenous communities to address climate change and old-growth logging, it is met with skepticism. Ecological values within the bill are still broadly defined, and all final decisions in forest planning fall to chief forester, without providing adequate wording or informed consent with First Nations. It could subsequently take up to ten years before any of these regulations are developed.[46]

In April 2023, The BC government removed the controversial "without unduly reducing the supply of timber" clause in the Forest Planning and Practices Regulation under the FRPA. This clause legally permitted the prioritization of timber supply in BC over other forest values. Though an important step in protecting biodiversity and forest ecosystems, similar clauses continue to exist in Government Actions Regulations, and ongoing Forest Stewardship Plans (FSP) do not require mandatory amendment.[47] As seen with Bill 23, practical changes to old-growth logging will take more time to recognize.

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[45] *Forest and Range Practices Act*, SBC 2002, c 69, s 21.
[46] Zoë Yunker, "A New Bill Could Put BC 'Back in the Driver's Seat' for Forestry," *The Tyee*, October 29, 2021, https://thetyee.ca/News/2021/10/29/New-Bill-BC-Drivers-Seat-Forestry/ (Accessed Jun 25, 2022).
[47] Government of British Columbia, "Removing limitations on objectives set by government," *Government of British Columbia*, https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/laws-policies-standards-guidance/legislation-regulation/forest-range-practices-act/frpa-improvement-initiative/removing-limitations-on-objectives.

Another significant challenge to BC's forestry practices is ensuring the enforcement of provincial forestry laws. Especially, in remote areas. A 2019 report released by the Forest Practices Board revealed that the natural resource officers tasked with enforcing responsible forestry practices often lack the resources to proactively monitor logging projects before an issue occurs. Difficult still, is determining whether companies with logging licenses are observing forestry laws or simply giving the appearance of compliance.[48]

Despite recent policy changes, BC's approach to forest management continues to reflect timber bias. While successive BC governments have acknowledged the value of protecting old-growth forests and publicly committed to implementing all 14 of the OGSR's recommendations, forestry practices still reflect a "talk and log" mindset.

Addressing the Issue: What Canadians Want

Recent polls reveal that 92% of British Colombians want old-growth protected in the province,[49] while another 85% of residents want the N.D.P. government to uphold its election promise of implementing all the Old Growth Technical Panel's recommendations.[50] Nevertheless, forestry policy continues to hierarchize timber supply over biodiversity conservation.[51] In a country that claims to value its natural environment, Canadian law does not recognize the rights of nature in any way: whether it be the right to exist, thrive or be restored. Unbeknownst to many Canadians, the federal government does not recognize citizens' right to clean water and has only legally

[48] Forest Practices Board, *Appropriateness of Government's Compliance and Enforcement Framework for FRPA and the Wildlife Act*, (Victoria: Forest Practices Board, April 2019) 4. https://www.bcfpb.ca/wp-content/uploads/2019/04/SIR50-Compliance-and-Enforcement.pdf.
[49] "Poll: 9 in 10 British Columbians Support Protecting Old-Growth," *Sierra Club BC,* January 15, 2020, https://sierraclub.bc.ca/9-in-10-support-protecting-old-growth/ (Accessed July 25, 2022).
[50] Jens Wieting, "Vast Majority (85%) of British Columbians Want Action for Old Growth Forest; Only 16% Think BC NDP has Done a Good Job Protecting Them," *Sierra Club BC*, June 4, 2021, https://sierraclub.bc.ca/forestpoll21/ (Accessed June 25, 2022).
[51] Donaldson et al., 32-33.

recognized their right to live in a healthy environment in 2023. All the while, 98% of Canadians see nature as essential to a human's ability to survive. Canada's lackluster environmental record and weak internationally performance amongst wealthy nations, further invites discussion on the role of constitutionally entrenched environmental rights.[52]

Although human rights-based approaches to constitutional environmental rights have made meaningful traction over the last few decades, they often place humans above nature rather than recognizing their reciprocity with the natural world. Many Western legal systems – including Canada's – see nature as property to be owned.[53] This is evident in both BC's *Wildlife Act* and Manitoba's *Fisheries Act*, which vest all property in the Crown until an individual rightfully acquires the right of property in accordance with these Acts' provisions.[54] Nevertheless, exceptions to these approaches exist in many cultures with some of the earliest examples originating from Indigenous worldviews and legal systems, which hold humans accountable to the natural world. Both Haudenosaunee and Haida worldviews, for instance, recognize animals and non-human entities as 'people' or family with whom they are interconnected with, and have a duty to.[55] Indigenous legal orders prove a marked departure from anthropocentric environmental rights models, demonstrating that human and non-human members of the planet have reciprocal rights and responsibilities to one another. These cosmologies have, to an extent, helped revitalize Western legal traditions by encouraging more ecocentric approaches to environmental rights and by recognizing nature's inherent rights.

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[52] David R. Boyd, *Constitutional Recognition of the Right to a Healthy Environment: Making a Difference in Canada*, Paper #3, (David Suzuki Foundation, 2023) 5-7. https://davidsuzuki.wpenginepowered.com/wp-content/uploads/2013/11/importance-consitutional-recognition-right-healthy-environment.pdf.
[53] David R. Boyd, *Rights of Nature: A Legal Revolution that Could Save the World*, (Toronto: ECW Press, 2017) xxv.
[54] *Ibid,* xxviii.
[55] *Ibid*, xxx.

It has been through the legal codification of Indigenous worldviews into dominant legal systems and laws, that various jurisdictions are recognizing nature's inherent right to exist, thrive, and maintain its vital cycles. This novel rights revolution has significant implications for the protection of environmental biodiversity and ecosystem health. Particularly, when considering the realities of modern consumerism and policymakers' prioritization of economic growth. By basing environmental protections on the premise that nature has inalienable rights, legal systems around the world are beginning to challenge the prevailing assumption that nature is property intended for human use and exploitation. This ecological movement and legal tool offers an opportunity to re-frame humans' relationships with all of Earth's communities, in a manner that could meaningfully transform how ecologically sensitive ecosystems like old-growth forests are protected in Canada. Rights of nature moves beyond the anthropocentrism of human rights-based environmental protections, and if constitutionally enshrined, could hold government more accountable to its policy promises and environmental commitments. Could the constitutional recognition of environmental rights, specifically the rights of nature (RoN), ensure the sustained protection of old-growth forests? What could the stand-alone constitutional recognition for the rights of nature look like in Canada?

To address these questions, I examine the RoN experiences and provisions of three countries that have constitutionally or institutionally granted nature elevated legal standing at the national level: Ecuador, Bolivia, and New Zealand. These countries are selected for comparison because like Canada, their reliance on resource-extractive economies have negatively impacted their environmental performance and have contributed to ongoing injustices against their Indigenous peoples. These difficulties have resulted in local communities' turning to RoN provisions as a method of challenging government extractivism. Each country's RoN or legal

personhood laws further incorporate elements of Indigenous laws and worldviews of human coexistence with non-human nature into Western law, that if applied in Canada, could re-frame Indigenous-state relations and promote a more legally pluralistic society. Not only could rights of nature provisions foster policy reform and ameliorate environmental outcomes in Canada; they could further help redress the historical exclusion of Indigenous peoples in the control of their lands and natural resources.[56] By incorporating Indigenous worldviews into constitutional environmental protections, Indigenous rights of self-governance could be further recognized and reconciliation better ensured.[57]

By comparing each country's environmental rights provisions and their respective RoN protections, this paper explores how the constitutional RoN could secure the protection of rare old-growth forest ecosystems in Canada. It also begins to consider what implications this might have on Indigenous self-determination and multi-juridicalism. The paper proceeds as follows. Chapter 2 provides an overview of human rights-based environmental rights, the prospective effects and benefits of constitutional environmental rights on national environmental performance, and how constitutional environmental rights might be recognized in Canada. RoN is then introduced as an alternative to human rights-based environmental protections, with its status assessed at the international level and in Canada. Chapter 3 restates the research objectives and establishes the paper's research design. In chapters 4, 5 and 6, the RoN and legal personhood laws and regimes of Ecuador, Bolivia, and New Zealand are examined in accordance with existing research findings, and their effects respectively evaluated. Chapter 7 presents a comprehensive analysis of the

[56] Lynda Collins, *The Ecological Constitution: Reframing Environmental Law*, (London: Routledge, 2021) 73; Anthony R. Zelle, et al., *Earth Law: Emerging Ecocentric Law – A Guide for Practitioners,* (New York: Wolters Kluwer, 2021) 44.
[57] John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation," in Michael Asch, John Borrows and James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 50-51; See generally John Borrows, *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010).

research findings, RoN's anticipated benefits, and offers a policy prescription for Canada, as well as recommendations for areas of future research. Final thoughts are delivered in Chapter 8.

Chapter 2: The Rights of Nature - What's in a Name?

There is a growing view that current environmental laws are ill-equipped to protect the earth's natural environment or ecosystem biodiversity. This is based on the understanding that environmental law, as a product of the modern era, is premised on human control, separation, and dominance over nature. Nature is consequently regarded as property to be exploited and commodified for the purpose of economic growth, industrialization, and human benefit. This wholly overlooks nature's intrinsic value or its finite carrying capacities.[1] Existing laws have therefore proven inadequate against the rising environmental global crises of the 21st century and prompted the demand for a legal paradigm shift.[2]

Rachel Carson was the first to write about the human right to a healthy environment, with her publication of *Silent Spring* in 1962. This was credited for kickstarting the modern environmental movement and the transition to modern environmental law. The human right to a healthy environment was eventually pronounced in the *Stockholm Declaration,* at the world's first environmental conference in 1972.[3] While legally unenforceable, this declaration played a normative function by inspiring constitutional environmental rights (CERs) and related human rights-based approaches at the national level. Constitutional rights afford the highest level of legal protection within a state, as all other laws, policies, and state regulations must remain consistent with these principles. Government institutions' failure to comply with these rights can consequently result in a policy being submitted to legal challenge. Beyond its structural purpose,

[1] Zelle et al., 39.
[2] Collins, 2021, 3-4.
[3] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, (Vancouver: UBC Press, 2010) 12-13.

a constitution serves a normative function of reflecting a society's most valued ideals and expectations, and delineating those of future generations.[4]

Since the *Stockholm Declaration*, over 155 countries have adopted some form of environmental right through their constitutions, national laws, court decisions, or adherence to related international treaties.[5] Of these, over 110 countries have explicitly included the human right to a healthy environment in their constitution. This reflects the modern concept of environmental constitutionalism, which exemplifies the convergence of environmental law, constitutional law, human rights, and international law.[6] Significant literature has been written on the subject, proposing that nations with constitutional environmental rights support stronger environmental protections and compel governments to improve their policies.

Boyd provides a comprehensive, qualitative assessment of a human rights-based approached to the explicit constitutionalization of environmental protections at the national level. 92 countries have adopted a constitutional right to a healthy environment, with 78 of these countries exhibiting stronger environmental laws post-entrenchment.[7] 44 of these countries with CERs have been influenced by environmental litigation.[8] Boyd's findings reveal that nations that have formally enacted or amended their constitutions with said protections have achieved better environmental performance, more effective laws and enforcement of these laws, and court decisions defending ecological rights from violation. Procedural rights are also shown to have improved, with greater public participation in environmental governance and increased access to

[4] Adam Dodek et al., *The Canadian Constitution* (version 2nd edition.), 2nd ed. (Toronto: Dundurn, 2016) 11-12.
[5] United Nations Environment Programme and United Nations Human Rights Special Procedures, *Right to a healthy Environment: good practices – Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* (United Nations Environment Programme, 2020) 3. https://wedocs.unep.org/bitstream/handle/20.500.11822/32450/RHE.pdf?sequence=1&isAllowed=y.
[6] James R. May and Erin Daly, *Global Environmental Constitutionalism,* (Cambridge: Cambridge University Press, 2014) 1.
[7] Boyd, 2010, 233.
[8] *Ibid,* 241.

information.[9] Boyd's use of an analysis of variance framework further reveals that countries with CERs hold noticeably lower carbon footprints and have reduced air pollution as much as 10 times faster than those without.[10]

Jeffords and Gellers reinforce Boyd's findings in a quantitative study revealing that constitutional environmental rights, specifically substantive environmental rights (SERs), are positively attributed to increased ecological protection. First of its kind, their study uses instrumental variables (IV) to assess the impacts of environmental rights in accordance with Yale's Environmental Performance Index.[11] Though their outcomes did not account for the legal enforceability of said rights provisions, control for existing environmental policies, laws, or natural resource endowments, nor consider the high environmental records of countries without CERs, the correlation between human and environmental rights still remains positive.[12]

Jeffords improves upon this research by discerning whether constitutionalized SERs impact a state's ecological performance in a consistent way. By employing the new Sustainable Development Index (SDI) and a heterogeneous treatment effects (THE) framework, Jeffords confirms the strong correlation between state CERs and environmental protection.[13] These findings are significant, as they consider the varying circumstances of each country using right-hand-side variables, such as constitutional age and instances of political violence, to address the issue of multiple causality on what influences environmental performance. [14] Jeffords and Gellers supplement the defense for CERs by studying the interaction between environmental justice and

[9] *Ibid*, 251-252.
[10] *Ibid*, 258.
[11] Chris Jeffords and Lanse Minkler, "Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes," *KYKLOS* 69 no.2 (2016): 296.
[12] Chris Jeffords and Joshua C. Gellers, "Constitutionalizing Environmental Rights: A Practical Guide," *Journal of Human Rights Practice* 9 no. 1 (2017): 140.
[13] Chris Jeffords, "On the relationship between constitutional environmental human rights and sustainable development outcomes," *Ecological Economics* 186 no.1 (2021): 14
[14] *Ibid*, 7.

constitutionally entrenched procedural environmental rights (PERs) involving access to justice, information, and public participation in environmental issues. Controlling for the level of democracy in each state, their data reveals how countries with PERs – particularly those with greater access to information– are more likely than those without to experience positive ecological justice outcomes and improved environmental democracy.[15]

May's examination of environmental human rights' laws at the international, domestic, and regional levels, and the extent apex courts have reached environmental decisions, further backs CERs' comprehensive improvement of environmental outcomes. This is reflected, despite findings that delayed judicial recognition present a real impediment to their implementation. Lastly, May's findings confirm the significance of environmental human rights' moral and normative influence on society.[16]

In the Canadian context, there are three ways environmental rights can be constitutionally recognized: through direct amendment, litigation resulting in its implicit recognition in existing human rights, and judicial reference. While formal amendment is seen as the most legitimate approach to enshrining new rights, [17] Collins purports that existing humans rights in the *Canadian Charter of Rights and Freedoms*, specifically s.7 rights to life, liberty, and security of the person, and s.15 equality rights, provide the conditions to attain constitutional environmental protection.[18] Collins equally advances how Aboriginal rights under s.35 of the Constitution and related unwritten constitutional principles (UCPs) may contain a broader approach to human

[15] Joshua C. Gellers and Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *Global Environmental Politics* 18 no.1 (2018): 116.
[16] James R. May, "The Case For Environmental Human Rights: Recognition, Implementation, and Outcomes," *42 Cardozo Law Review 983* (2021): 1020.
[17] David R. Boyd and Emmett Macfarlane, "Should environmental rights be in the constitution?", *Policy Options*, March 3, 2014, https://policyoptions.irpp.org/fr/magazines/second-regard/boyd-macfarlane/ (Accessed February 9, 2022).
[18] Lynda Collins, "Safeguarding the Long Durée: Environmental Rights in the Canadian Constitution," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71 (2015): 528-529.

environmental rights.[19] Especially, as Aboriginal and treaty rights under s. 35 can be recognized as containing a stand-alone right to nature. These existing human rights provisions, paired with the Supreme Court of Canada's (SCC) apparent high level of 'ecological literacy,' could arguably provide the grounds to informally recognizing environmental rights in Canada's Constitution.[20] Galloway further observes how an environmentally oriented UCP could address the systemic ecological injustice facing Indigenous peoples involving extractive activities on or around their traditional territories, by fully considering their burdens and advantages.[21]

Borrows bolsters this approach to environmental UCPs, advancing that Indigenous legal traditions depend on "unwritten cultural assumptions"[22] which comprise a part of Canada's normative principles. A fundamental feature of these Indigenous traditions is a respect for the Earth as a living entity, and a recognition of the interdependence between humans and the non-human world.[23] From this standpoint, environmental UCPs could bring about a multi-juridical approach to ecological justice by reflecting Indigenous law and upholding environmental protections. Importantly still, this could aid the process of reconciliation, which the Truth and Reconciliation Commission (TRC) has established "requires the revitalization of Indigenous law and legal traditions."[24] Still, the human right to a healthy environment is often seen as a prerequisite to all other human rights. To some, it's not being spelled out in Canada's constitution "because […] environmental protection is so fundamental (it must be) self-evident."[25] Despite these

[19] *Ibid*, 526-528.
[20] Lynda M. Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms," *Windsor Review of Legal and Social* Issues 26 no.1 (2009): 18-20; Collins, 2015, 526-528.
[21] Mari Galloway, "The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?" *Ottawa Law Review* 52 no. 2, (2021): 11.
[22] Borrows, 2010, 108.
[23] *Ibid,* 246.
[24] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) 16.
[25] Collins, 2015, 520.

arguments and the general empirical data supporting CERs' positive effects, the human rights-based approach to environmental protection faces various criticisms.

Constitutionalism and CERs have often been critiqued as undemocratic through their empowerment of the judiciary and constraining legislatures' decision-making ability.[26] Concern for judicial overreach is amplified when courts read-in environmental rights to pre-existing constitutional rights. This brings into question the implicit recognition of environmental rights through litigation and judicial reference. Macfarlane voices how courts lack the institutional capacity or legitimacy to effectively address complex policy issues. Especially, when involving positive rights and rights are non-justiciable. Arguments for the inclusion of positive constitutional environmental rights are further seen as misguided, as courts often lack the expertise or resources to oversee their implementation. Complex policy issues of this nature are seen as best left to the elected branches of government. Rights entrenchment is effectively framed as a diversion from meaningful institutional debate and balancing of interests, where the onus is placed on courts rather than politicians, to solve political issues.[27]

The rights framework to environmental protection has subsequently been criticized as neo-colonialist, Eurocentric, individualistic, anthropocentric, ambiguous, a threat to resource-based economies and other competing human rights, and ineffective at the level implementation.[28] Others emphasize how it conceals the difference between private and public power, and overlooks social issues of capitalism and globalization, given international institutions and corporations' pursuit of economic profit at the expense of human rights.[29] When looking at Canada specifically, critics

[26] David R. Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution*, (Vancouver: UBC Press, 2012) 28.
[27] Boyd and Macfarlane, 2014; Jason MacLean, "You Say You Want an Environmental Revolution?: Try Changing Canadians' Minds Instead (of the Charter)," *Ottawa Law Review 183* 49 no.1 (2018): 214.
[28] Boyd, 2012, 24; Collins, 2021, 38.
[29] Boyd, 2010, 6,9.

counter CER advocates' voiced preference of formally amending the Constitution by delineating the difficulties associated it. The entrenchment of a stand-alone environmental rights provision would require a high level of political will – the "7/50 formula" of consent – which has never been achieved since patriation.[30] Maclean further advances how constitutionalizing environmental rights does not "escape the irreducible politics of environmental protection," and if such a consensus already existed between the provinces, stronger environmental laws would likely already exist.[31]

Maclean recommends a bottom-up approach to improved environmental law, by increasing public involvement in and demand for policy reform. This model advocates for improved public education on the topics of sustainable living and climate change mitigation, and the "economic co-benefits" of achieving both.[32] Macfarlane further suggests that environmentalists "focus […] on convincing governments, political parties and the public" of the need for improved environmental policies, rather than pursuing constitutional amendment itself.[33] While both make strong points on the importance of increased public education and public involvement in demanding improved environmental protections, they are overly simplistic. Both arguments overlook the rollbacks made by governments that have 'acknowledged' the need for improved environmental protection, and taken steps to policy reform, but have preserved the status quo. There is a level of accountability that is missing that could better be accomplished through constitutional protection.

Although the literature supporting the human rights-based approach to CERs is significant, it could prove insufficient when attempting to address the issue of old-growth protection. This is largely due to the anthropocentric nature of the rights-based framework, which continues to prioritize human needs over the natural environment and related life-support systems. A more

[30] MacLean, 2018, 207-209.
[31] *Ibid*, 214.
[32] *Ibid*, 216-217.
[33] Boyd and Macfarlane, 2014.

ecocentric legal approach that prioritizes human needs but distinguishes that the needs of nature and of humans cannot be separated, would be of value.[34] The legal personhood and the rights of nature movement has emerged in the 21st century as a result of this reasoning.

The Rights of Nature

The term Rights of Nature is employed on an interchangeable basis, referring to both a legal philosophy, and as the legal provisions that build on this philosophy and give nature rights. Often, this legal philosophy is referred to as Earth Jurisprudence, and asserts that there is a "lawful order to the universe" where all features of the natural world – both human and non-human – are connected, and dependent on healthy ecosystems for their survival. [35] Consistent with this frame, Earth Jurisprudence advances that "humans must adapt their legal, political, economic, and social systems to be consistent with" the lawful order of the natural world, rather than humans forcing it into theirs.[36]

Boyd accordingly describes the RoN movement as a "legal revolution" where non-human animals, other species, ecosystems, and inanimate objects are granted rights to live unthreatened by human activities. Humans have the corresponding responsibility, morally and at times legally, to uphold these rights and live in harmony with the natural world.[37] This phenomenon moves away from the philosophical underpinnings of modern society, from Aristotle and Plato, to Christian philosophers, to Descartes and Kant, that is predicated on human superiority and dominion over non-human beings and animals.[38] It further diverts from the concept of property rights which are

[34] Zelle et al., 5-6.
[35] Kauffman and Martin, 2021, 4.
[36] Cormac, Cullinan, "A History of Wild Law," in *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, edited by Peter Burdon, (Kent Town, Australia: Wakefield, 2011) 13.
[37] Boyd, 2017, xxxv.
[38] *Ibid*, xxiii-xxiv.

embedded in Western legal systems, and introduces instead the concept of property responsibility.[39] Prevailing legal systems view nature in a mechanized way, as an assemblage of fragmented parts and resources providing unlimited economic wealth. Developed during the 16th century's scientific revolution, this industrialized perspective fails to consider modern scientific understandings of nature's dynamic ecosystems.[40]

The conception that humans are interconnected with and have responsibilities to the natural world, has its roots in many cultures and indigenous worldviews. Though varied in their approaches, the notion of human reciprocity with the non-human world is present in Jain, Buddhist, and Hindu faiths, and indigenous cultures from the Māori in New Zealand, to the Haida and Haudenosaunee in Canada. The human and non-human world are seen as one, and Indigenous legal systems have long recognized nature's inherent rights to exist and thrive.[41]

This ecological perspective entered Western legal thought with the work of Christopher Stone in 1972, in his seminal essay "Should trees have a standing?" In it, Stone advocates for the legal personhood and standing of the natural world, just as corporations and minority groups have had extended to them over time. These rights were all but considered "unthinkable" until they were finally established. Stone asserts the same could be said for the rights of non-humans and natural entities.[42] Cultural historian Thomas Berry continues on this view, promoting an ecocentric approach to the law that includes the judicial and constitutional recognition of the natural world. These conceptions eventually contributed to the promulgation of international declarations and

[39] *Ibid*, xxix.
[40] Craig M. Kauffman and Pamela L. Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future*, (Cambridge, Massachusetts: The MIT Press, 2021) 5.
[41] Boyd, 2017, xxix-xxx, 131.
[42] Christopher D. Stone, "Should Trees Have Standing – Towards Legal Rights for Natural Objects," *Southern California Law Review* 45 no.1 (1972): 454.

agreements over the recognition of nature's inherent rights, like the Universal Declaration of the Rights of Mother Earth in 2010.[43]

At the time of writing, 362 efforts to adopt a RoN legal provision have been recorded across 33 countries and at the global level. Of these initiatives, 237 have been approved with a substantial remainder in the process of being drafted or submitted for approval. At the domestic level, RoN legal provisions have been implemented in various documents, including national constitutions, statutes, and local ordinances.[44] Of these documents, local laws have recognized RoN the most, with over four times the number of legal initiatives than national RoN laws. That said, the majority of these local laws are in the United States. More countries have successfully established RoN in national statutory law, ostensibly due to the "weakness of local law and the difficulty of amending constitutions."[45] Case law is another avenue by which RoN initiatives have developed, with over 74 percent of global RoN court rulings having occurred in Latin America. Jurisprudence accounts for two-thirds of RoN provisions in this region, demonstrating how courts have been used to secure RoN protections where there exists greater political instability.[46] This pathway is significant, with judges interpreting laws and making decisions that establish RoN where explicit laws do not yet exist.[47]

Other legal tools have been used to establish RoN based on the cultural, political, and legal context in which they occur. This includes policy, Indigenous laws, and declarations, and through international documents, soft law, and citizens' tribunals. RoN have been incorporated in national policies through regulatory agencies and advocates' working with government, circumventing the

[43] Collins, 2021, 66-67; "Universal Declaration of the Rights of Mother Earth," *Southern Cross University Law Review* 14 (2011): 203–206.
[44] Data drawn from Eco Jurisprudence Monitor, https://ecojurisprudence.org (Accessed November 20, 2023).
[45] Kauffman, 2022, 6.
[46] *Ibid.*
[47] *Ibid, 8.*

need to work through the legislature and draft new legislation. Of special interest to this paper, is the recognition of RoN in Indigenous laws. Particularly, to address environmental damages that have been caused by government-approved resource extractive industries. This method has proven successful in countries that acknowledge the sovereignty of their Indigenous populations. There, RoN have been used to codify customary, Indigenous laws that find their origins in natural rights.[48] Indigenous communities are further collaborating with local and national governments to establish RoN and nature's legal personhood in these countries' legal systems. Such an approach was adopted in Canada in 2021, between the Innu Council of Ekuanitshit and the Minganie Regional Country Municipality in Quebec. [49] This specific experience will be explored in the paper's final chapter.

At the international level RoN have been recognized in over 38 documents. A majority of these documents involve UN reports and resolutions.[50] The global RoN documents of greatest significance include the UN's Harmony with Nature Programme[51] and the Earth Charter.[52] Despite RoN's recognition within these documents, RoN is still largely underdeveloped and unenforceable. This has resulted in the creation of different international declarations, alliances, and tribunals for the RoN by various civil society organizations, to facilitate RoN's norm construction.[53] The purpose of these global initiatives has therefore been to improve individuals' understanding of RoN and envision what RoN could look like if formally enshrined in law. The recognition of the legal personhood and rights of nature has consequently been denoted as the "heart of the [modern]

[48] *Ibid.*
[49] *Ibid*, 9.
[50] *Ibid.*
[51] UN Secretary General, *Harmony with Nature: Report of the UN Secretary General*, United Nations, 72nd Session, UN Doc A/72/175 (2017).
[52] "The Earth Charter," *Journal of Education for Sustainable Development* 4 no. 2 (2010): 317–24.
[53] Kauffman, 2022, 8.

ecological constitution."[54] Not only could this approach remedy the structural flaws of today's anthropocentric laws and encourage effective policy reform – especially if implemented at the constitutional level – it could incorporate Indigenous law and cosmovision into existent colonial systems.

Although deemed one of the "fastest growing legal expression of ecological jurisprudence,"[55] the RoN and nature's legal personhood have been met critically.[56] Tanasescu argues that while RoN is theoretically and practically possible, the dominant approach to RoN is based in liberal rights advocacy, and employs colonial legal mechanisms like legal personality and rights to justify environmental degradation.[57] Tanasescu presents RoN as a political tool over a legal one, that allows governments to advance their extractivist agenda while satisfying environmental interests.[58] While Indigenous worldviews are used in the development of RoN legislation, Western appropriation of terms like 'harmony' and the gendered categorization of *Pachamama* or 'Mother Earth' is argued to depart from the relational foundations of Indigenous cosmologies.[59] *How* Indigenous worldviews are applied in RoN is argued as simply the "latest expansions of state power into Indigenous worlds."[60]

Aaron Mills agrees that while RoN is well-meaning, it erroneously extends a liberal system of law to the entire planet by giving rights to autonomous, non-human entities, in pursuit of their own interests. This goes against the Indigenous conception of law, which does not originate from

[54] Collins, 2021, 64.
[55] Kauffman, 2022, 1.
[56] Mary Elizabeth Whittemore, "THE PROBLEM OF ENFORCING NATURE'S RIGHTS UNDER ECUADOR'S CONSTITUTION: WHY THE 2008 ENVIRONMENTAL AMENDMENTS HAVE NO BITE," *Pacific Rim Law & Policy Journal* 20, no. 3 (2011): 659–691; Mauricio Guim and Michael A Livermore, "Where Nature's Rights Go Wrong," *Virginia Law Review* 107 no.7 (2021): 1347–1419.
[57] Mihnea Tanasescu, *Understanding the Rights of Nature: A Critical Introduction*, (Bielefeld: transcript, 2022) 97.
[58] *Ibid*, 119.
[59] *Ibid*, 57, 63.
[60] *Ibid*, 68.

centralized states or institutions, but from communities organized through kinship. Instead of pursuing projects of mutual benefit and transforming the way humans interact with the earth community, RoN is seen to reinforce the anthropocentrism of Western legality. While the RoN approach might produce short-term environmental gains, Mills argues it fails to address overarching, interconnected concerns, like climate change.[61]

Aimée Craft adds that while RoN might be useful to counter government control over nature, Western legal mechanisms fail to capture the legal and sacred relationships between the natural world and Indigenous peoples. Canadian domestic law, for instance, does not recognize water as a spiritual or living being in the same way that Anishinaabe law does.[62] This reinforces the view that while RoN is based off of Indigenous relationships with the natural world, its vesting in Western legal traditions departs the relational approach of Indigenous law, by prioritizing rights over responsibilities.[63] This translation of Indigenous concepts into government policy is seen as "political acts of transformation,"[64] that not only harm Indigenous peoples but obstruct the distinctiveness of Indigenous legal orders.[65]

Despite these criticisms, there is ever mounting evidence supporting RoN's ability to protect the natural world by extending human responsibility and ensuring private and public accountability.[66] It is not presented as a single, blanket solution to all environmental issues, but as

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[61] Claudia Flores and Tom Ginsburg, "S1E6: The River Knows Where to Go," 2021, In *Entitled*, Produced by University of Chicago Podcast Network, podcast, mp3, 37:22, https://podcasts.apple.com/sk/podcast/s1e6-the-river-knows-where-to-go/id1577996421?i=1000537837001, (Accessed January 10, 2023).
[62] Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)," in *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, edited by Borrows et al. (Waterloo, ON, Canada: Centre for International Governance Innovation, 2019) 103.
[63] *Ibid,* 105.
[64] Natasha Affolder, "Contagious Environmental Lawmaking," *Journal of Environmental Law* 31 no.2 (2019): 209.
[65] *Ibid,* 208.
[66] See Boyd 2017; Cameron La Follette and Chris Maser, eds, *Sustainability and the Rights of Nature in Practice*, (Boca Raton: CRC Press, 2020); Collins 2021; Daniel P. Corrigan and Markku Oksanen, eds, *Rights of Nature: A Re-Examination*, (Abingdon: Routledge, 2021); Kauffman et al., 2021; Nathalie Rühs and Aled Jones, "The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature*," Sustainability* 8 no. 2 (2016): 1-19.

a key feature of improved environmental policy and democracy. While conceptual difficulties and tensions do exist with RoN, I argue it provides one of the strongest legal mechanisms and tools for improved environmental protections given the confines of the pre-existing, Imperial legal structures. There are irreconcilable difficulties between Indigenous legal orders and Western legal systems, that are based in their different philosophical foundations. RoN might not ever capture Indigenous cosmology in its entirety, but it offers a compelling space for discussion between Indigenous and Western legal systems and worldviews. The growing successes of RoN and legal personhood laws speaks to this and will be explored in the paper.

Although the possibility for RoN legislation in BC has been discussed, it is approached from the perspective of amending an existing, or creating a new, provincial statute.[67] These avenues for implementation – while more likely to be achieved than constitutional amendment – would not prove as robust as formal constitutional amendment. Furthermore, this research focuses on developing an annotated draft of a rights of nature law in BC without considering these provisions' potential effects on existing policy or on ecological sustainability throughout Canada. Finally, although other countries' RoN provisions are included in the discussion, it is to discuss the manner in which they were drafted.

While the literature on CERs is not without its critics, strong arguments have been made for their entrenchment in national law. This is specifically shown in comparative constitutional law research, which demonstrates how organizational rights have a greater chance of success over procedural rights.[68] The qualitative analysis provided by Boyd on the subject proves especially compelling and will help guide my own analytical framework on CERs. That said, there is a lack

[67] Rachel Garrett and Stepan Wood, "Rights of Nature Legislation for British Columbia: Issues and Options," *Centre for Law and the Environment* (2020).
[68] Guim and Livermore, 2021, 1352-1353.

of current research on the implications that constitutionally entrenched rights of nature could have in the Canadian context, or on what the stand-alone recognition of these rights could look like in Canada more generally. While few countries have successfully recognized RoN in their constitutions, I will contribute to the early discussions on the legal personhood and constitutional RoN in Canada by analyzing the processes of lawmaking that have occurred elsewhere. Although national laws on the RoN fall outside of the scope of my research questions, they will provide better understanding on what these legal approaches may permit with respect to environmental protections, and what this might mean for constitutionalizing the RoN in Canada.

Chapter 3: Methodology

Canada is not the only country whose economy depends on the exploitation and exportation of natural resources. Nor is it alone in its struggle to achieve environmental sustainability due to this reliance or adequately consult with its Indigenous people, especially over issues pertaining to land management on traditional territories. Other countries have encountered similar experiences and adopted RoN regimes to begin addressing these difficulties. Although there have been mixed results on the efficacy of legally recognizing nature's rights and granting nature legal standing, positive developments are noted at the national and international level. The RoN approach is recognized as an instrumental tool for ensuring sustained human and non-human ecological wellbeing and is gaining momentum internationally, encouraging humans to live with respect for nature. Should Canada subscribe to this legal paradigm shift? For a country whose environmental policies prioritize resource extraction over the protection of healthy ecosystems, and has often failed in its duty to consult with First Nations,[1] there is a need to do better. Constitutionally recognizing nature's rights could prove a central part of the solution by ensuring the highest level of environmental protections, and integrating Canadian and Indigenous law.

Two research questions emerge in light of what is happening in Canada and elsewhere:

- **Q1**: Could the constitutional recognition of environmental rights, specifically the rights of nature, ensure the sustained protection of old-growth forests in Canada?

[1] See Eugene Kung, "Canada aims for the minimum on Indigenous consultation," *Policy Options*, September 20, 2018, https://policyoptions.irpp.org/magazines/september-2018/canada-aims-for-the-minimum-on-indigenous-consultation/ (Accessed September 22, 2023); Ashley Stedman and Elmira Aliakbari, "Court ruling exposes Ottawa's failure to get Indigenous consultation right," *Fraser Institute*, September 17, 2019, https://www.fraserinstitute.org/article/court-ruling-exposes-ottawas-failure-to-get-indigenous-consultation-right (Accessed September 22, 2023).

- **Q2**: What could the stand-alone constitutional recognition for the rights of nature look like in Canada?

Challenges to the Research

There is conclusive evidence in the literature that constitutional environmental rights facilitate positive change on domestic environmental performance.[2] While challenging to trace the cause and effect between constitutional provisions and environmental outcomes, existing empirical research on the benefits of constitutionalizing the human right to a healthy environment lend a strong argument for Canada's adoption of these rights provisions.[3] Proponents for nature's rights now provide increasing evidence that this legal approach marks the next logical step in environmental law. Especially, when entrenched into national or constitutional law. That said, there are challenges to discerning their potential influence on domestic environmental performance when adopted into constitutional law.

First, while early discussions debate the theoretical and philosophical implications of legally recognizing nature's rights, no empirical research on the potential benefits and drawbacks of constitutionalizing these rights have been conducted. This is due to RoN's recent emergence in legal practice and lack of current initiatives recognizing RoN in national constitutions. To date, only Ecuador and Bolivia have constitutionally recognized nature's rights, and only Ecuador has constitutionally entrenched these rights. Remaining national rights of nature regimes or legal personhood models have either been written into legislation, municipal ordinances, or read-in by

[2] See Boyd 2010; Jeffords and Minkler 2016; Jeffords and Gellers 2017, 2018; Jeffords 2021; May 2021.
[3] Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution*, (Vancouver: UBC Press, 2012).

courts through other legal provisions, like the right to a healthy environment.[4] This presents an obstacle to objectively, or empirically, answering the research questions.

A second difficulty faced when comparing RoN laws, is a lack of overarching definition to help guide and describe what the RoN concept entails. While each country's laws are rooted in Earth Jurisprudence and emerged from the same environmental tensions, they are structurally and normatively different. This is due to the heterogeneity of the movement, with each domestic RoN legislation having been developed through separate processes in distinctive domestic environments. Regional discrepancies significantly shape how RoN norms are developed and practiced, influencing which natural features are afforded rights, who can speak on natures' behalf, legal enforcement mechanisms, and whether individuals have an obligation to protect nature. Although these differences help explain why the RoN concept varies so greatly across institutional environments, it complicates the task of comprehensively assessing the ecological outcomes of RoN laws.

Comparative legal methodology – specifically, comparative constitutional studies' (CCS) 'explanation through causal inference' – best evaluates causal links between constitutional systems to determine the outcomes associated with specific environmental provisions. It accomplishes this by allowing for more generalized conclusions based on inductive reasoning.[5] Although this methodological approach would typically suit this project's research objectives, the data does not support it. RoN's formal enshrinement in only one national constitution requires a different comparative framework. Considering these analytical limitations, my methodological approach is

[4] "Future Generations vs. Ministry of Environment and Others," *UNEP Law and Environment Assistance Platform*, https://leap.unep.org/countries/co/national-case-law/future-generations-vs-ministry-environment-and-others (Accessed September 24, 2023).
[5] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional law*, (Oxford: Oxford University Press, 2014) 191.

both informative and prescriptive. To address the research questions, I examine the RoN provisions and experiences of countries that have constitutionally or institutionally granted nature legal standing at the national level. Specifically, countries that are reliant on the extractive sector and whose RoN protection have sought to include, or are based upon, Indigenous worldviews.

Research Design

To determine the anticipated outcomes of what the constitutional RoN might look like in Canada and its potential influence on the protection of old-growth forest ecosystems, I analyze the RoN protections and experiences of Ecuador, Bolivia, and New Zealand. I examine these countries because like Canada, their reliance on resource-extractive economies have negatively impacted their environmental performance and have contributed to ongoing injustices against their Indigenous peoples. These difficulties have resulted in local communities' turning to RoN provisions as a method of challenging government extractivism. Most significantly, each country's RoN law incorporates or codifies Indigenous worldviews on human's relationship with nature into Western law. The inclusion of Indigenous cosmovision and legal orders is significant to Canada, for its potential to re-frame Indigenous-state relations, foster legal pluralism, implement the United Declaration on the Rights of Indigenous Peoples (UNDRIP), and secure active consultation and partnership with Canada's Indigenous peoples. Each country's RoN provisions also hold superior – if not, constitutional – legal standing, ensuring greater institutional legitimacy with these emergent rights models. This will help more closely envision the benefits constitutional RoN regimes might provide. Finally, these countries represent some of the earliest RoN laws and offer the most data to help measure the consequences of these rights provisions.

Other factors that enrich the comparison between the selected countries is their adherence to two different models for structuring RoN laws: the nature's rights model and the legal personhood model. While both Ecuador and Bolivia follow the former, New Zealand implements the latter. This provides insight on how structural variance affects implementation. These countries also present two cases that have experienced improved ecological jurisprudence since the adoption of these laws, and one that has not. This variance between countries' RoN laws and their practical results further reveals how domestic context influences environmental outcomes. Each country's unique experience provides us analytical leverage to better visualize what the Constitutional RoN might entail.

Due to the scope of this paper, my analysis relies primarily on the findings of various earlier scholars. Specifically, those that synthesize court rulings that implicate the RoN and that observe environmental law and policies pre- and post- RoN entrenchment. Particular focus is placed on the Kauffman and Martin's comprehensive comparative law research, which unpacks the RoN norms construction for Bolivia, New Zealand, and Ecuador.[6] Remaining supporting documents are gathered from government websites and online archives. By taking stock of what has been written by other academics on the impact of these countries' environmental rights' regimes, I write a policy recommendation for an improved approach to environmental protection in Canada. This recommendation both considers the need for more immediate protection of old-growth ecosystems given the time-sensitivity of the issue at hand, as well as for the long-term protection of these endangered ecosystems and others across Canada. By inductively drawing generalizations from each country's experiences within existing literature, and by using the analytical approaches of

[6] Kauffman et al., 2021.

earlier constitutional environmental rights research as a guide, I see what can be gleaned for a constitutional RoN regime in the Canadian context.

The Rights of Nature Defined

To evaluate the legal effects that rights of nature provisions have and their implication on national environmental rights regimes, the RoN concept must be clarified. Despite the recent international spread of the RoN legal philosophy and national RoN laws' onset from common environmental pressures, they are structurally and conceptually distinct. While the *Universal Declaration on the Rights of Mother Earth* provides the leading international statement on what the rights of nature entails, it does not set a standard that all RoN regimes subscribe. Rights of nature's conceptual variance brings into question the general content, scope, and limitations of these rights, including – but not limited to – the degree to which they incorporate negative and positive rights, their effect on substantive and procedural rights, and their relation to Indigenous right and human rights.

For the purpose of this paper, 'RoN' refers to the legal provisions that codify Earth Jurisprudence and recognize elements of nature as having inherent rights, which humans must respect and protect. The term 'legal,' though far-reaching, is limited within this study to official state legislation, court decisions, policies, and regulations of the countries under comparison. RoN protections are understood to comprise the following key rights are most commonly observed across RoN laws:

- The right to life and to exist
- The right to maintain and regenerate its vital cycles, free from human interference
- The right to full restoration when damaged by human activities

Expected Benefits from Constitutionalizing the Rights of Nature

Arguments for and against constitutional environmental rights have been debated at length in the literature. This paper proceeds on the assumption that the argument for constitutionalizing environmental protections has been established and deliberates the prospective advantages of constitutionalizing the RoN. Like other constitutional environmental rights, I expect that the constitutionally recognized RoN can contribute to: stronger environmental legislation and policy; improved enforcement of existing environmental policies, regulations, and laws; act as a safeguard to protecting nature when environmental laws are weak, unenforced, or non-existent; improve government accountability; strengthen procedural rights and citizen participation in decision-making; prevent government from regressing on earlier environmental legislation, policy, and regulation; and reflect the values of Canadians by protecting the natural environment.[7] These rights could further clarify each government's duty to protect nature at every level, resolving the old-age issue encountered in Canadian federalism of jurisdictional uncertainty over the environment.[8] The anticipated benefits central to this research and distinct to RoN laws are their:

- Ecocentric approach to environmental rights
- Recognition and integration of Indigenous worldviews and legal orders

RoN's ecocentric approach to environmental rights presents a marked departure from the human rights approach to environmental protection, which is criticized as being too anthropocentric. Rather than place human needs at the center, an ecocentric approach to rights safeguards the wellbeing and health of all earth communities, independent of any value the natural

[7] Boyd, 2012, 18-19.
[8] *Ibid*, 10.

world may provide humans. This results in a more balanced approach to navigating competing interests, ensuring that the social and economic rights invoked by government and industry are done with consideration and respect for the environment. Laws are therefore framed with consideration for all human and non-human life, rather than prioritizing the rights of humans alone.[9]

Indigenous peoples have lived in harmony with nature since time immemorial, and this deep respect for the natural world is embedded within Indigenous customs, laws, and worldviews.[10] There is, accordingly, a visible synergy between Indigenous views of nature and the principles upon with RoN protection are based. The incorporation of Indigenous perspectives into RoN laws therefore presents a possible avenue for codifying Indigenous legal orders and belief systems into settler colonial law. This has the potential to ensure improved consultation between Indigenous populations and settler states, foster reconciliation, decolonize environmental law, and have Indigenous peoples lead environmental decision-making. While promising, RoN provisions bring their own potential difficulties. The research considers the following possible limitations that RoN laws can encounter:

- Lack of clarity on what rights involve
- Issues of standing and who can represent nature's rights
- Conflicts between RoN and other rights
- Challenges to Indigenous laws and self-determination
- Justiciability on scientifically complex issues

[9] Zelle et al., 78-80.
[10] Siham Drissi, "Indigenous Peoples and the nature they protect," *UN Environment Programme*, June 8, 2020, https://www.unep.org/news-and-stories/story/indigenous-peoples-and-nature-they-protect (Accessed April 20, 2023).

These prospective advantages and disadvantages of constitutionalizing the RoN frame the theoretical parameters of what the constitutional RoN might entail, and will be considered in light of Ecuador, Bolivia, and New Zealand's experiences with their national RoN laws. By analyzing the effects that each country's RoN laws have had on domestic environmental protections, specifically their legal effects, I speculate what impact these rights might have if constitutionalized in Canada.

Assessing the Legal Influence of the RoN

The level of influence constitutional rights have on public policy can be established by their legal and extra-legal effects. Legal effects include how constitutional provisions shape legislation, policy, and court decisions, while extra-legal effects consider changes that may be exhibited in civil behaviour, values, opinion, and sentiment. The following research emphasizes the former.[11] Namely, how constitutional RoN might influence legislation, regulation, policy, and litigation to protect old-growth forests in Canada. General observations are made on the latter.

To guide my assessment of each country's RoN laws, I will refer to Boyd's comparative environmental law research in *The Environmental Rights Revolution*. One of Canada's leading environmental lawyers and globally acclaimed expert on environmental and human rights, Boyd's analysis of the constitutions, laws, and court decisions of over 100 countries has innovated the field's approach to assessing environmental rights. Moving beyond the theoretical implications surrounding the human right to a healthy environment, Boyd measures the practical effects of enshrining environmental rights in national constitutions.[12] His novel and systematic empirical

[11] Boyd, 2012, 15.
[12] "The Environmental Rights Revolution," *UBC Press*, https://www.ubcpress.ca/the-environmental-rights-revolution (Accessed December 15, 2023).

study reveals the influence constitutional environmental rights have on a nation's overall environmental performance and informs my methodology. Of great significance are two approaches Boyd identifies, which evaluate the legal influence constitutional environmental rights can have on a country's environmental performance. The first approach examines a constitutional environmental right provision to see whether it has been amended into existing law or written into new law. The second approach observes whether legal action has been taken and court decisions rendered in support of the environmental right provision. Both an environmental provision's implementation or drafting into legislation, and a court's enforcement of said provision, are two crucial components for realizing a constitutional right.[13]

Boyd's methodology streamlines the long sequence of events that often occur between a right's enactment and its outcome and provides a sense for a right's legal consequences. Although used to measure the effectiveness of *constitutional* rights, this method guides my assessment of the legal effects of early RoN laws. To evaluate the consequences of each country's RoN laws, I therefore examine their rights provisions' and see whether they have been drafted or amended into relevant policy, regulation, *and* law. While Bolivia and New Zealand's RoN laws do not hold constitutional status, their provisions are of higher legal standing and can be expected to influence relevant laws, regulations, and policies accordingly.

All judicial decisions involving Ecuador, Bolivia, and New Zealand's RoN provisions will also be considered, as they present direct correlation between an environmental right and policy outcome. This is true, regardless of whether the right is entrenched in constitutional or national law. Cases where RoN was not the central focus of the lawsuit but was relied on by the courts in a part of their ruling, will also be considered. How far courts are willing to go when enforcing RoN

[13] *Ibid,* 117-118.

provisions constitutes an important element of what makes rights effective. Especially, when the rights involved are constitutional. That said, while ecological jurisprudence is noted in some of these countries' experiences, others still have not had any lawsuit filed or judicial decision made based on the RoN. There are various reasons that might help explain this, including: the type of model employed for structuring the RoN legislation, a lack of clarity in the rights' wording, a conservative judiciary, and litigants' access to justice and other legal resources. These factors are important to the analysis and will be considered when deconstructing the domestic differences between each country's RoN regimes.

These effects that RoN have on legislation, policy, regulation, and litigation are considered comprehensively, to see whether the legal outcomes for each country are generally positive, negative, or bring no visible change at all.

Framing How Constitutional RoN Can Influence Policy

To help envision what the stand-alone constitutional recognition of the RoN could look like in Canada, I consult and modify two lenses employed by Boyd in his investigation on the influence of the right to a healthy environment. First, I review the anticipated benefits of constitutionally recognizing the RoN, then consider the extent to which these results have occurred in Ecuador, Bolivia, and New Zealand with their respective RoN laws. By looking at the legal effects that these countries' RoN provisions have had on related environmental law, policy, regulation, and litigation, I draw a general assessment on the degree to which these prospective benefits are being achieved. The second lens draws on Boyd's modification of the respective works

of Epp and Gloppen, whose analytical approaches, when combined, further measure the influence of the right to a healthy environment. [14]

Epp is a distinguished university professor, whose research emphasizes social change, law, and rights. Epp's comparative analysis on the growth of civil rights in *The Rights Revolution* focuses on the decisions of high courts in the United States, Canada, Britain, and India, and how new rights have developed through judicial interpretations. Moving beyond the developments that have occurred within these courts of appeal, Epp focuses on the influence that the strategic organizing of rights activists have had on producing civil and political 'rights revolutions,' through access to the judiciary.[15] Gloppen is a university professor of comparative politics, who focuses on the relationship between politics and law; specifically, involving judicial politics and rights movements. Epp's systematic comparative investigation examines the part of the judiciary in realizing economic and social rights, by identifying potential variables that might influence how courts constrain or drive social change.[16] Collectively, their frameworks outline key features that influence how legal rights can drive societal change and are used in the current research to determine the effects of RoN. These factors include:

- the strength of legal provisions
- the rule of law
- the plaintiffs involved
- access to the courts

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[14] *Ibid*, 119.
[15] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, (Chicago: University of Chicago Press, 1998).
[16]Siri Gloppen, "Courts and Social Transformation: An Analytical Framework," Chapter in *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux, 35-59 (Aldershot: Ashgate, 2006).

- access to funding and resources for legal action
- the courts' responsiveness
- social, economic, and political conditions

These elements are considered for each country's RoN experience, to explain regional variances in their RoN provision's influence on legislation, policy, regulation, and litigation. The strength and success of each RoN law is therefore reliant on: a provisions' clear political wording and structure; the efficacy and transparency of legal institutions, a provisions' legal enforceability, and the court's independent application of the law; the mobilization of concerned individuals, communities, and institutional enforcement agencies; civil society's understanding their own rights and their connection to nature's rights; litigants' equal and indiscriminate access to financial support, lawyers, legal resources, NGOs and other advocacy networks; the presence of ecologically literate or 'activist' courts; the existence of simplified legal procedures and regulations for the quick and efficient resolution of cases; and the degree of economic prosperity, as well as social and political stability, experienced in each country.[17] These factors help explore and justify instances where countries have strong RoN provisions on paper, but little to no discernable impact on litigation, policy, or legislation.

By analyzing both the legal effects of the RoN provisions of Ecuador, Bolivia, and New Zealand, and by considering the factors that influence their capacity to bring social change, I develop a sense of the extent that RoN's anticipated benefits are being realized for each case. This analysis provides insight into how far RoN laws go in addressing environmental threats, specifically those involving resource-extraction, and offers a point of reference as to what the

[17] *Ibid*, 120-121.

constitutional RoN might bring in the Canadian context, with respect to the protection of old-growth forests.

Other Factors Influencing RoN Regimes

Due to the variance in RoN laws and the uniqueness of each RoN regime, the following aspects for the countries under analysis are also observed: the RoN model employed, and the type of legal provisions used. These models complement and partly contribute to the factors listed in the preceding section, by contextualizing the legal outcomes experienced by each country and the normative construction of each RoN law. These considerations are essential for envisioning what the stand-alone constitutional RoN might entail in Canada. Especially, with respect to its degree of implementation.

As previously mentioned, Ecuador and Bolivia follow the natures' rights model, while New Zealand follows the legal personhood model. The nature's rights model sets a wider scope for which elements of nature hold rights, delineate specific substantive rights, and procedurally allow for any individual to voluntarily speak on behalf of nature and its rights. Conversely, the legal personhood model identifies specific ecosystems as legal persons. Rather than assigning these ecosystems unique substantive rights, the legal personhood model appoints the same rights and responsibilities that a legal person, or corporation would hold. Although not guaranteed fundamental rights to exist, evolve, or be restored, these ecosystems are appointed specific guardians who are mandated to protect nature's interests. While the nature's rights model addresses violations reactively, the legal personhood model protects nature proactively. This is an important distinction, as the appointment of guardians ensures that the ecosystems under protection are actively engaged in their own management. This reduces the need for judicial intervention by

preventing violations from occurring in the first place.[18] Lack of litigation over the RoN could therefore signal an effective guardianship arrangement, rather than weak rights provisions. The implications of both model types will be considered accordingly for the protection of Canada's old-growth forests.

Though each country's RoN laws hold superior, if not supreme, legal status, distinctions between each provisions' legal construction are noted in the analysis. These institutional differences explain the scope and strength of each respective RoN law and will help situate Canada's own prospective RoN provisions. Kauffman, an academic expert in environmental politics, and Martin, a professor whose work emphasizes global environmental politics, analyze the politics surrounding the development and implementation of RoN laws. Their comprehensive research into the mixed implementation of these rights in Bolivia, Colombia, Ecuador, India, New Zealand, and the United States, provide valuable insight into the global RoN movements and explanations for their varied legal effects. Kauffman and Martin's observations and analytical approach in determining RoN's scope and strength for Ecuador, Bolivia, and New Zealand will be applied accordingly. They define scope as the rights delineated by RoN laws and their reach, and strength as the enforcement brought on through the written law and through the efforts of citizens to uphold said rights.[19] These conceptual axes illustrate where these countries' RoN laws diverge in practice and where parallels might be drawn into Canada's case.

[18] Kauffman et al., 2021, 15-16.
[19] *Ibid*, 14-15.

Chapter 4: Ecuador

In 2008, Ecuador made history, becoming the first country to formally incorporate RoN protections in its constitution. A revolutionary approach to CERs, these provisions were the result of the social mobilization of environmental, Indigenous, and leftist organizations, who were looking to challenge the prevailing economic development model based in resource extractive industries. Established through Indigenous norms and belief systems, this revolutionary approach to RoN is celebrated as a successful example of ecological law. Nevertheless, their uneven implementation has led to debate over whether these RoN provisions are more symbolic than practical, and whether they accurately exemplify Indigenous worldviews. Despite constitutionalizing nature's rights, Ecuador's developmental agenda continues to support extractivism in Indigenous-led and ecologically at-risk areas.

Context

Ecuador is a presidential democracy that was under military or populist rule until 1979. The period between its first democratic elections and 2006 is marked by significant political instability, with eight different presidents called into office. It was during the 1990s that Ecuador's Indigenous populations mobilized under the Confederation of Indigenous Nationalities of Ecuador (CONAIE), and as a result of this movement, influenced the country's political landscape.[1] In 2006, Rafael Correa was elected president on a platform that received 56.57% of the popular vote. The greatest support came from Indigenous communities and the poor, who were drawn to proposed alternatives to the extractive development model threatening their quality of life. Correa's anti-neoliberal rhetoric allowed him to function outside of any major or traditional party,

[1] Mihnea Tanasescu, "The rights of nature in Ecuador: the making of an idea," *International Journal of Environmental Studies* 70 no.6 (2013): 846.

under the organization Alianza País. Not only did the Alianza País government usher in a sustained period of political stability; it provided the right political conditions to formally recognize RoN in Ecuador's 2008 constitution.

Wanting to depart from the political status quo, Alianza País introduced a government plan that would result in writing a new constitution in 2007. These institutional reforms were aimed to improve political democracy through the empowerment of its citizens. Dubbed the 'revolución ciudadana', or 'citizen's revolution,'[2] the Alianza País proposed a new kind of politics based on the Andean Indigenous the concept of *Sumak Kawsay*. Translated to '*buen vivir*' in Spanish, or 'good way of living' in English, *Sumak Kawsay* is a belief system based on the idea of living in harmony with nature.[3] The Correa government's plan laid the groundwork for various constitutional provisions adopted in 2008, including the RoN. Although not included in the constitution's initial drafting, *Sumak Kawsay* provided the framework for RoN to eventually develop. Specifically, by proposing a more balanced approach to social, economic, and environmental decisions made by government or society, that diverted from the country's existing neoliberal developmental approach.[4]

Participatory discussions engaged over 3000 proposals from interest groups across the country, providing RoN advocates with a critical window to influence the law's contents. Key contributors to RoN discourse were environmental and Indigenous activists, and environmental lawyers, who found support with the Constituent Assembly's president, Alberto Acosta. A country deeply embedded in extractivism, the RoN approach did not receive full support from the

[2] *Ibid,* 850.
[3] Zelle et al., 476.
[4] Tanasescu, 2013, 849.

assembly.[5] Nevertheless, Acosta arranged for RoN provisions to be included in the final document that were influenced by the philosophy of Ecuador's 14 Indigenous nationalities.[6]

Ecuador's constitutional RoN were meaningfully shaped by Indigenous groups that had mobilized under CONAIE and Pachakutik, a subsidiary Indigenous party. While only four Pachakutik representatives were present in the Constitutional Assembly at the time of the constitution's drafting, Indigenous opinion and tradition are recognized as cornerstone to RoN's development.[7] The Indigenous people of Sarayaku, for instance, see forests as comprising of communities of "living selves," from plants to larger beings, that communicate and have relations with one another. By protecting these ecosystems from oil, lumber, and mineral extraction, the Sarayaku draw on pillars of *Sumak Kawsay*, demonstrating a consistency between Indigenous philosophy and RoN law in Ecuador.[8] Rooted in Indigenous worldviews, the emergence of Ecuador's RoN provisions are consequently understood to have stemmed from larger societal frustration with the nation's oil industry, and its negative implication on citizens and the natural world.[9] This has not prevented however, the government's application of *buen vivir* to justify the pursuit of large-scale extraction projects since the constitution's ratification. This paradox reflects a difference in understanding what RoN and *buen vivir* mean in Ecuador, leading to its widely varied and contested legal application.

[5] Craig M. Kauffman and Pamela M. Martin, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail," *World Development* 92, no. 1 (2017): 132.
[6] Tanasescu, 2013, 847.
[7] *Ibid*.
[8] José Gualinga, "*Kawsak Sacha* – Living Forest," *Pueblo Originario Kichwa De Sarayaku*, https://ecojurisprudence.org/wp-content/uploads/2022/08/Kawsak-Sacha-–The-Living-Forest.UICN_.pdf (Accessed November 11, 2023).
[9] Tanasescu, 2013, 847.

Despite the constitutionalization of RoN, the expansion of unsustainable mining and oil extractive projects have continued.[10] Committed to the country's development plan, Correa immediately led a campaign after the constitution's passing for a mining law that would expand existing mining projects and produce new ones. Focused on using the revenue from these projects to address poverty, divert from the fossil fuel sector, and improve access to education and healthcare, Correa advanced these development plans were in line with objective of *buen vivir*. The Mining Law passed in 2009 and resulted in nation-wide protests. Not only did the law contravene nature's constitutional rights; it violated the constitutional right of prior consultation with Ecuador's Indigenous populations. Resulting clashes between government and civil society led to the arrest of hundreds of civil and Indigenous land defenders looking to obstruct government's extractivist plans.[11] Although recent developments in the country's RoN jurisprudence positively influenced the country's environmental protections, Ecuador's mixed success with RoN challenges its application as a legal tactic and alternative model to sustainable development.

Ecuador's Constitutional Provisions

Ecuador's constitution establishes the "Rights of Nature" in Title II, Chapter 7, from Articles 71 to 74. Articles 71 and 72 delineate nature's substantive rights, while Article 73 sets out affirmative duties on government to protect nature from any projects that could permanently injure the natural environment. Article 74 gives citizens the right to benefit from nature in accordance with *Sumak Kawsay*.

[10] Catrin Einhorn and Manuela Andreoni, "Ecuador Tried to Curb Drilling and Protect the Amazon. The Opposite Happened," *The New York Times*, January 14, 2023, https://www.nytimes.com/2023/01/14/climate/ecuador-drilling-oil-amazon.html (Accessed February 20, 2023).
[11] Kauffman et al., 2017, 132.

Art. 71. Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can demand public authorities enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Art. 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

Art. 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles. The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

Art. 74. Persons, communities, peoples, and nationalities shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good living. Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.[12]

The Legal Scope of Ecuador's RoN

Ecuador's constitution defines nature as "Pachamama," or Mother Earth, which represents the Andean Indigenous god from which all life flows. This is first mentioned in the preamble, which establishes the guiding principle of *Sumak Kawsay*, and is seen as the bedrock to Ecuador's constitution. This definition of nature is the most expansive, demonstrating that rights exist

[12] *Constitution of the Republic of Ecuador*, Republic of Ecuador, Official Registry No. 449, October 20, 2008, https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

throughout all of nature and earth's ecosystems.[13] It is within Articles 71 and 72 that nature is assigned the rights to exist, to its integrity, and to regenerate "its life cycles, structure, functions, and evolutionary processes." These substantive rights provisions also establish nature's distinctive right to be restored if harmed, outside of human rights and interests.

It is important to recognize that nature's right to restoration is only guaranteed when it has experienced permanent damage from human activities. According to Ecuador's constitution, nature can suffer human-caused harm without triggering a rights violation. As long as nature appears capable of self-regeneration, extractive projects are allowed. This distinction avoids establishing any baseline for ecological wellbeing. Without set, scientific thresholds defining what 'irreparable' damage involves for each ecosystem or natural entity, and without establishing the conditions under which self-regeneration is no longer possible, environmentally destructive activities can continue.

The Legal Strength of Ecuador's RoN

On paper, Ecuador's RoN provisions hold the highest legal standing in the country. The greatest legal challenges facing these provisions involve other constitutional rights. As previously discussed, a right's legal standing is central to the development of new rights norms. Specifically, if or when these norms are challenged in court, and the consequent result of these judicial decisions. For a constitutional right, the development of jurisprudence has substantial influence over where a right stands within the country's legal system. Of the three countries under analysis,

[13] Kauffman et al., 2021, 62.

Ecuador has developed the greatest RoN jurisprudence.[14] The content of these decisions are discussed below.

A second measure of RoN's legal strength is the manner in which it encounters competing rights. In 2015, Ecuador's Constitutional Court ruled that RoN are transversal, meaning that they interact with and are affected by all other rights. As a result, RoN rank higher within the hierarchy of rights and are established as more fundamental than property rights.[15] This distinction theoretically ensures a more level playing field between environmental protections and socio-economic rights.

The final measure of RoN's legal strength considers which players are responsible for protecting nature. Article 71 allows any concerned individuals, communities, or groups – whether Ecuadorian or not – to legally represent nature and ask government to uphold nature's rights. Authority for representing nature is therefore the broadest, but unenforceable. While any person can speak on nature's behalf, it is entirely voluntary. Without a legally mandated body representing nature's interests, rights protection in Ecuador is more reactionary than proactive. This can be seen as a hindrance to RoN's enforcement.

Secondary Laws and Legislation

Correa's desire to expand mining projects after the adoption of the 2008 constitution prevented the immediate development of any secondary RoN laws or institutions. Although RoN advocates quickly drafted a secondary law to support RoN's constitutional principles, Ecuador's

[14] Craig M. Kauffman, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor," (paper prepared for the workshop More-Than-Human Rights: A Global Interdisciplinary Dialogue to Advance Rights of Nature, New York City, September 22-23, 2022), 7.
[15] Kauffman et al., 2021, 67.

unstable political environment prevented its submittance to the legislature.[16] Two secondary laws were finally passed with the purpose of adding content to Ecuador's RoN: The 2014 Penal Code[17] and the 2018 Environmental Organic Code.[18] The Penal Code fails to distinguish what a rights violation against nature entails, and extends discretion to the Ministry of the Environment to eventually set these standards. Meanwhile, the Environmental Organic Code aims to protect citizens' right to a healthy environment and the RoN, but does not provide any technical guidelines for distinct environments' ecosystem cycles. Instead, the Ministry of Environment serves as the sole regulative authority for constitutional RoN protections, which is a responsibility that would normally fall to the legislative branch. No regulatory guidelines have been produced to date.[19]

After several years without amendment, the Environmental Organic Code's RoN provisions were finally reformed in 2021. These reforms include clarifying the scope of RoN, guaranteeing the highest level of protection for specific at-risk ecosystems, improving environmental impact assessments standards for medium- to high-risk projects, and establishing stricter rules on the restoration of degraded sites.[20] While a welcome change, the practical effects of these reforms have not been seen. Overall, Ecuador's secondary RoN laws have provided little content to constitutional RoN protections, leading to the gradual establishment of RoN norms through Ecuador's courts.[21]

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[16] Kauffman et al., 2017, 133.
[17] *Organic Integral Penal Code*, Republic of Ecuador, 2014, https://www.refworld.org/docid/44acc7854.html.
[18] *Organic Environmental Code*, Republic of Ecuador, 2018, https://www.ambiente.gob.ec/wp-content/uploads/downloads/2018/01/CODIGO_ORGANICO_AMBIENTE.pdf.
[19] Kauffman et al., 2021, 83-84.
[20] Hugo Echeverría and Mari Margil, "Press Release: Ecuador Changes Legislation to Strengthen Rights of Nature," *Centre for Democratic and Environmental Rights*, https://www.centerforenvironmentalrights.org/news/press-release-ecuador-changes-legislation-to-strengthen-rights-of-nature (Accessed November 12, 2023).
[21] Craig M. Kauffman and Pamela L. Martin, "How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms," *Transnational Environmental Law* 12 no. 2 (2023): 368.

Litigation and Judicial Decisions

RoN have been invoked in at least 61 different legal cases, and over half of these occurred between 2019 and 2023.[22] At least 14 other RoN statutory laws, declarations, and policies have called these constitutional rights into use.[23] Of Ecuador's RoN lawsuits, the majority of cases filed since 2019 with rulings favouring nature's rights were brought forward by civil society actors. Despite the recent onset of RoN victories, RoN's legal implementation has been varied. To date, all RoN cases filed by government bodies have succeeded, including those permitting the continuation of large-scale extractive projects in biologically sensitive areas.[24] Meanwhile, all of Ecuador's 12 failed RoN cases originated from civil society.[25] The mixed implementation of Ecuador's constitutional RoN can be understood through four legal pathways identified by Kauffman and Martin: civil society pressure, government and private action, bureaucratic actions, and interpretation by the judiciary.[26]

These four pathways are distinguished by the actors involved, as well as their motivations for implementing RoN, and directly influence the degree of RoN's success. Civil society actors are seen as being principally driven by normative principles for protecting nature's rights, while government bodies and private corporations apply RoN instrumentally for economic gains. Government agencies also invoke RoN for routine bureaucratic tasks, and as a consequence have facilitated the internalization of RoN norms.[27] Finally, judges are understood to implement RoN

[22] Data involving RoN cases are drawn from an original dataset, available at: https://ecojurisprudence.org/.
[23] Kauffman et al, 2023, 367.
[24] Jonathan Watts, "Ecuador approves Yasuní national park oil drilling in Amazon rainforest," *The Guardian*, August 16, 2013, https://www.theguardian.com/world/2013/aug/16/ecuador-approves-yasuni-amazon-oil-drilling (Accessed November 11, 2023); "Ecuador indigenous protesters march against mining," *BBC News*, March 9, 2012, https://www.bbc.com/news/world-latin-america-17306228 (Accessed November 11, 2023).
[25] Data drawn from an original dataset, available at: https://ecojurisprudence.org/
[26] Kauffman et al., 2021, 86.
[27] See, *Esmeraldas Environment Ministry* v. *de los Santos Meza Macías* (*Shrimping in Cayapas* case), Judgment No. 166-15-SEP-CC, 20 May 2015, Constitutional Court of Ecuador.

more objectively through routine and professional application of constitutional law.[28] These pathways and their interaction with one another help explain the evolution of Ecuador's RoN protections and justify why some RoN cases succeed while others fail.

The decade following Ecuador's 2008 Constitution was slow to see RoN implemented. Left to the discretion of Ecuador's courts to develop RoN's content, case law was gradually developed. The first lawsuit resolved through the application of RoN was the Biodigesters case, which involved the installation of biodigester machines by an agro-industrial pig farm in Santo Domingo de los Colorados. Made to convert animal waste into methane gas, neighbouring communities advanced that discharges from the machines would pollute surrounding air and water, and therefore compromise their rights to health and a clean environment. The Constitutional Court ruled in favour of the biodigesters, but only came to its decision after considering "all parties involved" – including nature. This ruling is significant, as the plaintiffs did not invoke RoN in their case. Identifying prospective violations to RoN, the court affirmed nature's right to be restored and ordered a commission to monitor the waste produced, in order to protect both the community and nature's interests.[29]

Biodigester demonstrates the court's unilateral application of RoN, and the fulfillment of its constitutional obligation to address RoN when not already invoked. Nevertheless, this was an uncommon occurrence in early RoN decisions. The majority of judges between 2008 and 2018 were largely unfamiliar with how to interpret RoN or balance nature's rights with other human rights. This was especially the case in smaller municipality courts where judges lack training on constitutional lawsuits.[30] Diverting to their legal training, lower court justices continued to

[28] Kauffman et al., 2021, 88.
[29] Zelle et al., 481.
[30] Kauffman et al., 2021, 93.

prioritize individual and corporate property rights in resource-extractive projects over RoN.[31] Lack of judicial understanding on RoN norms and the politicized nature of RoN lawsuits are further identified as hindrances to RoN's initial development. These factors consequently discouraged activists' earlier use of RoN as a tool for environmental protection, as they feared their efforts would weaken RoN through the establishment of negative jurisprudence.[32]

Few of the RoN lawsuits filed by civil society actors between 2009 and 2015 saw favourable rulings. Especially, those that were "higher-profile" or politically charged like the Mirador case. Although environmental activists and Indigenous groups were eager to apply RoN against government-approved mining projects, they waited for the perfect case to establish RoN precedent. The Condor-Mirador copper-gold mining project was finally selected in 2012, involving Ecuador's first large-scale open-pit mine. Located in the Amazon on Indigenous Shuar and Cañari-Kichwa land, the Chinese-owned mining operation risked destroying first growth rainforests, dewatering river systems, and forcing Indigenous communities from their territories. The mining company's own environmental assessment confirmed the project would violate RoN protections by destroying entire ecosystems and threatening endangered species to the point of extinction. The plaintiffs accordingly filed a protective action in civil court against the company, invoking the precautionary principle and Article 73 of the constitution.[33]

Although an incontrovertible case was made for nature's rights, the court ruled in favour of the mining company. Mirador demonstrates how the politicization around RoN and a lack of knowledge amongst Ecuador's judges prevented RoN protections early on. Unfamiliar with RoN's content, the civil court ruled that the Mirador mine was constitutional because the land was not

[31] *Ibid*, 89.
[32] *Ibid*, 81.
[33] Kauffman et al., 2017, 134-135.

listed as a protected area, and the mining company had obtained an environmental license. The judge further associated civil society's efforts to protect nature as a private goal, while the mining project was advanced as economic development plan for public interest. In the judge's weighing of competing interests, 'public interest' took precedent over 'private interest.' Despite Ecuador's constitution establishing all of nature as having rights – regardless of the land's status or society's interests – and evidence that destruction to nature was inevitable, the project moved forward. [34]

Mirador also exposes the impact of a suspected lack of judicial independence. In 2010, Correa issued a memorandum that judges would be held financially responsible for the prevention of any state-led development projects.[35] Civil society actors believe this further influenced the judge's ruling. Understanding the unlikelihood of their receiving a fair trial in politicized lawsuits, civil society pursued low-profile cases involving local agricultural and infrastructure projects.[36] As a consequence, RoN provisions were only used by advocates during this time to mobilize Ecuadorians against government mining projects.[37] A primary example of this involves the social movement known as YASunidos, which was led by RoN advocates and an environmental non-profit against oil extraction in the Yasuní National Park. By launching a media campaign against extractivism in the protected area, advocates were able to garner public support and increase the understanding that the government would violate the constitutional RoN. Mounting public

[34] *Ibid*,135.
[35] *Ibid*.
[36] See, *Huddle v. Province of Loja* (*Vilcamba River* case), Judgment No. 012-18-SIS-CC, 28 March 2018, Constitutional Court of Ecuador; "Galapagos, Ecuador Court Case on the Charles Darwin Highway in Santa Cruz," 2012, *Eco Jurisprudence* Monitor, https://ecojurisprudence.org/initiatives/charles-darwin-highway-in-santa-cruz/ (Accessed November 15, 2023).
[37] Manuela Picq, "Ecuador: Chronicle of a death foretold: The South American country has opened tract of indigenous land, biodiversity hotspot, to oil drilling," *Al Jazeera*, September 10, 2013, https://www.aljazeera.com/opinions/2013/9/10/ecuador-chronicle-of-a-death-foretold (Accessed November 28, 2023).

pressure eventually led to government's instrumental use of RoN to legitimize its own mining projects in the name of *buen vivir*, and ban any other unauthorized projects.[38]

Wanting greater regulatory control over mining, the Ecuadorian government drew from various academic and governmental reports to prove that illegal mining projects were irreparably damaging the environment. Invoking Articles 71-73, Ecuador's government took preventative legal action against unauthorized small-scale mining in the province of Esmeraldas in 2011. The Pichincha Criminal Court approved the government's request and ordered Armed Forces to seize control of the area. Additional military incursions were ordered within the cantons of Eloy Alfaro and San Lorenzo, resulting in the confiscation and destruction of artisanal miners' equipment on those sites. Similar operations proceeded throughout the provinces of Morona, Santiagio, Zamora-Chinchipe, and Napo.[39] The government's application of RoN – although paradoxical given the state's own extractive projects – is recognised to have unconsciously facilitated the development of RoN jurisprudence. For example, by invoking RoN in the Esmeraldas case, government efforts set a legal standard within Ecuador's 2014 Penal Code that allows for the destruction of private property in nature's interests.[40] While a victory for the Ecuadorian government, this ruling holds great connotations for upholding RoN in the future. Especially, against government or private actions.

RoN jurisprudence is further established in Ecuador through bureaucratic routine, where government ministries apply RoN to ensure environmental protections. The 2011 Cayapas shrimper case best exemplifies the strengthening of RoN through administration action. Involving a high-biodiversity wetland with special protection status in Cayapas-Mataje, the Ministry of the

[38] Kauffman et al., 2021, 81.
[39] *Ibid*, 98.
[40] *Ibid, 99.*

Environment sought to protect the area from a shrimp farm operating within the reserve. One shrimp farmer filed a protective action to prevent the company's removal, maintaining that an individual's economic rights surpass those of nature's.[41] The provincial court, employing a property-rights perspective, sided with the shrimp company, and ruled that the farmer's removal would violate their rights to property and to work. The ministry appealed to Constitutional Court, advancing that the decision violated nature's constitutional rights. The Constitutional Court agreed and ruled that the lower court had failed to address the RoN, or the mangrove's constitutionally protected status as a sensitive ecosystem. The court further established *buen vivir*'s centrality to Ecuador's constitution and ruled that RoN are transversal, meaning they share equal significance with other constitutional rights. The lower court's decision was subsequently overturned, and the case was ordered for retrial with nature's rights in mind. The Cayapas case represents a critical shift in Ecuador's courts to a bio-centric and non-anthropocentric approach to humans' relationship with nature.[42] The Constitutional Court clarified RoN's priority over property rights, setting new precedent for Ecuador's judiciary, diverting from conventional environmental law, and further contributing to RoN's norm construction.

The slow development of RoN jurisprudence and familiarization amongst judges and litigators, ultimately laid the groundwork for civil society's eventual, successful application of RoN. 2019 alone saw an unprecedented rise in civil society RoN lawsuits, many involving high-profile cases that directly challenged government mining projects. Another key factor to RoN activists' success was Ecuador's political context at the time, which brought a new Constitutional Court in 2019. Facing citizen backlash, Lenín Moreno overtook Correa as president in 2017. Although Moreno had served as Correa's vice president, he diverted from Correa and removed all

[41] Zelle et al., 483.
[42] *Ibid*, 484.

Correa's allies from government. Attempting to reform Ecuador's oil and mining development plan and limit Correa's influence, Moreno held a referendum in 2018 proposing seven constitutional amendments. The referendum received a 60% positive response and saw the appointment of a temporary transitional Council for Citizen Participation and Social Control (CCPSC) that was purged of Correa appointees. Designed to uphold democratic participation and address government corruption, the CCPSC dismissed all nine Constitutional Court judges due to perceived conflicts of interest with the executive.[43] This led to the election of a more independent Constitutional Court through a new merit-based system.

Committed to addressing RoN's juridical content, Ecuador's new Constitutional Court has allowed for successes in civil society cases that would have otherwise been "impossible" under the previous government.[44] The number of RoN decisions made by the Constitutional Court has consequently increased since the 2019 election, rising from 38% between 2008 and 2018, to over 63% between 2019 and 2023.[45] More meaningful still, has been the Constitutional Court's contribution to the development of RoN norms by clarifying its parameters and its connection to Indigenous and collective rights.

The Rio Blanco case demonstrates how collective rights – specifically those of Indigenous communities of Molleturo – have been successfully combined with RoN to halt mining operations within the Cajas National Park. Arguing both the mining company's failure to prior consultation with Indigenous peoples and violations to nature's rights under article 71, the Indigenous communities won in the provincial appeals court. By drawing on evidence of the environmental destruction caused from extractive activities and their impeding traditional, Indigenous practices,

[43] Kauffman et al., 2021, 104.
[44] *Ibid*, 2021, 105 ; Kauffman et al., 2023, 379.
[45] Kauffman et al., 2023, 376.

protective actions were ordered against the million-dollar mining company. All mining operations were halted to protect nature's rights and to ensure adherence to a non-extractivist development plan based on *sumak kawsay*. This win is especially significant given the violence suffered by Indigenous activists from police and miners while engaged in peaceful protest.[46]

Similar cases have followed, with Indigenous groups invoking both RoN and Indigenous rights of prior consultation to cancel existing and prospective mining projects.[47] One such case involved the Cofán Indigenous peoples, who sued the Ministry of Mining and the Ministry of Environment in 2018 for permitting mining projects that were damaging the Aguarico River basin. Citing violations to the river's rights, as well as the community's rights to clean water, a healthy environment, and prior consultation, the Cofán won both in civil court and Sucumbios Provincial Court. Although government argued that prior consultation was not required because the land was state-owned, the courts emphasized that all nature has rights, regardless of ownership. This decision affirmed the constitution's recognition that all living entities are interconnected, and that healthy ecosystems are necessary to humans' right to a dignified life. Moreover, by drawing on earlier domestic and international cases, the provincial court further established the inherent connection between Indigenous rights and the RoN, or "biocultural rights." The court subsequently cancelled all 52 mining concessions in the area, ordered government to restore nature to its pre-mining state, and prohibited future projects.[48]

Ecuador's RoN norms have also been developed by the courts through their addressing discrepancies between standard environmental law and nature's rights. Standard environmental

[46] Kauffman et al., 2021, 106.
[47] See *Criollo Quenama v. Perez Garcia* (*Mining Concessions and A'I Cofán* Case) Judgment No. 21333-2018-00266, 2019, Provincial Court of Justice of Sucumbios (Ecuador); *Teran Valdez Andrea v. Ministry of Environment et al.* (*Llurimagua Mining* case), Judgment No. 10332-2020-00418, 2023, Cotacachi Canton Court (Ecuador).
[48] Kauffman et al., 2021, 107.

law informs international standards for sustainable development, and is established through the issuance of environmental licenses, permits, and the carrying out of environmental impact assessments for prospective projects. Before 2019, Ecuador's courts applied this approach to sustainable development. This meant that environmentally harmful projects were permissible simply because they adhered to procedural environmental requirements.[49] The Piatúa River case and the Collay Forest case present two instances where Ecuador's provincial courts abandon this logic. Despite government obtaining environmental impact assessments permitting a hydroelectric project along the Piatúa River and road construction in the protected Collay Forest, the courts ruled that RoN were still under violation. In these rulings, RoN and *buen vivir* were used as new standards for sustainable development, reflecting a departure from traditional environmental law.[50] The Constitutional Court upheld this standard and the precedent that environmental permits are not adequate to protect nature's rights in the succeeding Aquepi River case.

The 2021 Aquepi River case is incredibly significant in the court's establishing explicit standards for protecting water-related ecosystem rights and providing substantive, scientific-backed content to the RoN. Specifically, by defining the Aquepi River's "vital cycles" and developing a framework for measuring and ensuring compliance to the river's rights. Although the provincial government of Santo Domingo and the National Secretary of Water (SENAGUA) held a permit to divert water from the river for an irrigation plan, local communities maintained it exceeded the river's ecological flow in the dry season. So much, that it could permanently disrupt the river's fluvial processes and life cycle. A protective action was filed by the community and approved by the Provincial Court in 2020. The Constitutional Court later selected this case to establish standards for measuring RoN violations involving aquatic ecosystems. The

[49] *Ibid*, 209.
[50] Kauffman et al., 2023, 380-382.

Constitutional Court advanced that SENAGUA had "used inconsistent and imprecise measurements" to protect RoN, and subsequently established the scientific components that can be measured to ensure an aquatic ecosystems' health. The court further mandated that local communities be consulted on all development projects and involving the rights of water ecosystems, as they involve both non-human and human communities.[51] These clarifications by Ecuador's Constitutional Court have meaningful implications on the content of RoN and their efficacy as a tool for environmental protection, both domestically and abroad.

Further Clarification Through the Courts

In 2019, Ecuador's Constitutional Court began selecting cases to establish binding jurisprudence on RoN. These decisions provide substantive content to these constitutional rights by further clarifying RoN's parameters and setting standards for how RoN interact with other rights. Six cases[52] – including the previously discussed Piatúa River and Aquepi cases – have been selected, with two verdicts issued as of December 2023.[53] The two cases with issued verdicts (the Los Cedros case and the Nangaritza case) involve RoN's use in protecting endangered species and ecosystems. More specifically, they address the protection of endangered mammals in two protected forests, that were facing imminent threat from industrial mining operations.[54] The Los Cedros case is particularly instructive for the objective of protecting old-growth forests in Canada.

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[51] *Ibid,* 383.
[52] Including*, CEDHU v. ARCONEL et al.* (*Dulcepamba River* case), Case No. 502-19-JP, selected 6 May 2019, Constitutional Court of Ecuador; *Canton Santa Clara et al. v. Ministry of Environment et al*. (*Piatúa River* case), Case No. 1754-19-JP, selected 9 July 2020, Constitutional Court of Ecuador; *Municipality of Cotacachi v. Ministry of Environment* (*Los Cedros* case), Judgment No. 1149-19-JP/21, 10 Nov. 2021, Constitutional Court of Ecuador; *Riera v. Ministry of Environment et al.* (*Nangaritza* case), Case No. 1632-19-JP, selected 5 Mar. 2020, Constitutional Court of Ecuador*; Rights of Nature and Animals as Subjects of Rights* (*Monkey Estrellita* case), Judgment No. 253-20-JH/22, 27 Jan. 2022, Constitutional Court of Ecuador; *Guayusa Parish et al. v. PetroEcuador et al.* (*San Rafael* case), Case No. 974-21-JP, selected 18 May 2021, Constitutional Court of Ecuador.
[53] See, *Los Cedros* case; *Monkey Estrellita* case.
[54] Kauffman et al., 2023, 385.

The judgement in Los Cedros establishes that while Ecuador's constitution permits mining in protected areas, economic rights must be balanced with RoN to prevent projects in fragile ecosystems, or where the homes of endangered species are at risk. The Constitutional Court further emphasized that environmental permits violating nature's rights are unconstitutional, and that in circumstances of scientific uncertainty government must apply the precautionary principle. Finally, the courts provided a framework for protecting ecosystems where mining exists, that places the onus on mining corporations to prove no harm to nature. By defining the integrated nature of biotic and human communities within an ecosystem, and the scope of water rights, the Constitutional Court expanded upon the relationship between RoN, human rights, and rights of environmental consultation. This has ultimately produced a new approach to forest management that requires all land management plans adhere to RoN.[55]

These Constitutional Court's RoN decisions, and those of lower-court rulings, exemplify how RoN norms are cumulatively being strengthened and developed. From addressing the constitutionality of environmental laws permitting extractivism in specific ecosystems,[56] to defining RoN violations and clarifying distinct entities' rights, Ecuador's courts are giving RoN legal form and force. Ecuador's Constitutional Court has further drawn from *amicus curiae* briefs and scientific testimonies,[57] and from the teachings of Indigenous communities, when issuing their rulings and establishing ecological definitions. This reflects a holistic approach to RoN norm development that incorporates knowledge outside the judiciary's expertise. By addressing legal-scientific concepts through the convergence of Western science and traditional Indigenous

[55] *Ibid*, 387.
[56] See National Environmental Law in the *Mangroves* case; National Law for Water Uses and Availability in the *Aquepi River* case and the *Los Cedros* case.
[57] See *Los Cedros* case; *Monge v. Quito Municipality* (*Monjas River* case), Case No. 2167-21-EP, Judgment No. 2167-21-EP/22, 19 Jan 2022, Constitutional Court of Ecuador.

knowledge, objections that RoN are too vague are being met.[58] The increase in lawsuits filed by Indigenous communities since 2016, further demonstrates how RoN is being used as an instrument to secure Indigenous rights of self-determination.[59] While arguments have been made in the literature that RoN do not correspond to Indigenous philosophies surrounding rights, its use by Indigenous communities demonstrates its utility.

Nevertheless, while advances in RoN jurisprudence have been made, evidence of backlashing within the courts over RoN's content still exists.[60] This has most recently been noted in the Fierro Urco case, regarding industrial mining projects in an at-risk ecosystem that also secures the water to many Loja region residents.[61] Here, the Provincial Court rejected the precedent set by the Constitutional Court to apply the precautionary principle when a project lacks scientific evidence on its prospective environmental impacts. Advancing that the environmental licensing procedures required by government for said project were met, the provincial court refused to evaluate available data and diverted to the procedural standards of environmental law.[62] While justifications for this decision range from a lack of resources available to lower courts for analyzing scientific thresholds, to a rejection of the activist role of the Constitutional Court, the judgment remains an outlier.[63] The lower-court's ruling provides new opportunity for the Constitutional Court to expand on the precautionary approach's approach to RoN, and further clarify the rights' normative content.

[58] Epstein et al., "Science and the Legal Rights of Nature," *Science* 380, (2023):5.
[59] Kauffman et al., 2023, 372-373.
[60] *Campesinos of Fierro Urco páramo v. Ministry of Environment* (*Fierro Urco* case), Judgement No. 11333-2022-00183, 19 Dec 2022, Provincial Court of Justice of Loja (Ecuador).
[61] Lena Koehn and Julia Nassl, "Judicial Backlash Against the Rights of Nature in Ecuador: The Constitutional Precedent of Los Cedros Disputed," *VerfBlog*, (2023): 1.
[62] *Ibid*, 3.
[63] *Ibid*, 4.

Additional Factors Influencing Ecuador's RoN

Variances in RoN's effect on legislation, policy, and litigation in Ecuador must also be considered with Ecuador's rule of law, access to justice and legal resources, and general social, economic, and political conditions.

Data obtained from the Worldwide Governance Indicators (WGI) reveals that Ecuador ranks 138th out of 193 countries for rule of law, with a value of -0.62 points reported in 2022 and an average of -0.81 points between 1996 and 2022 (-2.5 weak; 2.5 strong). The lowest valued recorded was -1.21 points in 2009.[64] In terms of political stability, Ecuador most recently ranked at -0.24, sitting below the world average of -0.07. While Ecuador's political stability has shown improvement over the last two decades, rising above its lowest recording of -0.96 points in 2003, both social and political stability have decreased in recent years. Under the Lasso government, political violence, violent deaths, and organized crime linked to cocaine trafficking rose dramatically. Facing additional corruption allegations, including corruption in the energy industry, Lasso dissolved the National Assembly in 2023 ahead of his possible impeachment.[65]

The incoming Noboa administration promises to reduce violence and created more jobs, but faces real challenges reversing Ecuador's security crisis. Further instability is attributed to a lack of consensus over reforms relating to the country's oil sector. Especially, following the binding referendum prohibiting oil extraction in Yasuní National Park in August 2023.[66] While a historic win for the defence of Indigenous peoples and nature, with nearly 60% of the population voting to ban drilling in the park, economists warn of more austerity for an already impoverished

[64] Daniel Kaufmann and Aart Kraay, *Worldwide Governance Indicators*, 2023 Update, www.govindicators.org, (Accessed on February 10, 2024).
[65] The Associated Press, "Daniel Noboa, son of Ecuador's richest person, wins election in campaign marred by assassination," *CBC News*, October 16, 2023, https://www.cbc.ca/news/world/ecuador-election-results-1.6997217 (Accessed April 5, 2024).
[66] *Ibid*; "The World Bank In Ecuador," *The World Bank*, April 4, 2024, https://www.worldbank.org/en/country/ecuador/overview (Accessed April 5, 2024).

country.[67] Political instability has exacerbated Foreign Direct Investment (FDI) flows, and alongside low oil prices, costly public expenses, and a high national risk premium, further aggravates Ecuador's economic strength. Ecuador subsequently continues to experience high levels of poverty. While unemployment stands at a low 3.2 percent, a majority of Ecuadorians work in the informal sector. This is due to high costs for dismissing employees, a higher minimum wage, and rigid labour laws.[68]

Since Ecuador's 2008 Constitution, access to justice has been facilitated by the creation of public defense for those without funding or resources for legal action. This includes access to free legal aid by constitutional mandate, as provided by through the Public Defender's office. Satisfaction ratings to these services range from 5.81 to 6.39 points, from the national to the rural level, with 0 signifying 'total dissatisfaction' and 10 signifying 'totally satisfied.'[69] The data reveals that although Ecuador's rule of law has improved, further advancements should be made. Moreover, while improvements have been noted in key democratic institutions, especially following President Correa's removal from office, trial delays, lack of due process, and claims of pressure on Ecuador's courts do persist.[70]

[67] Dan Collyns, "Ecuadorians vote to halt oil drilling in biodiverse Amazonian national park," *The Guardian*, August 21, 2023, https://www.theguardian.com/world/2023/aug/21/ecuador-votes-to-halt-oil-drilling-in-amazonian-biodiversity-hotspot (Accessed April 5, 2024).
[68] "Ecuador – Country Commercial Guide," *International Trade Administration*, February 8, 2024, https://www.trade.gov/country-commercial-guides/ecuador-market-overview (Accessed April 5, 2024).
[69] Àngel Torres Machuca, Elizabeth León and Diego Vaca Enríquez, "Global Overview – Ecuador," *The Global Access to Justice Project*, https://globalaccesstojustice.com/global-overview-ecuador/#:~:text=Its%20vision%20is%20to%20guarantee,due%20process%20and%20legal%20stability. (Accessed February 10, 2024).
[70] "World Report 2022: Rights Trends in Ecuador," *Human Rights Watch*, January 13, 2022, https://www.hrw.org/world-report/2022/country-chapters/ecuador (Accessed February 10, 2024).

Discussion

Based on the analysis, the legal influence that Ecuador's constitutional RoN have had on environmental protections – while mixed at the beginning – has been generally positive. Specifically, following the election of Ecuador's new Constitutional Court in 2019. Despite a lack of strong secondary laws, RoN's slow normative construction and implementation, and its paradoxical application from government and private actors in its earlier stages, Ecuador's judiciary helped transform RoN into an effective policy approach and legal tool for improved environmental performance. Of significance to the discussion, has been the court's reliance on the Indigenous conception of *sumak kawsay* as established in Ecuador's Constitution, for providing concrete form to RoN.

RoN's mixed implementation before 2019, their underdevelopment in secondary laws, and the constitution's failure to explicitly delineate a hierarchy of rights, reinforced an earlier view that Ecuador's RoN provisions were simply symbolic, political gestures, to secure the country's appearance on the international stage.[71] This perception was reinforced by the number of RoN cases won by government that permitted the expansion of harmful extractive projects. Rather than uphold nature's rights, Ecuador's initial experiences with RoN reveals how government instrumentally invoked RoN to preserve the developmental status quo. Although Ecuador's 2008 Constitution affords nature the broadest and strongest rights protections on paper, their earlier, normative application by RoN advocates encountered challenges. Procedural rights were not immediately strengthened, nor were nature's rights outright protected, when environmental laws were weak, unenforced, or non-existent. Specifically, when economically valuable, government-led mining projects were under dispute. The politicization surrounding earlier RoN cases required

[71] Erin Fitz-Henry, "Decolonizing Personhood," in *Wild Law: In Practice*, edited by Michelle Maloney and Peter Burdon, (Abingdon, Oxon: Routledge, 2014), 142.

environmental NGOs and civil society to seek out other means for protecting nature's interests, defeating the legal provisions' intended purpose. Police violence against Indigenous land defenders and civil society actors was even reported to have *increased* within the five years following RoN's enshrinement, challenging CERs' expected benefits.[72]

Although Ecuador's RoN did not immediately prevent the state from regressing on its environmental commitments, improve government accountability, facilitate citizen participation in decision-making, or safeguard nature from weak and non-existent environmental laws, Ecuador's courts are gradually given content and force to nature's rights. Despite ambiguity surrounding RoN at the time of their entrenchment, and difficulties involving competing rights, the judiciary's professional desire to apply and interpret the law has transformed RoN into a meaningful tool for environmental protection. Ecuador's experience demonstrates the important role that courts can play in supplementing rights norms when conceptually vague. Ecuador's courts are achieving this by considering the constitution in its entirety, referring to international RoN jurisprudence, and incorporating expert scientific opinion and studies in their decisions to establish ecological thresholds where uncertainty exists. The gradual development and enforcement of Ecuador's constitutional RoN proves an instructive case for the prospective protection of at-risk old-growth forests and other threatened ecosystems in Canada.

It is important to note that if Canada constitutionally recognized RoN in the same manner as Ecuador, state extractivism could still threaten rare and endangered ecosystems, humans, and non-human beings. This could occur from a lack of clarity and consensus over the content of RoN provisions, especially between courts and the state, as was seen in Ecuador. Further tensions could arise between existing standards in environmental law – namely, those established in

[72] Erin Fitz-Henry, "Distribution without representation? Beyond the rights of nature in the southern Ecuadorian highlands," *Journal of Hunan Rights and the Environment* 12 no.1 (2021), 10.

environmental impact assessment requirements – and principles of ecological law identified in Earth Jurisprudence and RoN. While provincial logging and forestry practices fall outside of the BC Environmental Assessment (EA) process, they do adhere to integrated land use planning, forest practices legislation, and associated resource management initiatives.[73] Forest licensees are subsequently required to prepare a forest stewardship plan (FSP) and have it approved before moving forward on prospective logging and road building projects.[74] Although these plans were designed to ensure that forest practice operations respect BC's resource values and address forest health concerns, the content of said ecological values are broad.[75] Existing regulations do not consider different old-growth ecosystem types in biodiversity protection, or values like carbon storage, and as a result, still threaten higher productivity old-growth forests. Thresholds for timber harvested could therefore be legally respected, yet produce irreversible environmental damages. This risks the protection of old-growth forests based on unclear, incorrectly defined, or outdated environmental forestry standards, that do not reflect evolving scientific understandings on forest site productivity.[76] If environmental requirements under the FRPA have been met, RoN cases attempting to protect higher productivity old-growth forests could be dismissed, and harmful projects allowed.[77] Nevertheless, Ecuador's experience illustrates how conflicts between pre-existing environmental standards and nature's rights could be addressed.

Both the Piatúa River and Collay Forest case demonstrate how Ecuador's courts have differentiated between RoN and environmental permits. Even though environmental impact

[73] *Forest and Range Practices Act*, SBC 2002, c 69.; Environment Canada, *Environment Canada Protected Areas Strategy*, Gatineau: Government of Canada, 2011 (Cat. No. En14-44/2011E-PDF).

[74] *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004.

[75] See recent amendments to FRPA through Bill 23.

[76] See, Price et al., "Conflicting portrayals of remaining old growth: the British Columbia case, *Canadian Journal of Forest Research* 51 no. 5 (2021).

[77] The management objectives under the Private Managed Forest Land Act (PMFLA) for private forest land consequently hold even lower environmental standards than Crown land under the FRPA. See, Benoit and Churchman.

assessments were conducted for each project, and licences granted, the courts ruled that the procedural requirements were not sufficient for permitting projects that infringed nature's rights. While the normative development of RoN standards through the courts were slow, with priority initially given to development projects that adhered to international standards of sustainable development, the judiciary eventually moved beyond conventional environmental procedural requirements. This demonstrates how constitutional RoN, through the courts, can safeguard nature against weak or underdeveloped environmental regulations. This can hold government accountable when failing to enforce environmental standards, or when approving permitting for projects that could violate nature's health and life cycles. This is meaningful for Canada, given the persistent gaps in BC's forestry policy while amendments are being made, and considering the SCC's high level of ecological literacy in environmental case law.[78]

Canada's courts have considered the applicability of section 7 of the Charter in the environmental context on various occasions to date, providing compelling evidence that they would uphold the provisional intent of constitutional environmental rights or constitutional RoN.[79] If current forestry practice standards are respected in a TFL, but RoN and the rights of old-growth are still considered at risk, it could be expected that the courts would declare the project unconstitutional. This decision could result in the complete cancelation of logging in ecologically sensitive areas, the prohibition of future logging projects within said regions, and orders against government to repair any environmental damages incurred from harvesting. The SCC's high degree of ecological literacy could even result in the earlier success of Canada's RoN cases beyond that of Ecuador, therefore facilitating the evolution of Canada's own RoN norms.

[78] See Collins 2009.
[79] Lauren Worstman, ""Greening" the Charter: Section 7 and the Right to a Healthy Environment," *Dalhousie Journal of Legal Studies* 28 no.36 (2019), 252-256.

The SCC's professionalism when interpreting the constitution, along with its noted ecological leanings, could also see the combination of RoN with collective rights and Indigenous rights, as demonstrated in the Rio Blanco and the Cofán Sinangoe cases. RoN's combining with Indigenous rights, specifically pertaining to self-determination, prior consultation, and the preservation of traditional activities, could have significant implications on Canada's commitment to reconciliation and ensuring a collaborative approach to environmental protection. Not only does Ecuador's RoN experience demonstrate this possibility, but it represents how RoN, Indigenous, and collective rights can be upheld against strong economic incentives.[80] Particularly, after the Ecuador's Constitutional Court clarified the transversality of RoN in 2015. By recognizing biocultural rights as Ecuador's courts have, Canada's judiciary could strengthen both RoN jurisprudence and existing Aboriginal rights under section 35 of the Constitution. Nevertheless, arguments have been made that Canada's federal and provincial courts have historically and purposefully acted to remove Indigenous self-determination. Judicial decisions surrounding section 35 demonstrate inconsistencies with constitutionally protected rights of Aboriginal peoples, reflecting a desire to assimilate Indigenous people into the liberal doctrine of Canadian law.[81] This brings into question how Canada's courts might approach biocentric rights, which affirm Indigenous sovereignty at the expense of state authority. Indeed, the liberal doctrine in which Canada's legal system is based proves a further difficulty to Indigenous systems of meaning. While RoN has its origins in Indigenous relationships with nature, the western liberal system of law does prioritize rights over responsibilities, challenging the Indigenous understanding of law and legal orders. Despite these shortcomings, Ecuador's experience demonstrates how RoN –

[80] See Rio Blanco case.
[81] See, Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis*, Toronto: University of Toronto Press (2019).

though imperfect – has supported a more ecologically sustainable approach to development that recognizes the territorial and collective rights of Indigenous communities beyond what was previously imaginable.

The development of RoN norms through Ecuador's courts also reveals how scientifically complex issues can be addressed democratically, with the involvement of scientific experts, studies, and related players. This signals the possibility for greater citizen participation in decision-making over resource extractive projects, and a more comprehensive approach to setting environmental standards for unique ecosystems. This collaborative approach is valuable to Canada, as a means of establishing ecological thresholds for highly complex ecosystems, like old-growth forests. Moreover, like the endangered jaguar and spider monkey living in Los Cedros Forest, Canada's old-growth forests are home to various at-risk plant and animal species, including the marbled murrelet and western screech owl.[82] Even though the Canadian Constitution permits large-scale logging, economic rights would need to be better balanced with RoN where there are endangered species are present. Where scientific uncertainty exists on the effects logging might have on at-risk species, or on old-growth forest ecosystems more generally, the precautionary principle could be employed has occurred in Ecuador.[83] This approach to biodiversity conservation could be followed until an official framework is developed that ensures RoN are not violated within these ecosystems. This would promote more responsible forestry practices based on current scientific understanding of ecological thresholds, or where potential irreversible damage or uncertainty exists, result in the cancellation of a project altogether.

[82] Kevin Laird, "Citizen scientist's fight for bird habitat access denied," *Victoria News*, March 13, 2024, https://www.vicnews.com/local-news/citizen-scientists-fight-for-bird-habitat-access-denied-7329150 (Accessed March 26, 2024).
[83] See Los Cedros case.

Finally, Ecuador's experience reveals how through the Los Cedros case, a new approach to forest management was developed, requiring that all land management plans adhere to RoN. Although Ecuador's constitution permits mining in protected forests, the Constitutional Court ruled that industry and state must consider the preservation of endangered ecosystems and species above economic rights. Beyond requiring the state to enact the precautionary principle, and more significantly, placing burden of proof on mining companies to prove no ecological harm, the Constitutional Court ordered a new forest management plan for the reserve that adheres to RoN, involves the collaboration of its surrounding rural communities, and respects Ecuadorians' right to environmental consultation.[84] If Canada's courts followed a similar approach, mandating government and extractive industry to adhere to land management plans based on RoN in ecologically sensitive areas, more rigorous mechanisms could exist to protect and preserve the health of old-growth forests. This could ensure greater industry and government accountability to log more sustainably, leaving the most productive old-growth in the ground. This approach would also consider for the unique conditions and characteristics of each forest ecosystem, and require collaboration with the involved First Nations, ensuring their participation in landscape planning. While the BC government has started supporting various Indigenous Protected Conserved Areas (IPCAs) comprising old-growth forests,[85] it is currently under no legal obligation to deliver a certain level of care, attention, or financial support to these Indigenous-led conservation efforts. Constitutional RoN could serve an effective tool for sustainable development by setting standards

[84] "Rights of Nature Campaign," *Los Cedros – Estación científica Los Cedros*, June 2, 2024, https://reservaloscedros.org/rights-of-nature-campaign/ (Accessed June 10, 2024).
[85] Denise Titian, "Ahousaht and Tla-o-qui-aht to establish conservancies in old growth-forest areas," *Ha-Shilth-Sa*, March 15, 2024, https://hashilthsa.com/news/2024-03-15/ahousaht-and-tla-o-qui-aht-establish-conservancies-old-growth-forest-areas (Accessed April 10, 2024).

that both government and industry must adhere. Whether for the preservation of endangered old-growth, of for other animals or plants species, in BC or elsewhere in Canada

Chapter 5: Bolivia

Bolivia was the second country after Ecuador to pass RoN laws, with the aim of implementing a more effective sustainable development model. Similar to Ecuador, Bolivia's RoN provisions are based on the Indigenous values of *buen vivir* and respect for Mother Earth, and were developed to counter the government's neoliberal economic development model. Both countries have strong RoN laws, that if fully implemented could have significant effects on sustainable development and the curtailing of harmful extractivist industries. Despite the similarities between their domestic political processes, there has been a lack of RoN implementation in Bolivia. While perceived as a global leader and advocate for the rights of Mother Earth, Bolivia's structural dependence on extractive industries proves a significant impediment to safeguarding nature's rights at the domestic level. This has ultimately resulted in the continuation of ecologically destructive extractivism in the name of economic liberation, threatening some of the most biologically diverse regions on Earth, and its Indigenous populations.

Context

Bolivia is a presidential representative democratic republic, that emerged from a military junta in the late 20th century. While the country experienced political stability and routine elections following 1982, the re-emergence of populism in the 21st century caused deep civil unrest that threatened Bolivia's democratic institutions. Critical to this, has been the prevailing wealth disparity between Bolivia's major ethnic and socioeconomic groups, which has led to the hierarchization of certain groups over others within government. Specifically, of select white, affluent elites over the Indigenous populations and campesinos, which make up the social majority. It is following the failed economic and political reforms that were designed to address these

inequalities between 1982 and 2005, that Indigenous peoples and campesino social groups looked to restructure the state and its institutions.[1] Key to this restructuring, was the increased involvement of Bolivia's marginalized communities in the decision-making over natural resources within their territories, which had historically been monopolized by the non-Indigenous elites.[2] Tensions continued to mount with these groups, resulting in two national uprisings: the Cochabamba Water War (1999-2000) and the Gas War (2003). These civil conflicts expose deep frustrations from Bolivia's impoverished and Indigenous peoples with the government's neoliberal development model, and a desire to protect the country's natural resources.[3] RoN emerged as the result of these social movements against the exploitation of Bolivia's natural resources. Indigenous communities and the campesinos regard development projects as extensions of colonialism, which directly challenges Indigenous values and customs. In an effort to restructure Indigenous-state relationships and improve their living conditions, these groups pursued a process of "decolonization" that included RoN.[4] Three distinctive socioeconomic and cultural groups contributed to the development of Bolivia's RoN laws, and must be considered to understand the factors that have prevented RoN's application.

The first group comprise the whites and mestizos, who make up Bolivia's societal elite and control a majority of economic and political interests. The second are the Aymara and Quechua peoples, who self-identify as campesinos or *originario* peoples, and originate from the highlands. The final group consists of self-identified Indigenous groups from the lowlands. Both the highland

[1] Meckenzie Sarage, "The Consequences of Populism: Evo Morales and the 2019 Bolivian Crisis," *Democratic Erosion Consortium*, October 17, 2022, https://www.democratic-erosion.com/2022/10/17/the-consequences-of-populism-evo-morales-and-the-2019-bolivian-crisis/ (Accessed January 9, 2024).
[2] Fabiola Vidaurre Belmont, "Right to Justice and Diversity of the Indigenous Peoples of Bolivia," in *Peacebuilding and the Rights of Indigenous Peoples: Experiences and Strategies for the 21st Century*, edited by Heather Devere, Kelli Te Maihā and John P Synott, (Cham, Switzerland: Springer, 2017), 77-78.
[3]Paola Villavicencio Calzadilla and Louis Kotzé, "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia," *Transnational Environmental Law* 7 (2018), 4.
[4] Kauffman and Martin, 2021, 121.

and lowland groups – while encompassing Bolivia's Indigenous peoples – diverge in how they self-identity. These differences significantly influence how indigeneity is defined in Bolivia and how each group approaches that objective of state decolonization. The campesinos self-identify by class, live closer to cities centres, and see any association with indigeneity as negative. Meanwhile, the self-identified Indigenous communities, are more marginalized than the campesinos and emphasize their connection to the land.[5] These group distinctions are necessary to understanding how RoN has evolved in Bolivia.

Convening in 2004 under the alliance The Unity Pact, lowland and highland groups sought to develop a new constitution that would address the relational division between citizens and government. It was a direct result of these groups' mobilization that Evo Morales, an Aymara who advocated for coca growing in the country, was elected president in 2005. Winning the popular voted with his party Movement for Socialism (MAS), Morales became Bolivia's first Indigenous leader, who more closely reflected the ideals of its Indigenous populations. Supporting the Unity Pact's desire to create a new constitution, Morales summoned the Constitutional Assembly to facilitate discussions on the political decolonization process. The Assembly developed a draft constitution, which received 61.43% of the approval of voters following a constitutional referendum in 2009. Abolishing the previous Republic, the new constitution establishes Bolivia as a 'plurinational' state, and formally recognizes the 36 Indigenous nations comprising the nation's identity. Recognized as one of the most progressive constitutions of its time, the document establishes broad-based human rights protections that recognizes and prioritizes specific Indigenous rights. The constitution further saw the involvement of many Indigenous peoples in the drafting process who were historically excluded from the state's political decision-making. [6]

[5] Kauffman and Martin, 2021, 121-122.
[6] Calzadilla and Kotzé, 5.

Despite their participation in the Constitutional Assembly, Indigenous peoples encountered difficulties having their recommendations incorporated. Although MAS allowed Indigenous representatives as MAS delegates within the Assembly, all decisions were approved by relative majority, excluding the constitution's final text. The proposals submitted by the Unity Pact to guide Assembly debates consequentially, heavily modified. Tensions between MAS, elite-driven opposition parties, and the Unity Pact, resulted in additional compromises between Morales and right-wing parties over the constitution's final content.[7] Frustrated by Morales' failure to implement the recommendations from their draft constitution, and for obstructing Indigenous representatives' participation in the Constitutional Assembly, the Unity Pact drafted new legislation in support of their decolonization project. Of the earliest laws proposed is Bolivia's first RoN law: The Law of the Rights of Mother Earth.[8] Of influence on this document's drafting process, were the climate conference proceedings that were occurring concurrently on the international level.

Morales presented himself as a staunch defender of RoN on the global stage, advocating that countries could only secure the wellbeing and rights of their citizens by protecting Mother Earth, the source of all life. According to Morales, RoN was essential to achieving sustainable development and navigating the climate crisis. Committed to making international progress on climate change, Morales hosted the World's Conference on Climate Change and the Rights of Mother Earth in 2010. It was during this conference that the Universal Declaration on the Rights of Mother Earth (UNDRME) was adopted. Developed from Ecuador's constitutional RoN provisions, the UNDRME also provided the framework for Bolivia to draft the Law of the Rights

[7] Kauffman and Martin, 122.
[8] *Ibid*, 123.

of Mother Earth.[9] By following the resolutions adopted at the conference, and RoN discussions initiated by Bolivia's lowland Indigenous people, the Unity Pact prepared The Draft Law of Mother Earth. The document's drafting process was highly collaborative, involving numerous Indigenous and civil organizations alongside government interests. The final draft had ecocentric foundations delineating Mother Earth's rights, as well as society and state's duties to nature. It further addressed discriminatory policies against Indigenous people over resource extraction, proposed an ecologically-balanced approach to economic development, and mandated a transition to renewable energy. These proposals directly threatened government's development model, particularly involving economically-significant extractive projects on Indigenous land, and were met with opposition.[10]

The Law of the Rights of Mother Earth (Law 071) was passed in 2010 and only contains 2 of the 12 articles proposed in the Draft Law.[11] The RoN legislation provides general principles on Mother Earth's rights, as well as society and state's obligation to respect these rights, but does not include any guidelines for their implementation. A revised version of this original law, the Framework Law of Mother Earth and Integral Development for Living Well (Law 300), was passed in 2012 to further guide Bolivia's development model.[12] The Framework Law is seen to depart from the Unity Pact's Draft Law so drastically, that it no longer represents the ideals of the non-profit groups and Indigenous communities that helped develop it.[13] The departure was so significant that the laws were condemned by Bolivia's leading Indigenous federations as violating

[9] *Ibid.*
[10] Calzadilla and Kotzé, 9-10.
[11] *Rights of Mother Earth Law (Law 071)*, The Plurinational State of Bolivia, December 21, 2010, https://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html.
[12] *Framework Law on Mother Earth and Integrated Development for Living Well (Law 300)*, The Plurinational State of Bolivia, October 15, 2012, https://s3.documentcloud.org/documents/7220617/Framework-Law-of-Mother-Earth-and-Integral.pdf.
[13] Calzadilla and Kotzé, 11.

Indigenous rights by allowing for the continuation of resource extraction in Indigenous-controlled territories.[14] It is due to the structure of Bolivia's RoN laws, and of Bolivia's constitution, that RoN supporters have had to pursue other legal avenues for protecting nature's rights.

Bolivia's RoN Laws

Bolivia's RoN regime is principally legislative. While the preamble to Bolivia's 2009 constitution emphasizes the protection of *Pachamama* and the importance of distributing wealth amongst its people, these provisions are more symbolic than enforceable. Article 108 of Bolivia's constitution subsequently imposes a responsibility on Bolivian "to protect and defend an environment suitable for the development of living beings," but is also non-binding. Interestingly, Article 33 recognizes the right to live in a balanced and healthy environment for all "individuals and collectives of present and future generations, *as well as other living things*, so that they may develop in a normal and permanent way."[15] It has been claimed that the article's reference to "other living things" could extend rights to non-living beings, and therefore provide grounds for constitutional challenge in favor of nature's rights. This application has not yet been tested in court. Still, this translation of Bolivia's constitution from Spanish to English has sparked debate over the section's content and opportunities for its prospective use in protecting nature's rights. Despite uncertainties surrounding the document's view on non-human beings, Bolivia's constitution recognizes the Indigenous worldview of *buen vivir* and provides a foundation for Bolivia's RoN laws.[16]

[14]Emily Achtenberg and Rebel Currents, "Earth First? Bolivia's Mother Earth Law Meets the Neo-Extractivist Economy," *NACLA*, November 16, 2012, https://nacla.org/blog/2012/11/16/earth-first-bolivia%25E2%2580%2599s-mother-earth-law-meets-neo-extractivist-economy (Accessed January 15, 2024).
[15] *Constitution of the Plurinational State of Bolivia*, Preamble, 2009, https://www.constituteproject.org/constitution/Bolivia_2009.pdf
[16] Collins, 2021, 70.

The Law of the Rights of Mother Earth describes the specific rights of Mother Earth set out in Bolivia's constitution.[17] It further establishes duties for both the state, citizens, as well as private and public entities to nature per constitutional Article 108. The state is specially obligated to develop policies that protect Mother Earth from exploitation and commodification, ensure long-term sustainable energy, and take preventative action to ensure nature's protection.[18] Legal persons and other entities are expected, in part, to report any violations to Mother Earth's rights, actively engage in creating proposals to uphold these rights, consume in a sustainable manner, and promote harmony with Mother Earth and all of Earth's communities.[19] The Law of the Rights of Mother Earth also sets out six binding principles to govern the document.

These provisions include 'harmony,' which requires the balancing of human activities with Mother Earth's natural cycles, and 'guarantee of the regeneration of Mother Earth,' which places a duty on society and state to ensure the necessary conditions for Mother Earth to sustain its systems and life structures. The principle of 'no commercialism' further requires that no living systems, nor their natural processes, be commercialized or "serve anyone's private property."[20] While seemingly revolutionary in their moving beyond anthropocentric environmental law and approaches to sustainable development, these principles have gone unenforced.[21] The principle of 'collective good' further prioritizes human interests and activities over that of nature, therefore conflicting with ecocentric approaches to environmental protection.[22] Finally, the law requires the creation of a national ombudsman, or Office of Mother Earth, to ensure compliance with these

[17] *Rights of Mother Earth Law (Law 071)*, The Plurinational State of Bolivia, 2010, Art. 7.
[18] *Ibid*, Art. 8.
[19] *Ibid,* Art. 9.
[20] *Ibid,* Art. 2.
[21] Calzadilla and Kotzé, 24-25.
[22] *Rights of Mother Earth Law (Law 071)*, The Plurinational State of Bolivia, 2010, Art. 2.

rights.[23] Although the office's establishment was left for a future law, it still has not been created over 13 years later.

The Framework Law of Mother Earth, while meant to operationalize The Law of the Rights of Mother Earth and establish objectives of integral development in accordance with *buen vivir*, effectively hinders nature's rights by prioritizing resource extraction.[24] Article 4 of the law states that the rights of Mother Earth cannot be realized on their own. Rather, they must be considered alongside the collective and individual rights of highland and lowland Indigenous peoples, the fundamental, political, economic, social and cultural rights of Bolivians, and the rights of rural and urban citizens to live without spiritual, economic, or social poverty. RoN must therefore be determined against competing economic and socioeconomic rights, which could efface nature' rights altogether.[25] Moreover, although the law establishes the concept of 'integral development,' or the use of integrated measures to balance human rights with the rights of Mother Earth, no concrete framework is provided.[26] More problematic still, are the provisions involving extractive industry and development, which directly challenge RoN. Despite the recognition that mining threatens the natural environment, the law places an obligation on the state to "promote industrialization of Mother Earth"[27] and to "use the best technologies" when extracting non-renewable resources.[28] The Framework Law ultimately prioritizes socioeconomic development with the objective of redistributing wealth and improving living standards for Bolivia's most impoverished.[29]

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[23] *Ibid*, Art. 10.
[24] *Framework Law on Mother Earth and Integrated Development for Living Well (Law 300)*, The Plurinational State of Bolivia, 2012, Art. 1.
[25] *Ibid*, Art. 4.
[26] *Ibid,* Art. 5.3.
[27] *Ibid*, Art. 10.6
[28] *Ibid*, Art. 15.3.
[29] *Ibid,* Art. 18, 19.

The Legal Scope of Bolivia's RoN

Bolivia follows a nature's rights model, and like Ecuador's RoN law, recognizes rights for nature broadly at the ecosystem level. The Law of Mother Earth refers to the rights of "Mother Earth," which it defines as "a dynamic living system comprising of an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny."[30] Use of the term 'Mother Earth' to represent nature in Bolivia's RoN laws is deliberate, representing a foundation in Indigenous culture that views the Earth as the nurturer and caretaker of all life.[31] Article 7 of the Law of the Rights of Mother Earth further establishes natures' right "to maintain the integrity of living systems and natural processes that sustain them, and capacities and conditions for regeneration." It also delineates nature's right to life, clean air and water, "diversity of life," pollution-free living, timely restoration when injured – directly or indirectly – by humans, and to maintain the "functionality of the components of Mother Earth in a balanced way for the continuation of their cycles and reproduction of their vital processes."[32]

Legal Strength of Bolivia's RoN

These statutory RoN laws, while of lower standing than other constitutional rights, hold elevated status due to the legal framework used in the Framework Law of Mother Earth and Integral Development for Living Well. Nevertheless, Bolivia's RoN face significant challenges from competing rights. Particularly, involving human rights and those affecting private property and economic development, which are prioritized by Bolivia's development model.

[30] *Rights of Mother Earth Law (Law 071)*, Art. 3.
[31] Calzadilla and Kotzé, 11.
[32] *Rights of Mother Earth Law (Law 071)*, Art. 7.

While Bolivia's RoN laws allow any natural person to represent nature's interests, it is on a voluntary basis. Without a regulatory policy to ensure guardianship over nature, rights protection are effectually weakened in Bolivia. Especially, considering the financial constraints involved in filing lawsuits and prospective risks to a claimants' personal security.[33] Moreover, although Bolivia's RoN legislation obliges society and the state to report rights violations, the Framework Law provides limited standing to public authorities and to individuals or groups that have been directly affected by these violations.[34] Furthermore, while the Framework Law affirms the need to create the Office of Mother Earth, it fails to provide procedures for its development. Without a national ombudsman for Mother Earth, citizens' ability to bring rights proceedings before the necessary tribunals and agencies are further hindered. Finally, while the Framework Law mentions that civil and criminal liabilities can occur from RoN violations, no additional information is given, or prescriptive period provided.[35]

Resulting Laws, Policies, Regulations

As of this writing, there is no evidence that Bolivia's RoN laws have been applied in administrative policy or state regulation. While Bolivia continues to uphold its image as a defender of RoN on the international stage, these principles gone unincorporated domestically. To the contrary, legislation has been created since Bolivia's RoN laws were passed that directly contravene nature's rights.

In 2014, the Mining and Metallurgy Law (Law Nº 535) was passed, which removed the requirement of obtaining consent from Indigenous communities for mining projects, and grants mining companies rights to water resources without further regulatory control or permit

[33] Kauffman and Martin, 2021, 139.
[34] *Framework Law on Mother Earth,* Art. 39.
[35] *Framework Law on Mother Earth,* Art. 42-44.

requirement. This law not only violates Indigenous land rights found within the constitution and threatens the livelihood of local communities; it challenges nature's rights by permitting large-scale development projects that threaten entire ecosystems' survival. Article 220 expressly allows for mining activities to be conducted in environmentally protected areas, despite the legislation's foundational principle of working in "reciprocity with Mother Earth."[36] This law further states that any person who interferes with state-led mining projects will face prosecution.[37] Members of Indigenous communities that have been negatively affected by mining projects and who have consequently fought to protect nature's interests have been criminalized. Even where Indigenous peoples have successfully prevented extractive projects within their territories, like in Madidi National Park, these communities still endure mercury poisoning in their water sources from mining activities upstream.[38]

The Mining and Metallurgy Law has even led to the overexploitation of water resources by mining companies to the point of irreparable damage. This is demonstrated by the case of Lake Poopó, Bolivia's once second largest lake, which was officially declared evaporated from drought in 2016. While rising temperatures aggravated the rate of evaporation, extensive mining activities contributed to the narrowing of the lake's tributaries. Government's mismanagement of water resources has further caused heavy pollution from mining projects and devastation to the region's biodiversity.[39] Environmentally harmful extractive projects have therefore not been avoided with the passage of Bolivia's RoN laws. Instead, the principle of integral development established in

[36] *Mining and Metallurgy Law (Law 535*), May 28, 2014, The Plurinational State of Bolivia, https://economic.mfa.ir/files/ecodep/newsattachment/20220802142534175762 8413.pdf., Art. 220, 5.
[37] *Ibid*, Art. 99.
[38] Bethan John and Eilidh Munro, "Bolivian activists push back against mining industry," *Al Jazeera*, November 16, 2022, https://www.aljazeera.com/news/2022/11/16/bolivian-activists-push-back-against-mining-industry (Accessed November 15, 2023).
[39] "Bolivia's second-largest lake dries up and may be gone forever, lost to climate change," *The Guardian*, January 22, 2016, https://www.theguardian.com/world/2016/jan/22/bolivias-second-largest-lake-dries-up-and-may-be-gone-forever-lost-to-climate-change (Accessed November 15, 2023).

the Framework Law of Mother Earth has been employed by the state to justify eroding environmental standards and prioritizing socio-economic development. Although Bolivia's constitution offers equal weight to all rights, including those of Mother Earth, the state continues to prioritize socioeconomic rights and the redistribution of wealth through development.[40] In an effort to eradicate state poverty and address social inequality, Bolivia's government has rolled back on environmental standards and employed a version of *buen vivir* drawing from the "anthropocentric logic of modern neoliberal development."[41]

Additional executive orders violate Bolivia's RoN laws, by allowing for permanently damaging extractive projects in protected parks and on Indigenous lands. While Supreme Decree Nº2400 lowers environmental standards for hydrocarbon sector activities, Supreme Decree Nº2992 expands the list of permitted regions for hydrocarbon ventures. Meanwhile, Supreme Decree Nº 2298 simplifies the procedures for hydrocarbon sector actors to initiate projects on Indigenous lands. [42] Oil drilling and gas exploration on Indigenous territories has been further supported with the passing of Supreme Decree Nº2366, which permits the exploitation of fossil fuels in 21 protected regions within the Bolivian Amazon. Gas exploration has more than doubled since this decree's issuance in 2015, threatening Indigenous inhabitants and jeopardizing the survival of the region's biodiversity.[43]

[40] *Constitution of the Plurinational State of Bolivia*, 2009, Art. 9.
[41] Calzadilla and Kotzé, 24.
[42] Lorna Muñoz, "Bolivia's Mother Earth Laws: Is the Ecocentric Legislation Misleading?", *ReVista: The Harvard Review of Latin America*, February 6, 2023, https://revista.drclas.harvard.edu/bolivias-mother-earth-laws-is-the-ecocentric-legislation-misleading/ (Accessed March 10, 2024).
[43] Iván Paredes Tamayo, "In Bolivian Amazon, oil blocks encroach deep into protected areas," *Mongabay*, August 16, 2022, https://news.mongabay.com/2022/08/in-bolivian-amazon-oil-blocks-encroach-deep-into-protected-areas/ (Accessed March 10, 2024).

Litigation and Judicial Decisions

To date, no RoN lawsuits have been filed in Bolivia and no court has invoked RoN in any of its decisions. While some justify Bolivia's failed implementation of its RoN laws as a result of its reliance on extractive industries to subsidize social development programs, experts argue it is not the sole factor at play. Especially, given the similarities between Ecuador and Bolivia's developmental agendas, and their continued resource extraction in ecologically-sensitive and Indigenous-controlled territories.[44] Both countries' leaders have undermined or strategically utilized their RoN laws to pursue state development projects, yet RoN case law and jurisprudence has developed – and continues to expand – in Ecuador. Another reason offered for why RoN has gone unenforced in Bolivia, is the court's lack of political independence. While this factor may influence implementation to an extent, Ecuador has faced similar experiences with its own judiciary, and RoN jurisprudence was still able to develop.[45] Three alternate factors are subsequently introduced in the literature to justify why Bolivia's civil society actors and government bodies have not implemented RoN domestically. Particularly, in light of Ecuador's experience. These factors include Bolivia's weaker RoN laws, Morale's framing strategy for Bolivia's "decolonization" project, and Bolivia's civil society structures.[46]

The preceding sections reveal evident contradictions between Bolivia's RoN laws, the constitution, as well as other laws and policy that support state development projects. Bolivia's RoN laws' prioritization of human socio-economic rights, their ambiguous use of language, and

[44] Myles McCormick, "'They lied': Bolivia's untouchable Amazon lands at risk once more," *The Guardian*, September 11, 2017, https://www.theguardian.com/environment/2017/sep/11/they-lied-bolivia-untouchable-amazon-lands-tipnis-at-risk-once-more (Accessed March 11, 2024); Kimberley Brown, "Oil highway bears down on uncontacted Indigenous groups in Ecuador's Yasuní," *Mongabay*, December 15, 2021, https://news.mongabay.com/2021/12/oil-highway-bears-down-on-uncontacted-indigenous-groups-in-ecuadors-yasuni/ (Accessed March 11, 2024).
[45] Craig M. Kauffman, "Why Rights of Nature Laws are Implemented in Some Cases and Not Others: The Controlled Comparison of Bolivia and Ecuador," *International Studies Association Annual Conferenc*e (2019) 6.
[46] *Ibid*, 12.

overall lack of enforcement mechanisms, reinforce perceptions amongst Indigenous groups and civil society that the laws are practically inapplicable. Resulting developmental policies' focus on resource extractive projects that violate constitutional Indigenous rights, further strengthen the view that Bolivia's RoN laws effectively abandon Indigenous cosmovision. Compared to Ecuador, Bolivia's RoN laws prove much weaker. Government failure to incorporate the Draft Law proposals of Indigenous representatives and operationalize RoN's content in both laws, has pushed RoN supporters to pursue other legal means in support of their goals. Namely, through the application of Indigenous rights, which are recognized in both constitutional and international law.[47]

Civil society's avoided application of RoN, and government's failure to invoke RoN instrumentally at the domestic level, are further influenced by how Morales frames "indigeneity" and "decolonization." While Morales strategically adopted rights of Mother Earth dialogue at the time of his election to secure his image as the leader of the campesinos and lowland Indigenous communities, he shifted from this vision of decolonization in 2011. This is widely attributed to the changing balance of power within MAS following the adoption of the Law of Mother Earth in 2010. It was at this time that the *indigenistas* group, which supported "idealized versions of Andean culture" on state-led economic projects as a remedy Western capitalism, left government.[48] Disheartened by the watered-down version of the Law of Mother Earth, this political base's removal from MAS resulted in the weakened the presence of RoN advocates in government. The remaining alliance structure within MAS supported the expansion of extractivism as a means to address rising poverty, and the mobilization of highland Indigenous and peasant unions against the power dynamics of the political elite.

[47] *Ibid*, 15.
[48] *Ibid*, 16.

As a result, Morales rejected the principles established in the Unity Pact's original restructuring of the Bolivian state, reframing *buen vivir* and decolonization as a means to liberate Bolivia's impoverished communities through resource extraction. This vision of economic freedom, though largely supported by highland Indigenous communities living in urban centres, negatively affects rural lowland Indigenous peoples who are threatened by extractivism. Attempts by environmental NGOs and lowland Indigenous groups to counter state-led extractivism has consequently been framed as "an imperialist plot to keep Bolivians poor and underdeveloped."[49] Environmentalism's presentation as a form of Western colonialism has therefore prevented RoN's use against resource extractive projects. Morales' redefinition of decolonization ultimately creates a division between highland and lowland Indigenous communities, that prevents prospective mobilization around RoN.

Bolivia's lack of organized lawyers and community organizations knowledgeable in RoN is offered as a final justification for RoN's failed enforcement. Compared to Ecuador, Bolivia's environmental movement is relatively weak, with far fewer environmental NGOs and lawyers contributing to RoN's development. The state's subsequent refutation of environmental advocacy groups as drivers of colonialism, undermines the strength of these organizations still.[50] Of the few environmental groups and lawyers actively challenging government approved extractive projects, the Law of Mother Earth is not considered a useful tool. Described by some legal professionals as "too vague and expansive" to be effective, Indigenous rights are regarded as a more practical approach to situating the decolonization project as was first established and defined within Bolivia's constitution. This further demonstrates a lack of training and understanding by Bolivia's

[49] *Ibid*, 18.
[50] *Ibid*, 21.

legal profession on RoN, and their reliance on human rights and Indigenous rights to achieve environmental protections.[51]

Additional Factors Influencing Bolivia's RoN

WGI reports that Bolivia ranks 174th of 193 countries with respect to its rule of law, sitting at a value of -1.3 points in 2022, for an average of -0.91 points from 1996 to 2022.[52] The lowest measurement recorded was in 2022, signalling a recent depreciation of societal confidence in the state institutions and rights enforcement. With respect to political stability, Bolivia's latest value rests at -0.28 points, which like Ecuador, is below the global average of -0.07.[53] Accusations surrounding election fraud have contributed to political unrest, resulting in the resignation of Morales and election of Luis Arce in 2020, and a demand by Bolivians for greater transparency in political processes.[54] Political stability has been further aggravated by the state of Bolivia's economy, with the country's central bank ceasing the publishment of its dollar reserves in 2023. This occurred after the announcement that the country's foreign currency reserves fell from over $15 billion in 2014, to $3.5 billion in 2023.[55] Although the nationalization of natural resources under Morales saw the growth of Bolivia's economy, resulting in a decrease in poverty from 60% in 2006 to 34.6% in 2017, declining gas exports and weak foreign investment threaten an economic crisis.[56]

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[51] *Ibid*, 22.
[52] Rule of law index, according to WGI: -2.5 weak, 2.5 strong.
[53] Kaufmann and Kraay.
[54] Juan Esteban Mosquera, "Understanding Political and Social Unrest in Bolivia," *ACLED*, March 24, 2021, https://acleddata.com/2021/03/24/understanding-political-and-social-unrest-in-bolivia/ (Accessed March 21, 2024).
[55] Raul Cortes and Daniel Ramos, "Bolivia's creaking big state model rings warning bell in South America," *Reuters*, June 27, 2023, https://www.reuters.com/world/americas/bolivias-creaking-big-state-model-rings-warning-bell-south-america-2023-06-27/ (Accessed March 20, 2024).
[56] *Ibid*; Oliver Balch, "How a populist president helped Bolivia's poor – but built himself a palace," *The Guardian*, March 7, 2019, https://www.theguardian.com/world/2019/mar/07/how-a-populist-president-helped-bolivias-poor-but-built-himself-a-palace (Accessed March 20, 2024).

2022 reports on access to justice reveal difficulties involving government interference on the independence of Bolivia's courts. Delays in the administration of justice disclose an exceptionally high number of Bolivians waiting for trials. It is further noted that government authorities have continuously failed to protect the environmental human rights of its impoverished communities and of Indigenous land defenders. These groups continue to face violent suppression by law enforcement when protesting extractive industries that threaten their access to fundamental rights, including their right to clean water and to a healthy environment.[57] While Ecuador and Bolivia share very similar regional socio-political processes, the variance between these additional factors further explicate how the implementation of their RoN laws differ, and the underperformance of Bolivia's RoN regime more generally.

Discussion

Based on an assessment of legislation and litigation, Bolivia's RoN laws have had no meaningful or positive effect on national environmental protections. At the international level Bolivia is regarded as a leader in the RoN movement, making meaningful contributions to the establishment of the UN Harmony with Nature Programme and financing annual discussions on the RoN at the UN General Assembly.[58] Still, Bolivia has yet to implement or support RoN domestically. Instead, RoN has been used as a lens through which Bolivia tackles climate change policy and related negotiations globally.[59] To the dismay of Bolivians, government continues to emphasize resource extraction and economic development over environmental rights protection.

[57] Amnesty International, *Amnesty International Report 2022/23: The State of the World's Human Rights*, (London: Amnesty International Ltd., 2023) 94-95.
[58] *Ibid*, 124
[59] Kauffman, 2019, 2.

Since the passage of Bolivia's RoN laws, government has perpetrated numerous violations against nature by permitting extractive projects in traditional, Indigenous-controlled territory and protected regions. One of the leading conflicts to have emerged from these violations involves the national movement to protect the Isiboro Sécure National Park and Indigenous Territory (known by the Spanish acronym TIPNIS) in 2011. It was during this time that Morales enacted legislation to construct a highway through the rainforest reserve, without first consulting its inhabitant Indigenous communities. The project not only encourages deforestation, oil exploration, and the growth of coca plantations, but threatens one of the most biodiverse regions on Earth.[60] Although the road's construction directly violates Bolivia's RoN laws and the constitutional rights of its Indigenous people, the Bolivian government maintains that the road will bring national integration and development opportunities. Specifically, by facilitating services to remote, lowland Indigenous communities, and by easing market access to rural farmers.[61]

More than a thousand demonstrators consisting of environmental advocacy groups and Indigenous activists protested the project in Bolivia's capital for over two months. Demonstrators experienced violent repression and a surprise raid from federal police, attracting international media attention.[62] While civil society's efforts initially prompted government to pass legislation protecting the region, the land's 'untouchable' status was removed in 2017. [63] The Bolivian government subsequently passed Law No. 969, allowing for the road's construction to continue. In 2019, the International Tribunal for the Rights of Nature issued a judgment on the case of the national park, concluding that the Bolivian state violated the RoN and the rights of the Indigenous

[60] Muñoz 2023.
[61] Álvaro et al., "New Law Puts Bolivian Biodiversity Hotspot on Road to Deforestation," *Current Biology* 28 no.1 (2018): R15.
[62] Emily Achtenberg and Rebel Currents, "Police Attack on TIPNIS Marchers Roils Bolivia," *NACLA*, September 28, 2011, https://nacla.org/blog/2011/9/28/police-attack-tipnis-marchers-roils-bolivia (Accessed March 10, 2024).
[63] Álvaro et al., R.15.

peoples of TIPNIS through its actions. The tribunal ruled the Bolivian government must permanently cease all road construction in the reserve, repeal Law No. 969, and ensure the protection and rights of the region's Indigenous peoples.[64] Despite the tribunal's decision, the ruling remains unenforceable. The integrity and protection of this national parks' ecosystems, and the effects on resident Indigenous communities, are still uncertain.

Bolivia's experience with its RoN legislation reveals the potential for these environmental rights to act as nothing more than paper tigers. The failure of Bolivia's government to abide by either of its RoN laws, its employment of principles of integral development to prioritize economic development over environmental protection, and it's passing of legislation and decrees that directly contradict RoN's intended purpose, demonstrates how socio-economic and political factors influence rights implementation. Although both the Law of the Rights of Mother Earth and the Framework Law of Mother Earth hold elevated legal status, and offer the broadest rights coverage on paper, they encounter challenges from competing rights and relating to standing. Conscious of the contradictions between Bolivia's RoN laws and the constitution, and with other environmentally harmful laws and regulations, civil society actors have reduced these laws down to practically inapplicable. Especially, as government advances on large-scale extractive projects in the name of *buen vivir* and integral development. This reaffirms the view amongst environmental advocates that RoN depart from Indigenous worldviews, and has since government omitted the majority of civil society's draft law proposals. Further deterrents for RoN's application, from restricted standing for public authorities or individuals directly affected by a violation, to high costs of litigation, to fears of being aggressed, criminalized, or labelled a

[64] Nathalie Greene, *Case of the Isiboro Sécure National Park and Indigenous Territory (TIPNIS) - Final Judgement*, International Tribunal for the Rights of Nature, https://www.rightsofnaturetribunal.org/wp-content/uploads/2018/04/sentence-tipnis.pdf (Accessed June 10, 2024).

supporter of colonialism for interfering with state-led development, has led environmental advocates to pursue other avenues for legally upholding nature's interests. Namely, through Indigenous rights, which support the decolonization project established in the constitution, and that lawyers are most knowledgeable in.

Although Canada does not face the same socio-economic and political constraints as Bolivia, or divisions between civil society structures as seen between lowland and highland Indigenous groups, it could encounter similar difficulties attached to the Nature's rights model. Specifically, over the voluntary basis for representing nature to protect its rights. While any Canadian could theoretically stand for the rights of old-growth under the Nature's rights model, they would be under no legal obligation to do so. The weakness of this guardianship arrangement could be exacerbated if impediments to RoN's implementation, and a lack of institutional framework to enforce RoN through policy, existed in Canada as does in Bolivia. If similar implementation obstacles are encountered by RoN advocates in Canada, and the personal cost to undertake a lawsuit to protect at-risk old-growth ecosystems are too high, it could undermine these rights' practicality or effectiveness.

Another complication involving the Nature's rights model and the protection of old-growth in Canada, is the ability for citizen oversight of forestry operations in rural areas. While civil society actors may voluntarily undertake lawsuits to protect RoN and old-growth forests, it is more difficult to track illegal logging or forestry activities occurring remotely. Even with the emergence of a satellite tracking system to aid in the detection of logging and road-building in at-risk old-growth forests,[65] the exact conditions of these forest ecosystems, their ecological thresholds, and

[65] "New forest surveillance system exposes ongoing old growth logging in British Columbia, amid ongoing calls for transparency," *Stand.Earth*, July 20, 2023, https://stand.earth/press-releases/new-forest-surveillance-system-exposes-ongoing-old-growth-logging-in-british-columbia-amid-ongoing-calls-for-transparency/ (Accessed June 5, 2024).

site productivity, may not be immediately known. By the time action is taken and conditions are observed, large areas of rare old-growth may already have been logged. These impediments to RoN's implementation could prevent the development of RoN jurisprudence in Canada as has occurred with Bolivia's RoN regime.

Finally, Bolivia's experience warns of the potential for RoN to misappropriate Indigenous language and cosmologies for the purpose of instrumental, state-led development projects. Moreover, it demonstrates how the Western conception of rights, as employed through RoN, may actually contradict Indigenous worldviews, and subsume Indigenous peoples into a world governed by non-Indigenous ways of thinking. This model could ultimately threaten Indigenous self-determination by forcing Indigenous peoples into a liberal rights approach that erases their own societies' laws and meaning-generating abilities. With this in mind, we turn to New Zealand's RoN regime and its employment of the legal personhood model. Not only does this model provide an alternative guardianship arrangement that more closely adheres to the philosophical traditions of Indigenous law; it also aids in the recovery of ancestral knowledge and practices lost through colonization. The legal personhood model further addresses the weakness associated with the guardianship arrangements in the Nature's rights models, through ecosystem governance institutions established by these laws.

Chapter 6: New Zealand

New Zealand is the third country after Bolivia and Ecuador to adopt national RoN legislation. New Zealand's RoN regime is distinctive from those before it for several reasons. Not only did New Zealand's RoN laws form as the result of ongoing negotiations between New Zealand's Indigenous Tūhoe iwi (tribe) rather than social mobilization, but it introduced a new RoN model – that of legal personhood. The implementation of the legal personhood model in New Zealand presents an approach to Earth jurisprudence that not only diverts from the anthropocentrism of environmental law, but demonstrates a compatibility with Indigenous cosmologies that has meaningful implications for countries in their recognizing the self-determination of their Indigenous people.

Context

New Zealand is a parliamentary democratic state without a written constitution. Rather, it has constitutional documents consisting of the Treaty of Waitangi and the 1990 Bill of Rights. The Treaty of Waitangi was signed in 1840, and is an agreement between the Indigenous Māori people and the British Crown that focuses on Indigenous and treaty rights. Although New Zealand's constitution is unwritten and politically – rather than judicially – enforced, the Treaty remains a principal founding document.[1] So, while New Zealand's RoN provisions are established in statute, they hold "quasi-constitutional"[2] status due to their basis in treaty settlements. It is from these settlements that New Zealand appointed nature legal personhood. Specifically, to the Te Urewera Forest in the Te Urewera Act of 2014, and to the Whanganui River in the Te Awa Tupua Act of

[1] Matthew S. R Palmer, "Indigenous Rights: New Zealand," Chapter in *Constitutionalism in Context*, edited by David S. Law, (Cambridge: Cambridge University Press, 2022).
[2] Collins, 2021, 71.

2017.[3] Another record of understanding was signed in 2017 declaring Mount Taranaki, a sacred mountain in the North Island, to have a legal personality. The mountain's legal personhood still awaits formal recognition through the ratification of treaty settlement.[4] New Zealand's current RoN legislation therefore comprise the legal personality of Te Urewera and Te Awa Tupua.

The Te Urewera Act is the result of treaty settlements between the Tūhoe and the New Zealand government, and is a central feature the Tūhoe's goal of self-determination. Te Urewera is a steep, forested region in the North Island of New Zealand and the traditional territory of the Tūhoe, a Māori iwi. Integral to their identity, the Tūhoe interact with the land in a relational way, inhabiting small mountain valleys surrounding Maungapohatu, their sacred mountain.[5] Living in isolation, the Tūhoe did not encounter European settlers until the 1860s. It was during this time and into the 1870s that Britain launched military invasions into Te Urewera in search of Māori rebels. In the process, Britain's military applied scorched earth tactics, destroying the Tūhoe's farmland and homes. Suffering famine, the Tūhoe offered the rebels in exchange for their secured independence from the Crown. While the New Zealand government finally passed the Urewera District Native Reserve Act in 1896, providing the Tūhoe their own self-government, the document was never honoured. Instead, the New Zealand government gradually began purchasing Tūhoe territory from private individuals, in direct contravention of the Act. Left with only 16% of the Urewera reserve and little agricultural opportunity, the majority of the Tūhoe relocated from the

[3] *Te Awa Tupua (Whanganui River Claims Settlement) Act*, New Zealand, 2017, https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html; *Te Urewera Act*, New Zealand, 2014, https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html.
[4] Eleanor Ainge Roy, "New Zealand gives Mount Taranaki same legal rights as a person," *The* Guardian, December 22, 2017, https://www.theguardian.com/world/2017/dec/22/new-zealand-gives-mount-taranaki-same-legal-rights-as-a-person (Accessed April 1, 2024); Robin Martin, "'No more Egmont' – Taranaki Maunga officially welcomed at treaty settlement," *RNZ*, March 31, 2023, https://www.rnz.co.nz/news/te-manu-korihi/487103/no-more-egmont-taranaki-maunga-officially-welcomed-at-treaty-settlement (April 1, 2024).
[5] Kauffman and Martin, 2021, 143.

forest by the 1930s. Their connection to the land and their traditional customs were further severed when the government established the Te Urewera National Park in 1954.[6]

The Tūhoe, seeking formal recognition for the dispossession of their land and to re-establish their self-determination, participated in a treaty settlement process beginning in the 1990s. While the Tūhoe never signed the Treaty of Waitangi, they hoped to rectify historical wrongs by bringing their claims before the Waitangi Tribunal. The tribunal recognized several violations perpetrated by the Crown against the Tūhoe involving their right to self-governance, and issued an extensive report from 2009 to 2015. A team including representatives from all Tūhoe clans, known as the Te Kotahi ā Tūhoe, was formed to represent the tribe's interests during negotiations. The first order of Crown-Tūhoe negotiations and fundamental objective for restoring the Tūhoe's self-determination, was the return of Te Urewera.

Seen as an issue of land ownership, the Crown refused to permanently transfer the title of the forest to the Tūhoe. Instead, the Crown made a proposal to the iwi offering them temporary transfer of title allowing, ending in the state's long-term management of the land in the public's interest. The Tūhoe rejected the proposal, asserting it would further prevent their reconnection to the land. An agreement was finally achieved in 2011, when Crown negotiators realized the Tūhoe were not seeking legal ownership of Urewera.[7] For the Tūhoe, ownership is seen as a transactional relationship between humans and nature, that erroneously departs from the Tūhoe principle of human kinship with the natural world. The Crown accordingly offered legal personhood to Te Urewera, allowing the forest to own itself instead. The Tūhoe accepted legal personhood as the closest alterative for viewing nature as a whole, spiritual being, within the confines of a Western

[6] Vincent O'Malley, "Tūhoe-Crown Settlement – historical background," *Māori Law Review*, October 2014, https://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-historical-background/ (Accessed March 15, 2024).
[7] Kauffman and Martin, 2021, 145.

legal framework.[8] Successfully circumventing Te Urewera's classification as property, negotiations continued, and a new governance structure was developed including two organization: the Te Urewera Board and the Te Uru Taumatua.

The Te Urewera Board represents the statutory guardians of Te Urewera and consists of seven members from all four Tūhoe tribal councils. This board is tasked with creating an environmental management plan for Te Urewera, which it developed in 2017. Known as Te Kawa or Te Urewera (Te Kawa), this management plan provides the framework for Te Urewera's governance system and is based in Tūhoe worldview. [9] Te Kawa departs from Western conception of rights and instead focuses on human responsibility and reciprocity to the land.[10] This abandons the New Zealand government's previous approach to land management under the Department of Conservation (DOC), by managing "people for the benefit of the land" rather than managing the land for human interest.[11] Te Uru Taumatua represents the centralized representational organization for the Tūhoe iwi, and works in collaboration with the Te Urewera Board to manage the ecosystem. [12]

The Te Awa Tupua Act emerged from the same process of treaty claims settlements between the Māori iwi and the Crown that produced the Te Urewera Act, and grants legal personhood to the Whanganui River. The Whanganui River is the third-largest river in the North Island of New Zealand, with regions alongside the river falling under the control of various Māori well before the arrival of European settlers. To the Whanganui iwi, the river is considered their ancestor, a central part of their identity, and the life force upon which they have historically

[8] *Ibid*, 146.
[9] *Ibid*, 150.
[10] Tanasescu, 2022, 84.
[11] *Ibid*, 83.
[12] Kauffman and Martin, 2021,150.

depended.[13] Following the Treaty of Waitangi, European settlers believed the iwi had relinquished all authority over the river. The iwi countered this assumption, accusing the Crown of violating their territorial rights by industrializing the river as early as 1883.[14] This resulted in two centuries of negotiations between the Māori and colonial settlers over control of the Whanganui. The Waitangi Tribunal overseeing negotiations resolved that the Whanganui iwi, unfamiliar with common law conceptions of property and the transfer of land title, had never agreed to the trade or disposal of the land.[15] According to Māori customs, while land can be offered in the form of a gift, it is under the terms of relationship instead of ownership. So, although land can be given to outsiders for their use, "the underlying interest remain[s] with the ancestral hapu (clan), to whom the donees continue[ ] to be obliged."[16]

Recognizing the unique relationship between the river and the Whanganui iwi, the tribunal facilitated the settlement deed *Ruruku Whakatupua* in 2014. The deed establishes the Whanganui as a legal entity, Te Awa Tupua, and upholds traditional Māori custom and legal systems. Te Awa Tupua's status was formalized with the passing of the Te Awa Tupua Act, becoming the first piece of legislation in the world to extend personhood rights to a river.[17] A two-person governing body was subsequently created to speak on behalf of Te Awa Tupua and act as the "human face" of the river.[18] This body, known as Te Pou Tupua, comprises one representative of the Crown and one

[13] Eleanor Ainge Roy, "New Zealand river granted same legal rights as human being," *The Guardian*, March 16, 2017, https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being (Accessed March 27, 2024).
[14] Toni Collins and Shea Esterling, "Fluid Personality: Indigenous Rights and the 'Te Awa Tupua (Whanganui River Claims Settlement) Act 2017' in Aotearoa New Zealand," *Melbourne Journal of International Law* 20 no. 1 (2019): 3.
[15] Waintangi Tribunal, *The Whanganui River Report*, (Wellington, New Zealand: GP Print, 1999) 106 https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68450539/Whanganui%20River%20Report%201999.pdf
[16] *Ibid*, 107.
[17] Ainge Roy, *The Guardian*, 2017.
[18] *Te Awa Tupua Act*, Art. 18.2.

nominated iwi representative with interests in the river, and is comparable to the Te Urewera Board.[19]

New Zealand's Legal Personhood Laws

Both the Te Awa Tupua and Te Urewera Acts codify aspects of Māori law and extend human rights and liabilities each ecosystem. They further delineate human responsibility and care for these environments with the appointment of guardian bodies that are required to speak on behalf of these entities and protect their interests. The legal design of New Zealand's RoN laws, and their resulting management approaches, set them apart from Bolivia and Ecuador in a way that meaningfully influences their environmental impact.

The Legal Scope

New Zealand's RoN laws are limited, in that they do not recognize all of nature as having distinctive, intrinsic rights. Instead, legal personhood rights are granted to two separate ecosystems: the Te Urewera Forest and the Whanganui River. Both the Te Urewera Act and the Te Awa Tupua Act explicitly outline each ecosystem's boundaries, and limit personhood rights to each region. Based in the Indigenous perspective that all ecosystems are whole, spiritual beings, elements that are typically seen as non-living in Western science such as water and earth are described as living entities and extended human rights.

The Te Urewera Act characterizes Te Urewera as "ancient and enduring, a fortress of nature alive with history" with spiritual value and "identity in and of itself,"[20] and establishes the forest's distinct relationship with the Tūhoe, all New Zealanders, and the Crown. Te Urewera is

[19] *Ibid*, Art.20.1-2.
[20] *Te Urewera Act*, Art. 3.1-3.3.

accordingly presented as an ancestor to the Tūhoe, providing the iwi's culture, identity, and ensuring their self-determination.[21] Te Urewera's intrinsic and national value is further outlined, recognizing its unique biodiversity and ecological systems, its scientific and patrimonial significance, as well as its recreational and spiritual benefits.[22] Meanwhile, the Te Awa Tupua Act defines Te Awa Tupua as an "indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements."[23] The act further establishes four principles representing the "essence" of Te Awa Tupua and the inalienable connection between its parts.[24] Both acts comprehensively define each entity and their significance to New Zealanders and the Māori. This reinforces each ecosystem's unique values and affirms human responsibility to them.

It is important to note that the Māori do not see Te Urewera or Te Awa Tupua as persons in their worldview. Rather, each Act presents a "legal compromise" between Western law and Indigenous cosmology that establishes these regions as new entities under the discretion of their guardian bodies.[25] These laws further assign each region with "all the […] powers, duties, and liabilities of a legal person."[26] Rivers and forests are therefore granted procedural access to New Zealand's legal and political institutions, in the same way that humans and corporations are. Seen as legal persons, these entities can acquire debt, own property, bring claims before the courts, and receive compensation for any harms suffered. Nevertheless, the Te Urewera Act and Te Awa Tupua Act do not guarantee either entities' right to their ecological integrity or to be restored.[27]

[21] *Ibid,* Art. 3.4,6.
[22] *Ibid,* Art.3.8.
[23] *Te Awa Tupua Act*, Art. 12.
[24] *Ibid*, Art. 13a-d.
[25] Tanasescu, 2022, 80.
[26] *Te Urewera Act*, Art. 11.1; *Te Awa Tupua Act*, Art. 14.1.
[27] Kauffman and Martin, 2021, 64.

The Legal Strength

Parliamentary supremacy is recognized in New Zealand's political system, giving national acts a higher legal standing. While a nation's institutional structure is seen to influence the development of new rights norms through the application of relevant laws, this is not as clear a measure of strength for New Zealand's RoN regime. New Zealand's legal personhood laws allow for nature's interests to be protected in a proactive manner through the appointment of statutory guardian bodies. This effectively reduces the likelihood of, or need for, RoN challenges in court.[28] The guardianship approach and governance institutions of these laws ensure that each ecosystem actively participates in their own management. Issues involving competing rights can, as a result, be addressed anticipatorily and resolved through the judiciary or ecosystem governance institutions.[29]

The issue of who can stand for nature is explicitly determined and vested in each ecosystem's representatives: Te Pou Tupua for the Whanganui River and the Te Urewera Board for Te Urewera. The according rights, powers, and duties of each ecosystem are exercised by these statutory bodies.[30] Although limiting who can represent nature's interests, mandated responsibility for upholding nature's rights is considered more effective. This legal design requires guardians' protection of nature's rights, in social and policy forums, and in courts, that ensures rights protections are not left to chance.[31] While the term "guardian" is widely used in RoN literature and recognized in Western law as an individual assuming the protection and care for whom is incapable, the Māori approach this conception differently. For instance, while the Te Urewera Act

[28] *Ibid*, 65.
[29] *Ibid*, 66.
[30] *Te Urewera Act*, Art. 11.2; *Te Awa Tupua Act*, Art. 14.2.
[31] Craig M. Kauffman and Pamela L. Martin, "How Courts Are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia, and India," *Vermont Journal of Environmental Law* 547 (2012): 272.

formally establishes statutory guardians to speak on nature's behalf, the Tūhoe approach their role as representatives of Te Urewera who are responsible for listening to what the land is "saying" and needs.[32] Te Kawa is implemented with this approach to guardianship in mind. Bush crews are instructed by Tūhoe elders with unsevered, traditional connection to the land, in order to learn Te Urewera's voice, reconnect with the forest, and uphold their responsibility as stewards of Te Urewera. This approach to land management is meaningful, in its ability to "recover [] ancestral knowledge, customs, and practices" of the iwi, who have lost their ties to the land from colonization. So, while the Te Urewera Board is established as Te Urewera's statutory guardian, these bush crews are regarded as the true guardians of the land. [33] Not only do these crews live on and learn from the land, but they respond to changing conditions within the forest and adapt human behaviour to the ecosystem as it evolves. Most notably, involving climate change.[34]

Finally, no hierarchy of rights is established in either personhood law. While the Te Awa Tupua Act establishes that any individual whose actions effect the river, must regard the river's interests and behave "in a manner that is consistent with the purpose of the Act,"[35] it does not extinguish or limit existing private property rights.[36] Resource use involving the river is subsequently contingent on the Resource Management Act (RMA), which weighs competing anthropocentric and ecocentric ideals.[37] Any individual fulfilling a function under the RMA or related legislation is required to respect the values defining Te Awa Tupua as a living, indivisible being with the Act.[38] A watershed management group called the Te Kōpuka is further mandated to

[32] Kauffman and Martin, 2021, 153.
[33] *Ibid*, 154.
[34] *Ibid*, 156.
[35] *Te Awa Tupua Act*, Subpart 2 Art. 12.
[36] *Ibid*, Subpart 2 Art. 16.
[37] Kauffman and Martin, 2021, 68.
[38] *Te Awa Tupua Act*, Subpart 2 Art. 15.

develop an integrated ecosystem management plan for Te Awa Tupua.[39] If any inconsistencies develop between the Te Kōpuka's watershed management plan and existing regulations, these laws must be modified to respect the management plan.[40]

Meanwhile, Te Urewera – having previously been a national park – does not hold private property within the forest boundary. This prevents the need to subject to the Resource Management Act and gives the Te Urewera Board full control of the ecosystem's wellbeing under the personhood law. The Tūhoe therefore assess whether an action will benefit Te Urewera or the people before a decision is made. Actions benefiting humans must have little to no effect on the ecosystem's cycles, while actions benefiting nature are normally taken.[41] While the Te Urewera Act affords greater prioritization of nature's rights, both RoN laws effectively leave the issue of competing rights open-ended. The further balancing of competing rights with the rights of these ecosystems will likely be addressed by the Environmental Courts.[42]

Resulting Regulations, Litigation and Judicial Decisions

No secondary legislation, policy, or regulation has resulted from either of New Zealand's personhood laws. Only one lawsuit has been filed and judicial decision rendered to date, involving Te Urewera.

In 2022, Wharenui Tuna of the Tūhoe iwi filed a suit objecting against destruction of 29 DOC backcountry huts in Te Urewera. These huts were burned down at the discretion of the Te Uru Taumatua, the Governing Board representing the Tūhoe and jointly managing the forest with

[39] Craig M. Kauffman and Linda Sheehan, "The Rights of Nature: Guiding Our Responsibilities through Standards," chapter in *Environmental Rights: The Development of Standards*, edited by Stephen J. Turner, Dinah L. Shelton, Jona Razzaque, Owen McIntyre, and James R. May, (Cambridge: Cambridge University Press, 2019) 355
[40] *Te Awa Tupua Act*, Subpart 4 Art. 38.
[41] Kauffman and Martin, 2021,155.
[42] Kauffman and Sheehan, 354.

the DOC. This occurred after a decision by the Te Urewera Board to remove all DOC structures from Te Urewera.[43] While the motion was supported by the necessary management bodies, Tuna obtained an injunction in November 2022 preventing all further demolition until the court issued a decision. Despite the injunction, ten more huts were destroyed before the Aukland High Court produced its' ruling. While the DOC and Te Uru Taumatua could have lawfully demolished the huts belonging to the Crown, they failed to produce the required annual operational plans. Moreover, necessary attention to the Te Urewera Act were not made.[44] This resulted in the justice's reproduction of sections 3,4,5, and 6 of the Te Urewera Act in the issuance of its decision in 2023.[45] Relying of various affidavits and other supporting documents, the judge found that the removal of the "biodiversity huts" undermined conservation efforts by removing bases used in the protection of endangered species.[46] The court ruled that Te Uru Taumatua and the board violated the Te Urewera Act by failing to act in a way that preserves native ecological ecosystems and biodiversity, ensures public access to the forest, and respects the people, land, and its assets.[47]

This sole RoN case reflects the effects of the personhood model's legal design. New Zealand's personhood models, though providing the necessary legal framework and enforcement mechanisms to report violations to each ecosystem, have largely prevented the need for reactionary legal measures through their appointed guardian bodies. In the one RoN lawsuit filed, Te Urewera's interests were addressed and clarified through the involvement of the necessary parties before the high court. The success of New Zealand's personhood laws are therefore not reflected

[43] Te Ao, "High Court condemns 29 Te Urewera huts burnt down as unlawful," *Māori News*, December 14, 2023, https://www.teaonews.co.nz/2023/12/14/high-court-condemns-29-te-urewera-huts-burnt-down-as-unlawful/ (Accessed March 20, 2024).
[44] *Tuna v. Te Urewera Board*, Judgment No. CIV-2022-463-000105, December 14, 2023, New Zealand High Court 3680, https://www.courtsofnz.govt.nz/assets/cases/2023/2023-NZHC-3680.pdf, Art. 28, 29.
[45] *Ibid*, Art. 24.
[46] *Ibid*, Art. 57.
[47] *Ibid*, Art. 106.

by the frequency of their legal implementation, but through the governing systems that actively manage each ecosystem in accordance with Indigenous worldviews. The internal politics of these respective governing bodies, and their influence on ecosystem management, must be considered accordingly.

Additional Factors Influencing New Zealand's Legal Personhood Laws

In contrast to Ecuador and Bolivia, New Zealand ranks as one of the global highest in terms of its rule of law. In 2022, New Zealand ranked 8th out of 193 countries with 1.73 points, and has averaged 1.86 points between 2022 and 1996. New Zealand has also experienced notable political stability, with 1.31points in 2022. Although it's score has declined in recent years, New Zealand's national average consistently remains above the world average of -0.07 points.[48] The country's economy also exhibited a strong post-pandemic recovery, but has slowed with rising inflation and interest rates. This has consequently curbed housing construction, further weighing on the rising cost of living for general goods and services.[49]

Despite it not having a written constitution, New Zealand does protect equal access to justice through its national laws. These provisions include the right to judicial review, to a fair and timely hearing, and to natural justice. New Zealand's current government has also facilitated access to justice through improved policy, government budgets, access to courts, and the amount of pro bono legal services provided by legal professionals. Nevertheless, the cost of civil litigation is still seen as a significant impediment to access to justice. Structural inequalities affecting access to justice are further noted against Māori, from high rates of incarceration to difficulties in the administration and access of legal support, to the high cost of legal services. Recent systemic

[48] Kaufmann and Kraay.
[49] "New Zealand Economic Snapshot," *OECD*, May 2024, https://www.oecd.org/en/topics/sub-issues/economic-surveys/new-zealand-economic-snapshot.html, (Access June 11, 2024).

reform has begun to address issues relating to access to justice, with New Zealand's granting of legal personhood presented as the most "broadly conceived" approach.[50] These additional social, economic, and political provide further context for the development and success of New Zealand's legal personhood laws. Although constraints and structural inequalities do exist, they are far less than those faced in Bolivia or even Ecuador, when it comes to the implementation of their RoN laws.

Discussion

Based on the lack of secondary legislation, related regulation, policy, and RoN litigation involving Te Urewera of Ta Awa Tupua, it would appear that New Zealand's legal personhood laws have had no impact on domestic environmental performance. Despite the lack of visible legal effects, and considering the more ambiguous nature of what success could entail for these laws, New Zealand's RoN laws can be considered a positive addition to national environmental performance. This is due to the RoN model and governance institutions New Zealand employs in its personhood laws, which ensure the proactive protection of Te Urewera and Te Awa Tupua through their statutory guardians. As presented in the findings, the Te Urewera Board and Te Pou Tupua allow each ecosystem to participate in their own management by speaking on each environment's behalf in both policy and legal arenas. This reduces the need for reactionary legal measures against rights violations, resulting in New Zealand's sole RoN lawsuit to date. In addition to the active protection and oversight of nature's interests, these laws present the meaningful hybridization of Western legal systems with the philosophical traditions of Indigenous legal orders.

[50] Toy-Cronin et al., "Global Overview – New Zealand," *Global Access to Justice Project*, https://globalaccesstojustice.com/global-overview-new-zealand/ (Accessed March 22, 2024).

Legal personhood is therefore offered as a solution to Māori-Crown settlement negations that moves away from Western rights orthodoxy, toward one of human responsibility to nature. This approach to environmental protection not only affirms Indigenous-based relationships of reciprocity with the natural world, but departs from the Western legal conception of ownership. While Māori worldviews might never be perfectly captured by the Western legal framework, New Zealand's personhood laws offer a meaningful proxy. By vesting ownership in Te Urewera and Te Awa Tupua, each ecosystem is established as a new entity under the common law that most closely resembles their representation as whole, living, and spiritual beings within Māori ontology.[51] A political innovation that balances governance between Māori and the state, the legal personhood model successfully extends political powers to entities once only recognized in Māori cosmology.[52]

Although New Zealand's personhood laws resulted from treaty settlement processes – rather than from social resistance to large-scale extractivism as seen in Ecuador and Bolivia – they have led to increased oversight for ecosystem health through their governance arrangements. Central to these arrangements has been the development of ecosystem management plans, which codify Indigenous conceptions of reciprocity with nature and of the natural world. Is it through Te Kawa, for instance, that Te Urewera is established as having its own unique way of being that "needs to be constantly rediscovered," in the same way that Tūhoe need to relearn and claim their ancestral ways that have been through colonialism.[53] This is indispensable**,** not only to ensuring that the land is actively managed and respected in accordance to changing ecological conditions, but in its supporting the training of Indigenous people to live traditionally off the land as bush

[51] Tanasescu, 2022, 87.
[52] *Ibid*, 82.
[53] *Ibid*, 86.

crews. These crews are seen as the "real guardians of Te Urewera," and it through their living in and working throughout the forest, that they observe patterns on how the ecosystem adapts to changing environmental conditions over time.[54] Initial bush crews then train succeeding bush crews, ensuring the transfer of traditional knowledge and cultural traditions. It is through the observations and oversight of these bush crews that the voice of Te Urewera is most accurately communicated to both the Te Urewera Board and Te Uru Taumatua, ensuring the effective functioning of the governance arrangement.[55] New Zealand's experience with its legal personhood laws provides invaluable insights for the prospective protection of old-growth – and other – at-risk environments in Canada.

If legal personhood were extended to old-growth forest ecosystems in Canada, like that of the Fairy Creek watershed, there is the potential for better environmental protections, oversight, and accountability for some of the most at-risk regions through Indigenous stewards. This form of governance arrangement could not only ensure Indigenous involvement and leadership in environmental conservation efforts, but secure Indigenous self-determination and authority over unceded traditional territories of First Nations peoples. This legal approach and governance structure could further support the resurgence of Indigenous culture, and traditions lost through the process of colonization, ultimately honouring Canada's commitment to enact UNDRIP and to reconciliation efforts with Indigenous peoples. By placing Indigenous peoples back in the driver's seat of territorial management and conservation efforts, TEK can ultimately be applied and developed upon to preserve and even improve the conditions of ecosystems affected by anthropocentric and natural climate change. Moreover, it offers an approach within the Canadian legal framework that incorporates Indigenous legal tradition and worldviews of reciprocity and

[54] Kauffman and Martin, 2021, 154.
[55] *Ibid.*

respect for all of Earth's communities. This hybridization of Canadian and Indigenous laws, while imperfectly capturing Indigenous cosmologies under the Western legal framework, provides a preliminary endeavour into a more comprehensive approach to transsystemic law in Canada.

Legal personhood's governance arrangement could also reduce the need for civil society action to ensure that industry and government respect rare ecosystems, through its proactive and territory-specific enforcement. This is meaningful to the context of protecting old-growth forests in more far-reaching regions. For example, throughout Northern British Columbia. While monitoring systems like Forest Eye can help the public detect old-growth logging and road building that might be occurring illegally, or without adequate collaboration or consent from involved First Nations, they do not prevent projects from first occurring. So, while the nature's rights model is more expansive in legal scope, allowing all citizens to stand for nature, it could prove less effective. The legal personhood model offers improved insurance through the designation of Indigenous stewards, that can monitor and prevent damaging projects before they occur. This governance arrangement could also ensure the more active amendment of ecosystem management plans, when additional changes to environmental conditions are noted, or when existing land management plans are deemed insufficient. Nevertheless, despite the potential benefits under the legal personhood model, impediments to the protection of old-growth ecosystems and other criticisms exist.

Although improved oversight can be noted for at-risk ecosystems appointed with legal personhood status, environmental coverage remains non-existent for areas not under explicit recognition. This would challenge the protection of remaining old-growth forests throughout BC, and Canada more generally. While the percentage of high productivity old-growth trees in BC is low, the last remaining stands are not isolated to one region. Pockets of old-growth exist across

the province, and the potential for designating each of these areas with legal personhood status is not just an immense undertaking, but highly unrealistic. Though there may be merit in appointing particular ecosystems also containing old-growth trees with legal personhood status – say, those providing irreplaceable ecosystem services or holding high societal value – this approach would not safeguard the protection of all at-risk old-growth in the province. Even if one or two ecosystems containing old-growth achieve legal personhood status, the remainder of BC's ancient forests would continue to face the same threats from logging.

The legal personhood model also extends human rights and liabilities to ecosystems, subjugating the natural environment to human law. This is seen as problematic, as it extends ecosystems with the same responsibilities that humans have to one another, wrongly inferring that "a river [can be held] liable for flooding" or that the climate can be held responsible for related environmental disasters. This gives the erroneous impression that the laws of nature can be modified to human will.[56] Moreover, the language employed in legal personhood places RoN into the anthropocentric legal framework, which ultimately diverts from principles of Earth Jurisprudence and "re-creat(es) the problems that plague conventional law."[57] These conceptual and philosophical difficulties could complicate the objectives of RoN, if legal personhood is not established with the help of integrated ecosystem management plans or in accordance with Indigenous worldviews, as has been done in New Zealand. A meaningful way that this complication was avoided in New Zealand, was by establishing ecosystems as legal "entities" within the legal personhood laws, instead of persons.

[56] *Ibid*, 221.
[57] *Ibid*, 220.

Finally, while New Zealand's Treaty Settlements and legal personhood laws depict the equal participation of Māori, they are still a product of imposed state power.[58] The imposition of the settler legal framework upon Indigenous peoples, and the state's offering legal personhood to specific ecosystems, reinforces a view that the state would rather nature own itself than extend legal ownership to Indigenous peoples. The same could be argued of the Canadian state if it appointed legal personhood to old-growth ecosystems, rather than offer legal ownership of the area to the First Nations involved. Just in the way that Canada's judiciary has historically ruled to preserve the authority of the Crown, legal personhood could be employed as a tactic to circumvent Indigenous self-determination.

This analysis and exploration into the RoN models and regime experiences of Ecuador, Bolivia, and New Zealand leaves much to consider for the prospective protection of endangered old-growth forests in British Columbia. With these results in mind, I deliberate whether CERS, or RoN more specifically, could secure the sustained protection of old-growth forests in Canada, and what the stand-alone constitutional recognition for the RoN could look like. Given the legal outcomes of each country's RoN experience, and the socio-economic context and conditions of each, I further contemplate which RoN model approach could best serve the protection of old-growth forests in Canada, in both the short and long-term.

[58] *Ibid*, 79.

Chapter 7: Overall Findings and Application to the Canadian Case

As of March 2024, evidence of old-growth logging continues in BC, with a recent leaked government map revealing only half of the trees identified as being at risk of permanent biodiversity loss have been approved for logging deferral.[1] While positive steps have been taken by the BC government in recent times, including a commitment to gradually protect 30% of old-growth in BC by 2030, secure over $1 billion to assist this protection,[2] and support IPCA plans in old-growth forest areas,[3] threats to progress persist.[4] This has resulted in some First Nations needing to monitor logging on their territories that they would like deferred, due to failed industry oversight by government amidst shifting political directions.[5]

Despite the largest act of civil disobedience in Canadian history, and the BC NDP's ensuing commitment to implement all 14 of the OGSR's recommendations, government still permits industry to log old-growth forests with the biggest trees.[6] With the worsening state of the planetary crisis and the upcoming expiration of the old-growth logging deferral in the Fairy Creek watershed, lasting change to BC's forestry management policy is needed now more than ever. Based on the

[1] Brennan Owen, "Leaked map suggest B.C. has approved less than half of the proposed old-growth deferrals," *Global News*, March 8, 2024, https://globalnews.ca/news/10344502/leaked-map-less-half-proposed-old-growth-deferrals/ (Accessed April 2, 2024).
[2] Chad Pawson, "B.C., Ottawa, First Nations announce conservation agreement worth $1B," *CBC News*, November 3, 2023, https://www.cbc.ca/news/canada/british-columbia/nature-agreement-bc-ottawa-1-billion-conservation-1.7017562 (Accessed April 10, 2024).
[3] Titian, 2024.
[4] Brennan Owen, "Poor data hinders B.C. old growth logging deferrals, advocates say," *CBC News*, October 22, 2023, https://www.cbc.ca/news/canada/british-columbia/old-growth-poor-data-1.7004441 (Accessed April 10, 2024); Paul Johnson, "Conservationists rap B.C. for 'significant loophole' in old-growth protection," *Global News*, October 27, 2024, https://globalnews.ca/news/10055116/conservationists-rap-bc-loophole-old-growth-deferral-process/ (Accessed April 10, 2024).
[5] Andrew MacLeod, "Why Locking In Logging Deferrals to Save BC Old Growth Is So Slow," *The Tyee*, April 4, 2024, https://thetyee.ca/News/2024/04/04/Finalizing-Logging-Deferrals-Save-BC-Old-Growth/ (Accessed April 12, 2024).
[6] Ben Parfitt, "Secret Map Shows BC Playing a Shell Game with Old Growth," *The Tyee*, March 7, 2024, https://thetyee.ca/Analysis/2024/03/07/Secret-Map-Shows-BC-Playing-Shell-Game-Old-Growth/ (Accessed April 10, 2024).

observed research findings, the constitutional RoN makes a compelling case for the prospective protection of old-growth forest ecosystems in Canada. Especially, when gaps exist in current environmental and forestry policy, and the need for improved government accountability and industry oversight exists.

The prevailing purpose and intent of the RoN movement is to shift human, legal, political, and socioeconomic systems based in modern environmental law to ecological law, in order to address the current biodiversity and climate crisis. This legal instrument and approach to the environmental rights implicates tenets of Earth Jurisprudence, shifting away from the current anthropocentric legal framework to one that is ecocentric. Both Ecuador and Bolivia's RoN laws and nature's rights models endeavour this by explicitly recognizing all nature's rights, and implementing Indigenous values and worldviews surrounding *buen vivir*. Implementation predominantly occurs through RoN lawsuits. Meanwhile, New Zealand incorporates principles of Earth Jurisprudence that resonate with the RoN movement through distinct legal personhood laws, that evoke Māori values of responsibility to nature. Implementation under this particular RoN model occurs through the governance arrangements instituted in each law.

Although Ecuador, Bolivia, and New Zealand's RoN regimes developed as improved responses to environmental threats, the research findings present a mixed level of success for each country's environmental performance and approach to sustainable development. Analyzing the outcomes and legal effects of each country's RoN legislation, I discuss to what extent the anticipated benefits associated with constitutional environmental rights have been achieved by RoN.

Assessing RoN's Anticipated Benefits

Ecuador's constitutional RoN successfully demonstrate how rights of nature provisions can be employed to address environmental threats surrounding environmentally destructive resource-extraction. Although RoN was initially employed by government to pursue large-scale mining projects, civil society efforts to utilize RoN in less politicized, lower-profile cases, aided in the development of RoN jurisprudence and norm construction consistent with RoN's original intent. Significant to this, was the election of a new professional Constitutional Court. Ecuador's Constitutional Court gradually developed RoN jurisprudence through government's instrumental application of RoN, bureaucratic routine, and civil society lawsuits, resulting in the clarification of provisional ambiguities. Issues of competing rights were further addressed when the Constitutional Court characterized RoN as transversal, securing the constitution's biocentric vision. Ecuador's experience reveals that while secondary RoN legislation, policy, and regulations were slow to develop, and RoN's content was initially unclear, these CERs have led to improved domestic environmental protections.

When considering the anticipated benefits of the constitutional RoN, the legal effects of Ecuador's RoN – specifically, RoN litigation – has resulted in the improved enforcement of environmental policies, regulations, and laws, and in greater government accountability. Although government successfully regressed on environmental legislation and policy after RoN's entrenchment, the introduction of a more independent and professional Constitutional Court has positively transformed the trajectory of Ecuador's CERs. This has resulted in nature's protection when environmental laws are weak, un-enforced, or non-existent, through the judiciary's unilateral application of RoN. Furthermore, while RoN advocates' have encountered issues of access to justice, Ecuador's strong environmental NGOs and advocacy networks have meaningfully

supported RoN's use by civil society. The constitutional RoN have therefore gradually improved citizen-participation in decision-making and strengthened procedural rights, despite Ecuador's history of political and economic instability.

The influence that Ecuador's RoN have had on preventing destructive extractive projects in recent years, is significant to the prospective benefits Canada could experience by constitutionally recognizing these rights. Although concerns over RoN's clarity were affirmed by Ecuador's earlier experience, RoN's norm development through Ecuador's courts demonstrates how provisional ambiguities can be addressed. While critics question RoN's content and ability to uphold nature's interests, specifically, given the scientific uncertainty that surrounds ecosystem health and functions, Ecuador's experience shows how courts can facilitate RoN norm development. Concerns about the justiciability of these rights are further addressed by the court's reliance on *amicus curiae*, expert scientific testimonies, and TEK, on scientifically complex issues. This illustrates how professional or progressive courts – like Ecuador's Constitutional Court or the SCC – can include the participation of critical policy players in the development of RoN norms. Moreover, while the nature's rights model expands liberalism, thus preserving the anthropocentrism of environmental law, the Ecuadorian Constitutional Court's combining RoN and Indigenous rights allows for a more ecocentric approach to the law. The creation of similar biocultural rights in Canada could not only support a shift to more ecological law, but better ensure Indigenous peoples' relationship to their territories and existing Indigenous rights.

Finally, while arguments have been made questioning the intentionality behind including Indigenous worldviews in Ecuador's RoN, their application by Indigenous groups and RoN advocates to protect nature demonstrates their value. Whether the Correa government allowed the inclusion of Indigenous worldviews to appease the electorate, or for its own instrumental use,

Indigenous understandings of humans' relationship to nature did influence Ecuador's RoN. Although irreconcilable differences exist between Indigenous and Western legal frameworks, the inclusion of Indigenous worldviews in Ecuador's RoN has helped secure nature's interests, those of Indigenous communities, and the health of all Ecuadorians. If Indigenous legal orders were implicated in the construction of Canada's constitutional RoN, societal goals of protecting the natural environment could be better ensured, and Indigenous customs and traditions better upheld.

Despite the commonalities between Ecuador and Bolivia's socio-political conditions and RoN regimes, the research exposes how Bolivia's RoN have failed to protect nature – or implicate Indigenous worldviews – in a meaningful way. Although Bolivia's RoN laws hold strong legal status and content, they have had no discernible legal effect domestically. Without secondary RoN legislation, policy or regulation, or RoN lawsuits, Bolivia's experience reveals how this environmental rights approach could be employed for mostly symbolic, political reasons. Regardless of their superior legal framework, Bolivia's RoN have not resulted in the improved enforcement of existing environmental laws and regulations. To the contrary, environmentally invasive mining projects have persisted, with new laws and decrees issued to ensure their continuance. Government accountability has subsequently not improved, nor have procedural rights been strengthened. Convinced of RoN's inadequacy, lowland Indigenous communities and RoN advocates continue to rely on the application of Indigenous rights to counter destructive government-led developmental projects.

Bolivia's social, economic, and political conditions have considerably influenced the outcome of its RoN laws. Although sharing various regional similarities with Ecuador, the division between lowland and highland Indigenous communities, lack of environmental activist base, and unfamiliarity amongst environmental lawyers on RoN's content, have prevented RoN litigation

from developing in Bolivia. These factors, accompanied with Morale's redefinition of decolonization, the country's general political instability, and the lack of transparency and efficacy of Bolivia's legal institutions, help explain the variance in the implementation of its RoN. Nevertheless, while Bolivia's RoN regime illustrates how environmental rights and Indigenous cosmovision can be employed for instrumental reasons, the country's socio-economic and political context differs from that in Canada. Although Canada faces difficulties pertaining to political and economic stability, rule of law, and access to justice, it is to a lesser degree than Bolivia.[7] The strength of Canada's democratic institutions, and stronger environmental advocacy networks, would arguably prevent RoN's misapplication to the same extent.

Analyzing the legal effects of New Zealand's legal personhood laws, it would seem that neither law has had any impact on domestic environmental performance. With only one RoN lawsuit filed to date, and no secondary legislation, policies, or regulations developed, these 'quasi-constitutional' laws' influence on public policy appear negligible. The Te Awa Tupua Act and the Te Urewera Act do not establish either ecosystem's place within the hierarchy of rights, nor assign either entity with distinct substantive rights. Citizen participation in decision-making and procedural rights have also not been noted to improve, with standing limited to each ecosystem's statutory guardians. Nevertheless, by departing from rights orthodoxy, these legal personhood laws better integrate Indigenous relational views into the dominant legal framework. Moreover, by ensuring proactive oversight over Te Awa Tupua and Te Urewera's interests, these laws' governance arrangements act as bulwarks against any prospective environmental threats. Whether said threats are brought on by public or private entities, weak or non-existent policies or laws, other environmental circumstances, or even by their Indigenous representatives. This ensures

[7] Kaufmann and Kraay; Trevor C.W. Farrow et al., "Canada," *Global Access to Justice Project*, https://globalaccesstojustice.com/global-overview-canada/ (Accessed June 6, 2024).

greater accountability and safeguarding of nature's interests, particularly in light of the global biodiversity and climate crises.

These research findings ultimately reveal how the success of RoN laws and their influence on national environmental performance, is largely dependent on each country's domestic circumstances and the RoN model employed. While Ecuador and Bolivia share similar socio-political conditions and some of strongest existing RoN legislation on paper, they significantly vary on how their RoN effect harmful extractive industries. Meanwhile, New Zealand's environmental performance has arguably improved with its legal personhood laws, despite a lack of secondary RoN legislation, policy, regulation, or lawsuits. Given these results, I now consider the respective effects the nature's rights and legal personhood models could have on the protection of old-growth forests in BC, if they were in place today.

Nature's Rights and the Legal Personhood Model: Is One Best?

If Canada subscribed to the nature's rights model as observed in Bolivia and Ecuador's RoN laws, nature would be afforded the most expansive protections. By constitutionally appointing all of nature with distinct substantive rights, old-growth forests would have the right to exist, maintain the functioning of their ecosystem cycles, and be restored when damaged, among others. These rights would be held by all old-growth trees, regardless of their structural and compositional attributes. Nevertheless, such rights distinctions would be of great significance to the preservation of the most at-risk, higher-productivity old-growth stands in Canada. For instance, those remaining in the Fairy Creek watershed. Unlike the legal personhood model approach to RoN, environmental protections would not be reduced to particular ecosystems or natural entities.

The nature's rights model could also advance procedural rights, by allowing any person to speak on nature's behalf. Any Canadian or concerned individual could file a RoN lawsuit against the BC government for permitting logging projects that pose a threat to old-growth forests' ecosystem cycles, or that risk irreparable damage to these forests. Government could then be held responsible for said projects, irrespective of whether integrated land use planning, forestry practices legislation, or resource management initiatives – in their current capacities – have been respected by license holders. Even if existing conventional environmental procedural requirements have been met by a project, Canada's courts could rule that they are insufficient to justify logging, because of potential threats to these ecosystems. This could better safeguard old-growth forests during instances of scientific uncertainty, and ensure that government is held accountable when unsustainable logging operations are approved. Especially, as BC's forestry policy undergoes reform that could see the eventual classification of old-growth not just by biogeoclimatic variant, but by relative site productivity as well.

Still, it is amidst these periods of reform and shifting political positions that companies continue to harvest old-growth trees, despite the presence of logging deferrals, and ongoing discussions with First Nations over land management. This has been attributed to government failure to commit the resources to ensure that old-growth deferrals are being implemented.[8] It is during these periods of political and scientific uncertainty that the nature's rights model could eliminate further barriers to the protection of old-growth in BC. Most notably, if RoN are enshrined in the Canadian Constitution. As illustrated by Ecuador's RoN experience, these CERs could act as a safety net for protecting Canada's old-growth forests when its environmental and forestry policies are weak or un-enforced, and prevent government rollbacks on related policy promises. It

[8] MacLeod 2024.

is through the professionalism of Canada's courts, and the mobilization of civil society actors and Indigenous peoples, that environmental standards could be enforced and gradually expanded upon. Most promisingly, through the development of RoN jurisprudence by Canada's ecologically leaning courts. Arguments for preserving Canada's current development model and prioritizing private property interests through unsustainable timber practices, could be further challenged and balanced against RoN's ecocentric approach to sustainable development. By incorporating Indigenous legal tradition and worldviews into the constitutional RoN, Canada's courts could further secure Indigenous rights through the concept of biocultural rights. Nonetheless, despite recent progress made by Canada's courts involving environmental protections and Indigenous rights, the reality of the Crown's historical oppression of Indigenous peoples, culture, and traditions cannot be overlooked.

The nature's rights model brings additional concerns over rights enforcement. Specifically, ensuring that industry does not log higher productivity old-growth in more remote regions where policy monitoring is more difficult. Whether this be to ensure old-growth deferrals are respected while forestry policy and agreements with First Nations are being determined, or to ensure that old-growth management policy is respected altogether. Although voluntary oversight organizations and monitoring systems can track logging operations from afar, there is a possibility that hectares of old-growth could be logged before any legal action or notice is taken. Moreover, although natural resource officers are tasked with ensuring that public, businesses and government comply with current legislation, oversight difficulties still persist. So, while the nature's rights model could offer the broadest rights protections and standing on nature's behalf, these specificities are meaningless for the protection of old-growth without adequate oversight agencies or mechanisms in place. The nature's rights model is also more susceptible to collective action

problems, due to the predominantly voluntary approach to rights reporting. This could produce results in Canada similar to those encountered in Bolivia: a provisionally strong law with no teeth.

If Canada subscribed to the legal personhood model approach to RoN adhered to in New Zealand, human rights and responsibilities would be limited to ecosystems with explicit recognition. Any rare old-growth forests outside of these areas would be managed according to Canada's current environmental legislation and old-growth forestry policy, thus confronting the same threats they encounter today. With rights limited to particular ecosystems, RoN advocates would not be able to petition the courts to have nature's rights ensured, or have old-growth forest ecosystems restored from developmental projects to the best of human ability. Specific guardians, however, would be appointed to manage ecosystems containing old-growth that have been extended legal personhood. These new governance arrangements could ensure greater oversight for the sustained health of old-growth forests, by reconnecting Indigenous peoples to their territories and restoring their ancient responsibilities to care for the land. Specially, through the appointment of Indigenous representatives who live on and learn from the land, like the bush crews overseeing Te Urewera's interests. This approach could not only support reconciliation by reconnecting Indigenous peoples with their ancestral knowledge, culture, customs, but by further incorporating worldviews and Indigenous legal orders into settler law.

The legal personhood model could therefore secure an approach to old-growth forest management in Canada, that supports a government-to-government framework between Indigenous peoples and provincial governments. Although constitutionally enshrining RoN through the nature's rights model would afford nature the highest and broadest legal rights, extending legal personhood status to particular ecosystems could provide the conditions for a more

active and collaborative ecosystem management strategy. Especially, when old-growth identified as most at-risk of irreversible biodiversity loss occurs on Indigenous land.

A Policy Prescription for Canada

While this paper considers what the effect the constitutional RoN could have in Canada, and on the protection of at-risk old-growth forests in BC specifically, the likelihood of RoN achieving constitutional recognition in the near term is low. As previously discussed, the entrenchment of a stand-alone RoN provision requires extensive political consensus. Direct Constitutional amendment involves approval by Parliament and at least 7 provinces, representing at least 50% of the population of all the provinces, and must be secured within three years' time. This level of agreement has not been achieved since Patriation. Remaining ways that RoN could gain constitutional recognition is through judicial reference or litigation, resulting in a court decision that there is an implicit RoN within existing sections of the constitution.

Unlike the human right to a healthy environment, RoN would prove more difficult to read into existing human rights in the Charter. Namely, s. 7 rights to life, liberty, and security of the person, and s.15 equality rights. Still, although RoN departs from the more anthropocentric, human rights-based framework, there is the possibility for RoN to be implicitly recognized in other sections that violate the rights of First Nations. Infringements to nature's rights in traditional territories containing old-growth forests, for instance, could violate s.2(a) religious freedoms of Canada's Aboriginal people(s). Particularly, when Indigenous "spiritual beliefs concerning the Earth are holistic, deeply held, and linked to their self-determination," and constitute a non-trivial interference with their religious beliefs or practices.[9] RoN could be further read into Aboriginal

[9] Borrows, 2010, 253.

rights in section 35, or advanced through related UPCs, as Aboriginal and treaty rights are reliant on the environment to be preserved.[10] While it presents most reasonable to have environmental rights established through s.35 Aboriginal rights, and include Indigenous legal orders within constitutional interpretation in Canada, they would be limited to Indigenous rights.[11]

All three avenues for constitutionally recognizing the RoN in Canada ultimately require more time than the last remaining stands of old-growth can afford. While the stand-alone constitutional RoN, or implicit recognition of the RoN, could better protect Canada's natural environment from state-led or approved resource extraction in the longer-term by affording nature the broadest rights protection, it would not produce immediate legal action. Even if proponents could successfully demonstrate violations to s.2(a) or s.35 through harm to old-growth forest ecosystems, court proceedings and eventual decisions can take years. Although the research reveals prospective benefits of constitutionally recognizing RoN in Canada, and what this could mean for the protection of Canada's most vulnerable ecosystems, this would only be achieved many years after BC's current forestry policy reforms. In order for RoN to benefit environmental protections in Canada and safeguard rare old-growth forests in the long-term, a hybrid RoN regime would be most effective.

Direct formal amendment of the Canadian Constitution to include the stand-alone RoN would undoubtably extend the greatest rights protections to all of Canada's natural environment, in the most legitimate way. This approach would not only extend authority to represent nature to all people, but capture all potential old-growth forests under threat – not just those with legal entity status or protected within provincial park boundaries. While enforcement is mostly voluntary, the explicit constitutional recognition of nature's rights allows for the gradual expansion of

[10] Collins, 2015, 528-529; Borrows, 2010.
[11] Boyd and Macfarlane, 2014.

environmental protections through Canada's courts. RoN norms can therefore develop and undergo clarifications for particular ecosystems and their vital cycles, and nature more generally. Competing rights interests can be addressed accordingly, through the courts' professionalism and by their considering the constitution in its entirety. The involvement of scientific experts, Indigenous peoples, and key policy players in court decisions, further provide the opportunity for ecological standards to evolve with changing climatic conditions and scientific understandings. Procedural rights and citizen participation could therefore expand, and nature's interests better safeguarded, as Canadian environmental and developmental policies adjust with the climate and biodiversity crises. While this approach to RoN does not guarantee the protection of all at-risk old-growth, it certainly casts the largest net for their possible protection. The constitutional RoN would further require the highest degree of government accountability and transparency on ensuring environmental rights.

Despite arguments supporting the constitutional RoN, there is a chance these CERs will appear too radical for many Canadians. Given the slow development of Canada's environmental policies, and the diversity of views held by Canadians concerning the natural resource sector and developmental policies, the more immediate constitutional recognition of RoN is not imminent. The gradual recognition of RoN through provincial, territorial, and more localized legislation, is far more likely. This bottom-up approach to RoN offers the best avenue for their eventual recognition at the federal level. Not only could this permit RoN norms to develop according to local socio-political, and economic contexts, but could allow for their eventual promulgation across Canada. The same grassroots approach could be prescribed for the development of RoN legal personhood laws, that along with the nature's rights approach, can further supplement the protection of at-risk ecosystems in Canada.

While a recent phenomenon, the legal personhood approach has already seen success in Canada, with the granting of legal personhood status to the Magpie River in Quebec. The Magpie River, located on Quebec's north shore and traversing through the ancestral territory of the Innu Ekuanitshit, has remained mostly free-flowing from hydroelectric dams. Facing threats to its ecological flow and freshwater ecosystems from impending hydro developments, environmental advocates and community groups began discussing how to best protect the river. This resulted in an eventual resolution adopted between the Innu Council of Ekuanitshit and the Minganie regional municipality, granting the river legal personhood in 2021. The river was granted nine legal rights, including the right to flow, have its cycles respected, and maintain its biodiversity, that its appointed guardians must ensure are upheld.[12] Adhering to the guardianship approach modeled in New Zealand, the Magpie relies on traditional Innu custom and knowledge, and attracts tourism for internationally recognized white water rafting.[13]

This successful implementation of nature's legal personhood in Canada, reveals how RoN can slowly develop at the local level to protect nature from the damages associated with resource development projects. It also demonstrates how a region can divert to other fiscally-lucrative economies, like eco-tourism. By appointing the Magpie River with legal personhood status, the threat of hydroelectric development was avoided, notwithstanding Quebec's reliance on the industry. While this paper deliberates what the stand-alone constitutional RoN could look like in Canada, and its influence on the protection of old-growth forest ecosystems, the legal personhood approach to RoN would effectively supplement Canada's environmental rights protections. Not

[12] Brigitte Pellerin, "A new era for nature's rights," *CBA National*, January 31, 2024, https://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2024/a-new-era-for-nature-s-rights (Accessed April 6, 2024).
[13] "The First River to Have Recognizes Rights in Canada," *Earth Law Centre*, April 6, 2024, https://www.earthlawcenter.org/blog-entries/2021/4/the-magpie-riverfirst-river-granted-rights-in-canada (accessed June 20, 2024).

only would the legal personhood approach mandate guardians to proactively oversee ecosystems or at-risk areas containing old-growth, but it could also draw from First Nations Guardians programs developing across Canada. These Guardians initiatives manage protected areas and ecosystems according to Indigenous and western science, in a manner that reconnects Indigenous peoples to their culture, and upholds their relationship and responsibilities to the land.[14] These programs were recently buttressed by the national First Nations Guardian Program, securing federal funding and resources to aid Indigenous guardians tackle the biodiversity crisis and climate change.[15] The legal personhood approach to RoN demonstrates great complementarity with the Guardians programs in Canada, presenting a meaningful opportunity to place ecosystems under legal protection, through Indigenous-led management bodies.

Both the nature's rights and legal personhood models demonstrate considerable utility for the prospective protection of old-growth forest ecosystems in BC, and other at-risk natural entities in Canada. While unlikely that this legal approach to environmental protections will produce immediate results – specifically, when considering the possibility for RoN's constitutional entrenchment – it offers a more ecocentric approach to environmental and human rights protections moving forward. It further provides the opportunity to recognize and involve Indigenous cosmologies, laws, and governance structures, within Canada's dominant legal system. Through both the incorporation of Indigenous worldviews and legal perspectives into the construction of RoN provisions, and the Indigenous guardianship arrangements of legal personhood laws. Although RoN employs settler legal mechanisms and extends a liberal system of law that departs

[14] "What Guardians Do," *Land Needs Guardians*, https://landneedsguardians.ca/what-guardians-do (Accessed June 20, 2024).
[15] Steph Kwetásel'wet Wood and Ainslie Cruickshank, "Indigenous guardians connected by new national network in Canada – the first of its kind in the world," *The Narwhal*, December 9, 2022, https://thenarwhal.ca/first-nations-guardians-network/ (Accessed June 20, 2024).

from the relational approach of Indigenous law, I posit that it offers the opportunity for a multi-juridical perspective in Canada. As best described by Borrows, "for effective constitutional governance *in our current context*, [w]e must design systems of government that accommodate deeply differing and contrasting views."[16] In order to support a transsystemic approach to the law in Canada, support reconciliation, and transition to a more ecological approach to environmental protections, we must improve the condition of the structures currently in place. RoN is one such way forward.

Areas of Future Research

While RoN offers an alternative approach to sustainable development and ecological law founded on Indigenous worldviews and legal orders, there are challenges to its application in Canada. For instance, without adequate collaboration with Canada's Indigenous communities on RoN's norm development, this legal instrument could simply reinforce settler colonial law. RoN's foundation in rights liberalism already confounds Indigenous views of human reciprocity with nature and all earth's communities. For this reason, further discussions and greater research must be conducted on how existing and re-emergent Indigenous laws could be incorporated within the Western legal framework.

Additional research could also be conducted on how existing First Nations Guardians initiatives across Canada might be implicated in the creation of governance arrangements for ecosystems appointed with legal personhood. Especially, with the creation of the First Nations National Guardians Network, there is the opportunity for Guardians to collaborate and manage these protected areas to ensure nature's interests are upheld. This could lead to the development of

[16] John Borrows, *Law's Indigenous Ethics*, (Toronto: University of Toronto Press, 2019) 31.

more robust ecosystem management plans, that are equipped with resources to better monitor development projects and changing climatic conditions.

Finally, further consideration should be made on how RoN could impact other threats to Canada's natural environment and its communities, pertaining to non-renewable industries. This environmental rights approach and legal mechanism could have deep implications for addressing ongoing disputes involving industry and civil society, like that involving the Grassy Narrows First Nation's and the mercury contamination of their river.[17]

[17] Sarah Law, "Grassy Narrows First Nations appeals to international human rights commission over mercury contamination," *CBC News*, July 10, 2024, https://www.cbc.ca/news/canada/thunder-bay/grassy-narrows-first-nation-human-rights-commission-1.7258531 (Accessed July 24, 2024).

Chapter 8: Conclusion

RoN is an emergent legal philosophy and approach to environmental protections rapidly expanding at the global level. Consistent with principles of Earth Jurisprudence, it departs from the philosophical foundations of modern society and law, emphasizing human interconnectedness and responsibility to the natural world. Finding commonality with many Indigenous worldviews and traditions, RoN offers a remedy to the anthropocentrism of environmental law, and incorporates Indigenous legal orders into the dominant Western frame. Despite arguments made for human-rights approaches to CERs, the constitutional RoN offers a more ecocentric approach to sustainable development and response to the planetary crisis. It also presents a legal instrument with meaningful implications for the protection of old-growth forest ecosystems in Canada.

While not a silver bullet to recurrent trends in BC's forestry practices, RoN offers a legal foothold to better balance economic and environmental rights in a resource dominant country. As demonstrated by Ecuador, Bolivia, and New Zealand's RoN experiences, the success of a country's regime is reliant on the RoN model employed and the country's socio-political conditions. Based on the research, there is reason to believe that the stand-alone constitutional RoN could safeguard Canada's remaining old-growth from weak an unenforced forestry policy. Especially, during periods of policy reform and with evolving scientific understandings on old-growth ecosystem health. These CERs could further strengthen procedural rights, prevent rollbacks on government policy promises, and improve government accountability when approving and overseeing logging operations. The professionalism and ecological leanings of Canada's courts could further see the creation of biocultural rights though the interweaving of Indigenous rights and RoN. Not only could this strengthen existing Aboriginal rights, but along with RoN provisions, incorporate Indigenous worldviews and legal orders into Canada's dominant

legal system. Despite these findings, the constitutional recognition of RoN in Canada is far from imminent. Although this legal tool could secure the sustained health of old-growth forests in the long-term, ensure environmental accountability at every level of government, and reflect Canadian values, it will not protect the most at-risk old-growth in the immediate term.

The gradual recognition of RoN through provincial, territorial and local legislation, and the development of legal personhood laws, provides a bottom-up approach to RoN norm development. This hybrid approach to RoN could sooner protect at-risk ecosystems and result in their eventual recognition at the national level. While less expansive, the legal personhood approach to RoN could ensure more active oversight for significant natural entities through the appointment of Indigenous-led governance bodies. Demonstrating complementarity with existing Guardians programs in Canada, the legal personhood model could further support Indigenous peoples' reconnection to their traditional territories, and promote the recovery of ancestral practices and customs severed by colonization. Nevertheless, while the nature's rights and legal personhood models hold commonalities with Indigenous conceptions of reciprocity with nature, they are still products on non-Indigenous legal mechanisms. To foster reconciliation, legal pluralism, and decolonize environmental law, requires the active collaboration of Canada's Indigenous peoples in RoN's development.

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