The Legal Standing of Nature and Right to a Healthy Environment

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The Legal Standing of Nature and Right to a Healthy Environment

by the

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Executive Summary

This paper looks at nature and the environment through a double lens. On one hand, it analyzes nature as a rights holder, referring to the legal rights of nature and its protection. On the other hand, the paper analyzes the Canadian Charter of Rights and Freedoms and the human right to a clean and healthy environment, in Canada and internationally. This paper will discuss new legislation granting oceans, trees, mountains, rivers, and ecosystems the same legal rights as human beings. The focus is placed on Canadian and international law regarding the legal standing of nature and the environment. We focus on countries that have passed legislation granting legal rights to the environment, including India, Bolivia, New Zealand, Ecuador, and we address the situation in Canada. In courtrooms and countries all over the world, laws and perspectives are changing and moving towards protecting the environment. This paper provides information about new legislation and perspectives in many places.

Introduction

All around the world, humans are experiencing the effects of environmental change, including global warming and pollution. The human race is growing while destroying animals, forests, and ecosystems (David R. Boyd, *The Rights of Nature, A Legal Revolution That Could Save The World* (Toronto: ECW Press, 2017) at Intro [Boyd, *Rights of Nature*]). In *Rights of Nature,* (at Intro), David R. Boyd suggests three main beliefs that are attributed to the reason human beings mistreat animals, species, and nature. The first is the belief that humans are superior and separate from other species, the second is that nature is the property of human beings, and the third is that humans have the right to and should pursue economic growth without limitations, and this is usually the goal of the community (Boyd, *Rights of Nature* at Intro). Economic growth is the main intention for businesses and governments and it usually takes precedence over environmental concerns (Boyd, *Rights of Nature* at Intro). For example, laws and contracts are set in place to protect property rights of individuals and businesses instead of protecting the environment (Boyd, *Rights of Nature* at Intro).

The notion of nature as a rights holder acknowledges that humans are not above nature; animals, oceans, forests, mountains, and so on, should all be granted the same legal rights as human beings. In western legal systems, humans are considered a separate species from ecosystems and animals (Boyd, *Rights of Nature* at Intro). The majority of legal systems treat animals and the environment as "property" (Boyd, *Rights of Nature* at Intro). Most rights and protections that exist in legal systems are not granted to animals and where legal protections apply to include animals, reptiles and farm animals are excluded and seen as property to be used by the meat industry (Boyd, *Rights*

of Nature at Intro). As well, little protection is given to animals in regards to research or agriculture (Boyd, *Rights of Nature* at Intro). This reinforces the concept that human beings do not see nature as their equal, but as property. The environment and ecosystems are not awarded legal standing (that is, they are not recognized as legitimate parties by courts). Further, environmental protection laws legalize environmental damage by placing a limit on damage or regulating how much pollution corporations can cause within the law (*Global Alliance for the Rights of Nature*, "What is Rights of Nature?" online: Global Alliance for the Rights of Nature [Global Alliance]). *The Rights of Nature* involves a universal approach to the relationship between humans and nature. Human beings, as well as other species, are all intertwined and a balance between them should be maintained (Global Alliance).

Taking a holistic approach to nature also enhances environmental justice. Environmental Justice is defined in the proposed *Canadian Environmental Bill of Rights* as: "the principle that there should be a just and consistent distribution of environmental benefits and burdens among Canadians, without discrimination on the basis of any ground prohibited by the *Canadian Charter of Rights and Freedoms*" (David R. Boyd, "Elements of an Effective Environmental Bill of Rights" (2015) 27 J. Env. L. & Prac. 201 [Boyd, "Elements"] at 223). The concept of environmental justice means that the benefits of, harms of, and access to the environment should be equally shared between all members of a community (Boyd, "Elements" at 222). However, in Canada, socially and economically marginalized communities are exposed to more environmental harm and likely will not have equal access to natural resources from the environment (Boyd, "Elements" at 222). It is asserted that recognizing the legal standing of the environment would increase access to justice. Access to justice allows individuals to ensure that they are consulted and able to participate in decision-making on environmental matters. It empowers groups and brings about equality, enables individuals to seek redress from courts and tribunals, and increases society's ability to prevent environmental harm (Boyd, "Elements" at 237).

This paper discusses the Rights of Nature and the human right to a healthy environment. We use the terms "environment" and "nature" to describe mountains, ecosystems, rivers, oceans, trees, lakes, and other elements of nature. (We have decided to leave a discussion about animal rights to the future.) When analyzing environmental laws, it is important to think about why these issues are important and how environmental protection will have long-term effects; not just for our generation, but for future ones.

Section III, History, describes human rights and the *Canadian Charter of Rights and Freedoms* in Canada. As well, it discusses the relationship between Canadian law and international law. Canadian lawmakers are allowed to consider and refer to international law when making decisions if there is no conflicting domestic law or if the domestic law is ambiguous and unclear. This section will also provide a brief overview of environmental rights in Canada and internationally.

The Human Right to a Healthy Environment, Section IV, focuses on international law and the right to a healthy and clean environment from a human rights perspective. The human right to a healthy and clean environment has been recognized in legislation and constitutions all over the world. The focus will be on legal materials from the following countries: India; Bolivia; Ecuador; and New Zealand. As well, it will briefly discuss the Inter-American Commission on Human Rights. In Canada, the right to a healthy environment is not recognized in legislation or in the *Constitution*. However, Canadians feel strongly about changing this and about enhancing environmental safeguards.

Section V discusses the meaning of legal standing in Canada and provides an overview of what the Rights of Nature are. The concept of the Rights of Nature encompasses the entirety of the environment and grants the environment the same legal rights as human beings. The environment should have its own rights instead of being thought of as property and only used for human consumption. This section will discuss countries where the Rights of Nature have been recognized—including India, Ecuador, Bolivia, and New Zealand. For example, New Zealand has granted a river and a national park their own legal rights and acknowledged them to be their own legal entities. This section then moves on to discuss Indigenous communities and their relationship with nature. Although Canada has not granted legal rights to the environment, Indigenous rights are based on the relationship between Indigenous (Aboriginal) people and the environment. These rights have been incorporated into the Canadian Constitution. This section also provides examples of Aboriginal* rights through Canadian case law.

The current Canadian and international environmental laws are discussed in Section VI. This section discusses the International Tribunal for Environmental Claims, protection of the environment and its processes. In addition, it discusses Canadian environmental legislation, specific to each province/territory.

Finally, Section VII discusses recommendations for incorporating international environmental principles into Canadian domestic law, enforcing these laws and granting protection to the environment.

**A note re terminology: While the current preferred term among many Canadians is "Indigenous", where our* Charter, Constitution Act*, legislation or caselaw use "Aboriginal" or "Indian", we use that terminology.*

History

1. Canada

Human rights are held by all human beings regardless of their race, gender, religion, or sexual orientation. Everyone has a set of human rights, and everyone has the right to be treated equally. Canadian human rights are protected federally and provincially, through the *Canadian Charter*

of Rights and Freedoms and the *Canadian Human Rights Act* (Brian Orend, *Human Rights: Concept and Context* (Peterborough, Ont: Broadview Press, 2002) at 24 [Orend, *Human Rights*]). In Canada, each province has its own human rights legislation, and although the Acts between provinces and territories have similarities, there are some differences, which are important to recognize when interpreting each statute. Every individual in Canada has guaranteed human rights under both the *Charter of Rights and Freedoms* and the applicable provincial or territorial *Human Rights Act*. When these rights are violated, legal remedies are available (Peter Hogg, *Constitutional Law of Canada*, *Student Edition* (Toronto: Carswell, 2016) at 36.1 [Hogg, *Constitutional*]; Orend, *Human Rights* at 24).

The *Charter of Rights and Freedoms* is part of the Constitution of Canada (*Charter*; Hogg, *Constitutional* at 1.2). Section 52 of the *Constitution* states that "the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" (*Charter*; Hogg, *Constitutional* at 36.1 and 1.2). The *Charter* was passed in 1982 and was entrenched into part of the Canadian *Constitution*, meaning it is very difficult to change. The *Charter of Rights* applies to the federal, provincial, and municipal governments, and to all Canadian citizens, and, in some cases, visitors. The *Charter of Rights* protects basic human rights and civil liberties and remedies are available for individuals when these rights are infringed Hogg, *Constitutional* at 36.2). Specifically, s 7 of the *Charter*, the Right to Life, Liberty and Security of the person, states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Countries that have added the human right to a clean environment in their constitution have included it under the right to life and tied the human right to a clean environment to their constitutional rights. This is important to note because even though Canadian law has its own domestic law, international law may serve as a precedent in some circumstances.

Canadian domestic laws are established through provincial and federal governments, as well as through court rulings. However, individuals may be able to access a remedy for a breach of human rights through international law (Linda McKay-Panos, Human Rights and Resource Development Project: *How Human Rights Laws Work in Alberta and Canada* (Alberta Civil Liberties Research Centre, 2005) at 20 [McKay-Panos, Human Rights]; *Charter*; Hogg, *Constitutional* at 36.9 (c)). International law consists of conventions and treaties entered into by Canada (McKay-Panos, *Human Rights* at 20). International human rights law is also an important component of Canadian law. The government of Canada has passed legislation incorporating international treaties directly into domestic law, and where Canadian law is silent on a particular legal issue, international law can be relied on to assist the courts in interpreting Canadian law, as long as the international law does not conflict with any other Canadian domestic law (McKay-Panos, *Human*

Rights at 20; Hogg, *Constitutional* at 36.9 (c)).

International law consists of conventions, treaties, or customary law. Conventional international laws are laws that have been approved by Canada and have often been signed or agreed to by numerous countries (McKay-Panos, *Human Rights* at 20). Customary international law consists of legal concepts which have gained recognition around the world, and, because these concepts are so well-known, they apply universally (McKay-Panos, *Human Rights* at 20; Hogg, *Constitutional* at 36.9). International human rights law can be used by Canadian courts to help interpret domestic legislation, including the *Charter*. The *Charter* does not make express references to specific international conventions; however, the *Charter* makes references to international models regarding human rights law (McKay-Panos, *Human Rights* at 20). Several sections within the *Charter* also reference the *International Covenant on Civil and Political Rights* and *European Convention on Human Rights* (McKay-Panos, *Human Rights* at 16; Hogg, *Constitutional* at 36.9).

R v Big M Drug Mart Ltd., is a landmark Canadian Supreme Court of Canada (SCC) case. The Alberta Court of Appeal decision in *Big M Drug Mart* discusses the importance of the *Charter*:

Thus it can be seen that the Canadian Charter was not conceived and born in isolation. It is part of the universal human rights movement. It guarantees that the power of government in Canada shall not be used to abridge or abrogate the fundamental rights to which every Canadian, as well as every other human being in the world, is entitled by birth. The Charter can be divided into two parts, one dealing with fundamental human rights in harmony with the International Covenant, the other dealing with matters peculiar to Canada. It is of course in the first part that s.2 of the Charter must fall.

That these fundamental freedoms were entrenched in the Charter in conformity with Canada's commitment in the International Covenant cannot be doubted. Even the Canadian Bill of Rights adopted before the International Covenant, was intended to link Canada with the worldwide movement for human rights (*Big M Drug Mart Ltd*., ABCA at paras 88 and 89).

When applying human rights law, the SCC has stated that customary and conventional international laws are relevant and that sources of international human rights law must be considered when interpreting the *Charter of Rights* (McKay-Panos, *Human Rights* at 17). Judges generally will rely on international agreements if there is ambiguity in domestic law (McKay-Panos, *Human Rights* at 17).

In the case *R v Rahey*, the SCC made references to the *European Convention on Human Rights* to resolve ambiguity in s 11 of the *Charter*. Thus, international law, especially in regards to human rights, plays an important role when interpreting *Charter* rights. Canada is also part of the United Nations and is responsible for implementing international human rights law into its domestic human rights law (McKay-Panos, *Human Rights* at 20).

2. International Legal Principles

The *Universal Declaration of Human Rights* was passed on December 10, 1948, and contains provisions regarding areas of human rights law and recognizes the importance of these laws (McKay-Panos, *Human Rights* at 21). Canadian domestic lawmakers are able to consult international law when dealing with human rights issues. Human Rights law protects individuals' civil liberties and human rights. Many countries around the world have started to intertwine human rights with the environment in which they live. Because human rights are related to both the environment and human lives, environmental rights and laws have been changing to fit with this change in perspective.

A landmark event for environmental rights was the First Earth Day, on April 22, 1970, in the United States (Linda Hajjar Leib, *Human Rights and the environment: philosophical, theoretical, and legal perspectives* (Brill, 2011) at 37 ([Leib, *Human Rights*]). Following that, in Rio de Janeiro, Brazil, in 1992, the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit or the Rio Summit, took place and brought together 172 countries, along with 100 heads of state (Leib, *Human Rights* at 37; Gunnar G. Schram, "Human Rights and the Environment" (1992-1993) Nordic J. Int'l L. 141 (HeinOnline) [Schram, "Human Rights"]). Two international instruments on the environment were created at this Summit: the *Rio Declaration* and *Agenda 21*. The *Rio Declaration* is a statement of principles to be a source of guidance for domestic law regarding environmental issues (Leib, *Human Rights* at 37; Gunnar, "Human Rights" at 141–142). *Agenda 21* consists of four sections: Social and Economic Dimensions; Conservation and Management of Resources for Development; Strengthening the Role of Major Groups; and Means of Implementation (Leib, *Human Rights* at 37). Two environmental treaties were also adopted at the Earth Summit; these include the *UN Convention on Biological Diversity* and the *UN Framework Convention on Climate Change* *(UNFCCC)* (Leib, *Human Rights* at 37). The first Earth Day was one of the first times environmental protection was recognized and this has moved the world towards the recognition of the human right to a clean, healthy environment (Leib, *Human Rights* at 37).

Human Rights to a Healthy Environment

Environmental law deals with regulating environment-related activities, however, through human rights, environmental degradation and protection can also be addressed (Leib, *Human Rights* at 2). Linda Hajjar Leib proposes three reasons for incorporating the environment into human rights law; including the fact that human rights can help promote environmental protection by allowing individuals to defend their interests and human rights regarding

environmental protection has already been incorporated into international and domestic laws around the world (Leib, *Human Rights* at 2). In the Stockholm Declaration, 1972, the right to a healthy environment was reiterated. The Stockholm Declaration states (in part):

Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Principle 2: The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

1. International Law

In many countries, the right to a healthy environment has been recognized as a human right. The right to a healthy environment is referred to in legislation in more than 100 countries (Boyd, "Elements" at 203). Boyd notes that: "94 percent of UN nations (181 out of 193) recognize this right" (Boyd, "Elements" at 203).

There has been a shift in perspectives and a movement towards an individual's right to a healthy environment. Many countries have enacted laws that involve environmental rights. Some countries have passed laws creating ways for the public to participate in the incorporation and enforcement of environmental laws (Boyd, "Elements" at 213; Schram, "Human Rights" at 144-145). As of 2015, the right to a healthy environment had been incorporated into constitutions in twelve different nations (Boyd, "Elements" at 213). Where the right to a healthy environment has been incorporated into a constitution, the provisions will usually include substantive and procedural rights in environmental legislation (Boyd, "Elements" at 213). These countries include France, Colombia, Portugal and Ecuador; Boyd notes that: "the constitutional environmental provisions themselves are so detailed that they can be characterized as including a *de facto* environmental bill of rights" (Boyd, "Elements" at 213). This perspective also exists in the United States; Hawaii, Illinois, Massachusetts, Montana, Pennsylvania and Rhode Island have validated environmental rights in their constitutions (Boyd, "Elements" at 209).

A. India

The Supreme Court of India stated that a "hygienic environment is an integral facet of the right to a healthy life and it would be impossible to live with human dignity without a humane and healthy environment" (Leib, *Human Rights* at 73). Leib notes that in *Subhash Kumar* the Supreme Court of India stated that the right to life "includes the right to enjoyment of pollution-free water and air for full enjoyment of life." Leib also notes (at 74) that another Supreme Court of India case, *Rural Litigation and Entitlement Kendra v Uttar Pradesh* stated that "every citizen has a right to fresh air and to live in a pollution-free environment." The Supreme Court of India (in *Kendra*) also ruled that the limestone quarries in the Dehra Dun area should be shut down in order to "protect and

safeguard the right of the people to live in a healthy environment with minimal disturbance of ecological balance." The right to a pollution-free environment is part of a right to life (Leib, *Human Rights* at 74).

Environmental provisions and duties are included in the *Constitution of India*. However, these provisions are not enforceable on their own because they are under the Directive Principles of State Policy (DPSP) (Leib, Human Rights at 74). Leib notes that according to the *Constitution of India*, under Article 37, the environmental provisions "shall not be enforceable by any court, but are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws" (Leib, *Human Rights* at 74). A majority of the provisions included in the DPSP are associated with social and cultural rights (Leib, *Human Rights* at 74). Leib notes that Articles 48A and 51A are part of the DPSP, and state that Indian citizens and the country have duties regarding environmental protection (Leib, *Human Rights* at 74). Leib also notes that Article 48A states that the "state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country," and Article 51A states that it "shall be the duty of every citizen of India … to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures" (Leib, *Human Rights* at 75). The Constitutional provisions of India have been referred to in countless judicial decisions and have led to the recognition along with the enforcement of the human right to a clean environment (Leib, *Human Rights* at 75).

Leib notes (at 74-75) that the High Court of India, in the case of *L.K. Koolwal v State of Rajasthan and Others*, held that every individual has a constitutional duty to protect the environment; as well, under Article 51A, individuals also have the right "to go to the Court for the enforcement of the duty cast on the State instrumentalities agencies" (Leib, *Human Rights* at 75).

A connection can be made between the right to life, an appropriate living environment, and the right to health; a healthy environment can be seen as one of the first steps to a healthy living standard (Leib, *Human Rights* at 75). The Indian judiciary is known for having a large role in protecting the environment through the human right to life (Leib, *Human Rights* at 75). The Supreme Court of India interpreted the constitutional right to life in broad terms and included the protection of the environment under this section (Leib, *Human Rights* at 75). Leib notes that the lack of clean drinking water, poor sanitation, and pollution are the main causes of both health problems of the Indian people and environmental health problems (Leib, *Human Rights* at 75).

B. Inter American Commission on Human Rights

While in Canada there is a lack of recognition of the enforcement of the *American Convention on Human Rights*, this document is important to environmental rights. The Canadian government has noted that ratification of the Convention would make a minor impact on Canadians, due to the fact that Canada also has a *Charter of Rights and Freedoms*, along with a legislation provincially and

federally to protect human rights (Canada, Senate Canada, Standing Senate Committee on Human Rights, Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights (May 2003) Chapter IV (Honourable Shirley Maheu) [*Senate*]). As well, in Canada, the absence of legislation regarding the implementation of international treaties limits the ability to rely on these in a court of law (*Senate*). There are also some Canadian governmental concerns with recognizing the *American Convention on Human Rights*. For example, Article 4: "protecting the right to life in general from the moment of conception" and Article 13: Freedom of Expression and Prohibition of Prior Censorship, along with other Articles, have raised concerns for Canadians and government members (*Senate*).

However, Canada is subject to the jurisdiction of the Inter-American Commission and this is non-binding in nature (*Senate*). In addition, other states in North, South and Central America have recognized the *American Convention*. The Inter-American Commission on Human Rights (IACHR) stated that the "realisation of the right to life, and to physical security and integrity is necessarily related to and, in some ways, dependent upon one's physical environment" (Leib, *Human Rights* at 75). The IACHR also held, in the case of *Sawhoyamaxa Indigenous Community v Paraguay*, 2006, (at para 145) that "Paraguay failed to respect the right to life of the Sawhoyamaxa Community members since the lack of recognition and protection of their lands forced them to live on a roadside and deprived them from access to their traditional means of subsistence" (Leib, *Human Rights* at 75). The IACHR also noted (at para 145) that many community members died after a lack of access to nutrition and medical attention. The court held (at para 125) that "states have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such an inalienable right" and "states must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life." Leib notes the Inter-American Commission has advanced the protection and preservation of the environment (Leib, *Human Rights* at 76). However, the IACHR has ruled that in order for the right to a healthy environment to have been violated, the conditions must be life-threatening, and the environmental danger has to be severe and directly endanger human life; although the right to life includes environmental protection, it is limited to direct threats to life (Leib, *Human Rights* at 76).

C. Bolivia

Protecting nature and recognizing the rights of nature can arise through recognizing the human right to a healthy environment. In the *Bolivian Constitution*, 2009, Article 33 states "Everyone has a right to a healthy, protected, balanced environment." The exercise of this right allows "individuals and communities of present and future generations, as well as other living things, to develop in a normal and permanent manner" (Joel Colón-Ríosa, "Constituent Power, the Rights of Nature, and Universal Jurisdiction" (2014) 60 McGill L.J. 127 at 149 (HeinOnline) [Colón-Ríosa,

"Constituent Power"]). Bolivia's Constitution has recognized the right to a healthy, clean environment and its importance (Arts 34, 35).

D. Ecuador

The *Constitution of the Republic of Ecuador, 2008* includes many provisions which state that "individuals have the right to live in an environment that is pollution-free, healthy, and ecologically balanced. They have a corresponding obligation, along with the government, to 'respect the Rights of Nature', preserve a healthy environment and use natural resources sustainability" (Boyd, *Rights of Nature* at 172). Ecuador is another nation that has made huge steps towards environmental protection and prevention from degradation.

E. New Zealand

In 2011, the New Zealand government appointed a Constitutional Advisory Panel to gather information from the public to create a modern version of their Bill of Rights and include their views of environmental rights (Boyd, *Rights of Nature* at 157). The Advisory Panel recommended adding environmental rights to the Bill in 2013 and that it be added as a human right to a healthy environment; this has already gained legal recognition in some countries (Boyd, *Rights of Nature* at 157). Another suggestion was to implement the rights of the environment, along with obligations on the government and duties to the citizens (Boyd, *Rights of Nature* at 157).

2. Canada

As noted above, many countries around the world are recognizing the human right to a clean environment within their constitutions, jurisprudence and legislatures. Canada, however, does not recognize the right to a healthy environment (Boyd, *Rights of Nature* at 2). In "Elements" (at 202), Boyd notes that studies show that ninety percent of Canadians have expressed concerns regarding environmental protection and health issues connected to the environment, concerns also span to their children's health, grandchildren's health, and future generations. He also notes that the majority of Canadians agree that access to clean water is a basic human right; the right to live in a healthy environment should be recognized and laws protecting the environment should be much stricter ("Elements" at 203-4).

According to a study by Thomas Gunton and K.S. Calbick for the David Suzuki Foundation in 2010 (*The Maple Leaf in the OECD*), Canada's environmental performance is ranked 24 out of the 25 of the wealthiest nations (at 1). Boyd notes that if all seven billion people on earth consumed resources and produced waste the same as Canadians do, three additional planets would be needed for the survival of human beings; Canada has the "seventh-largest per capita ecological footprint" in the world ("Elements" at 205). However, Canadians seem involved in environmental change. Boyd notes that the David Suzuki Foundation has started an environmental rights movement and thirty municipalities across Canadian provinces have expressed interest in the Blue Dot campaigns, which are working towards passing laws that recognize the human right to

a healthy environment (Boyd, "Elements" at 202).

The human right to a healthy environment has been discussed in numerous articles. David Boyd's article: "*Elements of an Effective Environmental Bill of Rights*" sets out factors describing why Canada needs to implement environmental rights, including the reason that most Canadians value:

- environmental protection;
- preserving Canada's landscapes, natural wealth, and improving Canada's environmental performance;
- protecting the health of Canadians, future generations and avoiding environmental consequences, such as contaminated food, water and air pollution; and
- believing environmental rights are at the core of Indigenous law communities, laws; and
- these values would move Canada closer to reconciliation with Aboriginal people (Boyd, "Elements" at 203-4).

Boyd also notes: The recognition of a human right is accompanied by a set of corresponding obligations—falling primarily upon the shoulders of government—to respect, protect, and fulfil the right. Respecting the right means that governments cannot take actions that violate the right, such as dumping toxic waste from military operations into a river or lake (Boyd, "Elements" at 226-227).

It is not enough just to value the environment; steps must be taken to ensure environmental rights are protected. In 2014, the New Democrat Party introduced Private Members' Bill C-634 (2nd Session, 41st Parliament, 2014), the *Canadian Environmental Bill of Rights*, recognizing that Canadians have a right to live in a healthy environment, and this right included procedural guarantees and provisions requiring measures to be taken to protect this right.

The proposed *Canadian Environmental Bill of Rights* stated:

> 9(2) The Government of Canada has an obligation, within its jurisdiction, to protect the right of every resident of Canada to a healthy and ecologically balanced environment.
>
> (3) The Government of Canada is the trustee of Canada's environment within its jurisdiction and has the obligation to preserve it in accordance with the public trust for future generations.

In 2015, Private Members' Bill C-202 was re-introduced by the New Democrats and received first reading. It did not, however, proceeded any further. In 2017, David Suzuki lobbied for progress in this area, noting that more than 110 countries have constitutions that include the right to a healthy environment (David Suzuki "Why Canada needs an Environmental Bill of Rights" (April 21, 2017) Canadian Geographic).

The Province of Ontario also passed an *Environmental Bill of Rights* in 1993 (SO 1993, c 28). This law gives Ontarians the right to participate in environmental decision-making.

Rights of Nature

Many countries are moving towards the recognition of the human right to a clean and healthy environment. There are some countries that have taken this perspective a step further and have granted rights to the environment. Boyd defines "Rights of Nature" as "the rights of non-human species, elements of the natural environment and…inanimate objects to a continued existence unthreatened by human activities" (Boyd, *Rights of Nature* at 137). Christopher D. Stone, in "*Should Trees Have Standing-Toward Legal Rights for Natural Objects,*" (45 S. Cal. L. Rev. 450 at 453 (HeinOnline) [Stone, "Trees"]) argues that corporations, women, black people, and children have been granted legal rights over the course of history; therefore, nature's rights should be embraced as well. All the legal rights relating to corporations and minority groups seemed impossible and unbelievable until they were passed (Stone, "Trees" at 453).

The Rights of Nature ideology takes the view that human beings need to stop treating nature as objects or property, and change their perception of nature (Boyd, "Elements"; Stone, "Trees," at 453). Nature and human beings are connected, and life, for our generation and future ones, is only sustainable when the environment is protected. Human beings and plants, rivers, forests, and animals share the right to exist (Boyd, "Elements" at 221; Stone, "Trees," at 453). When recognizing the Rights of Nature, the approach should involve placing limits on use in order to preserve the balance of the ecosystem (Boyd, "Elements"). For example, cutting down trees may be necessary to establish a home, however, destroying a forest or exterminating an animal species has a negative effect on humanity; we may not see these effects in our generation but future generations will (Boyd, "Elements" at 214).

Several countries around the world have recognized nature as a rights holder and granted nature legal standing. "Standing" is defined as the legal permission to appear as an applicant in court (Boyd, "Elements" at 238; Hogg, *Constitutional* at 36.2; Stone, "Trees" at 453; Mary Warnock, "Should Trees Have Standing?" (2012) 3 J. Hum. Rts. & Env't. 56 at 57 (HeinOnline) [Warnock, "Standing"]). Trees, rivers, mountains, and other elements of the environment are not able to appear in court and they would not be granted standing themselves because they are not able to speak to their own case. However, this fact should not stand in the way of granting them standing because children and mentally incompetent people in the judicial system are allowed to have a guardian/advocate appointed to speak on their behalves (Boyd, "Elements" at 239-40; Hogg, *Constitutional* at 36.2; Stone, "Trees" at 453; Warnock, "Standing").

1. International

The United Nations General Assembly has talked about the Rights of Nature, referencing a proposed *Universal Declaration on the Rights of Mother Earth*, (Law on the Rights of Mother Earth, Law No. 71 of December 2010 [*Universal Declaration of Rights of Mother Earth*, 2010] (Boyd,

"Elements" at 226). There has also been recognition of human rights and the protection of nature through the International Court of Justice (Colón-Ríosa, "Constituent Power" at 147). For example, in *Hungary v Slovakia*, [1997] ICJ Rep 88 at 91, in a Separate Opinion, the Vice-President stated, "the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself" and that "damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments." (Colón-Ríosa, "Constituent Power" at 147).

The constitutionalization of the Rights of Nature ensures that humans can live in a healthy and clean environment, have a right to the enjoyment of life, and recognize the rights of our environment, as well as, grant nature its own rights, similar to the Indigenous perspective. Many countries around the world, including Switzerland, Portugal, France, Columbia and Brazil, have specified a set of obligations to the government regarding nature and its protection (Boyd, "Elements" at 227). For example, The Constitution of the Portuguese Republic (April 2, 1976 sets out the government's duties:

Art. 66(2) states: It is the duty of the State, acting through appropriate bodies and having recourse to or taking support on popular initiatives, to:

a) Prevent and control pollution, its effects and harmful forms of erosion;

b) Order and promote regional planning aimed at achieving a proper location of activities, a balanced social and economic development, and resulting in biologically balanced landscapes;

c) Create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical or artistic interest;

d) Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

The notion that nature has rights and value is reiterated in international laws in many countries (Boyd, *Rights of Nature* at 99). Most of the world's legal systems treat animals, nature, and ecosystems as property; however, this approach needs to change in order to sustain life and the environment. Many countries have made huge efforts to change perspectives between nature and humans; nature has been granted rights and legal protections in the Constitutions of Ecuador, Bolivia, New Zealand, and India.

A. India

India is an example of a country that recognizes the Rights of Nature. *The Constitution of India* imposes a duty on all citizens to "protect and improve the natural environment including forests, rivers, and wildlife, and to have compassion for all living creatures" (Art. 51A(g)) and states

governments must "protect and improve the environment and safeguard the forests and wildlife of the country" (Art. 48A). Boyd notes that the Indian Supreme Court has received recognition for its forward-thinking approach on environmental justice—specifically, in cases ordering New Delhi to replace diesel buses with cleaner gas vehicles, protecting Taj Mahal from air pollution, safeguarding eco-systems from destructive industrialization and stopping toxic discharges into the Ganga River (Boyd, *Rights of Nature* at 92).

B. New Zealand

New Zealand was one of the first countries in the world to create and pass laws acknowledging that nature is no longer subject to human ownership (Boyd, *Rights of Nature* at 155). The new ideology in New Zealand acknowledges the fact that people are part of nature; they are not separate from it or dominant over it (Boyd, *Rights of Nature* at 156). These laws emphasize nature as a rights holder, as well as, the importance of human responsibilities to uphold these rights. The rights of Te Urewera National Park and the Whanganui River in New Zealand were granted legal recognition in 2014 (Abigail Hutchison, "The Whanganui River as a Legal Person" (2014) 39 Alternative L.J. 179 (HeinOnline) [Hutchison, "Whanganui River"]; Boyd, "Elements" at 226; Elaine C. Hsiao, "Whanganui River Agreement" (2012) 42 Envtl. Pol'y & L. 371 (HeinOnline) [Hsiao, "Agreement"]).

Whanganui River

The Whanganui River was granted legal standing in New Zealand. The Whanganui River will have its own legal identity with all the rights, duties, and liabilities of a legal person (Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374; Isaac Davison, "Whanganui River given legal status of a person under unique Treaty of Waitangi settlement", *NZ Herald online* (15 March 2017) [Davison, "Whanganui River"]. This settlement resulted from New Zealand's longest-running litigation, spanning over a 140 year period (Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374; James D. K. Morris and Jacinta Ruru, "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water" (2010) 14 AILR 49 (HeinOnline) [Morris and Ruru, "Rivers"]). The Whanganui River is one of the largest rivers in New Zealand and the local Māori tribe fought for the recognition of their river for many years (Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374). The tribe wanted to treat the River as a living entity instead of treating it as property with others having ownership over it (Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374). Since the river has been granted legal recognition, if someone wants to harm the river, this would be the same as harming the tribe; the law sees no difference between the tribe and river; they are the same (Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374; Davison, "Whanganui River"; Morris and Ruru, "Rivers" at 49). Māori tribes are similar to other Indigenous tribes and regard themselves as part of the universe, and equal to the environment (Morris and

Ruru, "Rivers" at 49).

This may be inferred from the Māori expression: "Ko au te awa, ko te awa ko au" (I am the river, and the river is me) (Boyd, "Rights of Nature" at 131; Hsiao, "Agreement" at 372-374).

The Māori view is like other Indigenous cultures; New Zealand recently began to incorporate these views into their legal system (Boyd, *Rights of Nature* at 132; Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374). To Māori peoples, nature is not property, nor is it used for natural recourses. There are certain concepts that are fundamental to the Māori relationship with nature—including kinship and stewardship (Boyd, *Rights of Nature* at 132). This includes relationships between humans, and includes a web of relationships between people, land, water, flora, animals, and fauna (Boyd, *Rights of Nature* at 133; Morris and Ruru, "Rivers" at 49). The tribes of a particular geographical area are connected to its ecosystems, rivers, forests, lakes, and other species and have responsibilities to them (Boyd, *Rights of Nature* at 133; Hsaio, "Agreement" at 372-74). For Māori, taking responsibility for the environment and its protection is an important aspect of a healthy relationship between humans and nature (Boyd, *Rights of Nature* at 133; Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374).

In 2004, there was a dispute about discharging sewage wastewater into the Whanganui River (Boyd, *Rights of Nature* at 133). Boyd notes: "This made the country realize how engrained the saying ko au te awa, ko te awa ko au is to those who have connections to the river" and "to pollute the water is to pollute the iwi people;" their spirit and belief system are connected to the river (Boyd, *Rights of Nature* at 134).

The *Te Arawa Lakes Settlement Act* (2006) set a precedent for the river; this Act moved ownership of a cluster of lakebeds from Crown property to a new body called the Te Arawa Lakes Trust (Boyd, *Rights of Nature* at 135; Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374). The government cannot authorize commercial activities on the lakes without the consent of the trustees and these lakebeds cannot be bought or sold (Boyd, *Rights of Nature* at 135; Hsiao, "Agreement" at 372-374). The trustees' mission is to put the lake's interest first and to restore the health of the Waikato River (Boyd, *Rights of Nature* at 135).

Using precedent, a 2011 treaty settlement was one of the first to recognize that a river, Whanganui River, has the rights of a legal person (Boyd, *Rights of Nature* at 135; Hutchison, "Whanganui River" at 179-180; Morris and Ruru, "Rivers" at 50). This right was put into legislation in early 2017 (*Te Awa Tupua (Whanganui River Claims Settlement) Bill*, Government Bill 129-2; see also: Boyd, *Rights of Nature* at 134; Hutchison, "Whanganui River" at 179-180). The legislation includes provisions protecting the Māori perspective; representing the view that rivers, mountains, trees and nature have value and cannot be owned (Boyd, *Rights of Nature* at 139; Hutchison, "Whanganui River" at 179-180; Hsiao, "Agreement" at 372-374; Morris and Ruru, "Rivers" at 54). The Whanganui River is recognized as a legal entity with the "rights, powers, duties and liabilities of a legal person" (Boyd, *Rights of Nature* at 141; Morris and Ruru, "Rivers" at 53).

Te Pou Tupua is the entity representing the river; two individuals have been appointed to serve as guardians over the river, one guardian was chosen by the tribe and one was chosen by the government (Boyd, *Rights of Nature* at 141; Hsiao, "Agreement" at 372-374). These guardians are the face of the river and are meant to symbolize an agreement between the Māori and the Crown (Boyd, *Rights of Nature* at 141; Hsiao, "Agreement" at 372-374).

Te Urewera National Park

The *Te Urewera Act* was passed in 2014 and transformed Te Urewera National Park from Crown and government-owned property into a legal entity that owns itself and has the rights of a person (Boyd, *Rights of Nature* at 134). The law recognizes legal rights and standing of the National Park and recognizes the spiritual relationship of the Indigenous tribes to the environment (Boyd, Rights of Nature at 134 and 153; Hutchison, "Whanganui River" at 179-180). Section 11(1) of the *Te Urewere Act* acknowledges that Te Urewera has worth and possesses "all the rights, powers, duties and liabilities of a legal person". Te Urewera owns itself and has legal standing, similar to the Whanganui River. Te Urewera is governed by a board of trustees whose mandate is to act on behalf of the National Park (Boyd, Rights of Nature at 134 and 153; Hutchison, "Whanganui River" at 179-180).

C. Ecuador

Citizens from Ecuador, Columbia, Nigeria, and India brought an action before the Constitutional Court of Ecuador (Colón-Ríosa, "Constituent Power" at 129). They sought a remedy for harm caused by the British Petroleum Oil Spill in the Gulf of Mexico (Colón-Ríosa, "Constituent Power" at 129). The citizens asked the court to issue orders that required the British Company to produce public information relating to the disaster, its impact, and take measures to correct its effects (*Demanda Por lor Derechos del Mar Bajo el Principio de Jurisdicción Universal*, action before the Constitutional Court of Ecuador (26 November 2010). As of 2014, a decision on this case was still pending: cited in Colón-Ríosa, "Constituent Power" at 129, footnote 1). This case gained national attention because the oil spill did not occur in Ecuador's territory and it did not involve Ecuadorian citizens (Colón-Ríosa, "Constituent Power" at 129). The applicants asked the court to issue orders against the British Company based on the principle of Universal Jurisdiction, although none of the plaintiffs suffered any individual harm (Colón-Ríosa, "Constituent Power" at 129). The citizens asked Ecuador to protect the rights of the ocean, pursuant to Article 71 of the *Constitution of the Republic of Ecuador, 2008*. Colón-Ríosa notes that: "From an international law perspective, the case raises the no-less-interesting question of whether a constitutional court operating under a constitution that recognizes the rights of nature should exercise jurisdiction in cases of serious harms to the environment, even if those harms are caused by non-citizens outside the country's territory" (Colón-Ríosa, "Constituent Power" at 129). The principle of Universal Jurisdiction is in place to help protect state sovereignty, specifically, in cases of environmental

harm and Rights of Nature violations (Colón-Ríosa, "Constituent Power" at 131). Usually, limits on government powers are based on human rights; however, Ecuador's Constitution also attributes rights to Nature (Colón-Ríosa, "Constituent Power" at 146). The *Constitution of Ecuador* also states at Article 71 that: "all persons, communities, peoples and nations can call upon public authorities to enforce the Rights of Nature" (see also: Colón-Ríosa, "Constituent Power" at 146). Colón-Ríosa notes that one of the drafters of the *Constitution of the Republic of Ecuador, 2008*, Alberto Acosta, stated: "The destruction of nature eliminates the conditions required for the existence of the human species and therefore violates all human rights" (Colón-Ríosa, "Constituent Power" at 147).

Many individuals have utilized the *Ecuadorian Constitution*. For example, the first court decision (*R.F. Wheeler and E.G. Huddle v Attorney General of the State of Loja* (March 30, 2011), [2011] Judgment No 11121-2011-0010 (Loja Provincial Court of Justice) [*Wheeler and Huddle v Loja*]) involving the Rights of Nature, in Ecuador, was about the Vilcabamba River and its right to be protected against damage inflicted by a highway construction project (Boyd, "Elements" at 226). In 2007, Eleanor Huddle and her husband, Richard Wheeler, traveled to Ecuador; they fell in love with the Vilcabamba River and bought a farm close by (Boyd *Rights of Nature* at 160; *Wheeler and Huddle v Loja)*. In 2008, they returned to Ecuador and noticed that the road by their farm was being turned into a highway (Boyd, *Rights of Nature* at 160; *Wheeler and Huddle v Loja)*. The construction waste was being dumped directly into the river, along with thousands of tonnes of debris (Boyd, *Rights of Nature* at 162; *Wheeler and Huddle v Loja)*. In 2009, there was a storm and water levels in the river rose several feet above normal (Boyd, *Rights of Nature* at 162; *Wheeler and Huddle v Loja)*. The couple was upset about the loss of their view, property damage and destruction of the river. They heard about provisions of the *Ecuador Constitution* and hired a lawyer (Boyd, *Rights of Nature* at 162; *Wheeler and Huddle v Loja)*. The lawyer filed a lawsuit requesting that the highway project stop dumping debris in the river; that the natural course of the river be restored; and that the rocks, dirt, gravel and vegetation deposited in the river be removed (Boyd, *Rights of Nature* at 162; *Wheeler and Huddle v Loja)*. The first judge dismissed the suit but they appealed a few months later, and an appellate court overturned the trial judge's decision (Boyd, *Rights of Nature* at 162; *Wheeler and Huddle v Loja)*. Boyd notes that:

> For the first time in the world, a court, the provincial court of Loja, upheld the constitutional rights of a river. The judge stated that it is the duty of constitutional judges to immediately guard and to give effect to the constitutional rights of nature, doing what is necessary to avoid contamination or to remedy it (Boyd, *Rights of Nature* at 162; *Wheeler and Huddle v Loja)*.

The Vilcabamba River case is a legal precedent, representing the fact that nature as a rights holder is no longer just a philosophical concept and real actions and steps are being taken to make this concept a reality (Boyd, *Rights of Nature* at 164; *Wheeler and Huddle v Loja).*

In 2007, Alberto Acosta was elected to create the new *Ecuadorian Constitution*, along with Eduardo Galeano, who wrote an article on the Rights of Nature (Boyd, *Rights of Nature* at 168). He acknowledged that incorporating the Rights of Nature into the *Constitution* would make Ecuador the first country in the world to take this step (Boyd, *Rights of Nature* at 169). Galeano wrote:

[I]t sounds weird, right? This idea that nature has rights….Crazy. As if nature was a person. Instead, it sounds perfectly normal that large U.S. companies enjoy human rights. In 1886, the supreme court of the United States, a model of universal justice, extended human rights to private corporations. The law recognized them possessing the same rights as people…as if companies breathe (Boyd, *Rights of Nature* at 169).

This means that corporations have the same legal standing that is awarded to human beings, and to many people, it makes more sense to enable the Rights of Nature rather than the rights of corporations (Boyd, *Rights of Nature* at 170).

Indigenous people were one of the main reasons the Rights of Nature was included in Ecuador's *Constitution*. The Right of Nature concept is deeply rooted in Indigenous views and ways of life; their belief is to live in harmony with nature (Boyd, *Rights of Nature* at 170). In Ecuador's *Constitution*, there is a phrase called "Sumak Kawsay" (buen vivir in Spanish) which translates as "harmonious coexistence" between nature, ecosystems, animals and humans (Boyd, *Rights of Nature* at 171). The preamble of the *Constitution of the Republic of Ecuador, 2008*, states:

> We women and men, the sovereign people of Ecuador ….. celebrating nature, the Pacha Mama (Mother Earth), of which we are part and which is vital to our existence… hereby decide to build a new form of public coexistence, in diversity, in harmony with nature, to achieve the good way of living, the sumac kawasay.
>
> Pachamama is a goddess that sustains life; this is also similar to the core beliefs of Indigenous groups (Boyd, *Rights of Nature* at 171).

The constitutional sections relating to the Rights of Nature are intended to protect Mother Earth, stating that nature has rights, humans have rights and no right is superior to the other; the state also has a duty to uphold these rights (Boyd, *Rights of Nature* at 172).

The *Constitution of the Republic of Ecuador, 2008* states:

Article 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 call upon public authorities to 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.

Article 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

Article 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.

Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.

There are, however, some discrepancies within the *Constitution* and it remains a work in progress (Boyd, *Rights of Nature* at 173). The Rights of Nature are included in the *Constitution*, and under Article 407, the removal of non-renewable resources in national parks and protected areas are banned. However, Article 407 of the *Constitution* also allows the president to lift this ban with the consent of the National Assembly (Boyd, *Rights of Nature* at 174). The drafters of the *Constitution* acknowledged that the changes are very drastic and there are some discrepancies, "which would take decades to solve" (Boyd, *Rights of Nature* at 175). Acosta, along with other Assembly Members, are trying to speed up the change process and have nature's rights incorporated into laws to ensure its protection and enforcement (Boyd, *Rights of Nature* at 154).

A 2012 case involved a group of businesses in the Galapagos Islands, who were concerned about road construction during their peak tourist season (Boyd, *Rights of Nature* at 154; see also: Craig Kaufmann and Pamela Martin, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail" (2017) 92 World Development 130 at 138). Another case involved illegal shark fishing in the Galapagos National Park and Marine Reserve (See: Richard Barreno, Sea Shepherd Global "Judge sentences Chinese Ship Crew for Environmental Crimes" (translation) (August 29, 2017)). Due to these cases, the courts decided that Rights of Nature could be enforced against private entities as well as the government (Boyd, *Rights of Nature* at 154). Most of the world's legal systems recognize nature, ecosystems and the environment as human property, therefore, Ecuador's new constitution challenges the laws and social norms that have been in place for so long.

D. Bolivia

There have been many developments in Bolivia regarding environmental legal rights. Boyd notes: Bolivia's new law on the Rights of Mother Earth establishes a new ombudsperson and enumerates seven specific rights to which Mother Earth and her constituent life systems, including human communities, are entitled, including life, preservation of biological diversity, clean water, clean

air, equilibrium, restoration and freedom from toxic contamination (Boyd, "Elements" at 226).

Bolivia has a variety of Indigenous groups and this has increased the importance of granting legal rights to nature. The *Bolivian Constitution*, 2009 has a section on environmental rights which states "everyone has the rights to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things" (Boyd, *Rights of Nature* at 189). This part in the Constitution speaks to the notion that animals, plants, and ecosystems have constitutional rights in Bolivia (Boyd, *Rights of Nature* at 189).

Lake Poopó was the second largest lake in Bolivia; however, it dried up in 2016 and turned into a salt desert (Boyd, *Rights of Nature* at 190). This lake was home to thousands of fish and fishing boats; the fish populations died and the boats became anchored to the ground (Boyd, *Rights of Nature* at 190). Many Indigenous people who used the lake for fishing for many centuries were no longer able to (Boyd, Rights of Nature at 190). Due to these climate changes, Bolivia has reacted by becoming one of the world's leaders in regards to the Rights of Nature, the human right to water, and climate change (Boyd, *Rights of Nature* at 191). Bolivia is another country that has adopted the notion that the Rights of Nature are the same as the rights of human beings.

In 2010, Bolivia gained attention around the world for its laws on the Rights of Mother Earth. The Rights of Nature and responsibilities of the government, people and communities are all set out. Its mandate is to bring balance between humans and nature, restore ecosystems, and avoid treating the environment as private property (Boyd, *Rights of Nature* at 192). The Law on the Rights of Mother Earth articulates seven broad rights of Mother Earth in Article 7:

1) To life: It is the right to the maintain the integrity of living systems and natural processes which sustain them, as well as the capacities and conditions for regeneration

2) To the Diversity of Life: It is the right to preserve the variety of the beings that comprise Mother Earth, without being genetically altered, nor artificially modified in their structure, in such a manner that threatens their existence, functioning and future potential

3) To water: It is the right of the preservation of the quality and composition of water to sustain life systems and their protection with regards to contamination, for renewal of the life of Mother Earth and all its components

4) To clean air: It is the right of the preservation of the quality and composition of air to sustain life systems and their protection with regards to contamination, for renewal of the life of Mother Earth and all its components

5) To equilibrium: It is the right to maintenance or restoration of the inter-relation, interdependence, ability to complement and functionality of the components of Mother Earth, in a balanced manner for the continuation of its cycles and the renewal of its vital processes

6) To restoration: It is the right to the effective and opportune restoration of life systems affected by direct or indirect human activities

7) To pollution-free living: It is the right for preservation of Mother Earth and any of its components with regards to toxic and radioactive waste generated by human activities.

The constitutional law on the Rights of Mother Earth describes responsibilities for people, preventing the extinction of species, and protecting natural cycles; including production and consumption and developing assessments regarding the ecological impact of private and state companies (Boyd, *Rights of Nature* at 195). Bolivia's new laws on rights of nature have been slow to implement and progress, similar to those in Ecuador. They are struggling between protecting nature and trying to reduce poverty (Boyd, *Rights of Nature* at 197).

Bolivia proposed a resolution in 2009 to the United Nations General Assembly proclaiming April 22 as "International Mother Earth Day" each year. The Assembly states in Resolution 63/278 that "Mother Earth is a common expression for the planet earth in a number of countries and regions, which reflects the interdependence that exists among human beings, other living species and the planet we all inhabit."

In 2010, the People's Congress on Climate Change and the Rights of Mother Earth was held in Cochabamba, Bolivia (Boyd, *Rights of Nature* at 207). A working group at the Congress drafted the following:

Universal Declaration of the Rights of Mother Earth

Preamble

> We, the peoples and nations of Earth:
>
> Considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny;
>
> Gratefully acknowledging that Mother Earth is the source of life, nourishment and learning and provides everything we need to live well;
>
> recognizing that the capitalist system and all forms of depredation, exploitation, abuse and contamination have caused great destruction, degradation and disruption of Mother Earth, putting life as we know it today at risk through phenomena such as climate change;
>
> Convinced that in an interdependent living community it is not possible to recognize the rights of only human beings without causing an imbalance within Mother Earth;
>
> Affirming that to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws that do so;
>
> Conscious of the urgency of taking decisive, collective action to transform structures and systems that cause climate change and other threats to Mother Earth, proclaim this *Universal Declaration of the Rights of Mother Earth*, and call on the General Assembly of the United Nation to adopt it……every individual and institution takes responsibility for promoting through teaching, education, and consciousness

raising…..

Article 1. Mother Earth

(1) Mother Earth is a living being.

(2) Mother Earth is a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings.

(3) Each being is defined by its relationships as an integral part of Mother Earth.

(4) The inherent rights of Mother Earth are inalienable in that they arise from the same source as existence.

(5) Mother Earth and all beings are entitled to all the inherent rights recognized in this Declaration without distinction of any kind, such as may be made between organic and inorganic beings, species, origin, use to human beings, or any other status……

Article 2. Inherent Rights of Mother Earth

(1) Mother Earth and all beings of which she is composed have the following inherent rights:

(a) The right to life and to exist;

(b) The right to be respected;

(c) The right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions;

(d) The right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;

(e) The right to water as a source of life;

(f) The right to clean air;

(g) The right to integral health;

(h) The right to be free from contamination, pollution and toxic or radioactive waste.

Article 3. Obligations of human beings to Mother Earth

(1) Every human being is responsible for respecting and living in harmony with Mother Earth.

(2) Human beings, all States, and all public and private institutions must:

(a) act in accordance with the rights and obligations recognized in this Declaration;

(b) Recognize and promote the full implementation and enforcement of the rights and obligations recognized in this Declaration;

(c) Promote and participate in learning, analysis, interpretation and communication about how to live in harmony with Mother Earth in accordance with this Declaration;

(d) Ensure that the pursuit of human wellbeing contributes to the wellbeing of

Mother Earth, now and in the future;

(e) Establish and apply effective norms and laws for the defence, protection and conservation of the rights of Mother Earth.

In 2011, Bolivia requested that the United Nations hold a debate about the proposed *Universal Declaration of the Rights of Mother Earth*, which led to an ongoing annual discussion at the UN about living in harmony with nature (Boyd, *Rights of Nature* at 211). At the 2012 Rio+20 Earth Summit in Brazil, South America, the final report of the Conference, *The Future We Want*, requested the UN to endorse the rights of nature.

The Global Alliance for the Rights of Nature is one of the leading advocates for the *Universal Declaration of the Rights of Mother Earth* (Boyd, *Rights of Nature* at 213). The Global Alliance also created and hosts the International Rights of Nature Tribunal. The International Rights Tribunal was set up to address environmental laws and damages inflicted on nature; the tribunal was established in 2013 (Boyd, *Rights of Nature* at 213). The Tribunal is made up of leaders from Indigenous groups, lawyers, and social justice and environmental communities around the world; it works similar to government organizations under a set of codified rules (Boyd, *Rights of Nature* at 213). The Tribunal's goal is to hear cases and pursue actions to prevent future harm and damage to ecosystems, environments, and communities (Boyd, *Rights of Nature* at 213). One of the main reasons for creating the Tribunal was to allow human voices to advocate for the environment, as well as to challenge laws that allow the environment to be destroyed (Boyd, *Rights of Nature* at 214). The Tribunal contributes resources into educating states, governments, the media, and the public about the Rights of Nature (Boyd, *Rights of Nature* at 218). Indigenous leaders, lawyers, and scientists can gain practical experience and learn how to start a dialogue regarding the Rights of Nature and how human activities violate these rights (Boyd, *Rights of Nature* at 218).

E. Other Countries and Locales

The Rights of Nature are legally protected in Bolivia, New Zealand, Ecuador, India and several American communities, ranging from Santa Monica to Pittsburgh (Boyd, *Rights of Nature* at 223). These new laws regarding the Rights of Nature are branching out to protect endangered species and animals. David Boyd notes that courts in the United States, Costa Rica and India have ruled on cases about endangered species, stopped activities that harm them, and ruled to save these populations, including: the snail darter, papilla, northern spotted owl, Asian lion, and Asiatic buffalo (Boyd, *Rights of Nature* at 223). These judicial decisions all have the same goal— enforcing the idea that all of life has value, and should not be used as human property; humans as well as the state have a responsibility to avoid causing harm to these species (Boyd, *Rights of Nature* at 223).

The act of destroying ecosystems is classified as ecocide; ecocide is a specific crime that the

International Rights of Nature Tribunal is set up to address (Boyd, *Rights of Nature* at 214). Vietnam and Ukraine, among other countries, have referred to ecocide as a crime under their criminal legislation. Boyd notes that: "Art 278 of Vietnam's Penal Code states that destroying the natural environment, whether committed in time of peace or war, constitutes a crime against humanity" (Boyd, *Rights of Nature* at 214). Boyd also notes that: "Art 441 of Ukraine's Criminal Code states mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster, - shall be punishable by imprisonment for a term of eight to fifteen years" (Boyd, *Rights of Nature* at 214).

The Supreme Court's *Rules of Procedure for Environmental Cases*, in the Philippines, passed a remedy called a *Writ of Kalikasan* (nature); this is a court order to protect nature's value and rights without the requirement of proving a direct injury to human beings (Boyd, *Rights of Nature* at 214).

Legal recognition of the Rights of Nature was granted in two Mexican states. Mexico City changed its Constitution in 2017 to include the rights of nature (See: Darlene Lee, Earth Law Centre, "Mexico on the Vanguard for Rights of Nature" (November 21, 2017). In 2014, Guerrero amended its Constitution to include and protect the rights of nature; granting equality between humans and nature. This is mentioned as an essential value (Boyd, *Rights of Nature* at 225).

In Australia, advocates are working towards getting legal standing for the World Heritage Site—the Great Barrier Reef, due to human activities (Boyd, *Rights of Nature* at 226). As well, a grassroots group is working to have the Rights of Nature incorporated into Nepal's Constitution Boyd, *Rights of Nature* at 226).

As noted above, there are many countries, cities and states around the world that recognize the value of nature and want to advocate for its rights. These countries believe that nature is connected to human beings and want to move towards a more peaceful way of living.

2. Canada

Aboriginal Law

Recognizing nature as a rights holder aligns with perspectives and laws of First Nations in Canada. The Canadian *Constitution Act, 1867* recognizes Indigenous rights to land under s 35. Section 35 of *the Constitution Act, 1867* states:

> 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) 'treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights

referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35 grants constitutional protection to existing Aboriginal treaty rights of the Aboriginal peoples of Canada. Aboriginal rights that have not been extinguished are recognized by common law and are enforceable by the courts (Hogg, *Constitutional* at 28.8).

For example, there are a number of Supreme Court of Canada (SCC) cases that have set precedents for, and defined Aboriginal rights. In *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC) [*Guerin*], the majority of the Supreme Court of Canada recognized Aboriginal title of the Musqueam Indian Band to land in British Columbia. Aboriginal title is a legal right arising from historic occupation and possession of lands (Hogg, *Constitutional* at 28.8). The SCC held that the Aboriginal title to the land gave rise to a fiduciary duty placed on the Crown to deal with the land for the benefit of the Indians (Hogg, *Constitutional* at 28.8).

In *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) [*R v Sparrow*], the SCC recognized the Aboriginal right of a member of the Indian Band to fish for salmon in the Fraser River, where his ancestors had fished. The SCC held that s 35 provides constitutional protection for the Aboriginal right (*R v Sparrow*). As well, *R v Sparrow* decides that Aboriginal rights are now constitutionally guaranteed through s 35 of *Constitution Act*, 1982 (Hogg, *Constitutional* at 28.8). The effect of *Guerin* and *R v Sparrow* are to confirm that Aboriginal rights do exist at common law and that they are enforceable at the court by Aboriginal peoples (Hogg, "Constitutional" at 28.8). Aboriginal rights are rights held by Aboriginal peoples, not due to legislation or treaty, but because of the fact that Aboriginal peoples were once independent, self-governing and in possession of most of the lands in Canada (*R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC) [*R v Van der Peet*]. In *R v Van der Peet,* the Supreme Court of Canada set out the legal test that was to be used to identify an existing Aboriginal right, within the meaning of s 35. In order to be an Aboriginal right, an activity must be: an element of a practice and custom or tradition integral to the distinctive culture of the Aboriginal group asserting the right. In order for a practice to be integral, the practice must be of a central significance to the Aboriginal group; it must be a defining characteristic of the society (*R v Van der Peet;* Hogg, *Constitutional* at 28.8). As well, the practice must have developed before contact, meaning before the arrival of the Europeans in North America (*R v Van der Peet*; Hogg, *Constitutional* at 28.8).

In *R v Sappier; R v Gray*, [2006] 2 SCR 686, 2006 SCC 54 (CanLII) [*R v Sappier*], the SCC held that harvesting wood for domestic use was integral to the culture of the people. The SCC held that the pre-contact practice of harvesting wood for the construction of shelters evolved into the modern right to harvest wood for the construction of a permanent dwelling (*R v Sappier*). However, it is important to recognize that the time frame of "pre-contact" does not work for Métis rights, because Métis people originated from marriage between French-Canadian men and Aboriginal women during the fur trade period (*R v Sappier*). They did not exist before contact.

In *R v Powley*, [2003] 2 SCR 207, 2003 SCC 43 (CanLII) [*R v Powley*], the SCC held that for Métis

claimants of Aboriginal rights, the focus on European contact had to be moved forward to the time of European control. Apart from this shift in time, the same *Van der Peet* definition was used to identify Métis rights (*R v Powley*).

If a law has infringed or breached s 35 of the *Constitution Act, 1982,* remedies are available to Indigenous people through the courts. It is important to note that s 24(1) of the *Charter* does not apply to s 35 and therefore those remedies are unable to provide relief (Hogg, *Constitutional* at 28.8). However, *Constitution Act, 1982*, s 52 remedies do apply. The most common remedies are usually a declaration that a law or government act is invalid; an injunction to prevent action that is not authorized by a valid law; and a form of damages in tort, contract, or breach of fiduciary duty for acts causing damage (Hogg, *Constitutional* at 28.8).

Section 25 of the *Charter,* states:

> S 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) Any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) Any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

Section 25 is part of the *Charter*, but it does not create any new rights (Hogg, *Constitutional* at 28.9). It is an interpretive provision, included to clarify that the *Charter* is not to be interpreted as derogating from any Aboriginal treaty or other rights or freedoms that apply to the Aboriginal people of Canada (Hogg, *Constitutional* at 28.9).

Under the *Charter*, s 15(1) also contains an equality guarantee. The *Indian Act*, RSC 1985, c I-5 (*Indian Act)* like any other statute, can be challenged if it offends s 15(1) of the *Charter*. In *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203, 1999 CanLII 687 (SCC) [*Corbiere v Canada],* the SCC struck down the provision of the Indian Act that made residence on the reserve a requirement for voting in band elections. The court held that the distinction between band members who lived on the reserve, and band members who lived off the reserve, was a breach of s 15(1) (*Corbiere v Canada* at para 18). Alternatively, in the case *Lovelace v Ontario*, [2000] 1 SCR 950, 2000 SCC 37 (CanLII) [*Lovelace v Ontario*], the

SCC rejected a challenge to the distribution of the Casino Rama gambling profits that was limited to communities registered as bands under the *Indian Act*. The court held that such exclusions of non-status bands form the distribution of the profits was not a breach of s 15(1) (*Lovelace v Ontario* at para 6).

A somewhat different example is the case of *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41 (CanLII) [*R v Kapp*]. In this case, the SCC held that a communal fishing license granted exclusively to Aboriginals did not violate section 15(1) of the *Charter*, but this was because *Charter* s 15(2)

applied (*R v Kapp* at para 3). Under section 15(2), if a government program creates a distinction based on an enumerated ground but the program has an ameliorative or remedial purpose and targets a disadvantaged group, it will not violate s 15(1). In *Kapp*, the exclusive fishing licence, while discriminatory, was allowed because it was aimed at improving the situation of a disadvantaged group.

Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511, 2004 SCC 73 [*Haida Nation]* is one of the most recognized cases in Aboriginal Law; the case is about the duty to consult Indigenous people of Canada. It requires a two-part test: the Crown must have real or constructive knowledge of the potential existence of Aboriginal rights or title and contemplate conduct that might adversely affect it (*Haida Nation)*. The duty to consult requirement is set in place by s 35 of the *Constitution Act* and its purpose is to work towards reconciliation with Aboriginal Peoples (Hogg, Constitutional at 28.8). *Haida Nation* started out as an environmental rights case. This case has had one of the largest impacts in Canada's history (William A. Tilleman and Alastair R. Lucas, *Litigating Canada's Environment: Leading Canadian Environmental Cases By Lawyers Involved* (Toronto: Thomson Reuters Canada, 2017) at 121 [Tilleman and Lucas]). The Supreme Court's decision on *Haida Nation* has been cited hundreds of times, involving judicial review proceedings of government permits for resource projects (Tilleman and Lucas at 123; Hogg, *Constitutional* at 28.8). Aboriginal People have relied on the duty to consult, accommodate, and the *Haida Nation* precedent to protect environmental values (Tilleman and Lucas at 123; Hogg, *Constitutional* at 28.8).

Cases relying on the *Haida Nation* precedent include: *Blaney et al. v Minister of Agriculture et al.*, 2004 BCSC 1764 (CanLII) [*Homalco First Nation*], regarding the approval of salmon fish farming licenses (Tilleman and Lucas at 123); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* [2005] 3 SCR 388, 2005 SCC 69 (CanLII) [*Mikisew Cree*]– dealing with construction of a winter road in Wood Buffalo National Park, AB (Tilleman and Lucas at 123); *Huu-Ay-Aht First Nation et al. v The Minister of Forests et al.*, 2005 BCSC 697 (CanLII) [*Huu-ay-aht First Nation*] – B.C. forestry strategy approval of unsustainable volumes of logging in their territory (Tilleman and Lucas at 123); *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII); [*West Moberly FN*] –permits granted for mining exploration harming traditional caribou-hunting territory (Tilleman and Lucas at 123); and *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34 (CanLII) (*Coastal First Nations*)— granting an environmental certificate to develop an oil pipeline (Tilleman and Lucas, at 124). Thus, Canada's Indigenous peoples have standing and constitutional rights to ensure the protection of the environment, and they are usually involved in many environmental litigation cases (Tilleman and Lucas at 127).

For more information on the "Duty to Consult", please see the Alberta Civil Liberties Research Centre's "Indigenous Land Stewardship".

Procedural Issues

A. International

For many countries who recognize the right to a healthy environment, standing is not an issue (Boyd, "Elements" at 240). In the Philippines, standing rules state that "any person, including minors, can start proceedings related to environmental damage and environmental laws on behalf of themselves or future generations" (Boyd, "Elements" at 240). The new constitutional rights in Bolivia and Ecuador enforce the notion that standing is available for people representing nature and animals (Boyd, "Elements" at 240).

Broad standing laws have been established by many countries, including: Portugal, Spain, Finland, Netherlands, Slovenia, Estonia, India, Argentina, Brazil, Chile, and Colombia (Boyd, "Elements" at 240).

For example, *South Africa National Environmental Management Act, Act* 107 of 1998, regarding legal standing states:

> 32. Legal standing to enforce environmental laws
>
> (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources—
>
> (a) In that person's or group of person's own interest;
>
> (b) In the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
>
> (c) In the interest of or on behalf of a group or class of persons whose interests are affected;
>
> (d) In the public interest; and
>
> (e) In the interest of protecting the environment.

Further, the International Rights of Nature Tribunal provides an avenue to hear environmental cases regarding the Rights of Nature; there is a panel of Tribunal Judges that recommend action for restoration, protection, prevention and preservation in each case (Global Alliance). Ecosystems, trees, oceans, mountains, rivers, and other elements of nature have been granted their own rights, are rights holders, and have legal standing in a court (Global Alliance). The Tribunal has a duty to provide information which educates society and governments on what the Rights of Nature are and how to enforce it (Global Alliance). This Tribunal enables people from different countries around the world to have a legal voice and presence to protect nature (Global Alliance).

In Lima, Peru, in 2014, the second International Rights of Nature Tribunal came together (Global Alliance). This Tribunal heard evidence by experts and witnesses speaking about violations of the

Rights of Nature, including the human rights to a clean environment and rights of Indigenous communities (Global Alliance). The Global Alliance notes that "Selected cases addressed the impacts of climate change, destructive oil and mineral extraction, and aggressive actions against defenders of the earth, especially in South America" (Global Alliance).

In Paris, 2015, the third International Rights of Nature Tribunal convened (Global Alliance). As noted by Global Alliance, "The Tribunal uses the emerging field of Earth Laws to hear and decide cases brought to it" (Global Alliance). Global Alliance states that: "Earth Laws includes laws recognizing the Rights of Nature, as stated in the *Universal Declaration for the Rights of Mother Earth*, the crime of Ecocide and the laws of the commons" (Global Alliance).

There are many environmental documents that include procedural provisions regarding the environment. The https://digitallibrary.un.org/record/39295?ln=en, 1982, (*UN World Charter of Nature*, GA Res 37, UN GAOR, 48TH Plen mtg, III (23), UN Doc A/Res/ 37/7 (1982)) states:

All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.

As well, Principle 10 of the Rio Declaration on Environment and Development (1992) states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

B. Canada

In order to fully understand the environment as a rights holder, it is important to understand what "legal standing" means in Canada. Legal standing is the legal right to bring a lawsuit to court. Standing requires that the person bringing the case is directly affected by the statute, action, or without the court's intervention, the individual would continue to suffer damage (Warnock, "Standing" at 57; Stone, "Trees" at 453). However, legal standing can also apply to parties who are not directly harmed or affected, but the damage has a reasonable relationship to their situation; this is also known as public interest standing (Warnock, "Standing" at 57; Stone, "Trees" at 453).

The Supreme Court of Canada defines public interest standing in three cases, as modified by a fourth case. These cases are called "the Standing trilogy": *Thorson v Attorney General of Canada, Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265 1975 CanLII 14 (SCC); and *Minister of Justice v Borowski*, [1981] 2 SCR 575 1981 CanLII 34 (SCC). The trilogy was summarized in

Canadian Council of Churches v Canada, [1992] 1 SCR 236, 1992 CanLII 116 (SCC) [*Canadian Council of Churches*].

The SCC, in *Canadian Council of Churches* sets out three aspects should be considered:

- Is there a serious issue raised as to the invalidity of legislation in question?
- Has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity?
- Is there another reasonable and effective way to bring the issue before the court?

The most recent development in the law of standing in Canada may be found in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) [*DESW*]. The Downtown Eastside Sex Workers United Against Violence Society brought an action challenging the constitutional validity of sections of the *Criminal Code* that dealt with prostitution, claiming that the *Criminal Code* violated their constitutional rights under *Charter* s 15(1), and s 7. This case modified the third requirement of public interest standing. It was held that three requirements should be present for public interest standing: "serious justiciable interests; the proposed plaintiff's interest; and *a* reasonable and effective means of bringing the issue before the court" (*DESW* at paras 37 to 52).

In Alberta environmental cases, standing is limited to direct effects on *individuals,* and the *Canadian Council of Churches* test is interpreted narrowly; in other jurisdictions, standing rules vary (Boyd, "Elements", at 240). For example, Boyd notes: "In British Columbia, some tribunals limit standing to the person or entity that is the holder of an order or permit and owners of land, some limit standing to aggrieved persons and others to interested persons" (Boyd, "Elements", at 240). However, whether narrowly or widely interpreted, in Canada, the principle of standing applies to people, and not nature or the environment.

1. Federal Legislation

Boyd ("Elements" at 205) asserts that Canada's environmental rules regarding air pollution, toxic substances, food contamination and drinking water are not strong. Further, Canada does not have a legally binding air quality standard and produces more air pollution than the majority of other countries (Boyd, "Elements" at 205). Individuals who live in smaller communities and rural areas are more likely to develop health issues, specifically, in Alberta and Manitoba; there are Aboriginal people living on reserves dealing with a lack of running water, which can result in waterborne illnesses and other diseases (Boyd, "Elements" at 205).

The SCC has reiterated the right to a clean and healthy environment, and this is clear in many cases where environmental harm infringes on the *Charter*, specifically, s 7 rights (Boyd, "Elements", at 202). Within the last 15 years, the SCC has recognized that environmental protection is an important value for Canadians (Boyd, "Elements", at 204).

In addition, Boyd notes that the Canadian Parliament has expressed some interest in this right:

Bill C-634 (2nd Session, 41st Parliament, 2014), the proposed *Canadian Environmental Bill of*

Rights set out five purposes:

- safeguarding the right of present and future generations of Canadians to a healthy and ecologically balanced environment;
- confirming that the federal government has a public trust duty to protect the environment;
- ensuring all Canadians have access to environmental information, effective mechanisms for participating in environmental decision making, and access to justice;
- providing legal protection for environmental whistle-blowers (employees who act to protect the environment and may be subject to reprisals by their employer); and
- Enhancing public confidence in the implementation of environmental law.

2. Provincial and Territorial

Canadians agree that environmental laws are important and these can also be seen at the provincial level. Boyd notes: "In Quebec, Ontario, Yukon, Northwest Territories, and Nunavut, citizens enjoy limited environmental rights in legislation" (Boyd, "Elements" at 215). Boyd ("Elements" at 215) lists the applicable legislation as:

Quebec: *Environmental Quality Act*, CQLR c Q-2, and *Charter of Human Rights and Freedoms*, CQLR c C-12;

Ontario: *Environmental Bill of Rights, 1993*, SO 1993, c 28;

Yukon*: Environment Act*, RSY 2002 c 74

Northwest Territories: *Environmental Rights Act*, RSNWT 1988 c 83 (Supp).

Nunavut: adopted all NWT legislation, including the *Environmental Rights Act*, (Nu) 1988 c 83 when it became a territory in 1999 (Boyd, "Elements" at 8).

Canadian laws and regulations primarily focus on procedural rights, such as the right to access information, to be informed about regulatory changes, and to request investigations; however, the laws generally do not offer legal protection for rights to clean air, a healthy environment, or water (Boyd, "Elements" at 215). There are a few exceptions that seem to indicate a willingness to consider the right to a healthy environment.

a. Quebec

Boyd ("Elements" at 215) notes that Quebec was the first province to put environmental rights into legislation. The *Environmental Quality Act* states in Art. 19.1 that: "Every person has the right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this act and the regulations, orders, approvals, and authorizations issued under any section of this act." Boyd ("Elements" at 8) asserts that even though this law has not made a big impact, it has expanded the law of standing; therefore, this will increase access to justice for residents in Quebec.

In 2006, the Quebec *Charter of Human Rights and Freedoms* was amended, stating (at Art 46.1): "Every person has a right to live in a healthful environment in which biodiversity is preserved, to

the extent and according to the standards provided by law". Boyd notes ("Elements" at 216) The amendment also requires the provincial government to establish a legislative and policy framework for enforcing these environmental rights and making them a reality.

b. Ontario

Ontario's *Environmental Bill of Rights, 1993*, Preamble, states: "the people of Ontario have a right to a healthful environment."

Section 2(1) states:

> The purposes of this Act are,
>
> (a) To protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
>
> (b) To provide sustainability of the environment by the means provided in this Act; and
>
> (c) To protect the right to a healthful environment by the means provided in this Act.

c. Yukon

Yukon's *Environment Act*, states in s 6 that: "the people of the Yukon have the right to a healthful natural environment and recognizes that citizens should be provided legal remedies for breaches of the law involving the environment."

d. *Northwest Territories and Nunavut*

The preamble of the *Environmental Rights Act* for the Northwest Territories and Nunavut states: "The people of the Northwest Territories have the right to a healthy environment and a right to protect the integrity, biological diversity and productivity of ecosystems in the Northwest Territories."

3. Aboriginal and Treaty Rights

Before the *Constitution Act*, 1867, came into force, Indigenous systems, along with English and French legal systems, co-existed in Canada (Boyd, "Elements" at 206; Hogg, *Constitutional* at 28.8). Steps have been taken to integrate common law and civil law into the Canadian legal system and progress has been made—however, less progress has been made with Aboriginal law (Boyd, "Elements" at 206; Hogg, *Constitutional* at 28.8.) As noted by Boyd ("Elements" at 206): "Indigenous law can be defined as those procedures and substantive values, principles, practices, and teachings that reflect, create, respect, enhance and protect the world and our relationships within it." The Canadian *Constitution* protects Aboriginal rights, title, and self-government. Boyd and Hogg assert that Indigenous people would receive the most benefit from an *Environmental Bill of Rights* (Boyd, "Elements" at 206; Hogg, *Constitutional* at 28.8). An *Environmental Bill of Rights* should reflect principles and belief systems of Indigenous law as well as protect the environments upon which Indigenous people depend, work towards reconciliation and reduce environmental injustice (Boyd, "Elements" at 249; Hogg, *Constitutional* at 28.8).

Recommendations for Canada

In the article "Elements of an Effective Environmental Bill of Rights" (at 207) David Boyd suggests that legal recognition of environmental rights can be enforced and strengthened in four different ways. These include:

- Inclusion in a constitution;
- Inclusion in human rights codes;
- Inclusion in existing environmental legislation; or
- Stand-alone legislation.

1. Inclusion of Environmental Rights in Human Rights Codes, Bills of Rights or the Constitution

Human Rights Law aims to protect equality and fight against discrimination. This usually involves human rights commissions, tribunals or courts dealing with complaints regarding violations of human rights; these provide a venue where rights violations can be heard, as well as, complainants can find remedies (Boyd, "Elements" at 210). These laws could be amended to include protections for environmental rights.

The *Alberta Bill of Rights*, RSA 2000, c A-14 currently recognizes the following:

> (a) The right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) The right of the individual to equality before the law and the protection of the law;
>
> (c) Freedom of religion;
>
> (d) Freedom of speech;
>
> (e) Freedom of assembly and association; and
>
> (f) Freedom of the press.

Again, it could be amended to include the right to a clean environment.

Constitutional Amendment

The *Charter* is part of the Canadian Constitution. It has been entrenched, meaning it is very difficult to change and is legally protected. Constitutional protection for the right to a healthy environment has been incorporated in many other countries as seen above; this has inevitably lead to strengthening environmental laws, improved enforcement, and increased public participation (Boyd, "Elements" at 207). There are only a few ways to change the Canadian Constitution; one of the ways is through the Political Amendment Process (Boyd, "Elements" at 208). This process requires the approval of Parliament and the approval from at least seven provinces or territories, which represents the majority of Canada (Boyd, "Elements" at 208). Amending the Constitution and adding the right to a healthy environment under s 7 of the *Charter*

would inevitably place protections on nature, ecosystems, and our environment along with improving our health; conflicting legislation and regulations would have to change to conform to this constitutional amendment.

Amending the Constitution to grant nature its own rights and standing would have huge impacts on the protection and preservation of our ecosystems and forests, rivers, trees and mountains. Other countries have set rules and regulations in place to work towards nature's protection and the protection of human being's health and wellness.

Interpretation of Charter Rights

The right to a healthy environment is recognized in international law. All human rights are connected and intertwined. Although the SCC has not yet recognized it, the concept of legal standing for the environment can be and should be included as a human right to a healthy environment, under *Charter* s 7 – the right to life, liberty and security.

Even though the SCC has dealt with cases regarding some aspects of environmental protection, it has not yet dealt with the issue of the right to a clean and healthy environment under s 7 of the *Charter*. However, there have been academics who strongly argue that *Charter* s 7 can play a significant role in environmental litigation (See, for example: Avnish Nanda, "Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the Charter in the Environmental Realm" (2015) 27 J Env L & Prac 109; Nickie Vlavianos, "The Applicability of Section 7 of the Charter to Oil and Gas Development in Alberta" (2008) 17(3) Constitutional Forum Constitutionnel 123; Catherine Jean Archibald, "What Kind of Life? Why the Canadian Charter's Guarantees of Life and Security of the Person Should Include the Right to a Healthy Environment" (2013) 22 Tulane Journal of International & Comparative Law 1; Lynda Collins and David Boyd, "Non-Regression and the Charter Right to a Healthy Environment (2016) 29 J Env L & Prac 285).

In addition to *Charter* s 7, other *Charter* sections (e.g., s 2(b) – freedom of expression; s 15(1)—equality) have been argued in environmental cases. In one case arising from Alberta, the SCC was asked to address the role of the *Charter* in environmental cases. In *Ernst v EnCana Corporation*, 2013 ABQB 537 (CanLII); appeal dismissed: *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 (CanLII), Ernst brought an action against the EnCana Corporation for damage to her water well and the Rosebud aquifer caused by construction, drilling, and other fracking activities from the company. The action also claimed Alberta Environment [now Environment and Sustainable Resource Development] and the ERCB [now the Alberta Energy Regulator] owed the applicant a duty to protect her water supply and had failed to address her complaints about EnCana. The applicant claimed for damages against the Energy Resources Conservation Board (ERCB) for breaches of her *Charter* s 2(b) right to freedom of expression. The ABQB and the ABCA agreed that the claim against the ERCB should be struck. Unfortunately, the SCC, in a split decision (4:4:1) in *Ernst v Alberta Energy Regulator*, [2017] 1 SCR 3, 2017 SCC 1 (CanLII), eventually agreed that Ernst's claim for *Charter* damages should be struck, with the "tie

breaking" justice ruling it was because she had not given proper notice of the Constitutional challenge.

In a separate case, another party, Alberta Environment, was not successful in getting all of Ernst's claims against it struck (*Ernst v Encana Corporation*, 2014 ABQB 672).

2. Inclusion of Environmental Rights in Existing Environmental Legislation

Including environmental rights in a jurisdiction's environmental legislation would be easier to incorporate and add changes to a law that already exists, instead of implementing new laws (Boyd, "Elements" at 212). The Yukon Territory and Quebec are the only provinces/territories in Canada where the right to a healthy environment is incorporated into the main environmental statute (Boyd, "Elements" at 212).

3. Separate Environmental Bill of Rights with Paramountcy Provision

Including legal provisions which make an *Environmental Bill of Rights* paramount over other laws would improve its strength and enforcement (Boyd, "Elements" at 239). Boyd notes that this has happened in legislation in some Canadian provinces and territories. For example, "The *Human Rights Acts* of both Nunavut and the Yukon contain the following provision: this Act supersedes every other Act, whether enacted or made before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act" (Boyd, "Elements" at 239). As well, Boyd notes that in "Quebec's *Charter of Human Rights and Freedoms* includes a clause that makes some of its provisions superior to existing and future laws unless those laws explicitly state that they apply despite *the Charter*." (Boyd, "Elements" at 239). Paramountcy would enable an environmental law to supersede other laws and guarantee enforcement of environmental laws and environmental protection and preservation.

Conclusion

Perspectives are changing all around the world and individuals are becoming more conscious of the role that the environment plays and the importance of it. The human right to a clean and healthy environment has been incorporated into laws and constitutions in many countries around the world, specifically India, Ecuador, Bolivia and New Zealand. The right to a clean and healthy environment is interconnected with the *Charter:* specifically, the right to life, liberty and security under *Charter* s 7. Protecting the right to a healthy environment will protect individuals from illness, enable access to basic needs and indirectly protect the environment. Every individual should have the right to live free from pollution and toxins.

Many countries including Bolivia, Ecuador, India, and New Zealand have also recognized the Rights of Nature, these rights mean that oceans, trees, mountains, ecosystems and lakes are

granted legal standing, have their own rights and own themselves instead of being treated like property. The environment should not be bought, sold or used for commercial use; if the environment needs to be utilized, limits should be placed on it. The Rights of Nature recognizes that the environment should have the same legal rights as a human being and be treated as an equal; one should not be above the other. Recognizing that nature should be a rights holder will protect and preserve the environment, making it last longer for our generation and future ones. Even though Canada does not recognize the right to a clean and healthy environment or the Rights of Nature, there are many ways these laws can be incorporated into the legal system. More countries around the world and changing their views and moving towards recognizing these environmental rights.

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