

The River's Legal Personhood: A Branch Growing on Canada's Multi-Juridical Living Tree

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Abstract

Relationships with rivers in British Columbia are often imbued with social and material toxicity. Learning from three sources of law in British Columbia—Indigenous, Canadian, and international law—this article draws out one potential remedy to the imbalanced relationships between humans and rivers through exploring the viability of declaring the rights of nature in accordance with the socio-cultural and doctrinal frameworks embedded in these three sources of law. By taking seriously storied precedents and governing practices from the 'N̓amgis, Heiltsuk, and W̓SÁNEĆ Nations, this article is guided by their water relations, governance, and legal orders. In expanding Canadian conceptions of personhood, challenging anthropocentrism within section 7 of the Charter of Rights and Freedoms, and expanding section 35 constitutional protections, this article also leverages Canadian legal concepts and protections for remedying river relations. Drawing upon the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) further guides the process of affirming the rights of rivers, especially in light of legislation that has codified UNDRIP domestically. Braiding these three sources of law indicates that subsequent rights of nature cases should be rooted in the interpretative and analytical framework of Canada's multi-juridical living tree.

Keywords: Indigenous governance; Indigenous legal orders; Indigenous rights; legal pluralism; rights of nature

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Introduction

One of the most pressing environmental, political, and legal challenges today is locating effective remedies to reduce and rectify injuries committed against more-than-human natural actors. This challenge has been addressed in the natural sciences (Cooke et al., 2016; Nordhaus, 2008), social sciences (Dell, 2009; McGregor, 2018), and legal studies (Borrows, 2002a; Dellapenna & Gupta, 2009; Fisher, 2017), which indicate that relationships between nature and humans are imbued with social and material imbalance and toxicity. In the pursuit of remedying these relationships, some scholars have leveraged rights-based discourses to argue that a healthy environment is a human right (Hiskes, 2008), whereas others have shifted the location of rights to argue in favour of recognizing the inherent rights of nature (Burdon et al., 2015; O'Donnell & Talbot-Jones, 2018). The latter has gained social, political, and legal traction globally. Pursuing the rights of nature by attributing legal personhood to natural actors is innovative in Western environmental law and policy because doing so marks a departure from prescriptive environmental policies. Recognizing the animacy, living-nature, and personhood of rivers, however, is not so nascent within Indigenous legal orders² and the relational practices that derive from Indigenous expressions of nationhood and governance. As such, this article draws on Western and Indigenous legal practices to draw out a potential remedy to imbalanced relationships with natural actors, which is developed through using legal personhood as a cross-cultural and inter-legal nexus. This article therefore develops the claim that rivers' legal personalities might offer a mechanism to leverage when declared through and in accordance with Indigenous, Canadian, and international law to remedy imbalanced water relations.

The organizational analysis of this article spans three overlapping legal geographies within which British Columbians move: Indigenous, Canadian, and international law. Following an overview of current developments in and literature on the rights of nature, the first substantive section learns from the legal theories and practices of 'Namgis, Heiltsuk, and WSÁNEĆ law, with an emphasis on the reasoning that defines humans' distinctive obligations to more-than-human actors. This section is followed by an exploration of the role of Canadian law in the rights of nature. This part interrogates how personhood has historically shifted in Canadian socio-cultural and legal epochs, why section 7 of the Charter of Rights and Freedoms (Charter) acts as a reference point for understanding Canadian legal values, and why corporate personhood under British Columbian and Canadian law justifies the legal personhood of rivers. This exploration is then followed by a discussion of section 35 of the Constitution Act (1982), and how the thesis advanced in this article might be pursued through the inter-societal principles embedded in doctrinal and jurisprudential developments. The final section of this article briefly examines how international declarations, as a form of "soft law" (Barelli, 2009; Gunn, 2017), might contribute to rights-based approaches to environmental relations and governance.

When considering these legal sources, it is important to emphasize that I understand law to be a social process and cultural derivative that is living, dynamic, and reflexive. This perspective means that each legal order and system should adapt to changing societal needs by rescinding practices contrary to fundamental justice. Furthermore, discussing questions of personhood for natural actors requires a broader consideration of the personhood of people in communities targeted by colonial governmentalities. The injustices that personhood has created and continues

² Val Napoleon (2007) distinguishes legal order and legal system: the former is described as "law that is embedded in social, political, economic, and spiritual institutions" whereas the latter refers to state-centric "law [that] is managed by legal professionals that are separate from other social and political institutions" (p. 2).

to create are deeply enduring political tools to categorize groups into the boxes of “deserving” and “undeserving”—a social border that creates an insider-outsider dichotomy for who is (un)worthy of rights, protections, and respect. Until its 1951 amendment, the Indian Act defined a person as “an individual other than an Indian” (as cited in Wilson-Raybould, 2019, p. 18), which codified the socio-cultural norm that Indigenous people were unworthy of rights and protections. In fact, it was not until 1960 that all status Indians retained suffrage rights and were recognized as citizens “capable” of engaging in civic activities (Leslie, 2016). By considering how personhood has functioned as a mechanism to liberate and oppress, it is vital that these realities are reflected in how personhood for natural actors develops, so that it does not grow in an ahistorical vacuum divorced from personhood’s social, political, and juridical entanglements.

The Rights of Nature in Retrospect

Prior to engaging with academic literature on the rights of nature, it is important to address why legal personhood can be a useful mechanism in righting nature, despite its imperfections. There are legitimate concerns regarding the practice of attributing legal personhood to natural actors since doing so has the potential to misrecognize Indigenous relationships to place, constrain liberatory politics, hinder radical emancipation, and erase the underlying title interests of a Nation (Collins & Esterling, 2019; Coombes, 2020; Tănăsescu, 2020). These concerns emerge from legal personhood and the rights of nature not taking Indigenous law seriously, so reaffirming the role of Indigenous legal orders in these pursuits could work to address these concerns. While this analysis primarily interrogates the rights of nature via legal personhood, it also recognizes that other vehicles may be more fitting, powerful, and transformative for Nations. Despite having ambiguous conceptual borders, understanding legal personhood through a mask metaphor can elucidate its dual function: “to hide, or rather to replace, the actor’s own face and countenance, but in a way that would make it possible for the voice to sound through” (as cited in Gaakeer, 2016, p. 290). Thus, legal personhood understood through the mask metaphor protects the underlying entity while also providing a voice to express their interests through the false face that legal personhood confers. The substantive purpose and intent of extending legal personhood to rivers is twofold: first, the expansion of personhood should recognize Canada’s “multi-juridical legal culture” (Borrows, 2010), which derives reasoning from a plurality of regulatory systems and dispute resolution processes across geographical areas with overlapping spaces of inherent and asserted jurisdiction; second, natural actors recognized as legal persons are granted higher thresholds of rights and protections—privileges withheld prior to obtaining legal personhood. These additional protections arise from rights that are made accessible to legal persons, such as the right to enter contracts, own property, and litigate (Business Corporations Act, s. 30, 2002; O’Donnell & Talbot-Jones, 2018). Such rights grant juridical standing, which means that legal persons can initiate claims against those who harm them, including through pursuing monetary damages and injunctive reliefs (O’Donnell & Talbot-Jones, 2018). Due to these rights, legal personhood offers a means to protect natural actors because remedial mechanisms are expanded to the natural actor and normative shifts may occur in how people, governments, and corporations (re)interpret their relationships with lands and waters.

American law scholar Christopher Stone (1972) first introduced an approach to what has become known as the “rights of nature” discourse by engaging with legal standing and rights frameworks to advance environmental protections. In essence, Stone’s work is predicated on the following question: if corporations, trusts, and governments hold rights and privileges, why is the

environment not subject to a similar set of protections through the attribution of rights? This inquiry asks states to move beyond the common law’s riparian doctrine, which allows damages to be recovered only if a natural person (human being) can demonstrate that an environmental harm has inflicted damages that impede *their* own interests (Stone, 1972, pp. 459–460). Rather than continuing to allow the law to treat nature as a non-rights-bearing entity, Stone has suggested that state authorities should recognize natural actors as rights holders and bestow upon them the standing required to claim injury and pursue damages. Despite this innovative proposal, it was not until the following decades that Stone’s work gained traction when it developed in practice into what is now globally known as “Earth jurisprudence” (Burdon, 2011), “wild law” (Cullinan, 2011), and “the rights of nature” (Mortiaux, 2021).³

Approaches to the Rights of Nature

The rights of nature first formally appeared in Ecuador’s constitutional reform in 2008, followed by Aotearoa (New Zealand) in 2017, India in 2017, Hawai‘i in 2021, and Innu of the Ekuanitshit territories (Quebec) in 2021. These developments, and the processes through which they arose, can be generally understood as applying four possible approaches, in which the fourth has the potential to transform Canada’s colonial legal landscapes. While these approaches are non-exhaustive and invite combination, they offer an understanding of the breadth of approaches that have been taken to declare the rights of nature. The first approach occurs through legislation, which codifies specific rights for natural actors. The second approach occurs by recognizing the rights of nature through a judicial declaration, which is largely reliant on pre-existing frameworks. The third, more institutionally transformative, approach occurs by declaring the rights of nature through constitutional reform. Finally, the fourth approach, albeit still emergent, embraces the legally plural landscapes of colonial states by using both state and Indigenous jurisdictional authorities and legal processes to attribute or recognize the rights, protections, and personhood of natural actors. It is with respect to this last approach that this article seeks to contribute to a more fulsome discussion on how the rights of nature can be better informed by Indigenous legal orders.

In the terms of the first approach, Aotearoa and Hawai‘i have both taken legislative means to pursue the rights of nature in 2017 and 2021, respectively. In Aotearoa, through the Māori’s defense of their territories, a land claims negotiation carved out a process in which neither New Zealand nor the Māori hold whole property interests in a river; rather, in 2017, the New Zealand legislature passed the Te Awa Tupua Act, which vested partial land rights to the river (Morris & Ruru, 2010; O’Bryan, 2017a; Studley, 2018).⁴ In one reading, this process has the potential to unsettle notions of property and ownership, which invites alternative visions of who can hold property interests. Alternatively, this development might be interpreted as deriving from the turbulent political climate in Aotearoa, where concerns persist about releasing land title back to iwi and hapū (Tănăsescu, 2020, p. 444). This legislative approach, nevertheless, has codified the Te Awa Tupua (Whanganui) River’s legal personhood in the hope of allowing the Māori to

³ These three developments possess distinctions that both overlap and invite critique; however, a more granular comparative analysis is beyond the scope of this article.

⁴ Property interests, and the property theories that shape them, have acted as both bases to deny and affirm Indigenous rights. Each theory of property reflects the ideological assumptions embedded in the worldview of the social group it is constituted by, which is a particularly pressing site of interrogation at the intersections between the rights of nature and dominant, emerging, and critical property theories (For diverse property theories, see Anthon, 1832; Borrows, 2019b, p. 151; Cameron et al., 2020; Davies, 1999; Davies, 2021; Hohfeld, 1931; Johnson, 2007).

maintain their relationships with this river. Likewise, in 2021, Hawaiian legislation emerged from the state that interfered in Kānaka Maoli's relationships with Mount Mauna Kea (Casumbal-Salazar, 2017; Huihui & Karides, 2021). Such interventions in their land relations initiated the emergence of Mauna Kea's legal personhood via Bill 693 (Hawai'i House of Representatives, 2021). It is, however, too early to assess the impact that this emerging case will have on Kānaka Maoli rights, relationships with lands, and rights of nature discourse, more broadly.

The second approach, judicially declaring the rights of nature, occurred in India in 2017. Initiated through public interest litigation, the High Court of Uttarakhand deemed the Ganges and Yamuna Rivers legal/juristic persons in order to protect the rivers from further damage (O'Donnell, 2018; O'Donnell & Talbot-Jones, 2018; Studley, 2018). The Court's reasoning derived from the existing *parens patriae* doctrine, where there is duty vested in the Court to intervene in environmental degradation (O'Donnell, 2018, p. 139). This case is awaiting appeal at the Supreme Court, which could lead to the case being overturned.

The third approach to granting legal rights to nature, constitutional reform, was used in Ecuador—the first state to formally declare the rights of nature in 2008. Ecuador's "environmental constitutionalism" has since influenced the rights of nature across the globe (Macpherson et al., 2021, pp. 444–446). This influence derives from Article 71, in particular, which declares that "Nature, or Pacha Mama, 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" (Republic of Ecuador, 2008). Article 71, therefore, aligns with a set of (in)formal principles within rights of nature cases, which affirms and grants rivers the right to exist, flow, and flourish.

A fourth discernable approach has gained momentum that embraces legal pluralism, or what Anishinaabe legal scholar John Borrows has described as Canada's "multi-juridical legal culture" (2010). Dimensions of this approach have been advanced in a recent rights of nature case in Innu of the Ekuanitshit territories in 2021. This approach grows from the authority of the Innu Council of Ekuanitshit, who entered a partnership with the regional municipality of Minganie, which resulted in the collaborative recognition of the legal personhood of Muteshekau Shipu (Magpie River), including the river's right to flow, maintain physical integrity, and litigate (Townsend et al., 2021). A recent article with two rivers as its lead authors, the Martuwarra and Unamen Shipu Romain Rivers, demonstrates the transformative potential of listening to and voicing rivers' interests to nurture such relationships for future generations (Martuwarra RiverOfLife et al., 2022). The following section, therefore, seeks to develop a discussion that leverages the rights of nature to amplify Indigenous law and governance and, thereby, to listen and give voice to water beings.

Indigenous Legal Orders

The legal personification of natural actors can align closer with Indigenous legal practices since such processes transcend Western conceptions of natural actors as mere legal objects or property. While legal personhood derives from Roman law and is now a central component of the common law (Gaakeer, 2016), it may dovetail with Indigenous legal orders when infused with and informed by Indigenous ethics and relational responsibilities. This section focuses on, listens to, and learns from 'Namgis, Heiltsuk, and WSÁNEĆ law. I deliberately choose to engage with these Nations' practices because I belong to the 'Namgis Nation, and Heiltsuk governance demonstrates

the centrality of Indigenous self-determination to addressing environmental imbalance, and W̱SÁNEĆ law has guided my thinking as I move through their homelands and waters.

Consequently, this section is not intended to speak for these communities but to address how generative processes of engagement with Indigenous legal thought and practice can shape the rights of nature. Furthermore, as Borrows (2019a) has noted, Indigenous laws are constituted by subjective normative and juridical principles that have numerous interpretations. This complexity means that the rights of nature are best achieved through community-based reasoning and engagement. Additionally, what Saulteau and Gitksan legal scholar Val Napoleon has found by applying this interpretive ethic in practice is that “one could take up several perspectives” of a single legal principle since Indigenous laws are non-essentialist and can be applied to contexts that are as diverse as Indigenous Nations themselves (2019, p. 9). Recognizing that Indigenous laws have a multiplicity of interpretations ensures that Indigenous legal reasoning does not become deterministic, which means that these interpretations contribute to a broader legal fabric without essentializing Indigenous law and its application. In fact, it is through working with a plurality of interpretive lenses that Indigenous law maintains its intellectual and applied rigour. As such, the principles expressed here should be critiqued, challenged, and modified in order to refine the ways that Indigenous reasoning develops. While respecting the agency of Nations to assess the rights of nature on their own terms, the purpose of this section is to highlight how the rights of nature can be a strategic instrument leveraged by Indigenous Nations to maintain and perpetuate relationships with their lands and waters. This discussion is also intended to foreground the subsequent analysis of section 35 protections and the rights of rivers. These three coastal Nations’ legal orders thus offer an anchor point from which to broaden legal conceptions of rivers, natural actors, and personhood in ways that are rooted in contextual and coastal Indigenous ethics and laws.

The ‘Ṉamgis, which is a part of the Kwakwaka’wakw, is situated off of the northern end of Vancouver Island. This community is where I hold political membership and from which these lessons, principles, and practices emerge. The Legend of the Tsitsa’walagama’yi offers both normative and legal lessons on the relationships and responsibilities embedded in river relations. This story, understood as a mode of legal reasoning (Napoleon & Friedland, 2016), offers processes that demonstrate and apply responsibilities of intergenerational ethics and relationship continuance. The U’mista Cultural Centre has provided an account of this story, told by Pal’nakw̱alagalis Wa’kas, Dan Cranmer, in 1930. I have also heard this story shared by family and reflected on it in Irene Isaac’s analysis of Kwakwaka’wakw education, ecological knowledge, and storytelling (2010). U’mista’s account from Pal’nakw̱alagalis Wa’kas is as follows:

When the Transformer (or Creator), Ḵaniki’lakw, travelled around the world, he was eventually returned to the place where Gwa’nalalis lived. In an earlier encounter, the Transformer had beaten Gwa’nalalis, who was ready for his return. Ḵaniki’lakw asked, ‘Would you like to become a cedar tree?’ Gwa’nalalis replied, ‘No, cedar trees, when struck by lightning, split and fall. Then they rot away for as long as the days dawn in the world.’ Ḵaniki’lakw asked again, ‘Would you like to become a mountain?’ ‘No,’ Gwa’nalalis answered, ‘For mountains have slides and crumble away for as long as the days dawn in the world.’ The Transformer asked a third question. ‘Would you like to become a large boulder?’ Again, Gwa’nalalis answered, ‘No. Do not let me become a boulder, for I may crack in half and crumble away as long as the days dawn in the world.’ Finally, Ḵaniki’lakw asked, ‘Would you like to become a river?’ ‘Yes, let me become a river that I may flow for as long

as the days shall dawn in the world,’ Gwa’nalalis replied. Putting his hand on Gwa’nalalis’ forehead and pushing him down prone, *Kaniki*’lakw said, ‘There, friend, you will be a river and many kinds of salmon will come to you to provide food for your [descendants] for as long as the days shall dawn in the world.’ And so the man Gwa’nalalis became the river, Gwa’ni. (U’mista Cultural Centre, n.d.)

This Legend provides two lessons on one interpretation with river relations as the referent for drawing out legal principles. Through this lens, this story first demonstrates how relationships with Gwa’ni recognize the genealogical roots and the ancestral membership of the river. This principle indicates how river relations are not framed in terms of the ownership of an object but, rather, as a life-sustaining relationship with the river. Second, the Legend demonstrates that using the common law’s concept of legal personhood might offer a mechanism to affirm the first lesson, in which attributing legal personhood to the Gwa’ni River may prevent state interference in ongoing relationships with Gwa’ni. Without recognizing the river’s rights, Canadian authorities are likely to continue to treat the river as an object that is subject to their jurisdiction (Canada Water Act 1985, (RSC) c. C-11, ss. 4(a), 4(b), & 4(c); Land Act 1996, (RSBC) c. 245; The Constitution Act 1867 ss. 91(1A), 91(10), 91(12), 92A(1)(a), 92A(b), 92A(c)). Declaring the legal personhood of the Gwa’ni River offers a potential vehicle to fulfill obligations to Gwa’ni and to future generations, just as Gwa’nalalis did when he chose to become a river (rather than a cedar, mountain, or boulder). Pursuing these possibilities in practice must be shaped by community interests rooted in Indigenous property, management, and ownership regimes to ensure that these pursuits are informed by community-based reasoning.

East of the *Namgis*, the Heiltsuk Nation sits on the central coast across from Vancouver Island. In 2016, Heiltsuk waters were contaminated by an oil spill off of the coast of their territory. This oil spill offered an opportunity to re-envision how the legal personality of natural actors connects to Indigenous and water-based governance. The Nation responded to the oil spill in two ways: first, by serving the liable corporation notice of civil claim and, second, by drawing upon *ǻvilás* (Heiltsuk traditional law) to pursue just actions and remedies (Heiltsuk Tribal Council, 2018). It is the latter which is of greatest importance here because of the lessons embedded in the legal and governing practices advanced.

ǻvilás is what undergirds the relations between Heiltsuk citizens and natural actors. It governs and is the basis of their respective rights, responsibilities, and obligations to nature, humans, and future generations (Curran et al., 2020). In a 2018 report issued after the oil spill, which focused on the revitalization of their traditional laws, the Heiltsuk Tribal Council noted that “*ǻvilás* governs not only our relationship and responsibilities to land and sea resources, but also social relationships and obligations with respect to people, stories and all animate beings in our territory” (n.p.). Recognizing natural actors’ legal personalities is one potential process to create space for the revitalization of *ǻvilás* and the governing authority of Heiltsuk. The Declaration of Heiltsuk Title & Rights, which was issued in 2015 prior to the oil contamination, flows from *ǻvilás* and the rights, responsibilities, and relationships that it confers and upholds. Section C(7) of the Declaration outlines that the Heiltsuk Nation seeks to collaborate with external entities to advance the interests of the Nation (2015). This provision offers a jurisdictional space, if in the interests of the Nation, from which to expand legal personhood in accordance with the fundamental principles of Heiltsuk law and governance. Moreover, recognizing the legal personality of natural actors fits within the purpose and intent of section C(5), which outlines that traditional laws will evolve within a contemporary governance system (Declaration of Heiltsuk Title & Rights, 2018). Taken

together, sections C(5) and C(7) offer avenues through which the legal personhood of natural actors could be pursued when advanced in accordance with Ġviłás and the Declaration. In turn, advancing the rights of natural actors could facilitate broader and deeper forms of Heiltsuk governing authority in coastal, marine, and water governance—areas in which Indigenous stewardship practices have been historically marginalized but are being revitalized by Heiltsuk (von der Porten et al., 2019). This shift toward Indigenous governance could be formally actualized via declaring the legal personalities of natural actors, which would mark a fundamental departure from current relationships between British Columbia and Heiltsuk waters.

Moving to the southern end of Vancouver Island, the WŚÁNEĆ offer another perspective on the relationships, rights, and obligations to and/or with natural actors, especially in light of the 2011 oil contamination of Goldstream River (comprised of SELEKTEL and MIOEN Streams) (Clifford, 2016; Shaw, 2013). Not only does this unfortunate but common reality inform what the rights of nature could offer for Nations—both as a preventative mechanism and remedial process after an environmental disaster—but WŚÁNEĆ legal principles may align with the normative strands that righting nature possesses. As the WŚÁNEĆ Leadership Council has described, the SENĆOTEN word for Island means “Relative of the Deep” (n.d.-a; see also Clifford, 2016, p. 774), which denotes a relational worldview with natural actors. As noted in WŚÁNEĆ legal scholar Robert YELKATFE Clifford’s analysis of this expression, understanding land in a relational way illustrates the agency of non-humans, which is embedded, affirmed, and recognized in WŚÁNEĆ stories and law (2016, p. 773). In further reflecting on these strands of thought and practice, Clifford has drawn out the legal obligations of reciprocity in the creation story of LEL,TOS (James Island) (pp. 773–774). These ethical obligations derive from islands being past WŚÁNEĆ ancestors. As such, there is a responsibility to take care of the island, and, in return, XALS (the Creator) tells LEL,TOS to “look after your relatives, the WŚÁNEĆ People” (as cited in Clifford, 2016, p. 774). This relational engagement, which is premised upon the mutual agency of humans and natural actors, becomes further contextualized through the role that water plays for the WŚÁNEĆ, and how the oil spill has impacted WŚÁNEĆ practices. The spill not only impacted the river’s health and well-being, but it has also interfered in WŚÁNEĆ ceremonial bathing practices (pp. 775–777). Bathing, according to Clifford, emerges from the teachings of XALS because water has “a pure spirit and thus has the ability to cleanse” (p. 776). In these ways, the oil spill has impacted the environmental, social, and cultural dimensions of the legal geographies of SELEKTEL.

Adjacent principles to those discussed above radiate from the Legend of ŁÁU, WELNEW, which expresses that winds, trees, and bodies of water are people (WŚÁNEĆ Leadership Council, n.d.-b). Treating these persons—winds, trees, and waters—as legal objects seen only to serve the purpose of being owned, sold, and extracted from sits in tension with what WŚÁNEĆ practices express and uphold. There is a need to recognize and practice what LEL,TOS and ŁÁU, WELNEW outline, which remains true across many Indigenous governing and legal processes: natural actors are persons and relational caretaking is paramount. As the 2011 fuel spill indicates, Canada still treats rivers as objects rather than as beings enmeshed in a web of social, political, and juridical responsibilities. In this respect, the personhood of natural actors can amplify what Indigenous legal orders already know—that natural actors are animate and, as WŚÁNEĆ Elder Dave Elliot Sr. says, “Our people lived as part of everything. We ... were just like the birds, the animals, the fish” (1990, p. 75). The personhood of natural actors may help reassert the reality that humans and nature are not separate but inherently related, which can help humans (re)interpret their relationships with natural actors for both the health of rivers and human societies.

Canadian Law

Having addressed, through engaging with and centring coastal governance and law, where three inter-societal spaces for attributing legal personhood to natural actors might exist, this section turns to the role of Canadian law in the rights of nature. While the discussions explored below emerge from diverse contexts that may seem bounded by Western normative and juridical principles, this section seeks to bring these strands of Canadian history and rights together to develop a stronger rights of nature paradigm in the Canadian context. This section specifically examines how and why personhood has shifted throughout Canadian socio-cultural and legal epochs, why section 7 of the Charter guides this pursuit, how corporate personhood and the rights of nature’s relational witnessing ethic are related, and how section 35 of the Constitution Act (1982) can be used as a medium to recognize these inter-societal claims.

A Canadian Personhood Genealogy: Reflections on *Edwards v. Canada*

At one point in Canadian history, a fundamental legal debate transpired over the meaning of “qualified persons” in section 24 of the Constitution Act (1867). Generally, this debate centred on the question of whether women were classified as “qualified persons” in the context of senate appointments (*Edwards v. Canada*, 1929). This case, *Edwards v. Canada*, was appealed to the Judicial Committee of the Privy Council—the highest appellate court in 1929. Despite ruling only on White women’s personhood, *Edwards* has been regarded as groundbreaking for both substantive and interpretive reasons (L’Heureaux-Dube, 2000; Tuck, 1941). First, the case established that personhood is not rigid nor static by permitting women to be appointed as senators; second, the case embraced what has become known as “living tree constitutionalism,” in which Canadian judicial decisions must consider and remain responsive to societal change (L’Heureaux-Dube, 2000; Tuck, 1941).

When Lord Sankey delivered the judgment in *Edwards*, it was “unthinkable”⁵ that “person” in the Act included women since the ruling departed from the exclusionary jurisprudence pertaining to women within Canadian law (L’Heureaux-Dube, 2000; Tuck, 1941). The importance of *Edwards* in the context of the rights of rivers rests in its judicial reasoning since the case emphasized that personhood lives and grows with societal needs. Given this context, this judgement carries with it two important implications for the personhood of rivers: first, that judicial analyses should not undertake narrow readings of statutory and constitutional provisions for rivers’ rights; and, second, that Canadian law determines personhood by contextualized analyses rooted in the time and space of the claim. Thus, if socio-cultural understandings of Indigenous legal orders (as well as the domestic and international rights of Indigenous Peoples shift) there is established doctrinal and jurisprudential flexibility for the expansion of personhood, even when it may be initially deemed “unthinkable.” Since *Edwards* found that judicial analyses cannot rest on narrow interpretations of legal provisions, section 7 of the Charter is a constitutional provision that can guide rivers’ rights. Following living tree constitutionalism, and the generous and liberal approach expressed in *Edwards* (see Hogg, 1990)—characteristics also shared with section 35 rights (*R. v. Gladstone*, 1996; *R. v. Sparrow*, 1990; *R. v. Van der Peet*, 1996)—

⁵ There are notable overlapping narratives of “the impossible” and “the unthinkable” in discourses on the rights of nature, colonial permanence, and personhood (Escobar, 2020, pp. 131–134; Stone, 1972, pp. 450–457).

recognizing rivers' legal personalities can be consistent with Canadian law when read and interpreted through existing norms, doctrines, and processes within Canadian constitutionalism.

Affirming the “Life, Liberty, and Security” Rights of Rivers

As a pillar of Canadian law, section 7 embodies fundamental Canadian values as protections for the “life, liberty, and security of the person” (*Charter of Rights and Freedoms*, 1982, s. 7). This constitutional protection provides natural persons with the freedom to make personal choices without the state depriving them of their life, liberty, or security (Sharpe & Roach, 2013). This protection has been demonstrated in application in the 2003 case of *R. v. Clay*, which found that the liberty right under section 7 protects individual autonomy to make profoundly personal choices without state interference (2013). *Clay* built upon the 2000 case of *Blencoe v. British Columbia*, which found that the security right under section 7 is violated when the state interferes in profoundly intimate matters and induces physical or psychological suffering (2013). While developments under section 7 have centred on the right to abortion (*R. v. Morgentaler*, 1988), the right to physician-assisted dying (*Carter v. Canada*, 2015), and the limitations of criminal punishment (*R. v. Bissonnette*, 2022; *R. v. Vaillancourt*, 1987), the underlying principles of section 7 also inform the rights of rivers. In this context, the life, liberty, and security rights of rivers may be violated by state contracts that enable interactions that deprive rivers of their health and well-being (i.e., resource extraction or the implementation of hydro-electric technologies). Rivers' life and security rights under section 7 are placed in further jeopardy since extractive technologies interfere with the profoundly intimate matters of rivers and induce the detrimental suffering of water beings. Although currently interpreted to protect “only human beings” (*Irwin Toy Ltd. v. Quebec (A.G.)*, 1989, para. 13), section 7 protections provide important insights into limitations to governmental involvement in matters of individual agency, autonomy, life, liberty, and security. Even if rivers are not yet considered “persons” because of existing non-human (corporate) cases under section 7, this omission should not preclude rivers from challenging the anthropocentrism of section 7 protections through the emergence of robust and rooted rights of nature claims. Indeed, the ability of section 7 to adapt to changing societal needs tests the durability of living tree constitutionalism that Canada has embraced since cases such as *Edwards* in 1929.

Riverine Rights and Rationality: Connecting Relational Personhood and Witnessing Ethics

Thus far, this article has challenged some of the fundamental assumptions that underpin Western notions of rights, persons, and constitutional protections. Therefore, there are some broad counterarguments that can be initially addressed. Before considering the role of section 35 rights in these inter-societal pursuits, this section explores natural personhood, legal personhood, and rationality in the context of British Columbian and Canadian law to repudiate an argument that emerges from logics embedded in liberal philosophy. Without abandoning lessons that can be drawn from corporate personhood, this section also identifies not only how corporate personhood can be cited as a supplemental method to advance the rights of nature but also how rivers' representative bodies are largely premised upon relational and witnessing ethics.

Strands of liberal philosophy suggest that personhood cannot be extended to non-human, non-rational entities incapable of expressing free will or exercising agency (Ripken, 2019a). It is important to acknowledge and address this counterargument because Canadian institutions and

normative orders are undergirded by liberal logics and structures. To be transparent, I understand natural actors, under the standard grammar of rationality, to be rational beings with interests and preferences that are pursued advantageously (Mancuso & Viola, 2015). I, however, do not believe that the logical inverse of my argument has any weight when considering the legal personhood of rivers, since it has yet to have substantive and significant weight in corporate personhood. As an anthropocentric and Eurocentric construction,⁶ however, rationality has underpinned the philosophical underbelly of personhood debates for centuries and has remained an enduring consideration in contemporary questions of “who or what can be a legal person” (Kurki, 2019; Travis, 2014). Although a rigid definition of rationality is contested, rationality is commonly understood as the capacity exercised by living beings who have beliefs and values, which then determine their actions in ways that are advantageous to achieving their own interests (Brouner & Di Iorio, 2018; Shepsle, 2010). Despite countervailing tides that challenge the anthropocentrism embedded in theories of rationality (Osto, 2010), seldom do these critiques challenge the ontological assumption that humans are the dominant rational beings. Indeed, most are premised on the assumption that the more similar beings are to the human species, the more rational they are. David Papineau, Professor of Philosophy, for instance, draws on psychological literature to classify non-humans as “unrefined thinkers” within a broader hierarchy of knowledge, in which humans are superior thinkers on the basis of rationality (2006, p. 21). Thus, the general application of rationality demonstrates that it is oriented toward the adjacent and erroneous practice of dichotomously demarcating beings into the categories of human/non-human, worthy/undeserving of protection, and agent/object.

Despite these philosophical debates informing contemporary Canadian political and legal thought, using liberal notions of rationality to restrict the extension of personhood to rivers can be rejected on the grounds of corporate personhood. Under both Canadian and British Columbian law, rationality is not a formal nor substantive prerequisite for legal personhood. Corporations, among other non-human, non-rational entities, possess legal personhood. Indeed, British Columbia grants corporations the statutory rights of a natural person (Business Corporations Act, s. 30), and corporations hold limited constitutional rights under the Charter, such as the right to free expression (*Irwin Toy Ltd. v. Quebec (A.G.)*, 1988). By implication, this logic means that rivers can also hold specific statutory and Charter rights, such as those afforded under section 7. According to section 30 of British Columbia’s Business Corporations Act, “[a] company has the capacity and the rights, powers and privileges of an individual of full capacity” (2018, s. 30). There is no *de facto* status that corporate persons are unrefined or incapable entities because they cannot express themselves without representatives, nor are there other substantive grounds that corporations must satisfy prior to becoming legal persons in British Columbia. In fact, the assumption embedded in corporate personhood is the logical inverse of what is projected upon natural actors—that corporations are rational. Therefore, recognizing the legal personhood of rivers is not met with a strong counterclaim, and arguments premised on rationality must be rejected since British Columbia already recognizes the legal personhood of non-human entities. Although critiqued (Ripken, 2019b), corporate personhood offers a framework for recognizing the legal personhood of rivers, including their right to maintain the integrity of their flow, health, and autonomy.

⁶ Rationality has also been central to creating colonial hierarchies in social orders, especially through constituting the artificial and erroneous notion that societies are located along a linear continuum from “primitive” to “modern/rational” (Quijano, 2007). Neoliberal rationality has likewise been used to justify the mistreatment of women—especially racialized women (Schuster & Weichselbaumer, 2022).

Reflected in developments beginning in 2017, international advancements have sought to draw lessons from corporate personhood for the rights of nature. There have been promising developments where statutory bodies are established to represent the interests and values of rivers (i.e., via a board, council, or executive body). This advancement is exemplified by the Yarra (O’Bryan, 2019) and Martuwarra Fitzroy Rivers in Australia (Poelina et al., 2019). Following the framework of corporate personhood with a representative executive body that acts as its voice, the representatives of a river’s statutory body serve as the “voice of the river” who both speak for and defend the river’s interests (O’Bryan, 2017b). Since the preferences and interests of rivers are unintelligible in Western fora, this approach offers a vehicle to centre and amplify the voices of rivers through Indigenous relationships to place. This mechanism for voicing rivers’ interests interlocks with “relational personhood,” which (re)conceives of personhood as interdependent rather than atomistic (Arstein-Kerslake et al., 2021). The concept of relational personhood also challenges Western anthropocentric notions of personhood as a characteristic exercised by individuals in a vacuum absent of communal supports. In essence, relational personhood can make Indigenous relationships to place intelligible to Western actors and institutions, particularly to those who choose not to hear the interests that rivers have voiced and communicated to Indigenous Nations for generations.

This representative approach, which empowers a group of representatives to act on behalf of a natural actor, may be framed in a manner that positions the council as a conduit (from the river to state and private actors) to actualize the rights of nature. In so doing, this approach overcomes liberal counter-arguments regarding rationality and personhood. Not only does this approach address debates over how rivers voice their interests, but it may also be consistent with what Kwakwaka’wakw scholar Sarah Hunt, ȚlaliȚila’ogwa, identifies as the “Kwagiulth Witnessing Methodology” (2018, p. 288), in which the act of witnessing “is inherently bound up in relations based in responsibility” (p. 289) and is mobilized for the purpose of “making visible and audible those members of our communities who are being silenced” (p. 293). The intersection of pressing research and activism regarding land, gendered, and sexualized violence (Konsmo & Pacheco, 2016) provides rooted ethics to further guide contextual developments in connecting the practice of listening to rivers to adjacent colonial violence. Both relational personhood and Kwagiulth witnessing provide processes that advance the practice of listening to persons whose voices are suppressed, whose interests are obscured, and whose rights are denied through colonial governmentalities.

Toward an Inter-societal Rights of Nature: Leveraging Section 35

The former sections, generally speaking, have been neatly demarcated along the lines of Indigenous and Canadian law, with a focus on their respective practices, obligations, and theoretical strands. This section will now take a more “inter-societal” approach (*R. v. Sparrow*, 1990) since section 35 and Aboriginal rights are *sui generis* and rooted in Indigenous and Canadian law (Borrows, 2002b; Slattery, 2000). This section demonstrates that section 35 jurisprudence, albeit embedded within problematic frameworks, offers opportunities to advance the legal personhood of rivers. This opportunity is particularly true if the boundaries of section 35 protections are redrawn. International developments in Aboriginal rights and Aboriginal law have advanced the legal personhood of rivers (O’Donnell et al., 2020; Studley, 2018), which suggests that section 35 may be a suitable provision to achieve the rights of nature in Canada. Although Indigenous Nations have distinctive practices integral to their cultural and social principles (*R. v.*

Van der Peet, 1996), corporate interests persist in hindering these practices, as witnessed in the degradation of SELEKTEL and Heiltsuk waters (Clifford, 2016; Curran et al., 2020; Hernandez, 2018). What often permits this degradation derives from the Crown’s “ownership” of public lands and its leasing schemes over cultural sites (Lavoie, 2018), which exemplify the connections between the imposition of Crown ownership over Indigenous lands, corporate wealth, and environmental harms. Additionally, both private and public entities have harmed Indigenous lands due to Canada’s flawed proportionality doctrines, which position private property interests as superior to the interests of Indigenous Nations (Barker, 2007; cf. Borrows, 2015; Bryce, 2008). In such circumstances, section 35 can be leveraged to prevent state authorities from permitting harms against Indigenous lands and waters. It is not just that maintaining relationships with rivers is becoming increasingly difficult but also that governmental (in)actions are restricting Nations from fulfilling legal responsibilities to rivers and future generations under Indigenous law.

In the 2006 joint Supreme Court case of *R. v. Sappier; R. v. Gray*, it was further clarified that culture encompasses a Nation’s “socialization methods” and “legal systems” (2006, paras. 4 & 45). The case instructed courts not to view these practices as fixed but as responsive to the contemporary needs of the Nation (2006). Within this framework, section 35 can be used to protect the connections between the ‘N̄amgis and the Gwa’ni River since that relationship falls under the legal system of the Nation. In fact, such practices arguably meet the higher threshold of being “integral to [their] distinctive culture” (*R. v. Sparrow*, 1990, paras. 53 & 66; *R. v. Van der Peet*, 1996, para. 6) since the Nation’s relationship with Gwa’ni is not incidental but instrumental to their Nation, culture, and societal identity. Furthermore, Heiltsuk’s Ğvilás and subsequent legal practices can also be protected under section 35 since these governing practices are rooted in Heiltsuk law and act in the interests of future generations. This set of practices is guided by socialization processes that purposively weave together core pillars of Heiltsuk governance, authority, and responsibility. In fact, any or all these legal developments could also be protected under section 35 since they have grown out of traditional law to reflect the current needs of the Nation. Lastly, the WSÁNEĆ’s relationship with SELEKTEL can be protected in Canadian law as a set of practices that affirm the river’s personhood under both the socialization and legal system modifications to culture in *Sappier* and *Gray*. That said, to meaningfully remedy Canada’s infringements of Indigenous law, the Crown’s jurisdictional powers *over* lands and waters must be deconstructed to nurture what a nation-to-nation relationship should mean. In short, while some of these practices may fit within existing protections under section 35, expanded protections are needed to uphold both Nations’ land rights and the land’s own rights.

While leveraging section 35 for the rights of nature may not be the most effective way of affirming riverine rights, it can be an instrument to strategically support these pursuits. This strategy can be especially effective since one successful case under section 35 can confirm the existence of this right for all Nations. There is indeed continuity in the relational, cultural, and legal practices across the ‘N̄amgis, Heiltsuk, and WSÁNEĆ Nations and Indigenous Nations more broadly: they regard natural actors as agents that are embedded in relationships that are built upon the principles and practices of respect, dignity, and reciprocity. As *Van der Peet* has suggested, an Aboriginal right must be “morally and politically defensible” in the sense that any Aboriginal right must derive from both Indigenous and Canadian perspectives (1996, para. 42). Since respecting natural actors’ health, well-being, and personhood are long-standing and integral practices within many Indigenous legal orders, the Canadian legal system, rooted in the common law tradition, has room to grow a new branch of legal practice—one that reflects changing societal needs. As this legal branch is cultivated and nurtured, it must not be forgotten that the central trunk of Canadian

constitutionalism allows for this claim to be consistent with pre-existing jurisprudential and doctrinal frameworks. It is, in fact, through these inter-societal processes that the legal personhood of rivers can be made morally and politically defensible through section 35 developments, processes, and doctrinal tests.

International Declarations and Law

Lastly, British Columbia's recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) further cements the applicability of this article's claim. Despite UNDRIP's legally non-binding status (UNHR, 2013, p. 37), it has led to numerous international developments regarding Indigenous rights and Indigenous-state relations. Further, as international law scholar Mauro Barelli has reminded those engaging with UNDRIP's legal status, "soft law cannot be simply dismissed as non-law" (2009, p. 959). Numerous jurisdictions have additionally adopted UNDRIP into domestic law by codifying the document into statutory protections, including British Columbia. Notwithstanding the fact that British Columbia has yet to fully integrate and apply UNDRIP, a cursory analysis of the Declaration further advances the central thesis of this article. Article 25 of the Declaration on the Rights of Indigenous Peoples Act (DRIPA) (2019), for instance, declares that Indigenous Nations are provided the right to maintain their relationships with lands and waters, which includes fulfilling their obligations to future generations. In conjunction with Article 34 of DRIPA, which guarantees that Indigenous peoples can live in accordance with their own juridical systems (2019), pursuing the legal personhood of rivers according to Indigenous legal orders can fall under this statutory right, which is derived from international law and politics. Maintaining these relationships and obligations to lands and waters could be protected under and encapsulated within the attribution of legal personhood to natural actors. While this section on international Indigenous rights is brief, it is of central importance to these growing discussions.

Future Considerations

In sum, this article has addressed how the rights of nature can be informed by Indigenous legal orders through offering a cross-cultural and inter-legal analysis of legal personhood to demonstrate that personhood is more expansive than what is currently recognized under Western law. This inquiry also alludes to the fact that shifting conceptions of rivers from legal objects to subjects requires that policy-makers embrace "the grammar of animacy" (Kimmerer, 2013). In order to meaningfully advance this politic, there is a need for additional research and community-led involvement to develop a rooted rights of nature through contextual, place-based actions shaped by Indigenous storied precedents, Indigenous governance, and Indigenous legal mechanisms. Through interrogating the socio-cultural and doctrinal practices across three overlapping legal geographies in British Columbia, this article first contends that the legal personhood of rivers could be leveraged to assert Indigenous legal orders when advanced in accordance with their socio-cultural and doctrinal frameworks. Further, this article demonstrates that attributing legal personhood to rivers is congruent with Canadian law through the historical growth of personhood, corporate personhood, section 7 of the Charter, and section 35 of the Constitution Act (1982). Just as a multi-juridical account of the rights of nature may lead to Indigenous legal orders growing a branch of legal practice that draws on Canada's conception of legal personhood, Canadian law must also cultivate and nurture a new branch rooted in Indigenous

legal principles. This approach will involve sections 7 and 35 developing a more inclusive legal understanding—developments that would benefit both Canadian citizens and the “national interests” of the state. At the same time, it must not be forgotten that Indigenous relationships with rivers, and the practices that such connections embody, are integral to Indigenous cultures, legal systems, and socialization methods, and must be protected accordingly.

Recognizing the legitimacy of the thesis advanced in this article may appear to be “unthinkable” to some; however, it was not so long ago that women had to fight to be recognized as persons under Canadian constitutional law, which resulted in a partial break from patriarchal, exclusionary, and oppressive conceptions of personhood. Indeed, this battle is a struggle that is still being fought, which indicates that justice is met not simply through formal enactments but through continuous processes of social, political and juridical exchange and interaction. Similarly, fundamental justice for natural actors must braid the legal principles and practices of Indigenous, Canadian, and international law to affirm the rights of nature from the most formal of declarations to the relationships that individuals embody with rivers, lands, and oceans. As demonstrated in *Edwards*, a judicial declaration on the matter of personhood may substantially advance the legitimacy of this claim. A declaration might explore, *inter alia*, a *parens patriae* claim against the state for neglecting to act in the best interests of persons who may not be able to represent themselves (Studley, 2018). Moreover, a declaration might develop a decolonized public trust doctrine rooted in Indigenous multi-generational and legal ethics. A more grounded approach might also engage in cultural, political, and legal resurgence to advance Indigenous nationhood and “sustainable self-determination” (Corntassel, 2008; 2012), which may also challenge the very foundation of the rights of nature—its reliance on rights-based discourses. Notwithstanding what process is pursued, societal change must be paired with these declarations to advance its legitimacy as well, which could occur through engaging with Indigenous storied precedents, advocacy work, and the transformation of public and academic discourses across Canada’s plural legal landscapes and diverse socio-cultural geographies.

No matter what approach is taken towards justice for natural actors, it must reconcile with the fact that, as an analytical mode of legal reasoning and interpretation, the legal traditions that emerge from the territories of Canada are most generatively understood through the multi-juridical living tree. The standard application of living tree constitutionalism, however, does not account for the tree’s roots. For a robust shift towards the rights of nature, the processes that shape these developments must be grounded in and informed by the roots of a multi-juridical Canada informed by Indigenous, Canadian, and international law. Canada’s multi-juridical living tree must strive to foster practices that embody the multi-generational ethics of cultural continuance and rooted reciprocity that emerge from Indigenous relationships with lands and waters. To not remedy the social and material toxicities embedded in current river relationships would be to forgo acting upon responsibilities to lands, waters, and future generations in accordance with Indigenous storied precedents. The responsibility of those living in Canada and beyond is to nurture inter-legal innovations through the multi-juridical living tree now to remedy imbalanced relationships with lands and waters.

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