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Climate Change Law and Colonialism: Legal Standing of Three Rivers and a Hypothetical Case of Bison Personhood in Canada

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Climate Change Law and Colonialism: Legal Standing of Three Rivers and a Hypothetical Case of Bison Personhood in Canada

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1. Introduction

In March 2017, three new legal persons were created on Earth: the Whanganui River in New Zealand, and the Ganga and Yamuna Rivers in India."[1] Taken together, and in consideration of two great apes designated as judicial persons in the last few years, these judgements suggest a new precedent may be forming regarding the extension of rights to non-human entities.

To appreciate why personhood of non-human entities could be relevant to the future of climate change law and policy, the cultural, spiritual and ecological reasoning that lead to the extension of rights to rivers will be examined in context of the dominate legal principles that have influenced law-making since European empires laid claim to most of the Earth's land and water.[2]

The relationship between colonialism and climate change law and policy should not be ignored. For nearly two Centuries as the industrial revolution flourished, and greenhouse gases rose, the views and governance systems of most Indigenous Peoples around the world have been absent from law and policy – ever since millions of European migrants[3] forced their world view. Now, as the world faces a crisis unlike humans have ever witnessed, traditional knowledge is being invited into international climate change law and policy discourse. For example, the multilateral Paris Agreement that calls on States to both consider "the rights of indigenous peoples,"[4] and that country-driven adaptation should, as appropriate, take into account the knowledge of Indigenous Peoples.[5] Given the views that Indigenous People hold with regard to nature, the inclusion of Indigenous knowledge into decision making about adaptation and mitigation might also be a game changer for animal rights – a potential outcome that will be briefly discussed.

In this essay, it will be shown how personhood of rivers and the hypothetical case of bison as person could be viewed as operationalizing the commitments made by New Zealand, India and Canada as Parties to the Paris Agreement. A link will be made between the extension of legal personhood and the deconstruction of colonial ways of thinking as a means of promoting biodiversity

[1] E. O'Donnell 3 Rivers Just Became Legal 'Persons'. University of Melbourne and Julia Talbot-Jones, Australian National University. March 24, 2017
[2] Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada The Truth and Reconciliation Commission of Canada. 2015. P. 53
[3] Ibid 3. P.P 24-25
[4] Ibid 1
[5] Ibid 1. Article 7.5

and adaptive capacity. It will be argued that extending rights to nature based on cultural and ecological reasons could provide numerous benefits to States in their efforts to address climate change while also mending relations with First Peoples. Underpinning the contents is also a challenge to the anthropocentric framing of laws related to climate change that are guided by the *common concern for humankind* principle.[6] Perhaps it is time the principle evolved to be more inclusive - *a common concern for all kind.*

To illustrate the above points, this paper is organized into three parts: Part I presents an overview of the key arguments that led to personhood of the Whanganui, Ganga and Yamuna rivers. The arguments offered for the Ganga and Yamuna personhood are basically the same, therefore with exception of geographical distinction, these cases will be discussed in unity. Part II presents relevant background on colonialism, bison, and Indigenous views on nature and applies relevant arguments offered in the river cases (focusing on the Whanganui River), as well as the main argument used for personhood of great apes - to a hypothetical case for bison personhood in Canada. Part III explores how the extension of rights to nature could be seen as a form of active reconciliation with Indigenous Peoples that could result in the protection of biodiversity and increased adaptive capacity, thereby operationalizing Article 7.5 of the Paris Agreement[7] This section will also assess whether the International Indigenous Peoples Forum on Climate Change (IIPFCC) and the new Local Communities and Indigenous Peoples' Platform (LCIPP)[8] pursuant to the Paris Agreement, could be useful instruments in helping to establish the case for legal standing of nature.

The primary rationale offered for granting legal personhood to the rivers in India revolve around spiritual and scientific/ecological arguments while the reasoning behind legal standing of the Whanganui River in New Zealand had an added complexity of attempting to resolve a historical legal battle between the Maori and the State. Though the key arguments in the India and New Zealand cases differ, the result of these judgements nevertheless indicates a potential shift in willingness by the courts to grant non-human entities legal standing based on cultural and ecological reasoning. These arguments could inform future legislation such as suggested in the hypothetical case of bison person in Canada.

How and why all three rivers achieved legal personhood is best understood in context of the views on nature that have influenced environmental law since European settlement - views that are very different than those held by inhabitants before settlement and the evolution of common-law became predominant in legal systems. This context is also relevant to the rationale offered in the hypothetical case for bison person.

We are living in an era of fast and unpredictable change due to climate change and the fate of life on Earth may depend on a rapid rethink of how we govern our lives. The last three years have consecutively been the hottest on record.[9] Perhaps Indigenous views on nature present a key to unlock new ways of governing our relationship with nature. Dramatic shifts in how we govern ourselves as a society are possible, as was the case with the colonization of Indigenous People in many parts of the world that happened relatively quickly once advances in transportation allowed European settlers to cross oceans and cultivate new lands - touching all "corners of the globe."[10] It is estimated, for example, that within only 10 years (1830 to 1840), there was a 40 per cent rise in European immigrants to North America.[11] It could be far too ambitious to hope for, but as this essay will show, stepping up efforts toward deconstructing the effects of colonization could help Nations – at least those influenced by the former British Empire[12] – to embrace views held by First Peoples on nature that in turn could

[6] Ibid 1
[7] Ibid 1. Article 7.5.
[8] Ibid 1. Paragraph 135.
[9] A. Thompson. 2016 was the Hottest Year on Record. Both NASA and NOAA declare that our planet is experiencing record-breaking warming for the third year in a row. Scientific America. January 18, 2017
[10] D. Pierce. Decolonization and the Collapse of the British Empire. Inquiries Social Sciences, Arts, and Humanities. 2009, 1 (10)
[11] Ibid 3. P. 28
[12] For example, a campaign might concentrate on the Dominions in which Indigenous people where particularly impacted such as: Canada, Australia, South Africa, and New Zealand

help States establish bold new legislation to address climate change. Written into the United Nations Framework Convention on Climate Change (UNFCCC)[13] and echoed in the Paris Agreement, the principle of *common concern for humankind* makes no mention of the need to have a common concern for other living entities. If Parties to the Paris Agreement are to truly embrace traditional knowledge and the views of Indigenous Peoples',[14] then future climate change law and policy – whether a multilateral agreement, national or sub-national legislation - really ought to stretch the boundaries of this principle to at least consider all living entities. To pave the way for traditional knowledge to influence decision-making, we must deconstruct the barriers created over nearly two centuries.

Judgements for non-human personhood means that rights can be enforced.[15] This is very different than suggesting that States or individuals be *conscious of* or just *note* the value of nature such as in the Convention on Biological Diversity (CBD)[16] and the Paris Agreement.[17] Of course, establishing legal personhood for non-human entities does not equate to an absolute right[18] nor guarantee that no harm will come to subjects. Personhood does however, create an enforceable instrument that could be a deterrent for further destruction to species, land, and water that have ecological and cultural significance and therefore could be considered crucial actors in addressing climate change.

A. Methodology

The topic of this paper is at the nexus of Indigenous knowledge, human and non-human rights, biodiversity, and climate change. It therefore requires a creative approach to investigation that not one method can adequately address. *Climate Change and Colonialism: Legal Standing of Three Rivers and a Hypothetical Case of Bison Personhood in Canada* invites the reader on a journey of enquiry that involves an interdisciplinary approach using aspects of comparative analysis and socio-legal methods. Of focus are the potential implications of judgements, the functions of principles, the perceptions of cultural rights, spiritual beliefs, and scientific fact, in context of evolving climate change law. An interdisciplinary approach seems most appropriate given the relatively new circumstance of climate change for it allows multiple forms of analysis that "engage with each other and interact to produce a type of analysis that would not otherwise be possible from the application of either discipline in isolation."[19]

An in-depth analysis of why certain methodological approaches would be better than others is beyond the scope of this paper, but it is important to note that there are many possible choices for legal research.[20] For example, a comparative method may have allowed deep exploration into how legal standing of water could be analogous to legal standing of an animal, or an in-depth comparison of how different national laws in New Zealand and India paved the way for legal rights to be awarded to three rivers. This paper will only briefly engage with comparative law by summarizing the key arguments in the Ganga, Yamuna, and Whanganui Rivers which allows for a comparison with the potential arguments for legal standing of bison in Canada. The paper also engages a policy-oriented approach[21] in the analysis of how arguments leading to the legal standing of three rivers could be applicable to the creation of new policy or legislation that is inclusive of Indigenous views and therefore enhances climate adaption strategies. The influence of common law, history of colonization, and new policies that incorporate Indigenous ways of viewing nature such as extending rights to non-human entities, will also be discussed in context of operationalizing commitments made to the Paris Agreement.

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[13] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994)
[14] Ibid 1. Article 7.5
[15] Ibid 2.
[16] Convention on Biological Diversity. 1992. Preamble. P.1
[17] Decision 1/CP.21, *Adoption of the Paris Agreement.* 2015: "Noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth"
[18] J.S. Beaudry. From Autonomy to *Habeas corpus*: Animal Rights Activists Take the Parameters of Legal Personhood to Court. Global Journal of Animal Law (GJAL) 1. 2016. P.10
[19] M. Salter and J. Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research. Pearson Education. 2007. P.133
[20] Ibid 20. P.183
[21] Ibid 20. P.165

This essay adopts the conceptualization of 'Indigenous' that outlines three central aspects:

> "indigenous are those people who lived in the country to which they belong before colonisation or conquest by people from outside the country or the geographical region. Secondly, they have become marginalised as an aftermath of conquest and colonisation by the people from outside the region. Thirdly, such people govern their life more in terms of their own social, economic and the cultural institution than the laws applicable to the society or the country at large."[22]

It is, however, important to point out that the term 'Indigenous,' primarily used in the past as an anthropological term to describe tribes,[23] is now more broadly used to classify people in international treaties such as the UNDRIP and the Paris Agreement despite it not having consistent meaning between States. Relevant to this paper is that the social complexities of India's first peoples make the distinction of 'Indigenous' difficult and even contentious in some circles.[24] Also, unlike in New Zealand and Canada where nearly all First Peoples were colonized, in India some tribes escaped British rule altogether.[25] It would be beyond the scope of this paper to elaborate on the social and cultural distinctions that make up India's diverse tribal history, but with acknowledgement of India's unique situation, a common thread that links India to our discussion is that pre-Aryan and pre-British societies had deep connections to place and cultural and spiritual connectedness with the natural world.[26] Beliefs that perhaps have not been reflected in the evolution of laws created by the common law system.

A few final logistical notes on terminology: bison versus buffalo; imperialism versus colonialism; the capitalization of Indigenous versus lower case; and Indigenous versus Aboriginal, First Nations, Natives, and First Peoples.

Some sources refer to bison as buffalo, but for the purposes of this essay, buffalo and bison are one in the same. It should be noted; however, that the correct term for the North American species is bison. The term buffalo derived from early settlers who referred to bison as buffalo perhaps because of their similar appearance.[27]

The terms colonialism and imperialism are often used interchangeably. Colonialism "refers to the practices involved in the transforming of the acquired territories into colonies, most commonly by transferring settlers from the imperial power to the colony." [28] Imperialism relates more to the policies around obtaining and keeping empires.[29] In this paper the term colonialism is preferred, but it should be noted that imperialism could also have been used at times.

To capitalize Indigenous or not seems to be highly variable. In Canada, the word is more often capitalized than not; however, international treaties, such as the Paris Agreement use lower case "i." With exception of quoted reference, Indigenous will appear in capitals in this paper.

In Canada the words Indigenous, First Peoples, Native and First Nations are often used interchangeably, however First Nations does not apply to Metis or Inuit.[30] It is noted that not all tribal members like to be referred to as Aboriginal therefore, Indigenous, First Nations, and First Peoples will be used in this essay with exception of references.

2. The Journey to Legal Standing – Key Arguments in Three Rivers

The following is an overview of the key arguments that led to personhood of the Whanganui, Ganga and Yamuna rivers. As mentioned in the Introduction, the arguments offered for legal standing of the Ganga and Yamuna Rivers are basically the same, therefore with exception of geographical distinction, these cases will be discussed in unity.

[22] V. Xaxa. Tribes as Indigenous People of India. Economic and Political Weekly, Vol. 34, No. 51. 1999. P. 3590
[23] Ibid
[24] Ibid 24. P. 3589
[25] Ibid 24. P. 3592
[26] Ibid 24. P. 3594
[27] J. Bryner Bison vs. Buffalo: What's the Difference? Live Science. September 6, 2012
[28] Ibid 3. P. 26
[29] Ibid
[30] B. Joseph. Indigenous Peoples Terminology: Guidelines for Usage. 2016

A. *Whanganui River Claims Settlement, New Zealand*

After decades of court battles and discontent between Indigenous people and the State, a settlement was reached in New Zealand that serves as both an acknowledgement of the interconnected relationship that the Maori have with Whanganui River and as an apologize for over a century of the Treaty of Waitangi not being honoured.

The Whanganui River Claims Settlement defines a collective group of Maori with ties to the River as the Whanganui Iwi "comprising every individual who is descended from a person who, at any time after 6 February 1840, exercised customary rights and responsibilities in respect of the Whanganui River by virtue of being descended from." The Iwi plaintiffs argued that the River has spiritual significance which is essential to the Maori's identity as well as their spiritual and cultural well-being. To them, the River is perceived as a "living entity with its own personality and life-force." Central to the personhood decision is the acceptance by the courts of this concept also known as Te Awa Tupua, "the inseparability of the people and River"[31] that is linked with the wellbeing and health the people[32]– including non-Indigenous peoples of New Zealand.[33] The Whanganui River is one of the second longest rivers on New Zealand's North Island,[34] weaving through mountains on a journey to the sea, it is a major artery for food and all of this activity is perceived by the Maori as a single living entity.[35]

It is helpful to understand that prior to reaching the Settlement there was a long history of court battles between the Maori and the State regarding the interpretation of property as it applied to the River. It is noted as one of the longest litigation cases in New Zealand's history.[36] The claim was built on the belief that Indigenous People for "hundreds of years, possessed and controlled the Whanganui River and its tributaries, and they have never since 1840 freely and knowingly relinquished their rights and interests in the river."[37] This contentious battle between the State and its First People brought to light the injustices of colonization and the different worldviews of between European settlers and those Indigenous to the land. The on-going conflict was so impactful that finally in 1975 the Waitangi Tribunal was created[38] to make recommendations on how to move forward with the claims.

In the ruling, the legal interpretation of property law did not change, but in considering the Maori's views on the physical world, the notion of property became more inclusive. As stated in the settlement: "it does not matter that they thought in terms of territory rather than property. What they possessed, even rivers, is deemed to be a property interest for the purposes of law, and it has been treated that way by the courts."[39] The Treaty of Waitangi between the British Crown and the Indigenous Peoples of New Zealand stated that the Iwi would own and exercise their rights according to their customary norms.[40] An in-depth analysis of the evolution of property law is out of this paper's scope, but of relevance is that the Settlement acknowledges the acceptance of principles that arose from the doctrine of Aboriginal title in what the Tribunal calls "universal principles of law."[41] These universal principles include the concept of property rights that are centuries old European paradigms that became adopted in many parts of the world, including in Canada and New Zealand. Principles of property rights were foundational to the treaties between settlers and Indigenous peoples[42] – irrespective of how Indigenous people viewed the concept of ownership. To embrace these different views, the Courts had to set aside preconceived notions of State-like territories and concepts of private ownership or rights"[43] while at the same time honouring the intent of the original Treaty that was established to respect the pre-

[31] Whanganui IWI and The Crown. Agreement. August 30, 2012. P.P. 4-5
[32] Ibid
[33] This integrated perspective also "recognises the intrinsic interconnection between the Whanganui River and the people of the River (both iwi and the community generally)."Whanganui IWI and The Crown. Agreement. August 30, 2012. P. 6
[34] K. Buchanan. New Zealand: Bill Establishing River as Having Own Legal Personality Passed. Library of Congress. Global Legal Monitor. March 22, 2017. P. 36
[35] Ibid
[36] Ibid. 36. P. xvii
[37] The Whanganui River Report. Waitangi Tribunal Library. WAI 167. 1999. P. 12
[38] Government of New Zealand. Waitangi Tribunal
[39] Ibid. 36. P. 337
[40] Ibid. 36
[41] Ibid. 36. P. xix
[42] Ibid
[43] Ibid. 36. P. 35

existing rights of the Maori,[44] which has been found to include the Whanganui River.

The Treaty signed on February 6, 1840 at Waitangi, New Zealand stated that the Iwi were guaranteed "the undisturbed possession of their properties, including their lands, forests, and fisheries, for as long as they wished to retain them."[45] According to the Tribunal, this should have included the River. A key finding of the Tribunal was that the Maori considered the River a resource and an entity that was intrinsically linked to them – therefore it was in essence their property and therefore the Crown was in breach of the Treaty signed during colonization.[46] Taking this into account, the Whanganui River Claims Settlement on March 20, 2017 declared the River, or Te Awa Tupua, a legal person with "all the rights, powers, duties, and liabilities of a legal person."[47]

Legal personhood of the River ensured that its status became central to the settlement so that going forward it was considered as "an integrated whole when any matters relating to or affecting the River"[48] arose. The Act provides a robust definition of the Whanganui River that includes the soil under and around it, the streams and tributaries that flow from it, the wetlands it contributes to - even the airspace above the water,"[49] as well as protection of "its environmental, social, cultural, and economic health and well-being."[50]

As noted above, integral to the Whanganui River Claims Settlement was the position that "in the Maori scheme, rivers were not 'owned' in the English sense of the term."[51] Therefore, with the Settlement came a ground-breaking legal framework that centres around the concept of nature's interconnectedness with humans – the Te Awa Tupua "an indivisible and living whole."[52] By making the River central to the issue, a new legal construct is formed that weaves together traditional beliefs of the Maori with the legal system that became entrenched in New Zealand since colonization by the British in 1840.[53] This could be a model moving forward for how States that are party to the Paris Agreement incorporate traditional knowledge into legislation and other policies in effort to meet their climate change goals.

B. Ganga and Yamuna Rivers, India

Arguments for legal personhood of both the Ganga and Yamuna Rivers in India revolved primarily around the need for protection from pollution and climate change, but in context of their spiritual and cultural relevance dating back to pre-Aryan contact. As such, though the arguments do not refer directly to Indigenous Peoples, it can be inferred that references to past generations and spiritual relevance applies to cultures that developed views and connections with nature long before European settlement.

In the final ruling, it was determined that "urgent remedial steps are required to be taken to ensure that the receding of these Glaciers is stopped. Both Ganga and Yamuna Rivers are revered as deities by Hindus. Glacial Ice is the largest reservoir of fresh water on earth." Hinduism can be said to embrace many traditions and be thousands of years old, therefore the reference to the rivers as deities revered by Hindus could similarly be as nature is viewed by those referred to as Indigenous in other countries.

Legal personhood for both Rivers was granted by the Uttarakhand high court on March 20, 2017 "in response to the urgent need to reduce pollution in two rivers considered sacred in the Hindu religion." The Ganga, for example is plagued with toxic waste, but it also considered the Mother Ganga – the most holy Hindu river. The Ganga flows from the Gangotri Glacier that is estimated to have significant recession in the last two decades. This is significant because the Ganga River provides water for millions in India. Similarly, the Yamunotri Glacier in the District Uttarkashi is also receding in what the courts deemed partly due to climate change, which threatens the health and volume of River Yamuna.

A significant rationale behind granting personhood to the Ganga and Yamuna Rivers was the Court's interpretation of the principle of *parens*

[44] Ibid. 36. P. 339
[45] Treaty of Waitangi 1840. Article 2
[46] Ibid. 39. P. 12
[47] Ibid 49. 14 (1)
[48] Ibid. 33. P. 6
[49] Ibid. 49. Schedule 5 and 7
[50] Ibid
[51] Ibid. 36. P. 48
[52] Ibid. 36
[53] New Zealand History 1769-1914. Introduction

partriae. Referenced in the Uttarakhand high court judgement, *parens partriae* has its origins in the 1890 case Mormon Church v. United States that found States should "act as guardian for those who are unable to care for themselves." Application of this principle resulted in new legislation establishing the Rivers as minors who will be represented by three adult designate guardians: the advocate general, director general of Namami gange project, and the chief secretary of the Uttarakhand. The judges thus declared the Yamunotri and Gangotri glaciers and all the "rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridical 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."

In the judgement, many references were quoted from "learned authors" to show the ecological, spiritual and cultural value of nature which ultimately would only be possible by the protection of the Rivers. While a list of these references would be too detailed for this paper, a few examples serve to illustrate the depth of reasoning offered for the judicial person judgements: a detailed account of the ecological importance of trees was provided from Nobel Peace Prize author Sri Wangari Muta Maathai; the sacred relevance of trees according to Indian mythology was quoted from Devdutt Pattanaik, author of 'Under the Banyan Tree;' and scientific references were given on how the "alpine zone in the Himalaya constitutes a unique habitat and has contributed to great biological diversity..."

Numerous references to treaties and related conferences were also offered as further rationale for legal personhood. These include: all the principles from the Stockholm Declaration of the United Nations Conference on the Human Environment; all 27 principles in the Rio Declaration; the articles in the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and some references to the Bali Action Plan. This all to support the judges' conclusion that it is "a fundamental duty of all the citizens to preserve and conserve the natural it its pristine glory. There is a grave threat to the very existence of Glaciers, Air, Rivers, rivulets, streams, Water Bodies including Meadows and Dales." Moreover, that the courts are "duty bound to protect the environmental ecology," and it is the intrinsic right of the rivers and lakes not to be polluted.

Considering that personhood for the Whanganui River in New Zealand occurred very close in time as personhood for the Ganga and Yamuna Rivers, one could conclude that a concept of legal personhood seems to be forming that is based on arguments about the cultural and ecological value of nature in context of threats due to a rapidly changing climate system. Advocates for animal rights may be inspired by these cases as well. Legal frameworks for animal rights have primarily focused on arguing sentience which has had limited results, but a framework that revolves around cultural and ecological relevance in context of climate change might enable judges to extend principles in law in new ways, as will be proposed with the hypothetical case for bison in the next section.

3. Background

A. Brief History of Colonization in Canada

"Reconciliation is not an Aboriginal problem; it is a Canadian one. Virtually all aspects of Canadian society may need to be reconsidered."[54]

In 1867, British legislation established the Dominion of Canada which came into effect on July 1,[55] and so in 2017 Canada celebrated its sesquicentennial. But Canada's 150th birthday was not welcomed by everyone.[56] Many Indigenous People marked the occasion with a stark reminder that the country's history is tainted with more than a century of policy brought by European settlers that was designed to "eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural,

[54] Ibid 3. Preface
[55] The Making of Canada, 1867 - An Enduring Compromise. The Globe and Mail. June 2, 2017
[56] D. Bascaramurty. 'A horrible history': Four Indigenous views on Canada 150. The Globe and Mail. July 1, 2017

religious, and racial entities in Canada."[57] Indigenous People were banned from practicing their culture, speaking their language, living on the land they had occupied for thousands of years, and their children were removed and sent to residential schools - all of which "can best be described as 'cultural genocide.'"[58]

The negative effects of residential schools on Canada's Indigenous People runs deep having been in existence from the 1870's until 1996. Over 150,000 First Nations, Métis, and Inuit children were taken from their families in an attempt to weaken their cultural and family bonds and assimilate them into the Euro-Christian society.[59] As of 2009 it was estimated that 80,000 former residential school students were still alive.[60]

The impacts of residential schools are sadly not confined to Canada's history; the "legacy from the schools and the political and legal policies and mechanisms surrounding their history continue to this day."[61] In 2004, an Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools Numerous brought forward numerous claims against the Canadian Government from former students. The Report highlighted the impacts of "unresolved trauma"[62] passed on through the generations, and triggered negotiations with government, religions organizations, and Indigenous Peoples. An Agreement in Principle was reached on November 20, 2005[63] that resulted in a multi-billion-dollar settlement agreement in 2007 that to date remains Canada's largest class action settlement in history. A significant outcome of the Settlement was the creation of the Truth and Reconciliation Commission.[64] Part of the Commission's mandate was to provide inspiration and guidance for a process of truth and healing that would lead to "reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments, and Canadians generally."[65]

The Government Canada and many other non-governmental organizations are now in the process of acting upon the Commission's recommendations. A key point made by the Commission relevant to this paper is that to achieve reconciliation, respectful relationships between Canada's Indigenous and non-Indigenous people must be built which requires "the revitalization of Indigenous law and legal traditions."[66] Incorporating Indigenous views on the natural world, such as legal personhood of bison presented as a hypothetical case in this essay could be an example of such revitalization.

B. The Relevance of Bison

"What happens to a culture when landscapes and ecosystems are modified? Both social and ecological systems have co-evolved with a fine-tuned network of checks and balances."[67]

The impact of illness brought by settlers[68] altered the relationship Indigenous People had with the environment which in the prairie regions was compounded by the mass killing of bison – a food and clothing source that had deep cultural and spiritual ties to First Peoples such as the Blackfoot tribes. Bison once roamed freely throughout the grasslands of Canada, sustaining Indigenous cultures in the region who were physically and spiritually tied to the animals,[69] but in the late 1800s the animals were hunted to near-extinction by European settlers.[70] Bison were slaughtered for their hides and to free up prime grazing land for cattle. It was also a form of cultural eradication because "for Indigenous people of the plains, the bison was a food staple, a clothing source and a religious symbol. With its destruction came the end of an entire way of life."[71] To this day bison are considered symbolic of culture and tradition by tribal leaders in

[57] Ibid. 81. P. 1
[58] Ibid
[59] Ibid. 81. Preface
[60] The Truth and Reconciliation Commission of Canada Backgrounder
[61] Ibid. 81. P. 135
[62] Ibid. 87
[63] Indian Residential Schools Settlement Agreement. May 8, 2006. D. P. 6
[64] Indian and Northern Affairs Canada 2017
[65] Ibid. 81. P.23
[66] Ibid. 81. P. 16
[67] A. Garibaldi N. Turner. Cultural Keystone Species: Implications for Ecological Conservation and Restoration. Ecology and Society 9 (3). 2004. P.3
[68] Ibid. 81. P. 28
[69] R. Alexander. Historic Intertribal Treaty works to Restore Bison in Western Canada, U.S. HuffPost. Sept 26, 2014
[70] Bison to return to Montana after 140 years in the Canadian wilderness. March 28, 2016
[71] S. Lewsen. Where the bison roamed. The Globe and Mail. March 1, 2017

North America,[72] which is one of the reasons why bison personhood makes a perfect hypothetical case for this paper. The other reason is that bison are ecologically significant as key contributors to biodiversity and therefore are important to Canada's climate change goals.

Accepting the definition provided by the CBD that Canada is a Party to, biological diversity means "the variability among living organisms from all sources including, *inter alia,* terrestrial. marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.[73] Since ratifying the treaty in 1992, Canada became "*conscious* of the intrinsic value of biological diversity and of the ecological, genetic, social. economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components."[74] But what does being 'conscious' look like in action? Canada's goals by 2020, as stated to the CBD Secretariat[75] include that "lands and waters are planned and managed using an ecosystem approach to support biodiversity conservation outcomes at local, regional and national scales"[76] and that traditional knowledge can effectively and meaningfully inform "biodiversity conservation and management decision-making."[77] Bison person therefore would surely help Canada achieve its biodiversity goals.

Because of their cultural significance and positive influence on creating and maintaining healthy ecosystems, bison are considered one of the Earth's keystone species. Conservationists believe that bison are essential to healthy prairie ecosystems and that "conserving bison and conserving landscapes through bison are inseparable notions."[78] The ecological benefits of bison are even thought to be unique due to their size and interaction with the landscape - contributing to the diversity of other animals and plants on mixed-prairie ecosystems. As the largest terrestrial animals in Canada they can enhance nutrient cycles and boost plant composition through what is called wallowing – rolling in soil – which in turn leads to water retention and drought mitigation.[79] Their extraordinary grazing ability and effect on nitrogen cycles in turn influences plant productivity.[80] Bison therefore have the potential to play crucial role in maintaining biodiversity and helping with climate adaptation efforts.[81] Some tribes in North America are already engaging with bison for this purpose, for example, the Inter Tribal Buffalo Council in Rapid City, S.D.[82] Bison's potential role in addressing climate change adaptation and mitigation will likely become more important in future years. Even in a low carbon scenario, the prairies are expected to warm by alarming rates; the number of hot days have already doubled and longer periods of drought are more prevalent.[83]

Similar to ecological keystone species, in social systems species that have a large influence in shaping the cultural identity of people are referred to as "cultural keystone species."[84] From a cultural perspective bison are considered keystone because they are closely connected with Indigenous Peoples of Canada and have been associated with meeting "needs for food, clothing, shelter, fuel, medicine, and other necessities of life."[85] Furthermore, bison have been considered a relative by Canada's Indigenous People for hundreds of generations[86] and are embedded in their "cultural traditions and narratives, their ceremonies, dances, songs, and discourse."[87] The loss of cultural keystone species

[72] Ibid 96
[73] Ibid 17. Article 2. P.3
[74] Ibid 17. Preamble
[75] CBD. National Country Profile. National Biodiversity Strategy and Action Plan (v.2). 2020 Biodiversity Goals and Targets and the 2006 Biodiversity Outcomes Framework
[76] Ibid 101
[77] Ibid 101. Target 15
[78] E. Sanderson. The Ecological Future of the North American Bison: Conceiving Long-Term, Large-Scale Conservation of Wildlife. Conservation Biology, 22(2). 2008. P. 263
[79] S. Fallon. The Ecological Importance of Bison in Mixed-Grass Prairie Ecosystems. Natural Resources Defence Council. 2009
[80] A. Knapp, J. Blair, J. Briggs. The Keystone Role of Bison in North American Tallgrass Prairie: Bison increase habitat heterogeneity and alter a broad array of plant, community, and ecosystem processes. BioScience 49 (1) 1999
[81] A. Savory. Saving the world with Bison. University of Saskatchewan. Feb. 2008
[82] K. Gahagan Restoring buffalo and resisting drought on the Pine Ridge reservation. AlJazeera America. March 21, 2014
[83] Prairie Climate Centre. Climate Atlas. Retrieved July 24, 2017
[84] Ibid 93. P.4
[85] Ibid 93. P.1
[86] The Buffalo: A Treaty of Cooperation, Renewal and Restoration. Relationship to Buffalo
[87] Ibid 93. P.1

can have a devastating effect on communities.[88] The near eradication of bison combined with residential schools and foreign illnesses must have been a horrific time for Indigenous People living on the prairies. For these reasons, the efforts to reintroduce bison into the Canadian prairies through a new Treaty is both a form of ecological restoration to build adaptive capacity, as well as active reconciliation: if "the decimation of the bison was an act of conquest, the species' return is a symbol of rejuvenation."[89]

The Northern Tribes Buffalo Treaty was signed in the Fall of 2014 by nearly a dozen Indigenous tribes from Canadian and the USA who together control approximately 2.5 million hectares of prairie grasslands in North America.[90] The occasion also marked the first intertribal agreement in over 150 years,[91] strengthening relations between tribes and restoring links that existed before European settlement.[92] The Treaty calls signatories to recognize the importance of bison to the ecological system - referring to the animal as a "practitioner of conservation."[93] It also recognizes the special cultural and spiritual relationship between bison and Canada's First Peoples with an aim to reconcile and grow that relationship.[94] Parties to the Treaty agree to: perpetuate conservation by respecting the interrelationships between us and 'all our relations' including animals, plants, and mother earth…as a means to embody the thoughts and beliefs of ecological balance."[95]

In conjunction with the Buffalo Treaty, the Government of Canada embarked on an ambitious endeavor to reintroduce bison into its oldest national park, referring to the animals as "ecosystem engineers."[96] The Government acknowledges that bison "were an integral part of the lives of Indigenous Peoples and Canada's pioneers, and they still have an important role in the culture of Indigenous Peoples. Restoring bison to the landscape is an opportunity to renew cultural and historical connections."[97] These acknowledgments are key to the hypothetical case for bison person. Considering Canada's recent commitment to reconciliation with Indigenous people,[98] granting legal status to bison would be an appropriate action and would create a new legal instrument to ensure that bison can do their jobs as "ecosystem engineers."[99]

C. Indigenous Views on Nature

> *"Humans' relationship with animals and our participation in their world bring forward our innermost instinctual selves, the highest in the order of our biological senses and being and the core element of our consciousness. Traditional peoples around the world have incorporated this sense into their relationship with animals, as they see all animal species as having equal rights to life and a place on Earth."*[100]

Former director of Harvard University's Native American Program and lawyer, Leroy Little Bear from the Kainai First Nation in Canada[101] advises that the "Native American paradigm is comprised of and includes ideas of constant motion and flux, existence consisting of energy waves, interrelationships, all things being animate, space/place, renewal, and all things being imbued with spirit."[102] This is a considerably different worldview than that brought to Canada by European settlers that ultimately led to the common law system and the separation of nature from humans in legal standing.

The view of nature as 'mother' and intrinsically linked to humans is widely held by Indigenous Peoples around the globe. For example, animals having souls is deeply embedded in the belief system of the Indigenous Peoples of North America, such as the Kainai[103] and other Blackfoot Tribes on the Canadian prairies.[104] Professor and Tewa Indian Gregory Cajete suggests that "to the Western mind, the associations that

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[88] Ibid 93. P.5
[89] S. Lewsen. Where the bison roamed. The Globe and Mail. March 1, 2017
[90] Ibid 95
[91] Ibid 95
[92] Historic treaty signed among 10 First Nations and tribes in Banff. CBC News. August 14, 2015
[93] Ibid 112. Article 1 Conservation
[94] Invite to Buffalo Treaty Open House, Prince Albert, Saskatchewan. July 20, 2017
[95] Ibid 112. Article 2 Culture
[96] Government of Canada. Bison Reintroduction
[97] Ibid 122
[98] Ibid
[99] Ibid
[100] G. Cajete. Native Science: Natural Laws of Interdependence. 2000. P. 152
[101] Part of the Blackfoot Confederacy, also known as Treaty 7
[102] L. Little Bear. Native Science: Natural Laws of Interdependence. 2000. Forward.
[103] Also known as the Blood Tribe located in Southern Alberta, Canada
[104] Ibid 126. P. 151

Native cultures may make regarding animals may seem illogical, but are indeed comprehensible and logical within the context of each Native cultural worldview."[105] The concept of nature having rights is also expressed by the Kichwa People of Sarayaku whose Living Forest Declaration proposes a "new legal category of protected area that would be considered Sacred Territory and Biological and Cultural Patrimony of the Kichwa People in Ecuador." [106] So prevalent across Indigenous cultures is this view of nature, that it was incorporated into the Articles of the Paris Agreement under the catch all term[107] "Mother Earth." Parties to the Agreement that are serious about integrating Indigenous and traditional knowledge into decisions about climate change ought to consider how current and future policy does or does not make way for Mother Earth.

D. Applied Reasoning for Personhood

> *"Saving the buffalo has been billed as one of the great conservation stories of the 20th Century…But conservation is more than preventing absence, it is also about creating presence: the presence of full, functioning nature that sustains itself and sustains humans as a unique part of that nature."*[108]

Though between them there are differences in their legal systems, India, New Zealand and Canada all share a legal history that evolved from British common law. Essential to the personhood designation of rivers was the awareness of the negative impacts of colonization and the willingness to incorporate Indigenous views of the natural into the Whanganui River Claims Settlement. The same awareness would arguably be required in a case for bison person in Canada.

Like the Whanganui River is considered woven into the lives of the Iwi, bison have been considered a relative of Canada's Indigenous people for hundreds of generations.[109] As described in the Northern Tribes Buffalo Treaty, they are considered part of who they are "culturally, materially, and spiritually."[110] The Whanganui River Claims Settlement describes the Te Awa Tupua as "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements."[111] Similar views on nature are held by Indigenous Peoples in Canada who consider themselves intrinsically linked with nature and whose traditional views on animals include animals having special qualities and powers that in their view can even be superior to humans.[112] Incorporating these views into the well-established legal system in Canada would be difficult; however not impossible.

It seems unlikely that the systems of law created since colonization would, or even could, significantly change anytime soon, but this may not be necessary for bison person. Woven into the arguments that resulted in personhood of all three rivers was recognition of the cultural, spiritual and ecological relevance of nature in the lives of both Indigenous and non-Indigenous people. This rationale for legal standing could help bring common law into a new era and show its flexibility to evolve. After all, common law as a system of rules based on precedent to guide judges "cannot be found in any code or body of legislation, but only in past decisions. At the same time, it is flexible. It adapts to changing circumstances because judges can announce new legal doctrines or change old ones."[113] Given the circumstance of climate change, perhaps judges will be more flexible in their interpretation of facts related to a warming world and the merits of culture including traditional and Indigenous views. The notion of property in the Whanganui River case is an example. For the Maori, the river was never owned, nor was it a tradeable item because it was part of "earth mother"[114] passed down through the generations – intrinsically linked to their culture. Similarly, Indigenous People in Canada interpreted Treaties differently

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[105] Ibid 126. P. 150
[106] Kawsak sSacha - The Living Forest: Declaration of Kawsak Sacha (the Living Forest) for Confronting Climate Change. Presented by the Amazonian Kichwa People of Sarayaku COP 21, Paris, November 30 –December 11, 2015
[107] The Blackfoot for example refer to Earth Person rather than Mother Earth. Personal conversation with Blood Tribe Councilor, Hank Shade, June 8, 2017
[108] Ibid 104. P. 264
[109] Ibid 112
[110] Ibid 112
[111] Ibid 49
[112] Ibid 126. P. 151
[113] Government of Canada. Department of Justice. Where our Legal System Comes From
[114] Ibid 36. P.48

than the Crown - to the First Peoples the Treaties were "a sacred obligation that commits both parties to maintain respectful relationships and share lands and resources equitably."[115]

A common law principle that could be used for granting personhood to bison held in captivity that has had some success with animal rights is *habeas corpus*, "a centuries-old means of testing the lawfulness of one's imprisonment before a court."[116] Once deemed a person, a *habeas corpus* complaint can be filed by a representative for the juristic person on the basis of being "illegitimately detained or that the conditions of his detention are aggravated or by anyone on his behalf..."[117] On December 18, 2014, a female orangutan at the Buenos Aires Zoo in Argentina became the first ape to be recognized as a judicial person with "the right to life, liberty and freedom from harm"[118] based on a successful argument of *habeas corpus* being extended to an orangutan called Sandy. Following Sandy's case, two years later on November 3, 2016, Judge Maria Alejandra Mauritius declared a "chimpanzee Cecilia, who lives in the Province of Mendoza zoo, a non human legal person"[119] and based on the same *habeas corpus* principle was awarded freedom and relocation to Chimpanzee Sanctuary.[120] Judge Mauritius's judgement only extended limited rights to one individual, but it is encouraging that in her explanation she recognized that "primates are non-human legal persons and they possess fundamental rights that should be studied and listed by state authorities, a task that exceeds the jurisdictional scope." [121] It is unfortunate though that the case was not broadened to include all primates.

Another example of *habeas corpus* that is being used as an argument for personhood of great apes is currently before the New York Supreme Court by[122] the Nonhuman Rights legal Project (NRP), a United States civil rights not-for-profit that aims to achieve rights for animals.[123] Lawyers for the NRP argue for the extension of New York common law to establish legal personhood to a chimpanzee called Tommy (among others) claiming that legal personhood is not limited to homo sapiens.[124] Furthermore, through expert affidavits, NFP argues that "fundamental right to bodily liberty"[125] exists based on the similar characteristics of chimpanzees to humans.[126] It extends beyond this paper's parameters other than to point out that arguments for granting rights based on similar or same characteristics have a long history in civil rights and liberationist movements,[127] but the application to animals is problematic. This is especially so within the framework of legal systems that evolved from believing that god empowered humans to reign over all other animals and nature as well those who were deemed uncivilized.[128] Rights for animals based on moral claims might be better made in spite of their differences, rather than sameness[129] as noted in a critique of NRP's case. The *habeas corpus* argument applied to animals on a case-by-case basis also seems like a slow and expensive route to law reform. It would be like trying to have achieved abolition from slavery one person at a time or women's suffrage one individual at a time.

A legal framework for non-human entities legal standing based on cultural and ecological significance in context of climate change seems much more promising; especially when one considers the principle of *common concern for humankind* (even in its limited application to humans only). Ecological and cultural importance especially that involve the rights of Indigenous Peoples, allows us to entertain reasoning that is outside the

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[115] Ibid 3. P. 196
[116] The Nonhuman Rights Project
[117] Tercer Juzgado de Garantías. Judicial Power Mendoza File No. P-72.254/15 "Presented by A.F.A.D.A about the Chimpanzee "Cecilia"- Non Human Individual" Mendoza, November 3, 2016. P. 19
[118] V. Roman. Argentina Grants an Orangutan Human-Like Rights. Scientific America. January 9, 2015
[119] Ibid. 143. Judgement. II. P. 32
[120] Ibid. 143. P. 16
[121] Ibid. 143. P. 26
[122] CASE NO. Tommy: Index. No. 162358/15 (New York County) & Kiko: Index. No. 150149/16
[123] Ibid 142
[124] State of New York Supreme Court County of Fulton. Dec 2, 2103. Nonhuman Rights Project Inc. on behalf of Tommy, v. Patrick C. Lavery of Circle Trailer Sales Inc., Diane Lavery, and Circle L Trailer Sales Inc. Preliminary Statement
[125] Ibid
[126] Ibid
[127] Ibid. 19. P.12
[128] Ibid 3. P. 30
[129] Ibid 19. P. 28

subjective determination of the ability to bear duties and / or responsibilities as a perquisite for rights.[130]

Though the arguments for granting legal personhood based on common law writ of *habeas corpus* for individual chimpanzees in the United States have thus far been unsuccessful,[131] the plaintiffs nevertheless offer important reflections on common law that are relevant to considering future cases for personhood such as for bison in Canada:

> "common law has been uniquely responsive to evolving standards of morality, scientific discovery, and human experience, especially in matters where the legislature hasn't definitively spoken. These evolving standards have already significantly changed how we view and treat nonhuman animals outside the courtroom. It's time for our legal systems to catch up."[132]

One might ask - why propose bison personhood and not another keystone species such as grizzly bears or wolves that are also culturally significant and play important roles in maintaining healthy ecosystems? The hypothetical case for bison was chosen not because there *isn't* reason to promote personhood of grizzly bears, wolves or even a notable river in Canada, but rather because there are current factors that may make a case for bison person not just hypothetical, but plausible. These factors are: the new multi-tribal North American Buffalo Treaty; Canada's investment in bison reintroduction; predicted drought for the prairie regions; the Pan-Canadian Framework on Clean Growth and Climate Change; Federal commitments to reconciliation; the newly established Principles Respecting the Government of Canada's Relationship with Indigenous Peoples,[133] and Canada's international commitments under the Paris Agreement, United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP), and the CBD. Further research into how these factors contribute to bison personhood would be a worthy investigation, but beyond the scope of this paper. As well, additional evidence for why bison should be granted personhood could be gathered through quantitative measures that would add to a slim body of knowledge that assesses the overall influence bison exert within Canada's Indigenous cultures.[134]

E. What would Bison Person do? And How?

"Bison are an icon of Canada's history… Restoring bison to the landscape is an opportunity to renew cultural and historical connections."[135]

Bison as person removes the animals from being considered as property in the form of livestock to be used by humans with no regard for their cultural or ecological relevance or their intrinsic value as part of Earth Person – as viewed by the Blackfoot. This designation could also go a long way in the campaign to grow the North America bison herd to 1 million by 2027. As in the Ganga and Yamuna Rivers case, rationale for judicial person for bison could be established on cultural and ecological grounds with references to national climate and reconciliation commitments as well as the international treaties that Canada is Party to.

Prairie tribes such as the Blackfoot would be likely plaintiffs to bring a case for bison person forward to the courts, but it would be quite a testament to Canada's commitment to both climate change and reconciliation to grant legal standing to bison in consultation with Indigenous People without confrontation. Bison as person would give Canada an extraordinary opportunity to show leadership in its international treaty commitments as well as on the home-front in its commitment to reconciliation. Known for their contribution to ecological integrity and drought mitigation capabilities, bison as person could be useful to the State's effort to achieve the sustainable management of natural resources commitment under Article 7.5 of Paris Agreement. Bison protected under the law also means that the land that they require for a viable existence will also have added protection. Bison as person would help ensure that large areas of land have an

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[130] B. Fredericks. Animal rights group files suit to gain 'legal personhood' for chimp. New York Post. December 3, 2013
[131] Ibid 148
[132] Ibid 142
[133] J. Wilson-Raybould. Minister of Justice and Attorney-General of Canada. Beyond Denial: Indigenous Reconciliation. Globe and Mail. July 18, 2017.
[134] A. Garibaldi N. Turner. Cultural Keystone Species: Implications for Ecological Conservation and Restoration. Ecology and Society 9 (3). 2004. P.P. 4-5
[135] Ibid 122

added layer of protection from competing uses such as agriculture, urban development, and extractive industry growth. The ongoing contentious issues between the State and both Indigenous and non-Indigenous land holders are beyond the scope of this paper, but will likely only escalate as competition for land and resources increase in a warming world.

Personhood of bison could even inspire other States to extend legal standing to their iconic animals or natural features that have both cultural and ecological significance, especially if Canada could show that the advantages to personhood exceed the logistical challenges of guardianship. It is therefore important to consider how personhood would be operationalized and enforced. Bison cannot represent themselves in a court of law so humans must be appointed on their behalf. In addition, to possess a right implies that someone else has a commensurate duty to observe this right" – who would that be for bison? And lastly, how would future cases on behalf of bison persons be funded? Canada could start by dedicating sufficient funds to ensure a legal framework is established for bison personhood, as was done for the Whanganui River. The cost could be shared by ministries – for example with investments coming from both the Ministry of Environment and Climate Change and the Ministry of Indigenous and Northern Affairs.

To operationalize the Whanganui River's personhood, a not-for-profit entity called Te Pou Tupua was established to speak and act on behalf of the River. The Te Pou Tupua representatives to speak for the River include one from the Iwi and another person from the Crown. Under the principle of *parens partriae*, bison could be thought of as a minor before that law and designated legal guardianship, perhaps through a new not-for-profit in Canada. A similar circumstance of shared representation as in New Zealand could be followed in Canada. For example, speaking on behalf of bison it seems only right that a tribal member from one of the Canadian Prairies be a representative, perhaps with a co-representative from the Federal Government who is chosen in consultation with Indigenous communities.

A key process leading up to the settlement of the Whanganui River case was the establishment of a tribunal to explore how Indigenous views could be woven into a legal agreement. Canada has already developed a Commission on Truth and Reconciliation so it seems reasonable that an extension of this concept, such as tribunal or commission, could be created to explore how to incorporate Indigenous views and knowledge into climate change decision making starting with extending legal personhood to bison - which seems to be in the interests of both Indigenous communities and the State to protect. Canada might also learn from the process leading up to the Whanganui River Claims Settlement that embraced Maori customary law to help establish a new view of the river as a legal entity. The bicultural process adopted in New Zealand allowed for two different narratives to have voice in the proceedings. This is a process that would be aligned with Canada's commitment to reconciliation.

4. Active Reconciliation, Deconstructing Colonialism, and Operationalizing Paris Agreement Commitments

Making amends for wrongs associated with colonialism may not seem to have a direct link to climate change, but granting legal rights to non-human entities – that in the views of Indigenous Peoples have always had rights – could be considered a form of active reconciliation and a tangible action that States could make toward their commitments on climate action. The following section outlines how personhood of nature could be viewed as a form of active reconciliation with Indigenous Peoples that also enhances adaptive capacity to climate change and therefore can be considered as operationalizing Article 7.5 of the Paris Agreement. An examination of whether or not the UNFCCC's International Indigenous Peoples Forum on Climate Change (IIPFCC) and the new Local Communities and Indigenous Peoples' Platform (LCIPP) could be instruments in helping to establish rationale for the extension of rights to nature will also be offered.

A. Active Reconciliation and Climate Change

"Climate change is a phenomenon which illustrates very lucidly what is wrong with the

way the world has been functioning economically, politically and socially."[136]

Careful consideration of the influence that colonization has had on law and policy decision-making – especially regarding the inclusion or exclusion of Indigenous views on nature is necessary if we are to address climate change. Around the globe, it is estimated that there are 370 to 500 million Indigenous People living on 20 per cent of the land and engaged with an estimated "80 per cent of the world's cultural and biological diversity."[137] For thousands of years they have survived environmental change despite many challenges that came to them with European settlement, but anthropocentric climate change brings challenges on a scale never experienced before. If ever there was a time to actively reconcile from the impacts of colonialism, it is now. Neither Indigenous nor non-Indigenous humans alone can solve the challenges that come with this new version of climate change, but together – perhaps by mending relations – we can transform our systems of law to make way for significant mitigation and sound adaptation strategies.

Calls to deconstruct the negative impacts of colonialism are world-wide; Canada is a prime example with the establishment of a Truth and Reconciliation Commission and the newly stated principles on the Government of Canada's relationship with Indigenous Peoples that "bring a new direction and standard to how government officials must work and act in partnership with Indigenous peoples to respect Indigenous rights and to implement the UN Declaration.[138]" The Truth and Reconciliation Commission provided a first step by making recommendations for the State and all Canadians regarding reconciliation; but 'active reconciliation' is what all levels of governments and others in Canada are actually doing. A recent article by Canada's Minister of Justice and Attorney-General highlights the importance of active reconciliation and legal reform. The following is an excerpt from the article:

> "…most federal laws and policies – especially those around land and resource decision-making – do not properly consider Indigenous rights. Underlying all of this is paternalistic colonial legislation, such as the Indian Act, that continues to govern the day-to-day lives of many Indigenous people and communities. For government to simply say to Indigenous peoples 'let's reconcile' while demanding that rights are only relevant if proven in court, or may be recognized at the end of a protracted negotiation, is not a true starting point for reconciliation and impedes progress. Similarly, reconciliation cannot emerge without undoing colonial laws and legacies that are based on denial."[139]

Current policy and laws on how we interact with nature are influenced by the dominate views on nature brought by European settlers, therefore given the compelling reasons to re-think our relationship with nature in context of climate change, active reconciliation ought to include extending legal rights to nature – at least in some circumstances. Personhood of cultural and ecological keystone species seems like a good place to start because as the three river cases illustrate: at the nexus of tradition, culture, and ecology is the vulnerability of natural entities and Indigenous People that if protected and respected could be invaluable to the world's efforts to address climate change.

Though the term 'reconciliation was not used in the Whanganui River Claims Settlement, personhood of the River could be viewed as active reconciliation with the Maori. The creation of a Tribunal was an instrument to incorporate the views of its Indigenous Peoples into law making and in doing so a Settlement was reached that was not possible for over a century prior. It is thought that the first settlers to New Zealand came between 1200 and 1300 AD from Polynesia.[140] In 1840, New Zealand acquired common law as a colony of England with the declaration of British sovereignty and the signing of the Treaty of Waitangi[141] This is a very long time to be at odds with a significant portion of the population.

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[136] E/C.19/2010/18, the Copenhagen Results of the UNFCCC; Implications for Indigenous Peoples'' Local Adaptation and Mitigation Measures. March 2, 2010. 43

[137] Ibid. 175. 4

[138] Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. Canada Department of Justice. 2017

[139] J.Wilson-Raybould. Minister of Justice and Attorney-General of Canada. Beyond Denial: Indigenous Reconciliation. Globe and Mail. July 18, 2017

[140] New Zealand Now. A Brief History. Government of New Zealand

[141] Ibid

As Canada strives to reconcile with Indigenous Peoples, personhood of bison that the government describes as an icon of Canada's history[142] seems achievable. What would be even more remarkable though is if the government granted personhood without there having to be a lawsuit. The Government of Canada has already publicly acknowledged the importance of bison to renewing relations with Indigenous Peoples, in their words: "restoring bison to the landscape is an opportunity to renew cultural and historical connections."[143] As with judicial person of a river with deep cultural connections to New Zealand's First Peoples', legal personhood of bison would be an affirmation by the Federal government of the interconnected role bison have in the culture of many of the Indigenous Peoples in Canada. It would also help to protect a keystone species that can contribute to biodiversity. With legal personhood, bison would become a symbol of active reconciliation that the federal government is so committed as well as a form of decolonization because granting legal rights to bison creates a pathway for Indigenous views about animals to flourish – views that were silenced during colonization.

In addition to the urgency of climate change, there is good reason to revisit the foundations of the legal systems that evolved since colonialism and consequently continue to influence our relationship with nature. We are still working within a framework that was justified by a belief that bringing Christianity and therefore civilization to the Indigenous Peoples of the world, was the right thing to do. This we now know is false. As described in Canada's extensively researched Truth and Reconciliation Report:

> "as a justification for intervening in the lives of other peoples, it does not stand up to legal, moral, or even logical scrutiny. The papacy had no authority to give away lands that belonged to Indigenous people. The Doctrine of Discovery cannot serve as the basis for a legitimate claim to the lands that were colonized, if for no other reason than that the so-called discovered lands were already well known to the Indigenous peoples who had inhabited them for thousands of years."[144]

The judges in the case that ultimately led to personhood of the Ganga and Yamuna Rivers did not mince their words when stating that for transformative change to take place laws will have to embrace legal personhood: for "a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable."[145] Climate change invites us to think about extending legal rights to non-human entities, not for subjective reasoning such as views on inherent rights or sameness, but rather because providing nature with elevated status in turn could accelerate our efforts to build adaptive capacity whilst honouring Indigenous rights and views.

In summary, future law and policy meant to address climate change ought to be considered in context of reconciliation with Indigenous Peoples from the effects of colonization; and reconciliation ought to be considered in context of its influence on climate change law and policy. Canada and New Zealand share a history of settlement in the 1800's that resulted in colonies[146] and treaties with Indigenous Peoples therefore the Whanganui River Claims Settlement in New Zealand and the hypothetical case for bison person in Canada exemplify these points.

B. From Guiding to Informing

The process that lead to personhood of the Whanganui River – also known as Te Awa Tupua - could be viewed as an example of New Zealand having been guided by traditional knowledge as committed to under the Paris Agreement.[147] Legal standing of the Whanganui River can lead to the protection of biodiversity and therefore New Zealand's adaptive capacity to climate change. This is an example of legislation being informed by traditional knowledge.

Personhood of iconic species such as bison would be an excellent form of reconciliation as well as a novel way for Canada to show action in incorporating Indigenous knowledge into decision. As noted in the Commission's report:

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[142] Parks Canada: Backgrounder Plains Bison Reintroduction to Banff National Park
[143] Ibid
[144] Ibid 3. P. 56
[145] CLMA 3003/17. In the High Court of Uttarakhand at Nainital. Writ Petition (PiL) No. 140 of 2015. Lalit Miglani Versus State of Uttarakhand & others. March 30, 2017. P.62
[146] Ibid 3. P. 28
[147] Ibid 1. Article 7.5

> "Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world. If human beings resolve problems between themselves but continue to destroy the natural world, then reconciliation remains incomplete. It is a perspective that we as Commissioners have repeatedly heard: that reconciliation will never occur unless we are also reconciled with the earth."[148]

In its plan to reintroduce bison to landscapes where the animals once roamed freely, the Government of Canada acknowledges that they "influence the landscape in ways that benefit many plant and wildlife communities."[149] Legal representatives of bison could ensure its safety and free roaming capabilities, therefore its ability to contribute to healthy ecosystems, increase biodiversity thus contribute to both mitigation and adaptation to a warming world.

The river cases outlined in this paper and the hypothetical case for bison person serve as examples of how extending legal rights to nature could be viewed as operationalizing the Paris Agreement. Here's how: Firstly, all three countries of focus in this paper: India, Canada, and New Zealand are Party to the Paris Agreement as of 2016: India ratified the agreement on October 2; New Zealand on October 4, and Canada on October 5.[150] As such, these countries have committed to adaptation planning and implementation as is appropriate.[151] The ratification of the Paris Agreement therefore provides an opportunity for the consideration of non-human rights as a means of incorporating Indigenous and traditional knowledge into decision making. If traditional knowledge includes the belief that nonhuman entities have intrinsic value, then it is conceivable that climate change laws could evolve that include non-human rights. The establishment of new legislation such as legal rights for non-human entities that incorporates the perspectives of First Peoples could be a significant instrument for climate action, especially related to climate adaptation. By building positive relations with Indigenous Peoples and enabling their views to penetrate long-standing legal traditions, States at very least open pathways for country-based climate adaptation that otherwise might not exist.

Secondly, the extension of legal rights to aspects of nature that are known to have ecological significance establishes a formal legal instrument for the protection of these entities - with consequences. In context of climate change, the ability to advocate in a court of law on behalf of nature may prove crucial to adaptation and mitigation efforts especially in geographic regions where competition for natural resources and land development may become increase with resource scarcity in a warming world.

C. *Are there Instruments under the UNFCCC to Pursue Legal Rights for Nature?*

By becoming party to the Paris Agreement, most of the world has taken an oath to "strengthen the global response to the threat of climate change." In doing so, States also committed to the overarching goal under UNFCCC: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Unfortunately, 25 years since the UNFCCC was signed and a year after the historic Paris Agreement was ratified, greenhouse gas concentrations have risen at unprecedented rates. If incorporating Indigenous knowledge could help the world with its mitigation and adaptation efforts – it seems there is more than enough reason to clear the path for its inclusion.

As Parties to the Paris Agreement, Canada, India, and New Zealand have acknowledged that their adaptation efforts at least should involve country-driven, participatory approaches that take into consideration "vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems..." A brief note on why Indigenous Peoples are considered vulnerable is warranted, but with brevity to keep within the paper's scope. Across the globe Indigenous People can be found living closely with the land as such, they are vulnerable to ecosystem flux that

[148] Ibid 3. P.18
[149] Ibid 181
[150] United Nations Treaty Collection: Status as at: 20-07-2017 05:00:26 EDT Chapter XXVII Environment 7.d Paris, 12 December 2015
[151] Ibid 1. 7.9 (e)

results in changes to precipitation, frequency of forest fires and severe weather, among other symptoms. For many, their vulnerability is exacerbated by complex social and economic conditions that are linked to colonialism.

Though it is encouraging that Indigenous rights and traditional knowledge are included in the Paris Agreement, it could be argued that their involvement in negotiations should be much greater considering they are often the first to experience the symptoms of climate change. The addition of Indigenous rights and acknowledgement of the role traditional knowledge can play in climate change solutions is relatively new in UNFCCC treaties. For example, there was not one reference to Indigenous Peoples in the Kyoto Protocol. Since the 2007 Conference of the Parties (COP) in Bali, Indigenous People from around the world have worked to gain inclusion in the climate change treaties. A year later the International Indigenous Peoples Forum on Climate Change (IIPFCC) was established for Indigenous Peoples' participation in the UNFCCC processes. The purposes of the IIPFCC are to both facilitate and enable the integration of Indigenous Peoples' "diverse knowledge systems, practices, innovations, experiences and perspectives into all climate change related decisions and interventions, actions, programs and policies … in order to enhance the effectiveness and efficiency of the work of Parties." The Forum was effective in giving more voice to Indigenous Peoples and the REDD Plus documents during COP15 in Copenhagen was the first-time Indigenous rights and their traditional and local knowledge was referenced in negotiating text.

By the time COP 21 in Paris concluded, five references to Indigenous rights, traditional and local knowledge made it into the final Treaty and Decision text. While some hail this as a significant step forward, there were strong criticisms for failing to adequately recognize the threats facing Indigenous communities around the world and for continuing to sideline Tribes as non-party stakeholders therefore limiting their negotiation abilities. Soft language such as "noting," "should" and "guided by" in reference to Indigenous Peoples provides merely suggestions for States rather than legally binding requirements. Framework laws, such as the Paris Agreement may be good for guiding, but have limitations, including how to engage non-State actors of any kind.

In attempt to address the gaps in Indigenous involvement, Parties to the Paris Agreement have created another instrument called the Local Communities and Indigenous Peoples' Platform (LCIPP). The UNFCCC purports the Platform will soon enable Indigenous Peoples' to "exchange lessons learned and share their unique perspectives on reducing emissions, adapting, and building resilience." In addition, the IIPFCC now calls on Parties to recognize the preamble of the Paris Agreement that includes Indigenous peoples as non-state actors in the mobilization of "stronger and more ambitious climate action" and asks States to further agree to confirm that "Indigenous peoples' knowledge and strategies to sustain their environment should be respected and taken into account when we develop national and international approaches on climate change mitigation and adaptation." It remains unclear how the new Platform will be operationalized or what its relationship with the existing Forum will be, but an Ad-Hoc working group has been established and talks will continue at the Subsidiary Body for Scientific and Technological Advice meetings and future COPs.

Canada has recently submitted its support of the Platform as "playing an important role in informing and enhancing global decision making by engaging Indigenous Peoples and in particular traditional knowledge holders..." While Canada cannot force other Nations to engage their Indigenous Peoples, the State is at least leading by example by consulting with tribal members across the country on climate change matters. In future, the State could even facilitate the ability of an Elder from one of the Canadian prairie provinces to bring forward the concept of bison person to the Platform, should this be of interest to tribes in Canada to pursue.

Perhaps a bigger concern given the time sensitivity of climate change is if the limited avenues for Indigenous participation in the UNFCCC processes are enough for traditional knowledge to really infiltrate future decision making on climate change. Indigenous Peoples "natural resource management practices are place-based, time-tested, climate-resilient, collectively managed, cost-effective, and sustainable. The replication and upscaling of these practices…should be ensured and integrated as part of global and national mitigation measures." Therefore obstacles that impede their participation in climate change negotiations and solutions "deprives the world of valuable allies possessing knowledge and solutions that could help address climate change,

the greatest challenge humanity has ever faced."

Given these limitations, it is important to question if the new LCIPP or the IIPFCC are appropriate avenues for further dialogue on the legal standing for nature. Another limiting factor with the UNFCCC process is that it is up to the individual States to establish pathways and capacity for their Indigenous Peoples to participate. An analysis of what States currently encourage and enable their Indigenous Peoples to participate in climate negotiations is beyond the scope of this paper, but suffice to say it would not be equal given the variance among Nations in capacity and in how First Peoples are defined and treated.

Nevertheless, by facilitating Platforms and Forums, the UNFCCC provides opportunities for Indigenous Peoples from around the world for knowledge and strategies to be shared that otherwise might not. While the integration of Indigenous knowledge and perspectives into climate change law and policy can likely only be achieved at the National or sub-National levels, by having a Platform to share knowledge, Indigenous People could strengthen their arguments for future personhood cases. This could bode well for nature.

It will also be helpful to be cognizant that the broader institutional arrangements these instruments fall under were formed largely in absence of Indigenous voices. Similar to academic pursuits, efforts to "document, interpret, understand, and address Indigenous experiences, concerns, and knowledges necessarily inherit[sic] a long tradition of knowledge production that has been intimately related to the colonization of Indigenous peoples." The recent legal standing for rivers shows that one need not rely on international treaties or committees to realize legal personhood for nature or to incorporate traditional knowledge and views into climate related decisions. The Waitangi Tribunal and the Truth and Reconciliation Commission are examples of National level instruments that have enabled Indigenous knowledge to influence legislation. Similarly, Canada could present its five-year program on the reintroduction of bison into a national park to the IIPFCC and the LCIPP as an example of how it is incorporating Indigenous knowledge into decision making, but legal standing for bison would be more significant. The elevated legal status would be reflective of the significant role bison play in Indigenous culture and in its potential to contribute to ecological biodiversity - therefore climate adaptation efforts – and therefore Article 7.5 of the Paris Agreement.

5. Concluding Remarks

There seems to be "recognition of the importance of cultural and spiritual values in relation to the natural features of the land… but the law has yet to catch up."[152]

Views on nature will continue to influence international frameworks and National and sub-National laws and policy which drive or hinder climate change action. It is therefore essential to the global effort to address climate change that we carefully consider the underlying assumptions that are guiding decision making. The collision of views on the natural world that occurred between Indigenous Peoples and European settlers is an excellent example of discourse that ought to be front and centre in climate change law and policy. Systems of law that were created under very different world circumstances may not be sufficient now.

If we accept the definition offered by the UNFCCC that climate change is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods,"[153] then we might be wise to rethink our strategy of trying to solve a crisis that *we* created by only putting humans at the centre of moral and legal duty. As a start, if Parties to the Paris Agreement are to truly embrace the views and knowledge of Indigenous Peoples, then future agreements ought to stretch the boundaries of the *common concern for humankind* principle to include all living entities.

An important outcome of the legal standing for three rivers is that it could send a signal to lawmakers that extending rights to nature is possible and urgent - from cultural and ecological perspectives. The flexibility of common-law combined with the willingness of judges to push the

[152] Ibid 36. P.100

[153] Ibid 14

boundaries of law reform could enable ambitious changes in legislation to happen quite quickly – such as we have seen with the extension of rights to three non-human entities within the a very short timeframe.

The Whanganui River Case Settlement serves as a model of how Indigenous knowledge can be incorporated into new laws that protect nature deemed to have cultural and ecological value to both Indigenous and non-Indigenous citizens. Similarly, personhood of the Ganga and Yamuna Rivers exemplifies the importance of legal standing for nature given the grave consequences that the world is facing due to climate change.

There will undoubtedly be challenges in the application of legal personhood though. The analysis offered by E. O'Donnell regarding the India and New Zealand river cases highlights this: "conferring legal rights to nature is just the beginning of a longer legal process, rather than the end. Although legal rights can be created overnight, it takes time and money to set up the legal and organisational frameworks that will ensure these rights are worth more than the paper they're printed on."[154] But with adequate funding for legal frameworks that enable personhood of natural entities to be recognized, legal standing of rivers, bison, and maybe other keystone species in the future would simply become part of the common law system as have corporations and other non-animate entities.[155] What we perceive as having rights is very much linked to our views of other than ourselves. We cannot dismiss that even some humans were once void of rights, such as those deemed as slaves and women. An example is one of Canada's most famous cases known as the "Persons Case" that resulted in women gaining legal personhood.[156] What once seemed impossible is now not even questioned by most of the women in the world, including Saudi Arabia which was the last country to permit women to vote.

This exploration took an interdisciplinary approach including comparative and socio-legal methods to assess whether legal standing of the Whanganui, Ganga and Yamuna Rivers could inform future climate change law and policy, such a case for bison personhood in Canada. Legal standing of three rivers and hypothetically, bison as person, contribute also to a world-view that is not anthropocentric but implies a duty of care that extends beyond – us.

Key arguments and principles that resulted in personhood for three rivers were outlined that could be used by Indigenous tribes in Canada in a case for bison person. It was suggested that commitments to climate action and reconciliation might inspire Canada to pursue bison as person independent of a case being brought before the courts. A case like bison person could highlight Canada's commitment under the Paris Agreement in showing how traditional knowledge woven into legislation could contribute to adaptation efforts.[157] This would also contribute to reconciliation efforts by making amends for the near eradication of bison. Bison person would support Canada's efforts to renew connections with its Indigenous peoples as well as build and protect ecosystem integrity,[158] therefore building its adaptive capacity to climate change.

As bison are central to the culture of tribes in the Canadian prairies, so too is the Whanganui River to the Iwi[159] and to Hindu and others in India, the "rivers, forests, lakes, water bodies, air, glaciers, human life are unified as are indivisible whole."[160] This interconnected view of nature could be a powerful tool in adaptation efforts. Furthermore, by making nature central to the issue through personhood, a new legal construct is formed that weaves together traditional views (and knowledge) with predominate legal systems. Such novel ways for protecting biodiversity and developing adaptation strategies may become increasingly important as communities strive to adapt to climate change and save their cultures and ecosystems from the consequences of a warming world.

The analysis of the relationship between personhood of nature and Indigenous knowledge as called for under the Paris Agreement led to a broad conclusion: future climate change laws and policies should be considered in context of colonization. The same mindset that led to our

[154] Ibid 2
[155] Christopher Stone. *Should Trees Have Standing?* (2010. Originally published in 1972) P.P 8-9
[156] Judgment of the Lords of the Judicial Committee of the Party Council 18th October, 1929
[157] Ibid 1. Article 7.5
[158] Ibid 181
[159] Ibid 39. P. 14
[160] Ibid 56

current anthropocentric climate change crisis was responsible for the atrocities that came with colonization, including the near eradication of bison in Canada. We cannot, therefore expect transformative societal change if we continue to work from the same colonial paradigms.

Three rivers gaining legal standing as person hints at legal precedent forming that could influence the evolution of climate change law and it will become more difficult for industry and government to abdicate their duties to mitigate and adapt to climate change if more than people matter – and consequently can prove it in the courts. This paper also shows that the river cases could influence legal standing for other non-human entities, such as bison in Canada therein raising the status and protection of a non-human entities that have both ecological and cultural significance. If bison achieved legal personhood based on cultural and ecological significance in context of climate change and active reconciliation, maybe there's hope for other iconic keystone species such as grizzly bears and wolves too.

As mentioned in Part III, the IIPFCC and LCIPP could serve as guiding instruments for States, but ultimately it will be up to the individual countries to find appropriate ways to engage their First Peoples – whether classified as Indigenous or other such as in India's case where people prior to British settlement may not identify as 'Indigenous,' but who nevertheless hold cultural and spiritual ties to nature that could support cases for legal personhood as in the Ganga and Yamuna River judgements.

As we face an uncertain future because of our choices over the past century or more, perhaps it is time to get serious about inviting different views into the laws and policies the govern our relationship with all that is other. Humans will resist granting personhood to non-human entities until we can truly appreciate that value of that which ought to have rights.[161] Reasons offered for personhood in the three river examples provide a rich foundation for judges in all jurisdictions who are faced with future application for personhood of non-human entities and in making decisions that could impact the Earth's ability to survive the consequences of climate change.

[161] Ibid 220. P.P. 8-9