

## **Legal Personality of Natural Features:**

# **Recent International Developments and Applicability in Canada**

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This student research memo discusses recent international developments that grant legal personality and related rights to natural features, including water bodies, related natural features, and sacred water beings.

Note that Part I of the original memo has been excised for confidentiality reasons.

Part II of this memo discusses the legal personality of natural features. It is divided into three subsections. The first subsection provides an introduction to the concept of legal personality, and an introduction to the rights of nature movement. The second subsection discusses five case studies from around the world, where natural features were granted legal personality. This subsection includes the case study of the Te Awa Tupua/Whanganui River in Aotearoa New Zealand and the Te Urewera forest in Aotearoa New Zealand, a case study of the Ganga and Yamuna Rivers and associated natural features in India, and case studies of Ecuador's Vilcabamba River and Colombia's Rio Atrato River. Each of these case studies sets out background context for the case study, and discusses:

- the method of legal recognition used to grant legal personality to the natural feature;
- the scope of protection;
- how the natural feature is legally represented;
- the impact of the designation on human relationships with natural features and sacred beings; and
- the implementation of the designation and practical outcomes.

Part 2.3 of the memo discusses what these case studies can tell us about the potential for legal personality of natural features in a Canadian context. It states that the site-and system-specific nature of the legal personality designations described in the case studies suggests that it may be difficult to translate this legal innovation into the Canadian context. In addition, certain weaknesses of the approaches outlined in the case studies would have to be overcome before implementing this approach in Canada. Nevertheless, it concludes that the lessons learned from other jurisdictions may be useful in advancing Canadian Indigenous law in light of a number of factors.

The third and final Part of this memo provides a short conclusion.

Overall, while this memo includes useful information that can help move towards better protection of water bodies, related natural features, and sacred water beings, more work and thought needs to be done to determine how best to legally protect Indigenous cultural keystone areas within the bounds of western law.

## **Part I ... (excised)**

## **Part II: The Legal Personality of Natural Features**

This section of the report explores recent international examples of natural features being recognized as rights-bearing legal persons, with a focus on water bodies and associated water beings. We have

identified relevant examples in Aotearoa<sup>1</sup> New Zealand and India, and similar legal developments in Ecuador and Colombia, which have recognized the “rights of nature.”

This part of the document is organized as follows. It is divided into three subsections. The first subsection provides an introduction to the concept of legal personality, and an introduction to the rights of nature movement. The second subsection discusses five case studies from around the world, where natural features were granted legal personality. This subsection includes the case study of the Te Awa Tupua/Whanganui River in Aotearoa New Zealand, that of the Te Urewera forest in Aotearoa New Zealand, a case study of the Ganga and Yamuna Rivers and associated natural features in India, and case studies of Ecuador’s Vilcabamba River and Colombia’s Rio Atrato River. Each of these case studies starts with background context for the case study, then discusses the method of legal recognition used to grant legal personality to the natural feature, the scope of protection, legal representation for the natural feature, the impact of the designation on human relationships with natural features and sacred beings, and the implementation of the designation and practical outcomes. The third and final subsection in the second part of the memo discusses what these case studies can tell us about the potential for legal personality of natural features, and its strengths and weaknesses, in a Canadian context.

## 2.1 Conceptual Frameworks

### 2.1.1 An Introduction to the Concept of Legal Personality

In modern Western legal systems, all human beings are recognized as ‘natural persons’ with certain fundamental rights.<sup>2</sup> This was not always the case: for example, women, children, and slaves have not been legally recognized as rights-holding natural persons at various points in Western legal history.<sup>3</sup> Western legal systems also recognize some non-human entities as legal persons.<sup>4</sup> Corporations may be the best-known type of legal person.<sup>5</sup> However, the category also includes nation-states and municipalities; religious, educational and charitable institutions; societies, co-operatives, trusts, and even ships.<sup>6</sup>

The concept of legal personality is a convenient legal fiction that allows non-human entities to hold legal rights, and requires them to fulfill corresponding legal responsibilities to others.<sup>7</sup> The “capability of enjoying rights and performing duties” can be seen as a prerequisite for legal personality.<sup>8</sup> If an entity has

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<sup>1</sup> The Māori name for New Zealand, which means ‘land of the long white cloud.’ See David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, forthcoming in September 2017) at 131.

<sup>2</sup> John A Yogis & Catherine Cotter, eds, *Barron’s Canadian Law Dictionary*, 6th ed (Hauppauge, NY: Barron’s, 2009) *sub verbo* “natural person” [Yogis & Cotter]; *Shiromani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass & others*, AIR 2000 SC 1421 (India) at paras 11, 13 [“*Shiromani*”].

<sup>3</sup> Christopher D Stone, “Should Trees Have Standing?: Toward Legal Rights for Natural Objects” (1972) 45 S Cal L Rev 450 at 451 [Stone]; Abigail Hutchinson, “The Whanganui River as a Legal Person” (2014) 39:3 Alt LJ 179 at 179-180 [Hutchinson]; Elaine C Hsiao, “Whanganui River Agreement: Indigenous Rights and Rights of Nature” (2012) 42:6 Environmental Policy & L 371 at 374; *Shiromani*, *supra* note 2 at para 11.

<sup>4</sup> Alternative terms include ‘juridical person’, ‘juristic person’, or ‘artificial person’. See, e.g., *Mohd. Salim v State of Uttarakhand & others* (20 March 2017), WP (PIL) 126 of 2014 (Uttarakhand High Court, India) [*Salim* 2017]; Yogis & Cotter, *supra* note 2, *sub verbo* “artificial person”.

<sup>5</sup> SM Solaiman, “Legal personality of robots, corporations, idols and chimpanzees: a quest for legitimacy” (2017) 25(2) *Artif Intell L* 155 at 157. The classic common-law case is *Salomon v Salomon & Co.*, [1897] AC 22 (HL).

<sup>6</sup> Stone, *supra* note 3 at 452; Michael Welters, “Towards a Singular Concept of Legal Personality” (2013) 92 CBR 417 at 420, 455 [Welters]; *Shiromani*, *supra* note 2 at paras 13-14; Laura Hardcastle, “Turbulent times: speculations about how the Whanganui River’s position as a legal entity will be implemented and how it may erode the New Zealand legal landscape”, online: (2014) Māori L Rev <www.maorilawreview.co.nz> [Hardcastle].

<sup>7</sup> Hutchinson, *supra* note 3 at 179-180.

<sup>8</sup> Solaiman, *supra* note 5 at 158, 175. See also James DK Morris & Jacinta Ruru, “Giving Voice to Rivers: Legal Personality as a Vehicle for Recognizing Indigenous Peoples’ Relationships to Water?” (2010) 14:2 AILR 49 at 50, 54 [Morris & Ruru]; Stone, *supra* note 3 at 464.

legal personality, it has standing – a right to appear in court and take legal action against others who have harmed it.<sup>9</sup> Typically, it has rights to hold property and enter into binding contracts.<sup>10</sup> A non-human legal person may also have other rights that are similar or different to the ones that humans typically have. Because rights carry corresponding responsibilities, legal persons can be held liable for harming others or otherwise failing to follow the law. In some circumstances, they may have a different range of legal duties than humans, and/or be subject to different kinds of penalties if they do not fulfill those duties.<sup>11</sup>

If a legal person cannot speak or act for itself to protect its rights and interests, one or more humans may be allowed to represent its legal interests and speak or act on its behalf. The law may recognize this person as a guardian, trustee, or agent.<sup>12</sup> Legal persons are treated as legally separate from the humans who represent them this way.

Who does and does not count as a legal person generally depends on the recognizing society's values.<sup>13</sup> For example, the common-law legal system in India has recognized Hindu idols and the ruins of a 12<sup>th</sup>-century temple as legal persons, but the English system has not.<sup>14</sup> Arguably, “anything which the community regards as a unit having socially important interests needing and deserving juridic protection” can become a legal person, even if it “exists only in the imagination of those who believe in it.”<sup>15</sup> Aotearoa New Zealand and India have recently become the first common-law jurisdictions to apply the legal personality concept to natural features.<sup>16</sup>

### 2.1.2 An Introduction to the Rights of Nature Movement

The ‘rights of nature’ movement is a more recent development in Western legal thought than the concept of legal personality. In 1972, Professor Christopher Stone proposed that the American legal system “give legal rights to forests, oceans, rivers, and other so-called ‘natural objects’ in the environment – indeed, to the natural environment as a whole.”<sup>17</sup> Stone’s article was cited in a famous U.S. Supreme Court dissent,<sup>18</sup> and has become one of the founding texts for the ‘rights of nature’ movement, which seeks recognition of nature’s rights without necessarily aiming for full personhood.

Stone’s argument focused on the need to give nature legal standing and enforceable rights, so that it could sue those who harmed it and receive financial redress for its injuries, which would then be used to restore it to its previous state.<sup>19</sup> Under American law at the time, only property-owners affected by environmental damage could launch a case to challenge that damage, and if they won, they could use the funds as they liked, rather than being required to use them to repair the environmental damage. Stone envisioned concerned humans bringing cases on nature’s behalf and speaking for nature, regardless of whether they had any personal property interests at stake. He suggested a “system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship.”<sup>20</sup> In his view, these guardians would not have difficulty identifying the interests of the

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<sup>9</sup> Yogis & Cotter, *supra* note 2, *sub verbo* “standing”; Hutchinson, *supra* note 3 at 179.

<sup>10</sup> Erin O’Donnell and Julia Talbot-Jones, “Three rivers are now legally people - but that’s just the start of looking after them,” *The Conversation* (23 March 2017), online: <www.theconversation.com> [O’Donnell & Talbot-Jones]; Welters, *supra* note 6 at 425.

<sup>11</sup> See, e.g., Hardcastle, *supra* note 6.

<sup>12</sup> Stone, *supra* note 3 at 464-465; Solaiman, *supra* note 5 at 163, 166, 168; Morris & Ruru, *supra* note 8 at 54.

<sup>13</sup> Hutchinson, *supra* note 3 at 180.

<sup>14</sup> *Shiromani*, *supra* note 2 at para 14; *Bumper Development Corporation v Commissioner of Police of the Metropolis and Others*, [1991] 1 WLR 1362 (CA) (England) [*Bumper*].

<sup>15</sup> Alexander Nékam, *The Personality Conception of the Legal Entity* (Cambridge: Harvard University Press, 1938) at 33.

<sup>16</sup> This recognition makes it awkward to use ‘natural person’ to refer to humans in opposition to non-human legal persons, which has been fairly common practice.

<sup>17</sup> Stone, *supra* note 3 at 456.

<sup>18</sup> *Sierra Club v Morton* (1972), 405 US 727.

<sup>19</sup> Stone, *supra* note 3 at 456-459; Morris & Ruru, *supra* note 8 at 54.

<sup>20</sup> Stone, *supra* note 3 at 464-465.

natural features they were representing: “natural objects can communicate their wants (needs) to us” through our senses, and humans frequently “make decisions on behalf of, and in the purported interests of, others” – such as corporations and states – “whose wants are far less verifiable... than the wants of rivers, trees, and land.”<sup>21</sup>

Stone’s article did not explicitly use the legal personality concept to structure his proposal, but his call for standing for trees and other natural features has been interpreted that way by some academics.<sup>22</sup> However, Stone stated that nature’s rights did not need to be identical to human rights, and suggested they could also differ between natural features.<sup>23</sup> Rights could be tailored to the specific needs and circumstances of each natural entity to be protected. Advocates have adopted this idea and provided some particulars.<sup>24</sup> For example, “the right to flow” could be seen as “a fundamental river right” because “the capacity to flow (given sufficient water) is essential to the existence of a river.”<sup>25</sup> However, this right would have no logical application to forests.

The rights of nature movement can be distinguished from efforts to guarantee human beings rights *to* nature through the extension of Western human rights frameworks.<sup>26</sup> While both approaches can protect natural features and ecosystems, the right *to* nature “has a utilitarian aspect” and ultimately serves anthropocentric, human-focused objectives. By seeking to secure environmental protection through a “human right to a healthy environment,” it frames natural features as objects to be managed for human use and enjoyment. By comparison, rights of nature activists seek “to have nature protected purely in recognition of its intrinsic worth, irrespective of how that ecological preservation impacts upon the welfare of human beings.” This approach arguably protects the natural world for its own sake and on its own terms.<sup>27</sup>

Although the rights of nature movement may be seen as generally consistent with Indigenous worldviews, and has sometimes received Indigenous support, it is not necessarily rooted in Indigenous legal orders or reflective of Indigenous priorities. In some cases, rights of nature activists and Indigenous groups may have different interests.<sup>28</sup>

Having provided an introduction to the concept of legal personality and its link to the rights of nature movement, the following subsection describes and analyzes five case studies (from Aotearoa New Zealand, India, Ecuador, and Colombia) where natural features have been granted legal personality.

## 2.2 Case Studies

### 2.2.1 Te Awa Tupua/Whanganui River (Aotearoa New Zealand)

The Whanganui River flows from Mount Tongariro to the Tasman Sea across Te Ika a Māui, the North Island of Aotearoa New Zealand.<sup>29</sup> To the *tangata whenua* (Māori with ancestral connections to the

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<sup>21</sup> *Ibid* at 471.

<sup>22</sup> E.g. Morris & Ruru, *supra* note 8 at 50.

<sup>23</sup> Stone, *supra* note 3 at 457-458

<sup>24</sup> See, e.g., Linda Sheehan, “Realizing nature’s rule of law through rights of waterways” in Christina Voigt, ed, *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge: Cambridge University Press, 2013) 222 at 229.

<sup>25</sup> Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd ed (White River Junction, VT: Chelsea Green Publishing, 2011), quoted in Meg Good, “The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia” (2013) 2013:1 National Environmental L Rev 34 at 36 [Good].

<sup>26</sup> For discussions of each approach by the same author, see David R Boyd, *The Right to a Healthy Environment* (Vancouver: UBC Press, 2012) and Boyd, *supra* note 1.

<sup>27</sup> Good, *supra* note 25 at 34.

<sup>28</sup> See Mihnea Tanasescu, “Nature Advocacy and the Indigenous Symbol” (2015) 24 Environmental Values 105 [Tanasescu].

<sup>29</sup> Office of Treaty Settlements, *Ruruku Whakatupua: Te Mana o Te Awa Tupua* (Wellington: Office of Treaty Settlements, 2014) at 2.7(2) [*Ruruku: Te Awa*]; Stephanie Warren, *Whanganui River and Te Urewera Treaty Settlements: Innovative*

area), the Whanganui River is a *tupuna* (ancestor) with its own *mana* (spiritual authority/power) and *mauri* (life force).<sup>30</sup> Their relationship to the River is structured by *whanaungatanga* (kinship) and *kaitiakitanga* (stewardship) duties, which give them “an inalienable interconnection with, and responsibility to [it] and its health and wellbeing.”<sup>31</sup> In March 2017, New Zealand’s common-law legal system recognized the Whanganui River as a legal person under the name Te Awa Tupua, meaning “river with ancestral power.”<sup>32</sup>

## Background Context

The Treaty of Waitangi (1840) is the main agreement that structures the relationship between Māori and the New Zealand Crown. The Māori-language version, signed by *rangatira* (chiefs) from most Māori *iwi* (kin groups or tribes),<sup>33</sup> grants the Crown *kāwanatanga* (a transliteration of Biblical ‘governorship’),<sup>34</sup> while retaining Māori *tino rangatiratanga* (full exercise of chieftainship) over lands, villages, and all their *taonga* (treasures).<sup>35</sup> The English-language version, which only a handful of *rangatira* signed, gives the Crown full sovereignty over New Zealand, while Māori retain “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties” unless they cede these to the Crown.<sup>36</sup> For over a century, the Crown either relied on the English-language terms or ignored the Treaty completely.<sup>37</sup>

Following widespread Māori protest in the 1960s and 1970s, the New Zealand government created the Waitangi Tribunal in 1975 to hear Māori grievances about Crown breaches of the Treaty and issue comprehensive reports, including findings of fact and largely non-binding recommendations on appropriate redress.<sup>38</sup> The Tribunal has been allowed to hear claims about historical Crown conduct since 1985.<sup>39</sup> All Māori *iwi* are allowed to bring claims to the Tribunal, regardless of whether their ancestors actually signed the Treaty.<sup>40</sup>

In order to implement the Treaty despite its contradictions, New Zealand courts and the Tribunal have identified various ‘Treaty principles’ that structure the Māori-Crown relationship. The Tribunal and courts apply these principles instead of trying to apply the precise wording of the texts.<sup>41</sup> One primary principle is the idea that the Treaty is “a partnership between Pakeha [settlers] and Maori requiring each

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*developments for the practice of rangatiratanga in resource management* (MA thesis, Victoria University of Wellington, 2016) [unpublished] at 60 [Warren].

<sup>30</sup> Charles Dawson, “Learning with the River: On Intercultural Gifts from the Whanganui” in Nicholas Holm & Sy Taffel, eds, *Ecological Entanglements in the Anthropocene* (Lanham, Maryland: Lexington Books, 2017) 35 at 38 [Dawson]; see also *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ), 2010/24, s 8(3) [*Waikato-Tainui Act*].

<sup>31</sup> Boyd, *supra* note 1 at 133; *Ruruku: Te Awa*, *supra* note 29 at 2.7(3).

<sup>32</sup> *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ), 2017/7, ss 12, 14 [*Te Awa Tupua Act*]; Anne Salmond, “Tears of Rangi: Water, power, and people in New Zealand” (2014) 4:3 HAU 285 at 286 [Salmond].

<sup>33</sup> Salmond, *supra* note 32 at 285-286; Good, *supra* note 25 at 35.

<sup>34</sup> Helen Yensen, Kevin Hague & Tim McCreanor, eds, *Honouring the Treaty: An Introduction for Pakeha to the Treaty of Waitangi* (Auckland: Penguin, 1989) at 13.

<sup>35</sup> “Te Tiriti o Waitangi/The Treaty of Waitangi” *Museum of New Zealand Te Papa Tongarewa*, online:

<[www.treaty2u.govt.nz](http://www.treaty2u.govt.nz)>.

<sup>36</sup> *Ibid.*

<sup>37</sup> Justice Prendergast famously dismissed the Treaty as a “mere nullity” in *Wi Parata v The Bishop of Wellington* (1877) 3 NZJur 72 (SC).

<sup>38</sup> Warren, *supra* note 29 at 19-22.

<sup>39</sup> *Ibid.* at 22.

<sup>40</sup> Richard Boast, “Recognising Multi-Textualism: Rethinking New Zealand’s Legal History” (2006) 37 VUWLR 547 at 548 [Boast].

<sup>41</sup> See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara claim* (Wellington: Department of Justice, 1983) at 47.

other to act towards the other reasonably and with the utmost good faith.”<sup>42</sup> Other core principles include reciprocity between the parties, Māori autonomy, active Crown protection of Māori interests, mutual benefit and equity for Māori and settlers, equal treatment of different Māori groups, and Crown redress for breaches.<sup>43</sup>

The Treaty of Waitangi does not have the explicit constitutional protection that s.35 provides in Canada.<sup>44</sup> Although it is generally considered to be part of New Zealand’s informal, unwritten constitution, it is only legally enforceable against the Crown when it has been incorporated into specific legislation.<sup>45</sup> Statutes like the Resource Management Act require government to “take into account the principles of the Treaty of Waitangi” when making decisions, and courts use the principles to interpret these laws, but otherwise it is “not part of the domestic law of New Zealand.”<sup>46</sup> This limits Māori’s legal options and makes negotiated compromises with the Crown a relatively attractive alternative means of resolving historical grievances, even though the Crown holds an “unequal share of power” in such negotiations.<sup>47</sup>

Since the early 1990s, the New Zealand Crown has “engaged in a comprehensive process of negotiations with Māori groups over redress for the settlement of historical claims.”<sup>48</sup> The Treaty Settlement process is not directly linked to the Waitangi Tribunal, but it “draws on the principles of the Treaty,” and Tribunal reports can provide a useful basis for negotiations.<sup>49</sup> Settlements are intended to be “full and final,” and generally “do not deal with the sovereignty issue and mostly conform to the Crown interpretation of the Treaty” and its principles.<sup>50</sup> They typically include “Crown apologies of wrongs done, financial and commercial redress, and cultural redress,” which “seeks to recognize the claimant group’s spiritual, cultural, historical, or traditional associations with the natural environment, often through creating opportunities for Maori to be involved in management decision-making.”<sup>51</sup> Although some Māori express frustration with the Crown’s procedural rigidity and unwillingness to negotiate certain issues, as well as other aspects of the process, many iwi have settled, and others are in the process of doing so.<sup>52</sup>

The degree of accuracy with which settlements reflect Māori relationships to bodies of water has increased over the past decade. Under the *Te Arawa Lakes Settlement Act 2006*, a number of lakebeds in the Rotorua area were removed from Crown ownership and vested in the Trustees of the Te Arawa Lakes Trust.<sup>53</sup> This Māori post-settlement governance entity is required to prioritize the lakes’ interests over human interests. The lakebeds can never be privatized or sold, and the trustees’ consent is required before government can authorize any new development involving the lakebeds.<sup>54</sup> However, rather than treating the lakes as indivisible entities, the legal interests in the lakes are highly fragmented. The Crown still owns “everything above the lake bed” and all minerals below the bed, and “public interests in the water,

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<sup>42</sup> *New Zealand Maori Council v Attorney-General*, [1987] NZLR 1 (CA) at 642.

<sup>43</sup> Waitangi Tribunal. “Principles of the Treaty” *Department of Justice* (19 September 2016), online: <[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)>.

<sup>44</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

<sup>45</sup> Jacinta Ruru, “Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand” (2013) 22:2 *Pacific Rim L & Policy J* 311 at 318 [Ruru]; Matthew SR Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008) at 25.

<sup>46</sup> *Resource Management Act 1991* (NZ), 1991/69, s 8; Ruru, *supra* note 206 at 318.

<sup>47</sup> Warren, *supra* note 29 at i.

<sup>48</sup> Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Vancouver: UBC Press, 2016) at 21 [Jones].

<sup>49</sup> Ruru, *supra* note 45 at 328; Warren, *supra* note 29 at 36.

<sup>50</sup> Warren, *supra* note 29 at 4, 26.

<sup>51</sup> Ruru, *supra* note 45 at 329.

<sup>52</sup> Jones, *supra* note 48 at 22.

<sup>53</sup> *Te Arawa Lakes Settlement Act 2006* (NZ), 2006/43, s 23(1) [*Te Arawa Act*].

<sup>54</sup> Boyd, *supra* note 1 at 135; *Te Arawa Act*, *supra* note 53.

aquatic life, access and recreation are unaffected.”<sup>55</sup> Nevertheless, the Te Arawa Lakes Settlement helped lay the groundwork for later water-related settlements that engage more fully with Māori worldviews.

The *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* goes further, and “articulates a very un-Western concept of a river” that draws on Māori understandings of their relationship with the Waikato.<sup>56</sup> The preamble begins, “To Waikato-Tainui, the Waikato River is a tupuna (ancestor) which has mana (prestige) and in turn represents the mana and mauri (life force) of the tribe.”<sup>57</sup> However, this language gives way to more standard common-law language in the Act’s operational provisions. The law can be seen as “acknowledg[ing] the personhood of the river in the eyes of the iwi” and honouring their “close spiritual relationship” with it, but it does not pair this Māori recognition of personhood with a recognition of Western legal personality.<sup>58</sup> Additionally, Māori have strong representation on the bi-cultural Waikato River Authority that is tasked with the river’s care, but do not appear to hold the balance of power.<sup>59</sup>

The Māori groups who make up Whanganui iwi have a long history of using whatever Western legal tools are available to defend their connection to Te Awa Tupua from Crown and Pākehā (settler) encroachment.<sup>60</sup> When Whanganui-area claimants began to negotiate the Te Ara Tupua settlement with the Crown, they did so in the context of this history, as well as the settlement precedents discussed above.<sup>61</sup>

### Method of Legal Recognition

On March 20, 2017, the Whanganui River became a legal person under New Zealand law when the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* received royal assent after being passed by Parliament.<sup>62</sup> This legislation implemented *Ruruku Whakatupua – Te Mana o Te Awa Tupua*, the 2014 Deed of Settlement that set out the terms negotiated by Whanganui iwi and the Crown.<sup>63</sup>

Section 12 of the *Act* establishes that “Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”<sup>64</sup> Section 13 sets out Tupua te Kawa, four “intrinsic values that represent the essence of Te Awa Tupua,” including recognition of the spiritual and physical sustenance provided by the river, the river’s indivisibility, and the inalienability of Whanganui’s connection and responsibility to the river.<sup>65</sup> Finally, Section 14(1) declares that “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.”<sup>66</sup>

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<sup>55</sup> Mick Strack, “Land and rivers can own themselves” (2017) 9:1 Intl JL in Built Environment 4 at 11 [Strack].

<sup>56</sup> Boyd, *supra* note 1 at 135.

<sup>57</sup> *Waikato-Tainui Act*, *supra* note 20 at Preamble (1).

<sup>58</sup> Boyd, *supra* note 1 at 135-136.

<sup>59</sup> Jacinta Ruru, “Legal Indigenous Recognition Devices” (2016) 8:26 Indigenous L Bull 26 at 27; Morris & Ruru, *supra* note 8 at 52.

<sup>60</sup> Boyd, *supra* note 1 at 136-138; Carwyn Jones, “‘I am the river and the river is me’: New Zealand’s recognition of the Whanganui River as a legal person” (Talk delivered at the Faculty of Law, University of Victoria, 15 June 2017), online: <[www.facebook.com/natabookworm/videos](http://www.facebook.com/natabookworm/videos)>.

<sup>61</sup> The Treaty Settlement enacted by the *Te Urewera Act 2014 (NZ)*, 2014/51 [*Te Urewera Act*], has also had a significant influence on the approach taken by Whanganui Māori and the Crown, but because it contains its own legal personality element, it will be discussed below as the next case study.

<sup>62</sup> *Te Awa Tupua Act*, *supra* note 32.

<sup>63</sup> *Ruruku: Te Awa Tupua*, *supra* note 29.

<sup>64</sup> *Te Awa Tupua Act*, *supra* note 32 at s 12.

<sup>65</sup> *Ibid* s 13.

<sup>66</sup> *Ibid* s 14(1).

The decision to use legal personality to structure future relationships between Te Awa Tupua and other persons may have been influenced by a 2010 article by two New Zealand legal academics. In “Giving Voice to Rivers: Legal Personality as a Vehicle for Recognizing Indigenous Peoples’ Relationships to Water?” James Morris and Jacinta Ruru drew on Stone’s standing idea and suggested it was “timely to consider the application of this concept in the specific context of New Zealand’s rivers.”<sup>67</sup> They proposed a draft *River Bill*, which would have made every river in New Zealand a legal person “for the purposes of environmental protection or natural resource management” and appointed the Parliamentary Commissioner for the Environment as an advocate or ‘river guardian’ in any relevant legal proceedings.<sup>68</sup> Their proposal likely had an impact on the settlement framework adopted by Whanganui-area claimants and the Crown.

### Scope of Protection

At first glance, the Act’s reference to “all the rights [and] powers... of a legal person” grants Te Awa Tupua broad protection. People exercising or performing a function, power, or duty under specific pieces of legislation have to “recognise and provide for” or have “particular regard to” Te Awa Tupua’s status and the Tupua te Kawa values, and may have to provide written explanations of how they did so.<sup>69</sup> However, governmental-decision-makers are still allowed to use their discretion when making decisions. Te Awa Tupua is not the decision-maker; it is just one (previously silent) voice that must now be weighed in the balance with other interests in Aotearoa New Zealand.

Most sections of the Whanganui riverbed that were held by the Crown before the passage of the Act are now vested in Te Awa Tupua as inalienable Māori freehold land.<sup>70</sup> Te Awa Tupua is supposed to be ‘an indivisible and living whole,’ but the Act protects “any existing private property rights in the Whanganui River” and “any rights to, or interests in, water... wildlife, fish, aquatic life, seaweeds, or plants.”<sup>71</sup> The Crown also retains ownership of riverbed minerals, as well as “part of the riverbed at the Tongariro Power Division... for the purpose of electricity generation.”<sup>72</sup> This fragmentation is seemingly at odds with the river’s declared indivisibility. The Act also does not give Te Awa Tupua a “proprietary interest in water” or “wildlife, fish, aquatic life, seaweeds, or plants.”<sup>73</sup> The issue of who – if anyone – owns the water in the river remains unanswered.<sup>74</sup>

Although Te Awa Tupua’s liability initially appears as broad as its rights, this too is limited in certain ways. Its liability for problems related to riverbed land is generally limited to problems arising after the Crown transferred that riverbed land to it, and the Crown remains liable for most riverbed-related problems caused by pre-settlement activities.<sup>75</sup> The Act also excludes Te Awa Tupua’s liabilities for “public access to, and use of, the Whanganui River, including for navigation,” which may mean that harm arising from human use of the river cannot lead to a lawsuit.<sup>76</sup> Additionally, Laura Hardcastle has

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<sup>67</sup> Morris & Ruru, *supra* note 8 at 49.

<sup>68</sup> *Ibid* at 56-57.

<sup>69</sup> *Te Awa Tupua Act*, *supra* note 32 at s 15.

<sup>70</sup> *Ibid* s 41(1).

<sup>71</sup> *Ibid* s 16.

<sup>72</sup> Warren, *supra* note 29 at 42

<sup>73</sup> *Te Awa Tupua Act*, *supra* note 32 at ss 41(1), 46(1).

<sup>74</sup> Warren, *supra* note 29 at 43; Jacob Otter, “From Wai 262 to Water: Towards Postcolonial Property Rights in Aotearoa New Zealand” in Nicholas Holm & Sy Taffel, eds, *Ecological Entanglements in the Anthropocene* (Lanham, Maryland: Lexington Books, 2017) 55 at 66; O’Donnell & Talbot-Jones, *supra* note 10.

<sup>75</sup> *Te Awa Tupua Act*, *supra* note 32 at s 56 & Schedule 5.

<sup>76</sup> *Ibid*.

analyzed the different tort actions available under New Zealand law to address damage to property and similar issues, and has concluded that most of them could not succeed against Te Awa Tupua, largely because the river lacks the capacity for intentional action.<sup>77</sup>

### Legal Representation

Under the Act, Te Awa Tupua is represented legally by the office of Te Pou Tupua.<sup>78</sup> This singular office is made up of two people, appointed jointly by Whanganui Māori and the Crown. Although one person is nominated by Māori and the other by the Crown, they are answerable to the river, not their nominators. Te Pou Tupua is intended to be “the human face of Te Awa Tupua and act in [its] name,” and it must “act in the interests of Te Awa Tupua and consistently with Tupua te Kawa” values.<sup>79</sup> Its broad statutory functions include “act[ing] and speak [ing] for and on behalf of Te Awa Tupua,” protecting its status, and “promot[ing] and protect[ing] [its] health and well-being.”<sup>80</sup> In addition to exercising and performing “the rights, powers and duties of Te Awa Tupua,” Te Pou Tupua is also responsible for its liabilities.<sup>81</sup> Te Pou Tupua will receive advice and support from Te Karewau, a bicultural advisory council, and Te Kōpuka nā Te Awa Tupua, a bicultural strategy group.<sup>82</sup>

Conceptualizing Te Pou Tupua as “the human face of Te Awa Tupua” is a shift from the 2012 framework agreement between Māori and the Crown, which talked about Te Pou Tupua as the “Guardian of the River.”<sup>83</sup> Although guardianship language was consistent with Morris and Ruru’s 2010 proposal, it also marked a departure from Māori legal understandings of the river’s *mana*. By placing Te Awa Tupua “in the same legal category as children, or adults who are incapacitated, and have guardians to make decisions for them,” the guardianship concept had the potential to infantilize and disempower the river.<sup>84</sup> The “human face” approach in the 2014 Deed of Settlement and the 2017 Act is arguably much more appropriate, because it “echoe[s] the Maori idea of *kahoni ora*, a person as a living face of their ancestors.”<sup>85</sup>

### Impact on Indigenous Relationships with Natural Features and Sacred Beings

Rather than being confined to the preamble, Māori worldviews and legal concepts are also incorporated into the body of the Act, giving them operational force in the common law legal system. This is a positive development and sets it apart from previous water-related settlement legislation like the *Te Arawa Lakes Settlement Act*.<sup>86</sup> The Tupua te Kawa values are expressed first in Māori, with English following:

“The first value is ‘Ko te Awa te mātāpuna o te ora - The River is the source of spiritual and physical sustenance’; the second is ‘E rere kau mai te Awa nui mai te Kahui Maunga ki Tangaroa - The great River flows from the mountains to the sea’; thirdly, ‘Ko au te awa, ko te awa ko au - I am the river and the river is me’; and finally, ‘ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua - The small and large streams that flow into one another and form one river’.”<sup>87</sup>

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<sup>77</sup> Hardcastle, *supra* note 6.

<sup>78</sup> *Te Awa Tupua Act*, *supra* note 32 at s 18(1).

<sup>79</sup> *Ibid* ss 18(2); 19(2)(a).

<sup>80</sup> *Ibid* s 19(1).

<sup>81</sup> *Ibid* s 14(2).

<sup>82</sup> *Ibid* ss 27-34.

<sup>83</sup> Office of Treaty Settlements, *Tūtohu Whakatupua* (Wellington: Office of Treaty Settlements, 2012) at 9 [Tūtohu].

<sup>84</sup> Salmond, *supra* note 32 at 299.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Te Arawa Act*, *supra* note 53.

<sup>87</sup> Warren, *supra* note 29 at 43-44; *Te Awa Tupua Act*, *supra* note 32 at s 13.

The Act's incorporation of these values is not merely "symbolic," and will likely "shape how the river is managed by iwi, the Crown, and local government for the foreseeable future."<sup>88</sup>

The use of the legal personality concept to translate the Māori-river relationship into terms that make sense to the common-law legal system has received mixed reviews from Māori commentators. When Morris and Ruru proposed their Rivers Bill in 2010, they were quite optimistic about the concept's possibilities. As they argued, "the legal personality concept aligns with the Maori legal concept of a personified natural world" and "a Maori world view that has always regarded rivers as containing their own distinct life forces"; it "recognizes the holistic nature of a river and may signal a move away from the western legal notion of fragmenting a river on the basis of its bed, flowing water, and banks."<sup>89</sup> Carwyn Jones has taken a more critical view. He has argued that while legal personality "comes close to expressing some fundamental ideas from within Māori legal traditions... it does not, in itself, recognize the value of [those] legal traditions" and "confirms that Māori legal traditions will not be recognized on their own terms but instead only through the closest equivalent from the Western legal tradition... deemed by the Crown to be a close enough match."<sup>90</sup>

In terms of the Act's implications for Māori relationships with sacred beings, it clearly states that Te Awa Tupua includes the metaphysical aspects of the Whanganui River. Although the Act does not specifically define what those aspects are, the Statement of Significance that follows the main text of the Act provides some indication:

"Whanganui hapū [sub-tribes] hold that each ripo [rapid] of the Whanganui River is inhabited by a kaitiaki (spiritual guardian), which is particular to each hapū. Each of these kaitiaki is a mouri and is responsible for maintaining the life force and therefore the health and well-being of the Whanganui River and its people. Each hapū and the whānau within that hapū are responsible collectively for maintaining the mouri of the ripo and, in so doing, the collective mouri of Te Awa Tupua. These kaitiaki of the ripo provide insight, guidance, and premonition in relation to matters affecting the Whanganui River, its resources and life in general. Whanganui Iwi and the hapū and whānau of Whanganui look to these kaitiaki for guidance in times of joy, despair, or uncertainty for the guidance and insight they can provide."<sup>91</sup>

The iwi-focused Deed of Settlement document<sup>92</sup> states, "we have been taught that the kaitiaki within the waterways, upon the mountains - wherever in the tribal domain they reside - are our ancestors."<sup>93</sup> This means that these *kaitiaki* can be understood as sacred ancestral water (and land) beings who are tied to local Māori and to the river, which has its own status as a spiritually powerful ancestor.

## Implementation and Practical Outcomes

Although Whanganui Māori, the Crown, and other stakeholders have had years to prepare for Te Awa Tupua's implementation, the Act's recent passage means its practical effects largely remain to be seen. The Crown has guaranteed Te Pou Tupua an annual \$200,000 funding stream for twenty years to facilitate implementation,<sup>94</sup> and a draft collaborative strategy for dealing with issues related to the river's

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<sup>88</sup> Warren, *supra* note 29 at 44.

<sup>89</sup> Morris & Ruru, *supra* note 8 at 50, 58.

<sup>90</sup> Jones, *supra* note 48 at 98.

<sup>91</sup> *Te Awa Tupua Act*, *supra* note 32 at Schedule 8.

<sup>92</sup> There are two 2014 Deed of Settlement documents: *Ruruku: Te Awa Tupua*, *supra* note 32, focuses on the mana of the river, while Office of Treaty Settlements, *Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui* (Wellington: Office of Treaty Settlements, 2014) [*Ruruku: Te Iwi*] focuses on the mana of the iwi.

<sup>93</sup> *Ruruku: Te Iwi*, *supra* note 92 at 15; Dawson, *supra* note 30 at 38-39.

<sup>94</sup> *Te Awa Tupua Act*, *supra* note 32 at s 57; Warren, *supra* note 29 at 51.

health and well-being should be forthcoming by late 2018.<sup>95</sup> However, the tension between the river's supposed indivisibility and practical fragmentation under the Act is a particular area of concern. It is unclear how future power struggles will play out between Te Awa Tupua, the Crown, hydropower companies, private riverbed owners, and members of the public who want to use the river. The question of water ownership may also come to a head in coming years. New negotiations between the Crown, Māori, and Te Awa Tupua may be needed to resolve these issues as they arise.

### 2.2.2 Te Urewera (Aotearoa New Zealand)

Te Urewera is an “ancient and enduring,” densely forested area in the central North Island of Aotearoa New Zealand, forming Te Manawa o te Ika a Māui, the heart of the great fish of Maui.<sup>96</sup> For Tūhoe *iwi*, it is “a place of spiritual value, with its own mana and mauri” and “an identity in and of itself”; it is also their *ewe whenua* (homeland).<sup>97</sup> The inalienable connection between Tūhoe and Te Urewera is similar to the relationship between Whanganui Māori and Te Awa Tupua. From 1954 to 2014, the New Zealand government administered Te Urewera as a national park, but in July 2014, it ceased to be a park and gained legal personhood status.<sup>98</sup>

#### Background Context

The context for the Te Urewera settlement is quite similar to the context for the Whanganui River settlement. However, Tūhoe's relationship with the Crown is unique in several ways. First, Tūhoe never signed the Treaty of Waitangi, but eventually reached an alternative agreement with the Crown in 1895.<sup>99</sup> Second, Tūhoe has a long history of resistance to the Crown's efforts to deprive it of its *turangawaewae* (traditional homelands).<sup>100</sup> By 1927, the Crown had secured two-thirds of the Tūhoe lands that had been protected by the 1885 agreement, and much of that land became Te Urewera National Park in 1954.<sup>101</sup> Tense relations between Tūhoe and the Crown have persisted into the twenty-first century, exacerbated by New Zealand security forces' decision to target perceived Tūhoe ‘terrorists’ in the 2007 Ruatoki Valley ‘antiterrorism’ raids.<sup>102</sup> Nevertheless, Tūhoe has used the Waitangi Tribunal and Treaty Settlement processes to secure partial redress for “a century of broken promises.”<sup>103</sup>

#### Method of Legal Recognition

On July 27, 2014, Te Urewera gained legal personhood status under New Zealand law when the *Te Urewera Act* received royal assent after being passed by Parliament.<sup>104</sup> This legislation implemented the Te Urewera-related portions of the 2013 Deed of Settlement that set out the terms negotiated by Tūhoe and the Crown.<sup>105</sup> Section 11(1) of the *Act* establishes that “Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person.”<sup>106</sup> Instead of listing intrinsic values like the later *Te Awa Tupua Act*, Section 5 sets out a number of implementation principles that primarily focus on environmental preservation and respect for Māori relationships with Te Urewera.<sup>107</sup>

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<sup>95</sup> *Te Awa Tupua Act*, *supra* note 32 at ss 35-36 & Schedule 4, Part 2.

<sup>96</sup> *Te Urewera Act*, *supra* note 61 at s 3.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid* s 11; Warren, *supra* note 29 at 64-67.

<sup>99</sup> Warren, *supra* note 29 at 3, 62-63; Boast, *supra* note 40 at 565-570.

<sup>100</sup> Warren, *supra* note 29 at 61.

<sup>101</sup> *Ibid* at 64.

<sup>102</sup> Jeffrey A Sluka, “The Rūatoki Valley Antiterrorism’ Police Raids: Losing ‘Hearts and Minds’ in Te Urewera” (2010) 7(1) Sites 44.

<sup>103</sup> Boyd, *supra* note 1 at 145.

<sup>104</sup> *Te Urewera Act*, *supra* note 61.

<sup>105</sup> *Ibid* s 7.

<sup>106</sup> *Ibid* s 11(1).

<sup>107</sup> *Ibid* s 5.

The decision to use legal personhood to protect Te Urewera was a compromise that Tūhoe negotiator Tāmami Kruger proposed late in the process. Tūhoe had originally negotiated the return of Te Urewera lands to Tūhoe ownership, but Prime Minister John Key rejected that agreement in 2010, apparently claiming it was “a bridge too far.”<sup>108</sup> Inspired by Māori legal principles regarding human relationships with land and land’s non-property status, Kruger successfully convinced the government to “agree that Te Urewera owns itself.”<sup>109</sup> The 2012 Whanganui River framework agreement’s provision for “statutory recognition of Te Awa Tupua as a legal entity with standing in its own right” may also have had an influence on the concept and language that appear in the 2014 *Te Urewera Act*.<sup>110</sup>

### Scope of Protection

The *Te Urewera Act* is intended to protect Te Urewera “for its intrinsic worth [and] distinctive natural and cultural values,” and to “preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage.”<sup>111</sup> As with Te Awa Tupua, the *Te Urewera Act* appears to give Te Urewera very broad rights. However, it immediately narrows them by specifying that those rights can only be “exercised and performed... in the manner provided for” in the Act.<sup>112</sup> This likely means Te Urewera can only do things the Act specifically allows it to do.<sup>113</sup> By comparison, Te Urewera’s liability appears to be almost unlimited.<sup>114</sup>

Under the Act, Te Urewera holds an inalienable fee simple estate in conservation, Crown, national park, and reserve lands that were held by the Crown prior to the Act. However, the registration of Te Urewera land titles does not affect “the title of a registered proprietor of land adjacent to Te Urewera land,” even if that land is also part of Tūhoe *turangawaewae*.<sup>115</sup> The Act also provides for continued public access to the former national park.<sup>116</sup> Some public activities in Te Urewera are subject to authorization, but “a mining activity that is authorized under the Crown Minerals Act” requires no additional authorization.<sup>117</sup> Subject to overriding sustainability objectives, people can get permits to take Indigenous fauna and flora from Te Urewera for specified purposes, including the “restoration of customary practices relevant to the relationship of iwi with Te Urewera.”<sup>118</sup>

### Legal Representation

Te Urewera is represented by the Te Urewera Board, which is mandated “to act on behalf of, and in the name of, Te Urewera” and “provide governance for Te Urewera in accordance with [the] Act.”<sup>119</sup> The Board’s functions include creating a Te Urewera management plan.<sup>120</sup> For the past three years, the board has had eight members – four appointed by Tūhoe, and four appointed by the Crown. In September 2017, the Board’s composition is due to shift from eight to nine members, with six members appointed by Tūhoe, and three appointed by the Crown.<sup>121</sup> Whether the Board’s approach to governance will also shift once Tūhoe holds the balance of power remains to be seen.

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<sup>108</sup> Boyd, *supra* note 1 at 145; Warren, *supra* note 29 at 3, 68.

<sup>109</sup> Boyd, *supra* note 1 at 146.

<sup>110</sup> *Tūtohu*, *supra* note 83 at 9.

<sup>111</sup> *Te Urewera Act*, *supra* note 61 at s 4.

<sup>112</sup> *Ibid* s 11.

<sup>113</sup> See Hardcastle, *supra* note 6.

<sup>114</sup> *Ibid*; *Te Urewera Act*, *supra* note 61 at s 96.

<sup>115</sup> *Ibid* s 91.

<sup>116</sup> *Ibid* ss 4(c) & 5(2).

<sup>117</sup> *Ibid* ss 55-56.

<sup>118</sup> Strack, *supra* note 55 at 11.

<sup>119</sup> *Te Urewera Act*, *supra* note 61 at s 16, 17.

<sup>120</sup> *Ibid* s 18.

<sup>121</sup> Boyd, *supra* note 1 at 153; *Ibid* ss 7, 21.

## Impact on Indigenous Relationships with Natural Features and Sacred Beings

The Act is intended to “strengthen and maintain the connection between Tūhoe and Te Urewera,” and Tūhoe perspectives and priorities are reflected in the Background section.<sup>122</sup> The Board is also empowered to “give expression to” Tūhoetanga and Tūhoe management concepts when carrying out its functions.<sup>123</sup> However, the Act calls the legal personhood strategy “a unique approach to protecting Te Urewera in a way that reflects New Zealand’s culture and values” – not Tūhoe’s.<sup>124</sup> This arguably reinforces Carwyn Jones’ assertion that using legal personality “confirms that Māori legal traditions will not be recognized on their own terms but instead only through the closest equivalent from the Western legal tradition.”<sup>125</sup> Even though Tūhoe’s negotiator ultimately suggested its use, it was not what Tūhoe originally wanted, and they did not have a great deal of choice in the circumstances.

In terms of spiritual relationships, the Act recognizes Te Urewera as a whole as “a place of spiritual value, with its own mana and mauri.”<sup>126</sup> The Act does not identify specific sacred places or beings within Te Urewera. However, it does empower the Te Urewera Board to “consider and give expression to” *mana me mauri* – defined as “a sense of the sensitive perception of a living and spiritual force in a place” – when carrying out its functions.<sup>127</sup> This suggests there may be much more to the spiritual geography of Te Urewera than the Act discusses.

## Implementation and Practical Outcomes

Since the passage of the Act, the Te Urewera Board has “issued a statement of principles” to “guide the development of a unique management plan” by 2017.<sup>128</sup> The management plan is supposed to have a ten-year duration.<sup>129</sup> It is unclear whether the management plan has been completed yet. In the interim, the pre-settlement Te Urewera National Park Management Plan 2003 has “continue[d] to apply, to the extent that the plan is consistent with the purpose and principles” of the Act.<sup>130</sup> Hopefully Tūhoetanga and Tūhoe management principles have been guiding the Board’s actions, in accordance with the Act.<sup>131</sup>

One check on the Board’s ability to protect Te Urewera’s rights is the limited list of offenses and corresponding penalties prescribed by the Act. For example, anyone who “removes or wilfully damages any, or any part of, any plant, stone, mineral, gravel, kauri gum, or protected New Zealand object in Te Urewera” is subject to fines up to \$100,000 or possible imprisonment of up to two years.<sup>132</sup> Other prohibited activities included damaging turf, sowing seeds, or “liberating an animal” in Te Urewera.<sup>133</sup> Penalties increase if the offender is a corporation or violating the act for financial gain.<sup>134</sup> While this clarity may be helpful for enforcement and deterrence purposes, it also “arguably preclude[s]” the Board’s ability to recognize new offenses, and makes Te Urewera reliant on state enforcement efforts.<sup>135</sup> If those enforcement efforts fall short, Te Urewera (through the Board) may not have the ability to bring its own proceedings against the offender, which would undermine the link between Te Urewera’s legal personality and the concept of legal standing as envisioned by Stone.

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<sup>122</sup> *Te Urewera Act*, *supra* note 61 at ss 3-4.

<sup>123</sup> *Ibid* s 18.

<sup>124</sup> *Ibid* s 3.

<sup>125</sup> Jones, *supra* note 48 at 98.

<sup>126</sup> *Te Urewera Act*, *supra* note 61 at s 3.

<sup>127</sup> *Ibid* s 18.

<sup>128</sup> Boyd, *supra* note 1 at 154.

<sup>129</sup> Warren, *supra* note 29 at 68.

<sup>130</sup> Tūhoe, “Te Urewera Management Plan” *Ngati Tuhoe*, online: <[www.ngaituhoe.iwi.nz](http://www.ngaituhoe.iwi.nz)>.

<sup>131</sup> *Te Urewera Act*, *supra* note 61 at s 18.

<sup>132</sup> Hardcastle, *supra* note 6.

<sup>133</sup> *Te Urewera Act*, *supra* note 61 at s 76.

<sup>134</sup> Hardcastle, *supra* note 6.

<sup>135</sup> Warren, *supra* note 29 at 78.

### 2.2.3 Ganga & Yamuna Rivers and Associated Natural Features (India)

The Ganga (Ganges) River and its main tributary, the Yamuna River, provide water for over 500 million people and are considered sacred by India's majority-Hindu population.<sup>136</sup> The same day the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* received royal assent in New Zealand, the High Court of Uttarakhand recognized the legal personality of the Ganga and Yamuna rivers. Ten days later, the same court extended legal personality to the glaciers that feed these two rivers, as well as associated "rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls."<sup>137</sup>

#### Background Context

A number of legal precedents created the conditions that facilitated the High Court's recognition of natural features' legal personality. As previously mentioned, India's common law legal system recognizes Hindu idols and the ruins of a 12<sup>th</sup>-century temple as legal persons.<sup>138</sup> The juridical personhood of a "consecrated idol in a Hindu temple" was well established in Indian common law before the 1960s, and was upheld by decisions of the Judicial Committee, the highest common-law appeal court.<sup>139</sup> Under Indian law, Hindu idols can hold property and are entitled to human representation. A 1999 Supreme Court case held that "property which is dedicated to the deity [idol] vests in an ideal sense in the deity itself as a juristic person," while a manager "is entrusted with the custody of the idol" and "preservation of the property."<sup>140</sup> This legal landscape arguably made India one of the most likely jurisdictions to extend legal personality to natural features.

Indian law had also been moving towards rights of nature recognition for some time. The Indian Constitution requires citizens to "protect and improve the natural environment," which implies corresponding rights of nature.<sup>141</sup> The Kerala High Court has suggested animals have fundamental rights, while the Supreme Court has recognized certain animals' constitutional right to life.<sup>142</sup> In 1983, the Supreme Court halted all mining operations in the Doon Valley after considering the valley's best interests, and in 1992, it ordered hundreds of mines closed to protect endangered tigers.<sup>143</sup>

The selection of Ganga and its main tributary as India's first natural features with legal personality is unsurprising, because Ganga has been a particular focus of environmental activism in India. Even though the river is sacred, it is "treated more like an open sewer than a cultural and ecological treasure," with approximately 3 billion litres of wastewater dumped into it every day.<sup>144</sup> Environmental lawyer MC Mehta filed a writ petition for the River Ganga's protection in the Supreme Court in 1985; in 2014, the court orders that resulted from that petition were transferred to the National Green Tribunal for enforcement.<sup>145</sup> Organizations like Ganga Action Parivar have been articulating the river's "right to flow in a clean, pristine form" for its own sake and for the sake of the 500 million humans who rely on it.<sup>146</sup> With the support of India's Minister for Water Resources, they have been campaigning for a Ganga Rights Act that would "recognize the river's right to exist, thrive, regenerate, and evolve," prohibit

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<sup>136</sup> Boyd, *supra* note 1 at 227.

<sup>137</sup> *Lalit Miglani v State of Uttarakhand & others* (30 March 2017), WP (PIL) 140 of 2015 (Uttarakhand High Court, India) [Miglani].

<sup>138</sup> *Shiromani, supra* note 2 at para 14; *Bumper, supra* note 14.

<sup>139</sup> *Yogendra Nath Naskar v Commission of Income-Tax, Calcutta*, 1969 (1) SCC 555 (India).

<sup>140</sup> *Ram Jankijee Deities v. State of Bihar*, 1999 (5) SCC 50 (India).

<sup>141</sup> Boyd, *supra* note 1 at 91.

<sup>142</sup> *Ibid* at 55, 95.

<sup>143</sup> *Ibid* at 91-92.

<sup>144</sup> *Ibid* at 227.

<sup>145</sup> Email from MC Mehta to Calvin Sandborn (22 June 2017).

<sup>146</sup> Boyd, *supra* note 1 at 227.

activities interfering with those rights, establish enforcement mechanisms, and require “that any damages awarded for violations of the watershed’s rights... be used to restore the ecosystem.”<sup>147</sup>

### Method of Legal Recognition

The Ganga and Yamuna Rivers received legal personality through a High Court of Uttarakhand case about river management. In December 2016, the Court ordered the Central Government to “constitute a Ganga Management Board... and make it functional within a period of three months.”<sup>148</sup> When the case came back in March 2017, the Court expressed its “serious displeasure” that the States of Uttarakhand and Uttar Pradesh were not “cooperat[ing] with the Central Government... for the constitution of Ganga Management Board.”<sup>149</sup> It then declared that the “situation require[d] extraordinary measures... to preserve and conserve Rivers Ganga and Yamuna.”<sup>150</sup>

The Court used *parens patrie* jurisdiction<sup>151</sup> to declare “the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers” to be “juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person.”<sup>152</sup> In language reminiscent of the Whanganui legislation, the Court explained that “the rivers have provided both physical and spiritual sustenance to all of us from time immemorial... They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.”<sup>153</sup>

Ten days later, the same High Court judges responded positively to a “miscellaneous application... for declaring the Himalayas, Glaciers, Streams, Water Bodies etc. as legal entities as juristic persons at par with pious rivers Ganga and Yamuna.”<sup>154</sup> Under the same *parens patriae* jurisdiction used to recognize the rivers’ legal personality, the Court declared “the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls” to be “legal entity/ legal person/juristic person/judicial person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them.” They added that these entities were “also accorded the rights akin to fundamental rights/ legal rights.” In language once again reminiscent of the Whanganui legislation, the Court explained that the “integrity of the rivers is required to be maintained from Glaciers to Ocean,” and “the rivers, forests, lakes, water bodies, air, glaciers, human life are unified and are [an] indivisible whole.”<sup>155</sup> The Court also referenced the Te Urewera legislation.

### Scope of Protection

The Court’s judgment regarding Ganga and Yamuna is relatively short, but appears to provide broad rights for both rivers, with correspondingly broad liabilities. The “rights, duties and liabilities of a living

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<sup>147</sup> *Ibid* at 228; National Ganga Rights Movement. “The Ganga Rights Act” *Ganga Rights* (2012), online: <[www.gangarights.org](http://www.gangarights.org)>.

<sup>148</sup> *Mohd. Salim v State of Uttarakhand & others* (5 December 2016), WP (PIL) 126 of 2014 (Uttarakhand High Court, India) at 25 [Salim].

<sup>149</sup> *Salim 2017*, *supra* note 4 at paras 3, 9.

<sup>150</sup> *Ibid* at para 10.

<sup>151</sup> *Parens patriae* can be understood as a “prerogative... inherent in the the supreme power of every state... for the prevention of injury to those who cannot protect themselves.” See *Fontain v Ravenel* (1854), 58 US (17 How) 384, quoted in *Miglani, supra* note 137.

<sup>152</sup> *Salim 2017*, *supra* note 4 at para 19.

<sup>153</sup> *Ibid* at para 17. Note that this court decision has been appealed and the Order stayed pending appeal. *Mohd. Salim v State of Uttarakhand & others* (7 July 2017), WP (PIL) 126 of 2014 (Supreme Court of India).

<sup>154</sup> *Miglani, supra* note 137.

<sup>155</sup> *Ibid*.

person” could be interpreted to include almost anything, but the physical differences between humans and rivers are likely to impose some limitations on their practical scope. Nevertheless, the vagueness of the language may result in litigation.<sup>156</sup> The Court’s reasoning suggests they are particularly concerned with the rivers’ preservation and conservation in the face of pollution, so rights related to those objectives are most likely to be litigated, while the rivers’ liabilities remain an open question.<sup>157</sup>

The Court’s second judgment is even broader than the first. It includes an incredibly large range of natural features, but it also has internal inconsistencies. The Court listed the natural features to be protected four times, and consistently referred to “Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles [and] forests.” However, it alternately added and omitted references to the Himalayas and “wetlands, grasslands, springs, and waterfalls,” creating some uncertainty about the legal status and/or protection that applies to those natural features.<sup>158</sup>

The second judgment targets global warming, climate change and pollution as threats to “the very existence of the rivers, forests, lakes, water bodies, air and glaciers.” In addition to recognizing the same broad “rights, duties and liabilities of a living person” as the first judgment, it also includes some references to specific natural rights and prohibitions on human conduct. For example, “Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system.” Rivers and Lakes also have an “intrinsic right not to be polluted,” and “polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to person.” Overall, everyone has “a constitutional and moral responsibility to endeavour to avoid damage or injury to nature,” and “any person causing any injury and harm, intentionally or unintentionally to the Himal[a]yas, Glaciers, rivers, streams, rivulets, lakes, air, meadows, dales, jungles and forests is liable to be proceeded against under the common law, penal laws, environmental laws and other statutory enactments governing the field.”<sup>159</sup> However, the Court’s hyperbolic suggestion that “plucking of one leaf, grass blade also damages the environment universally” is probably unenforceable, and the threshold for “injury or harm” will likely be significantly higher than that.<sup>160</sup>

## Legal Representation

The first judgment gives the rivers three human representatives. It appoints “the Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand” as “*persons in loco parentis* as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries.”<sup>161</sup> They are “bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.”<sup>162</sup> Additionally, the Ganga Management Board is to be constituted within eight weeks.<sup>163</sup>

The second judgment follows a similar model, but appears to name four human representatives: Praveen Kumar, Ishraw Singh, Balram K. Gupta, and MC Mehta. As in the first judgment, these four representatives are “*persons in loco parentis* as the human face to protect, conserve and preserve” all the listed natural features. They are “bound to uphold the status of these bodies and also to promote their

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<sup>156</sup> Kevin Underhill, “Two More Rivers Declared Persons” *Lowering the Bar* (23 March 2017), online: <[www.loweringthebar.net](http://www.loweringthebar.net)>.

<sup>157</sup> *Salim 2017*, *supra* note 4 at paras 10, 19; O’Donnell & Talbot-Jones, *supra* note 10.

<sup>158</sup> Miglani, *supra* note 137.

<sup>159</sup> *Ibid.*

<sup>160</sup> Omair Ahmad, “Indian court awards legal rights of a person to entire ecosystem” *The Third Pole* (3 April 2017), online: <[www.thethirdpole.net](http://www.thethirdpole.net)> [Ahmad].

<sup>161</sup> *Salim 2017*, *supra* note 4 at para 19.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid* at para 5.

health and well being.” Although the list of names and titles is somewhat unclear, all of these individuals appear to hold positions in government, educational institutions, and/or environmental justice organizations.<sup>164</sup>

### **Impact on Human Relationships with Natural Features and Sacred Beings**

Unlike the case studies from Aotearoa New Zealand, this section does not discuss Indigenous relationships because Hindus, members of the majority religion in India (and the group of people whose connection to nature was used to justify nature’s protection) are not necessarily Indigenous “adivasis” or “original inhabitants” of India.<sup>165</sup> Nevertheless, Hindus were subjected to British settler colonialism, and continue to have a common-law legal system rooted in Western, Judeo-Christian cultural assumptions and traditions that differ from their own culture and spiritual beliefs. Additionally, the rivers’ legal personality was recognized in part because of their sacredness to Hindus. As a result, there may be useful analogies to Indigenous contexts elsewhere.

In the first case, the Court decided to recognize the Ganga and Yamuna Rivers as legal persons in part because they are “worshipped by Hindus,” who “have a deep spiritual connection with” and “collectively connect with these rivers.”<sup>166</sup> In the second judgment, the Court partly justified their decision to extend legal personality to the glaciers that feed the two rivers (and associated natural features) by explaining that “both Ganga and Yamuna Rivers are revered as deities by Hindus.”<sup>167</sup> Consequently, the Ganga and Yamuna Rivers appear to be the main sacred beings at issue in both cases. By providing broad environmental protection for the features that feed the rivers, the second judgment could be seen as protecting sacred beings (Ganga and Yamuna) associated with the other protected natural features. However, the second judgment’s reference to ‘rivers’ could also be seen as a reference to Ganga and Yamuna that adds the second judgments’ specific rights and prohibitions to the general protection they received in the first judgment.

If the decisions improve the environmental condition of these highly polluted rivers and rapidly receding glaciers, their impact on human relationships with natural features/sacred beings may be generally positive. However, there is also a risk that “the poor and marginalized” will be targeted for prosecution and/or displacement to protect these new legal persons.<sup>168</sup> Although the second judgment states that “local inhabitants living on the banks of rivers, lakes and whose lives are linked with rivers and lakes must have their voice too,” it does not specify which communities will be consulted or how much weight their voices will be given.<sup>169</sup> The judgment’s offhand direction to the Magistrate of Haridwar “to ensure that the Beggars are not allowed to be present on the Ghats” (holy riverside areas) suggests that some concern about the human impacts of the decisions may be warranted.<sup>170</sup>

### **Implementation and Practical Outcomes**

Apart from the establishment of the Ganga Management Board, neither judgment is particularly clear about the mechanisms through which these new legal persons’ rights will be implemented and enforced. Unlike the Whanganui River legislation, which provides clear structures, rules, and funding for implementation after “eight years of careful negotiation” that gave everyone plenty of notice about the coming changes, the recognition of Ganga and Yamuna’s legal personality occurred “almost overnight,”

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<sup>164</sup> *Miglani, supra* note 137.

<sup>165</sup> Pooja Parmar, “Undoing Historical Wrongs: Law and Indigeneity in India” (2012) 49(3) *Osgoode Hall LJ* 491 at 494, 496, 498, 512-513, 515.

<sup>166</sup> *Salim 2017, supra* note 4 at paras 11, 17.

<sup>167</sup> *Miglani, supra* note 137.

<sup>168</sup> Ahmad, *supra* note 160.

<sup>169</sup> *Ibid*; *Miglani, supra* note 137.

<sup>170</sup> *Miglani, supra* note 137.

with extended recognition for the whole ecosystem following less than two weeks later.<sup>171</sup> The newly protected natural features face enormous environmental problems that will require enormous effort to resolve.

Unfortunately, the same court decisions that recognized the legal personhood of the rivers, glaciers, other natural features reveal how sluggish Indian governments can be to follow through on judicial orders regarding environmental protection. India had water pollution laws and designated authorities to enforce them long before March 2017, but that does not mean they were enforced. As Indian lawyer Ranjeev C Dubey put it, “I do not see how making a new bunch of officers responsible for fixing an old problem changes anything of the nature of the problem.”<sup>172</sup> Empowering high-ranking officials with environmental rights qualifications to act on behalf of these new legal persons may be a positive step towards enforcement, but whether or not it will produce real change remains to be seen.

As for these new legal persons’ liabilities, media coverage of one recent case provides potential insight into future litigation.<sup>173</sup> In late April 2017, Ganga received its first legal notice, naming it as a respondent in a case about a proposed garbage dump on land the river flows over during monsoon season.<sup>174</sup> The same judges who had recognized its legal personality was now asking it “to explain why its land was given for construction of a trenching ground.”<sup>175</sup> The state government, central pollution control board, state pollution control board, and local municipality also received notices.<sup>176</sup> Although the court documents did not specifically refer to Ganga, it appears to have responded to the notice through the same lawyer who represented the State in the proceeding.<sup>177</sup>

The case was dismissed in early May, and there were no legal ramifications for Ganga. However, the judges’ decision to make Ganga a respondent is odd and potentially sinister. Unless it was the most procedurally appropriate way for Ganga to become a party to relevant proceedings, the notice suggests the judges considered it possible that the river could be liable for things that occurred before they recognized its legal personality. The decision to make Ganga a respondent in this case is also bizarre because Ganga almost certainly does not have the present capacity or decision-making authority to give its land for a garbage dump. Future cases may reveal more about the scope of liability that will attach to new legal persons in India.

As a final note, the State of Uttarakhand appealed the High Court of Uttarakhand’s decision recognizing the legal personality of the Ganga and Yamuna rivers. In July, 2017, the Supreme Court of India stayed the High Court’s judgment (thus freezing the legal rights of the rivers), pending further court proceedings in September. The Supreme Court has not yet issued a decision on the appeal.<sup>178</sup>

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<sup>171</sup> O’Donnell & Talbot-Jones, *supra* note 10.

<sup>172</sup> Ranjeev C Dubey, “Rivers with legal rights of a human” *Business Today* (21 April 2017), online: <www.businesstoday.in>.

<sup>173</sup> *Sarop Singh Punder v State of Uttarakhand & others* (8 May 2017), WP (PIL) 39 of 2017 (Uttarakhand High Court, India) [Punder].

<sup>174</sup> Diwan Advocates, “Notice Slammed Against Human River Ganga” *Diwan Advocates* (2 May 2017), online: <www.diwanadvocates.com> [Diwan Advocates]; Pragati Chauhan, “Ganga receives its first legal notice from Uttarakhand High Court”, *eUttaranchal* (28 April 2017), online: <www.news.euttaranchal.com> [Chauhan].

<sup>175</sup> Chauhan, *supra* note 174.

<sup>176</sup> Diwan Advocates, *supra* note 174.

<sup>177</sup> Punder, *supra* note 173.

<sup>178</sup> *State of Uttarakhand & others v Mohd. Salim & others*, (07 July 2017), Supreme Court of India, SLP(C) No.-016879 – 2017 (interlocutory judgment); see also *State of Uttarakhand & others v Mohd. Salim & others*, (21 August 2017), Supreme Court of India, SLP(C) No.-016879 – 2017 (interlocutory judgment).

## 2.2.4 Vilcabamba River (Ecuador)

The Vilcabamba River flows through the Vilcabamba region of Southern Ecuador, also known as the Valley of Longevity. In 2011, the Provincial Court of Loja recognized the Vilcabamba River's constitutional rights, becoming the first court to do so for any river.<sup>179</sup>

### Background Context

In October 2008, Ecuador became the first country to “recognize nature as subject to rights, within a constitutional framework.”<sup>180</sup> Under Article 71 of the 2008 Ecuadorean Constitution, “Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance and for the regeneration of her vital cycles, structure, functions and evolutionary processes.”<sup>181</sup> The Constitution empowers every “person, community, people or nationality” to enforce this right through constitutional processes.<sup>182</sup> Shortly after Ecuador adopted its new constitution, the Provincial Government of Loja dumped “thousands of tonnes of debris” from a highway construction project into the Vilcabamba River, severely restricting its channel and causing significant flooding downstream.<sup>183</sup>

### Method of Legal Recognition

The Vilcabamba River received judicial recognition of its constitutional rights on March 30, 2011.<sup>184</sup> The case came before the Provincial Court of Loja because the Vilcabamba's flooding had affected an American couple's riverside property.<sup>185</sup> Rather than seeking compensation for themselves, Eleanor Huddle and Richard Wheeler used the constitutional rights of nature provisions to file an “action for protection” in December 2010, requesting an immediate end to the dumping, the removal of debris, and the restoration of the river's course.<sup>186</sup> Although they lost at trial, they won on appeal. Drawing on the language of section 71, the Court declared that the provincial government “had violated the rights of nature, especially full respect for its existence and the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”<sup>187</sup>

### Scope of Protection

The Provincial Court's ruling articulated expansive protection for the Vilcabamba River's rights, and potentially those of other natural features in Ecuador. Relying on the precautionary principle, the Court held that “until it can be shown that there is no probability or danger to the environment [in a particular context]... 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.”<sup>188</sup> It also stated that the rights of nature would prevail over other constitutional rights in the case of a conflict, because “a ‘healthy’ environment is more important than any other right and affects more people.”<sup>189</sup>

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<sup>179</sup> Boyd, *supra* note 1 at 162.

<sup>180</sup> Sofia Suárez, “Defending nature: Challenges and obstacles in defending the rights of nature: Case Study of the Vilcabamba River” (2013) *Energía y Clima*, online: <www.library.fes.de> at 3 [Suarez].

<sup>181</sup> Erin Daly, “The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature” (2012) 21(1) *RECIEL* 63 at 63 [Daly].

<sup>182</sup> *Ibid.*

<sup>183</sup> Suarez, *supra* note 180 at 1; Boyd, *supra* note 1 at 160-161.

<sup>184</sup> *Richard Fredrick Wheeler y Eleanor Geer Huddle c Director de la Procuraduría General del Estado en Loja y otros* (30 March 2011), Juicio 11121-2001-0010 (Provincial Court of Justice of Loja, Ecuador); Suarez, *supra* note 180 at 7.

<sup>185</sup> Suarez, *supra* note 180 at 5.

<sup>186</sup> Boyd, *supra* note 1 at 162; *Ibid* at 1.

<sup>187</sup> Suarez, *supra* note 180 at 8.

<sup>188</sup> Peter Burdon and Claire Williams, “Rights of Nature: a constructive analysis,” in Douglas Fisher, ed., *Research Handbook on Fundamental Concepts of Environmental Law* (Cheltenham, UK: Edward Elgar Publishing, 2016) 196 at 201.

<sup>189</sup> Daly, *supra* note 181 at 64.

The Court also laid out a series of specific remedies. It ordered the Provincial Government to “immediately clean up existing damage, secure environmental permits, protect against oil spills or leakage into the river and the surrounding soils caused by machinery, implement a warning system to prevent future damage to the environment, find appropriate sites for disposing of debris if construction continued, and publish an official apology in the local newspaper.”<sup>190</sup>

### **Legal Representation**

With the assistance of a lawyer, Huddle and Wheeler brought their case to the Provincial Court of Loja under the constitutional provisions that allow every “person, community, people or nationality” to enforce the rights of nature through constitutional processes.<sup>191</sup>

### **Impact on Indigenous Relationships with Natural Features and Sacred Beings**

Commentary on the Vilcabamba River decision does not provide much information about its potential effect on Indigenous peoples or Indigenous relationships with the river. However, Indigenous relationships with nature are implicated in the broader constitutional provisions that facilitated the judgment, first and foremost through their reference to Pachamama. Tammy Lewis explains Pachamama as “an Indigenous concept that views humans as part of nature/earth and nature as having intrinsic rights.”<sup>192</sup> The Ecuadorean Constitution equates Pachamama with nature. However, Pachamama is also “a sacred deity revered by Indigenous people in the Andes” – a detail that gets somewhat lost in the Constitution’s equation of Pachamama with nature.<sup>193</sup>

Much of the rhetoric around the Ecuadorean Constitution’s protections for the rights of nature suggests these protections draw on Indigenous understandings of human relationships with the natural world. However, some commentators have suggested that the Constitution does not really “embody... indigenous group interests” or priorities, and that it uses tokenistic recognition of Indigenous stereotypes to justify itself.<sup>194</sup> It is quite possible that Ecuador’s constitutional machinery has co-opted Indigenous voices and beliefs, leaving little space for actual Indigenous voices and beliefs to be taken seriously in rights of nature cases.

### **Implementation and Practical Outcomes**

Enforcing the Vilcabamba River’s rights has been extremely difficult. Despite clear orders from the Provincial Court, the provincial government continued its road construction and failed to remove the debris or restore the river.<sup>195</sup> Huddle and Wheeler “filed an action of non-compliance” in March 2012, asking the Constitutional Court to address the government’s persistent conduct. However, as of August 2013, that case had not progressed.<sup>196</sup> In an episode of *The Nature of Things* that aired in June 2014, Huddle confirmed that the provincial government still had not complied with the court orders. Instead, it had planted “a few seedlings” and “erected some large signs declaring that the riverbanks had been rehabilitated.”<sup>197</sup> It is unclear whether things have improved at all since then.

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<sup>190</sup> Boyd, *supra* note 1 at 163.

<sup>191</sup> Daly, *supra* note 181 at 63.

<sup>192</sup> Tammy L Lewis, *Ecuador’s Environmental Revolutions: Ecoimperialists, Ecodependents, and Ecoresisters* (Cambridge: MIT Press, 2016) at 177.

<sup>193</sup> Craig M Kauffman & Pamela L Martin, “Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorean lawsuits Succeed and Others Fail” (2017) 92 *World Development* 130 at 139.

<sup>194</sup> Warren, *supra* note 29 at 46-47; Tanasescu, *supra* note 28.

<sup>195</sup> Daly, *supra* note 181 at 64.

<sup>196</sup> Suarez, *supra* note 180 at 10.

<sup>197</sup> Boyd, *supra* note 1 at 163.

By contrast, in May 2011, the Ecuadorean government secured a rights-of-nature-based injunction against illegal gold mining activities in northern Ecuador that were “polluting the Santiago, Bogotá, Ónzole and Cayapas rivers.”<sup>198</sup> The Second Court of Criminal Guarantees of Pichincha ordered that the “armed forces of Ecuador and the national police should collaborate to control the legal mining... Including by destroying all of the [miners’] items, tools and other utensils... that constitute a grave danger to nature.”<sup>199</sup> The government wasted no time sending 580 military personnel into the region, where they blew up 70-120 backhoes and other machines to put a stop to the mining.<sup>200</sup> Comparing these two cases suggests that the feasibility of enforcing the rights of nature in Ecuador may largely depend on which – or whose – other interests are at stake.

### 2.2.5 Rio Atrato (Colombia)

The Atrato River flows through the Darien Gap jungles between Panama and Columbia, creating a bio-diverse, swampy delta before reaching the Caribbean Sea.<sup>201</sup> In November 2016, Colombia’s Constitutional Court recognized the Atrato River Basin’s right to “protection, conservation, maintenance and restoration.”<sup>202</sup> The decision was made public in May 2017.<sup>203</sup>

#### Background Context

Colombia’s Constitutional Court had previously recognized the rights of nature in 2015. In a case concerning the environmental degradation of Tayrona National Park, the Court adopted an eco-centric perspective, observing that “rivers, mountains, forests, and the atmosphere must be protected, not because of their utility to humans but because of their own rights to exist”; furthermore, the Court explicitly recognized a societal “duty to respect and guarantee the rights of nature.”<sup>204</sup> The decision suspended all area fisheries, and required the government to develop a long-term ecological restoration plan for the park.<sup>205</sup>

The Rio Atrato’s environmental condition made it an excellent next candidate for rights of nature protection. Although the river basin contains one of the world’s most biodiverse ecosystems, the river is also heavily polluted, and has been so for centuries. Illegal gold mining dating back to the Spanish colonial era has continued into the present, and the river receives approximately 60 tons of mercury and cyanide every year, contributing to Colombia’s status as the country with the highest mercury and cyanide pollution rates in the Americas.<sup>206</sup> Mercury poisoning has been a fact of life for the river’s fish populations and the people who rely on those fish for sustenance.<sup>207</sup>

#### Method of Legal Protection

The case that allowed the Constitutional Court of Columbia to recognize the Rio Atrato’s rights was launched by a coalition of Indigenous and Afro-Colombian groups and the environmental NGO Tierra

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<sup>198</sup> Daly, *supra* note 181 at 65.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> Laura Villa, “The Importance of the Atrato River in Colombia Gaining Legal Rights”, *Earth Law Center* (5 May 2017), online: <[www.earthlawcenter.org](http://www.earthlawcenter.org)> [Villa].

<sup>202</sup> *Acción de tutela interpuesta por el Centro de Estudios para la Justicia Social “Tierra Digna y otros c/ Presidencia de la República y otros* (10 November 2016), T-622 de 2016 (Constitutional Court, Columbia); Susan Bird, “Colombia Grants Legal Rights to the Polluted Atrato River”, *Care2 Causes* (30 May 2017), online: <[www.care2.com](http://www.care2.com)> [Bird].

<sup>203</sup> Community Environmental Legal Defense Fund, Press Release. “Colombia Constitutional Court Finds Atrato River Possesses Rights” (4 May 2017), online: <[www.celdf.org](http://www.celdf.org)> [CELDF].

<sup>204</sup> Boyd, *supra* note 1 at 225-226.

<sup>205</sup> Boyd, *supra* note 1 at 225-226.

<sup>206</sup> Villa, *supra* note 201.

<sup>207</sup> Bird, *supra* note 202.

Digna in 2015.<sup>208</sup> They were seeking protection both for the river and for the humans who live alongside it. Consistent with this framing, the Court’s decision arguably recognizes both the rights of nature and human rights to nature. The judgment gives the river constitutional rights to “protection, conservation, maintenance and restoration,” and this protection extends to the watershed as well.<sup>209</sup> However, the judgment also takes Colombian state authorities to task for “violating fundamental rights to life, health, water, food security, the healthy environment, culture and the territory of ethnic communities” by failing to prevent damaging river mining.<sup>210</sup> It is likely that this section of the judgment refers to human rights rather than river rights.

One commentator claims the decision recognized the Rio Atrato’s legal personhood, but this is difficult to corroborate without the assistance of a legally trained Spanish speaker.<sup>211</sup> The commentator’s interpretation may be based on an assumption that holding rights automatically makes the rights-holder a legal person, which is not necessarily the case when it comes to the rights of nature. Without explicit evidence that the Court granted the Rio Atrato legal personhood status, it is better to view this case as an example of the rights of nature in action.

### **Scope of Protection**

The Court has recognized the river’s rights to protection, conservation, maintenance, and restoration, and imposed a corresponding duty on the State to protect it.<sup>212</sup> While this language appears to provide relatively broad protection, it is also somewhat vague, leaving space for future interpretation.<sup>213</sup> The judgment gives the government “one year to develop a comprehensive plan to end the pollution and damage being inflicted on the Rio Atrato watershed by activities such as deforestation and illegal mining.”<sup>214</sup> It specifically calls for a restoration plan for the river basin, baseline studies, and the implementation of protective measures.<sup>215</sup> None of the commentaries consulted in preparing this section of the report make any mention of corresponding river liabilities or the river’s ability to initiate legal proceedings, which provides further support for the idea that this decision does not give the river full legal personality.

### **Legal Representation**

The Court has instructed the claimant communities to “establis[h] a joint guardianship for the Atrato River basin,” made up of one government representative and one representative from the local Indigenous groups.<sup>216</sup> The guardians will be responsible for “follow[ing] up on the protection and restoration that the State must provide for the river.”<sup>217</sup> The similarity to the Te Pou Tupua model adopted in Aotearoa New Zealand is unlikely to be a coincidence, as the Court referenced the Whanganui River settlement and then-pending legislation in the judgment.<sup>218</sup> However, instead of being supported by an advisory council of Indigenous and local government representatives like Te Karewao, the Rio Atrato’s guardians will receive advice from the Humboldt Institute and the World Wildlife Foundation.<sup>219</sup>

### **Impact on Indigenous Relationships with Natural Features and Sacred Beings**

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<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid*; Villa, *supra* note 201.

<sup>210</sup> Villa, *supra* note 201; Bird, *supra* note 202.

<sup>211</sup> Villa, *supra* note 201.

<sup>212</sup> *Ibid.*

<sup>213</sup> The precise wording of the Spanish-language judgment may provide further insight.

<sup>214</sup> Boyd, *supra* note 1 at 226.

<sup>215</sup> CELDF, *supra* note 203.

<sup>216</sup> *Ibid*; Villa, *supra* note 201.

<sup>217</sup> Villa, *supra* note 201.

<sup>218</sup> Boyd, *supra* note 1 at 226; CELDF, *supra* note 203.

<sup>219</sup> Villa, *supra* note 201.

The US-based Community Environmental Legal Defense Fund (CELDF), which has been “working in Columbia with the indigenous Raizal people to advance the Rights of Nature to protect their ancestral lands,” called the decision “a critical step forward to empower the Raizal people to protect the rights of their communities and nature.”<sup>220</sup> While this may be true, it does not provide much insight into the Raizal people’s spiritual relationships with the Rio Atrato basin or any sacred beings within it, or those of other Indigenous peoples in the Rio Atrato basin.

### **Implementation and Practical Outcomes**

Although the Colombian public has received the judgment positively, there are definite concerns about the feasibility of implementation. Colombia has “more urgent issues to attend to, with very limited capacities and resources to spare,” and its failure to enforce human rights laws in high-density population centres calls into question its ability to enforce the rights of nature in the remote Rio Atrato.<sup>221</sup>

Conversely, if the judgment is actually enforced, it will likely jeopardize the livelihoods of “thousands of people that depend on illegal mining in the Atrato River” for survival.<sup>222</sup> This raises concerns similar to those raised in India about environmental protection’s potentially disproportionate impact on the ‘poor and marginalized’ – some of whom may be Indigenous.

## **2.3 Implications in the Canadian Context**

The case studies discussed here demonstrate several innovative routes to Western legal protection for natural features and, in some cases, sacred beings associated with those natural features. However, the circumstances that allowed Te Awa Tupua, Te Urewera, the Ganga and Yamuna Rivers, and associated natural features to be recognized as legal persons are quite specific to the societies and common-law legal systems in which those recognitions occurred. Similarly, the rights of the Vilcabamba and Atrato Rivers are products of their Ecuadorean and Colombian contexts. The site-and system-specific nature of these legal innovations means it may be difficult to translate them into the Canadian context.

The legal recognition of these natural features’ rights and/or legal personhood came about via three different legal routes: negotiated settlements with Aotearoa New Zealand’s settler-colonial government, the extension of existing Indian common-law precedents, and judicial implementation of constitutionally-based rights of nature in Ecuador and Colombia. Unfortunately, Canadian common law may not provide equivalent precedents; the federal government has no apparent desire to reopen the Constitution; and, as currently implemented, the modern treaty process may lack the flexibility to consider including legal personality for natural features in a final agreement. Although these conditions may change in coming years, they currently raise questions about the feasibility of using the mechanisms discussed to protect natural features and associated sacred beings in Canada.

In addition, certain weaknesses of the approaches outlined in the case studies would have to be overcome, such as the fragmented nature of legal rights granted to the natural feature (seen with New Zealand’s Te Awa Tupua); a narrow scoping of rights (New Zealand’s Te Urewera); a lack of clarity about how rights will be enforced (India’s Ganga and Yamuna Rivers and associated natural features), issues with enforcement (Ecuador’s Vilcabamba River), and vague language that may fall short of granting full legal personality (Colombia’s Rio Atrato).

Nevertheless, the lessons learned in these other jurisdictions may be useful in advancing Canadian Indigenous law in light of:

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<sup>220</sup> CELDF, *supra* note 203.

<sup>221</sup> Villa, *supra* note 201.

<sup>222</sup> *Ibid.*

1. the *sui generis* nature of Aboriginal and treaty rights in Canada, which require bridging perspectives which include Indigenous peoples understanding of the living nature of the natural world;
2. the *Van der Peet* idea that a “morally and politically defensible conception” of aboriginal rights requires drawing on Indigenous laws and perspectives on their law;<sup>223</sup>
3. the concept of reconciliation – the purpose of section 35(1) of the *Constitution Act* – which would require understanding and implementing aspects of Indigenous law;<sup>224</sup>
4. the *UN Declaration on the Rights of Indigenous Peoples*’ use of language that discusses the necessity of Indigenous law for domestic decision-making;<sup>225</sup>
5. the principle of reading the legislation in the field in a manner consistent with Indigenous understandings (*Nowegijick*);<sup>226</sup> and
6. the possibility of reading ‘everyone’ in sections 2, 7-10, 12 of the *Charter* (right to assembly, expression, life, liberty, security, free from cruel and unusual punishment, etc.) to include elements of nature.<sup>227</sup> The Indigenous legal frame could be used to make the point that *Charter* rights cannot be read as Western or common law only – since all of the Constitution, not just section 35(1), must be about reconciliation.<sup>228</sup>

More research needs to be done on the above topics.

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<sup>223</sup> *R v Van der Peet*, [1996] 2 SCR 507 (SCC) at para 49.

<sup>224</sup> *Constitution Act, 1982*, *supra* note 44.

<sup>225</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295.

<sup>226</sup> *Nowegijick v The Queen*, [1983] 1 SCR 29 (SCC).

<sup>227</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982(UK)*, 1982, c 11.

<sup>228</sup> Our thanks to Professor John Borrows for providing the considerations above.

### **Part III: Conclusion**

The case studies discussed in this memo demonstrate several innovative routes to Western legal protection for natural features and, in some cases, sacred beings associated with those natural features. However, the case studies also suggest that the site-and system-specific nature of the legal personality designations described may make it difficult to translate this type of legal innovation into the Canadian context. In addition, certain weaknesses of the approaches outlined in the case studies would have to be overcome before implementing this approach in Canada. Nevertheless, more research needs to be done to analyse whether -- and how -- these international experiences might be integrated into Canadian law in a way that would better protect water bodies, related natural features, and sacred water beings in Canada. In light of the shortcomings of some of the international experiences, research should also carefully consider how the lessons might be used in a way that does not inadvertently weaken current Indigenous rights in Canada.

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