In Defence of the Trees: Presenting the Case for Ancient Forest Rights

Christopher Rusnak, K.C. and Evelyn Rusnak

[C]limate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world.

Chief Justice of the Supreme Court of Canada[1]

British Columbia used to be the land of giants with trees up and down the coast towering 250 feet tall. Today, only a fraction of these vital, old growth forests remain. They are our shield against climate crisis, yet are being logged across the province. For thousands of years, these forests have protected us. Now, we need to protect them.

Two hundred Indigenous leaders, political figures, scientists, authors, artists, business leaders, athletes and Olympians[2]

This is not our world with trees in it. It's a world of trees, where humans have just arrived.

Richard Powers, The Overstory: A Novel

Abstract

This Article examines the important role old growth forests play in mitigating climate change and argues there now exists both a social imperative and legal basis for our courts to recognize legal rights for these precious few remaining ancient ecosystems.

The Article is written from a unique perspective. Using as context first person accounts from one of the authors' two months living in an old growth forest and the events leading to her arrest during the largest civil disobedience protest in the history of Canada, the Article examines the disconnect between the current state of the law and science-based concerns about climate change. The Article describes one land defender's thoughts and feelings as she contemplates the ancient ecosystem she seeks to protect, learns from First Nations' Elders and encounters the Royal Canadian Mounted Police forces and frustrated loggers. The authors then present a legal analysis that addresses the science of old growth forests' crucial role in mitigating future climate change,

1. March 25, 2021 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para. 167.
2. The Globe and Mail, pages A8-A9 October 11, 2021.

considers failed international commitments to protect and restore these vital ecosystems and draws guidance from court decisions in other jurisdictions that have recognized legal rights for nature. The Article then builds on concepts from the ancient traditions and customs of First Nations, academic writings and concepts from Aboriginal rights and title litigation in Canada to present a rationale for Canadian courts to apply ecocentric-based principles in the future development of the law. Ultimately, the authors propose the recognition of "Ancient Forest Rights" to provide a voice for old growth forests in the courts of Canada.

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Prologue

Early on a Saturday morning, I received a call from my daughter, Evy. She told me she was dropping out of school. She was joining a civil disobedience movement seeking to save the Fairy Creek old growth forest.

It was a long call. I had many questions, but mostly I listened.

Evy was studying environmental sciences at university in Halifax because she, like many of her generation, is concerned about the future of our planet. School provides a certain perspective to understanding and studying nature, but she wants to develop her own. In her words, she "wants a deeper understanding of our forests and what is happening to them." She is also frustrated. She is frustrated by society's acceptance of the continued destruction of our ancient ecosystems and the growing threat of climate change. Evy felt a calling to be at Fairy Creek; she was passionate and determined. This was not a spur of the moment decision.

I told Evy I supported her decision, but before the call ended, we struck a bargain. Evy agreed that after her time at Fairy Creek, she would share her

experiences with others and continue to advocate for change. Evy, however, wants something from me. I am to explain the law. To her, and many others, the law is a black box that acts as a barrier to needed change. She reminds me of a paper I discussed with her some time ago, *Should Trees have Standing?*[3] Maybe, Evy surmises, if I write a legal argument for the trees at Fairy Creek, others will also understand what is happening to our old growth forests, why it is wrong, and what can be done about it.

Our agreement reached, the next day Evy began her drive across Canada. Ten days and six- thousand kilometers later, with a damaged fender and oil leak, Evy and her sixteen-year-old minivan arrived at Fairy Creek.

Two months later, Evy was arrested.

I. Introduction

This Article is not intended as a traditional academic article about the law. Instead, it seeks to speak to an audience beyond the legal profession by examining, through the events leading up to the arrest of my daughter, the disconnect between the science of climate change and the current state of the law.

The first part of the Article discusses Evy's experiences at Fairy Creek. In part using first person accounts, the Article provides a snapshot of her two months living in the forest. Evy tells not only her story of working with the other land defenders, but also her thoughts and feelings as she engaged with officers from the Royal Canadian Mounted Police (the "RCMP"), avoided angry loggers, learned from Indigenous Elders, and contemplated the ancient ecosystem she sought to protect.

As prompted by Evy, the second part of the Article will examine the dispute at Fairy Creek from the perspective of the trees. I consider whether, in light of the serious threat humanity faces due to climate change, there now exists a legal basis for our courts to apply an ecocentric perspective to the law and recognize legal rights for ancient forests such as those at Fairy Creek. I propose the recognition of "Ancient Forest Rights", which would provide our ancient forests with a legal voice in our courts and a legal avenue to advocate for the importance of their survival to addressing climate change.

Finally, the Article is written from a perspective informed by the legal traditions in which I am trained and practice. I recognize that other perspectives and legal traditions exist, including, importantly, those of the Indigenous People in this province.

3. Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

II. A Daughter's Actions—in Defence of the Trees

A. *Fairy Creek / Ada'itsx*

Geographically, Fairy Creek or Ada'itsx[4] is a watershed located on the southwest portion of Vancouver Island, within the traditional lands of the Pacheedaht Nation.[5] The Fairy Creek area is home to ancient ecosystems that have existed for millennia. Some of these ancient ecosystems are included within Tree Farm Licence 46, a forest tenure granted by the provincial government authorizing the logging of old growth trees in certain areas.

Politically, Fairy Creek is a movement. The discovery in August of 2020 of a forestry company's plans to log twenty-one hectares of ancient forest triggered the first blockade.[6] Since then, thousands of land defenders [7] have come to Fairy Creek to show their support.[8]

The Fairy Creek movement seeks to not only protect the biodiversity of an ancient forest ecosystem, but to make a stand in the fight against climate change. As will be discussed later in this Article, science tells us that retention of ancient forests such as those at Fairy Creek is one of the most effective

4. The traditional Indigenous name for this area.

5. The Pacheedaht Nation has overlapping and shared traditional territories with their First Nation neighbours: Ditidaht, Huu-ay-aht, T'Sou-ke, and Lake Cowichan. The Pacheedaht Nation is nearing a conclusion (Stage 5) of its treaty negotiations with the provincial government with respect to resolving its claims for title and rights. The treaty will recognize and protect Pacheedaht inherent title and rights, establish how the First Nation's laws interact with federal and provincial laws, recognize tree harvesting and resource rights throughout its territory, and establish the land, cash, and governance provisions of the treaty.

6. The twenty-one hectares is dense, untouched, rare forest habitat, representing a significant portion of the estimated remaining old growth. It is estimated that less than 3% of British Columbia's remaining old growth forest is comprised of these unique ecosystems which support large trees and significant carbon storage. *See* Karen Price, Rachel Holt & Dave Daust, *BC's Old Growth Forest: A Last Stand for Biodiversity* (Apr. 2020), https://veridianecological.files.wordpress.com/2020/05/bcs-old-growth-forest-report-web.pdf [https://perma.cc/M53H-Q9GT].

7. The term "land defenders" is used to describe individuals who attended Fairy Creek to support the protection of the old growth forest. These individuals are from all walks of life.

8. Brent Jang, *Fairy Creek Protesters Vow to Carry on Despite New Injunction*, The Globe and Mail (Oct. 11, 2021), https://www.theglobeandmail.com/canada/british-columbia/article-fairy-creek-protesters-vow-to-carry-on-despite-new-injunction/#:~:text=Protecting%20ancient%20forests%20remains%20a,Fairy%20Creek%20on%20Vancouver%20Island [https://perma.cc/3RX9-NCE3].

natural responses to climate change.[9] Science also tells us that these ancient forests are irreplaceable and their destruction, irrevocable.[10]

B. *Becoming a Defender of the Forest*

Evy's arrival at Fairy Creek is timely. With the summer coming to an end, the number of land defenders at Fairy Creek drops significantly[11].

Evy's first task is to select a camp name for herself. Evy creates a list: Salamander, Bear, Salmon, Newt and Beetle. My youngest daughter and I vote for "Newt". Evy picks "Beetle".

Our family's old reliable minivan lands Beetle her first job—shuttling fellow protestors to various sites. This job enables Beetle to meet people in her new community. The shuttlers are well-loved. Key locations can be separated by many kilometres and a ride, at least part way along a logging road, can turn a difficult four-hour hike into a one-hour trip.

Soon Beetle is drawn into other activities. The land defenders are organized not by hierarchical structure, but by common purpose. The main camp location is aptly named "The Hive" with small satellite camps supporting activities throughout the area. There is much work to be done. A new camp is built and another is prepared for the upcoming winter rains and snow. Evenings are spent sharing stories and keeping warm around campfires.

Indigenous Elders are a grounding presence.[12] They speak of their traditions and the stewardship of nature. Beetle is told about ancient First Nations' cultures in which women are leaders and their role is viewed as holy. Beetle hears about women who were the heart of their community and the source of shared knowledge, values, and wisdom. She learns of cultural practices in which women are revered as givers of new life and admired for their respect for the land.

Beetle also meets one of her heroes, Dr. Suzanne Simard. Dr. Simard is a professor of forest ecology and an author[13] who has spent her life studying

9. Pojar Aff., March 18, 2021, Ex. B, Teal Cedar Prods. v. Rainforest Flying Squad, 2021 BCSC 605 (Can. B.C S.C.). *See also* Beverly E. Law et al., *Land Use Strategies to Mitigate Climate Change in Carbon Dense Temperate Forests*, 115 Proceedings of the National Academy of Science 3663 (2018); Jim Pojar, Forestry and Carbon in BC 12 (Skeena Watershed Conservation Coalition, 2019); Risa B. Smith, Enhancing Canada's Climate Change Ambitions with Natural Climate Solutions (Metcalf Foundation, 2020); Polly C. Boutte et al., *Carbon Sequestration and Biodiversity Co-Benefits of Preserving Forests in the Western United States*, 30 Ecological Applications 1 (2020).

10. Pojar Aff., March 18, 2021, *supra* note 9, at 16.

11. Many protesters were able to attend for short periods of time during the summer. With the return of school or work and the deteriorating weather, the number of protesters dwindled.

12. This Article is only written from the authors' perspective and they recognize they cannot speak to the significant connection to the lands felt by Indigenous People and, in particular, to the Pacheedaht and Ditidaht First Nations.

13. Suzanne Simard, https://suzannesimard.com [https://perma.cc/PC4F-ZNMB] (last visited June 25, 2023).

trees and their ecosystems. She is widely-known for her discovery that trees communicate with each other through fungal networks. Dr. Simard's life story was the inspiration for one of the main characters in Richard Powers' Pulitzer Prize-winning novel *The Overstory*, a book which motivated Evy's journey to Fairy Creek.

Soon after Beetle arrives at Fairy Creek, Dr. Simard visits the forest and provides supportive words for the movement.[14] Dr. Simard speaks not only of the beauty and biodiversity of the old growth forest, but also the vital role it plays in reducing greenhouse gas from the atmosphere. She explains the elegant and complex process of photosynthesis. It is through this natural process that carbon dioxide is removed from the atmosphere, broken down and converted to energy for the trees and their surrounding ecosystem. The carbon from the carbon dioxide enters the forest's complex food chain and ultimately becomes part of the forest, stored in the living organisms, soils, and dead organic matter.

The amount of carbon stored at Fairy Creek is enormous.[15] In a talk Dr. Simard delivered after visiting the protest, she reports that the annual storage at Fairy Creek is equivalent to three years' worth of carbon emissions from the City of Victoria.[16] Sadly, when logged, much of the stored carbon is returned to the atmosphere, increasing greenhouse gas concentrations.[17]

C. *Thoughtful Tom*

My updates from Beetle are sporadic and brief as communication from Fairy Creek is difficult. There is virtually no Wi-Fi or cellular coverage. Brief text messages sent by satellite phone are all Beetle can manage.

On day six, I get a text from Beetle. Her commitment is more than I expected. Her message says only:

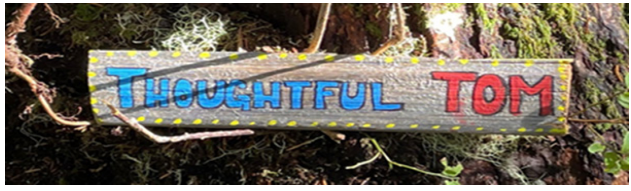
> Living in a TREE

The tree is hundreds of years old, almost 20 feet around, and over 150 feet high. To protect it, a four by six-foot plywood platform has been secured in its branches about 75 feet above the ground. On this platform, under a tarp and wrapped in a sleeping bag, Beetle spends the next several nights. The reason? Loggers cannot cut down a tree in which someone is living.

Beetle speaks of her experience:

14. Suzanne Simard, Remarks Delivered for Sunset Labs: The Disappearing Mother Trees (Sept. 22, 2021) [hereinafter *Simard Presentation*].
15. *Id*.
16. Ibid.
17. Ibid.

People here talk about spiritual and emotional connections to the trees. I felt this. Something happens when you are being completely supported by an ancient being. There is a feeling of vastness and life emanating from this tree. So tall, strong. I can feel life. It is so old, but I feel it has so much more to give. I was just there for such a small insignificant part of its life. The more time I spent around the tree, the more personified it felt; the more character it revealed.



Beetle names the tree "Thoughtful Tom". The name reflects the quiet strength of the tree; but the name is also intended as a reminder of the story of "Big Lonely Doug". Big Lonely Doug is an enormous, centuries-old Douglas fir that lives less than fifteen kilometres from Fairy Creek. Doug stands alone, surrounded by hectares of empty clearcut lands. The ancient ecosystem within which he lived has been destroyed. His story has been documented in numerous articles and photographs.[18]

D. *Injunction*

Months before Beetle's arrival at Fairy Creek, the British Columbia Supreme Court issued an injunction against protesters who were impeding the

18. *See e.g.*, Harley Rustad, *Big Lonely Doug*, The Walrus, (June 30, 2022, 9:44 AM), https://thewalrus.ca/big-lonely-doug [https://perma.cc/NXG5-QHJL]; Mark Hume, *Big Lonely Doug: Canada's loneliest tree still waiting on help*, The Globe and Mail (June 8, 2014), https://www.theglobeandmail.com/news/british-columbia/canadas-loneliest-tree-around-1000-years-old-still-waiting-on-help/article19064507 [https://perma.cc/P9KR-ELXX]. A video shows what was left after the logging of Big Lonley Doug's ecosystem: https://www.youtube.com/watch?v=E7LFM9EFKLc.

logging of the old growth forest.[19] The forestry company was granted an order empowering the RCMP to stop the blockaders' activities so that logging activities could continue.

From a purely legal perspective, the court's decision to grant the injunction is consistent with the rule of law and current legal precedent.[20] Our elected government has established laws that govern forestry practices in the province. In passing those laws, our elected officials are responsible for weighing their environmental and economic impact. Other than assessing the constitutionality of these laws, the court's role is not to second-guess our elected government. The public's recourse is the political process, e.g., to elect a different government.

The injunction was considered by the British Columbia Court of Appeal. In upholding the injunction as valid, the court stated:[21]

> The case is not about the wisdom of government forest policy. It is decidedly not about the Court's views on whether and where old-growth logging should occur in this province, even in the context of climate change. In an injunction application, those are matters outside of the constitutional competence of the courts and exclusively within the constitutional purview of the government elected by the citizens of British Columbia. . . .
>
> It is not tenable in a democracy for a group to abandon the democratic process and impose their will on others by force. In a complex, pluralistic society, the democratically-elected government makes laws, and the courts interpret and uphold them. Barring constitutional overreach, the laws and decisions flowing from them are to be respected and enforced.

As the forestry company has a forest tenure approved by the provincial government , it is authorized to log at Fairy Creek and has done nothing illegal. The forestry company sought an injunction to stop the unlawful interference with their legal and government-authorized commercial activities. In these circumstances, based on the current state of the law, the court had no mandate to consider the irrevocable loss and climate-related effects of destroying an old-growth forest. In other words, in the eyes of the law, the forestry company is in the "right" and the protesters are in the "wrong".

Many members of the public would consider the focus and outcome of the injunction proceedings as disconnected from current scientific knowledge and social imperatives. While legal principle and precedent support the court's decision, the science of old growth forest ecosystems and climate change demands a different result.

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19. Teal Cedar Products v. Rainforest Flying Squad, 2021 BCSC 605 (Can.), *aff'd,* 2022 BCCA 26 (Can.).

20. *Teal Cedar*, 2022 BCCA 26 (Can.); Cermaq Canada Ltd. v. Stewart, 2017 BCSC 2526 (Can.); Interfor v. Kern et al., 2000 BCSC 1141 (Can.); Red Chris Development v. Quock et al., 2006 BCSC 1472 (Can.), paras. 35–36; Husby Forest Products Ltd. v. Jane Doe, 2018 BCSC 676 (Can.) paras. 49–52; Marine Harvest Canada Inc. v. Morton, 2017 BCSC 2383 (Can.) para. 94; O'Brien & Fuerst Logging Ltd. v. White, 2019 BCSC 2011 (Can.) para. 27.

21. *Teal Cedar*, 2022 BCCA 26 (Can.) paras. 2, 76–77.

Fifty years ago, well before the serious threat of climate change was appreciated, the Supreme Court of the United States considered a similar case regarding government-authorized destruction of an ancient forest ecosystem.[22] The majority of the court allowed the destruction to proceed. However, one of the justices, in dissenting reasons, raised the following question:

> The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?[23]

The circumstances at Fairy Creek not only raise this question again, but, with the impending threat of climate change, there is now more urgency to find an answer. As promised to my daughter, later in this Article[24] I examine how, in a manner respectful of the rule of law, the courts might adapt the law to enable a legal challenge to the destruction of an ancient forest, based on what science tells us about the threat of climate change.

E. *Defending the Forest*

Over the weeks at Fairy Creek, Beetle observes the RCMP and loggers aggressively confront many land defenders. Tensions are high. An article published at the time is ominously titled "*Someone is Going to Be Seriously Injured or Killed*".[25] The land defenders adopt a rallying cry, "who keeps us safe? . . . we keep us safe!" to express their support for each other. Beetle is nervous but undaunted.

Over time, Beetle sees her fellow land defenders literally put their lives on the line to slow the ongoing destruction.

Over the course of one night, Beetle helps move logs, forty to fifty feet in length, to construct two tripods blocking a main access road. Once completed, protestors lock themselves to the top of each using a sleeping dragon.[26] The effectiveness of these tripods is in the risk to human life they create. If great care (and time) is not taken in dismantling them, the protestors could be sig-

22. Sierra Club v. Morton, 405 U.S. 727 (1972).

23. Sierra Club v. Morton, 405 U.S. 727 (1972) (Blackmun J., dissenting).

24. Infra, see Part III.

25. Michelle Gamage, *Someone Is Going to be Seriously Injured or Killed*, The Tyee (Sept. 27, 2021), https://thetyee.ca/News/2021/09/27/Someone-Going-To-Be-Injured-Killed [https://perma.cc/E5H8-XM4D].

26. A "sleeping dragon" is used to slow the removal of a protestor from a protest location. A long metal pipe is secured in an immoveable object and the protester places their arm in the metal pipe. The arm is locked into place with a carabiner that is tied to the protestor's wrist. This set up enables protestors to unlock themselves, but prevents others from doing so. The metal pipe also prevents others from using bolt cutters to remove the protestor.

nificantly injured. The longer it takes to remove protesters, the more delay to the logging process and the more trees saved.

Beetle, however, cannot stay to see how these efforts play out. She is needed elsewhere. There is a shortage of protesters at a cutblock[27] site where loggers will soon arrive.

At 4:00 a.m. the next morning, after being up all night working on the tripods, Beetle leaves for the cutblock with two fellow protesters. They are driven partway and then hike into a small land defender camp close to the cutblock. Over cowboy coffee they discuss their plan—hide and seek.[28] They then hike the rest of the way to the cutblock.

At the cutblock, each protester finds a hiding spot. When the loggers arrive, one of the protesters tells the loggers that there are protesters hidden throughout the forest and if the protesters are hurt, the loggers will be held responsible.

The loggers begin their efforts to find and remove the protesters. The RCMP soon join.

Beetle describes what happens next.

> I watch as the loggers and RCMP start their search. I see a number of protesters found and physically removed from the logging area. I am initially hidden behind a tree, but as the loggers and RCMP start toward me, I crawl under an area of slash.[29] They walk directly toward me. I hear them. Soon, they are standing right on top of me, literally. They have stopped and are standing on the logs under which I am hiding. I can hear them talking. I try not to move or breathe. I am scared. Eventually they move on to continue their search elsewhere.
>
> Ultimately, our efforts are successful. Some trees live for another day.
>
> That night I return to our main camp. One of the Indigenous Elders speaks and puts my efforts in perspective. The Elder speaks of the First Nations' difficult and ongoing battles beyond those at Fairy Creek, with the hope that one day they will heal and reconnect with their lands. Our work, while appreciated, is a small step towards attempting to right the many wrongs of our ancestors.

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27. A cutblock is a defined area of land authorized for logging. *Cutblock, Glossary of Terms*, B.C. Forest Prac. Bd., https://www.bcfpb.ca/news-resources/glossary/#:~:text=for%20this%20term-,Cutblock,defined%20boundaries%2C%20authorized%20for%20harvest [https://perma.cc/9EZB-LJSH].

28. Protesters organize activities to prevent or slow logging such as "hide and seek." Hide and seek involves protestors hiding amongst the old-growth trees in areas of active logging. As safe logging practices prevent the felling of trees when the area is not clear of people, this tactic can slow logging activities until all the hiding protesters are found and removed.

29. Slash is the debris (branches, trunks, and logs felled by loggers) left on the forest floor after clearcut logging. At Fairy Creek, the slash can be up to fifteen feet deep. Bill Cook, *Logging Slash*, Mich. State Univ. Extension (July 5, 2017), https://www.canr.msu.edu/news/logging_slash [https://perma.cc/W9YS-GK3X].

The next week Beetle is involved in a reconnaissance mission. Loggers are being helicoptered to a cutblock at the base of the watershed. Beetle and another land defender are to locate the drop-off locations and mark a trail to these areas for other land defenders to follow.

> We needed to travel from the top of the watershed down to its base. It is incredibly steep, tough bushwacking. It is also a journey that reveals the stark impact of the logging. At times we are deep in untouched old growth; a few steps later we are walking on slash. It is a long day. It is cold and wet. We are falling and sliding down muddy slopes. Our first attempted route encounters steep cliffs requiring us to circle back. Eventually we get there, but too late. On the previous day, the final old growth trees in this cutblock were felled and the loggers had moved on.
>
> We report back to main camp. No need to send resources.

After more than a month at Fairy Creek, Beetle's spirits begin to fall. The weather turns cold and wet. It snows. At the same time, the number of land defenders is dwindling while the RCMP presence increases and logging activities pick up.[30]

In the course of a day, Beetle sees dozens of ancient trees, centuries old, cut down and an ecosystem irrevocably destroyed.[31]

In an effort to improve these deteriorating circumstances, the land defenders hatch a new plan. Beetle and another land defender are enlisted to carry it out.

F. *Taking a Stand*

The plan centers around a dance party "decoy" and an old, blue Toyota Corolla. Before being arrested, Beetle spent a total of 61 hours locked in the old Corolla, blocking the entrance to a logging road.

Beetle describes the plan's execution.

> It is 11pm on a Saturday night. I sit in the old Corolla. Another land defender, Alaska,[32] is hiding in the trunk. We both have chains wrapped around one wrist and tucked down our sleeves.[33]

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30. One of Evy's inspirations for her efforts at Fairy Creek was Richard Powers' novel, *The Overstory*. To help sustain her spirits, I share with her the following statement from Richard Powers that was published in our newspaper at around this time: "I have been deeply moved by the action that people have taken at Fairy Creek. I wish everyone who is engaging and putting themselves on the line as much stamina and strength and clear vision as there can be. And I am grateful – and we all are, on this continent – for whatever assertion and better balance the protesters can hold out for." Marsha Lederman, *In his new novel Bewilderment, Richard* Powers *turns his pen to the State of our planet with both grief and hope*, The Globe and Mail (Sept. 27, 2021) https://www.theglobeandmail.com/arts/books/article-in-his-new-novel-bewilderment-richard-powers-turns-his-pen-to-the [https://perma.cc/H68W-GXAS].

31. The reality of the situation is captured on video: https://www.instagram.com/tv/CVtB59Ig_SL/?utm_source=ig_web_button_share_sheet.

32. Alaska is a fictitious name used to protect the anonymity of this individual.

33. These chains will connect Beetle and Alaska to sleeping dragons. They are hidden

We are waiting for the "go-ahead" signal.

I hear music blasting from down the logging road. Other land defenders are having a dance party to distract the RCMP.

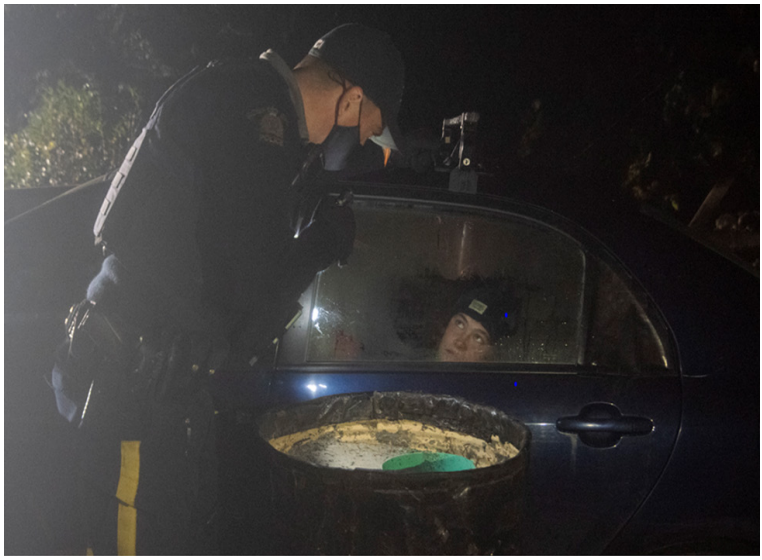
At last, I see the signal. We are doing this . . .

I start the car. I drive slowly down the road. A group of land defenders are walking with me, rolling a barrel full of concrete. I drive the car up to the entrance gate at the turn-off for the main logging road. I slowly maneuver the front end of car until the gate's metal crossbeam touches the windshield. I cut the engine, lock the doors and dive into the backseat. The entrance gate now cannot be opened. It is completely blocked. No road access in or out of the logging area until the old Corolla is moved.

The other protestors place the concrete-filled barrel beside the car, slash the car's tires and then quickly retreat as RCMP and security guards run over.

In preparation for the plan, a hole had been cut in the door of the car. The plan calls for me to slip my arm through the hole into a sleeping dragon embedded in the concrete-filled barrel which sits beside the car door (in other words, if the RCMP try to move the car without first releasing my arm, it will be broken or worse . . .). I wriggle my arm through the hole in the car door, but discover the opening for the sleeping dragon is not lined up. I cannot get my arm in!

As an RCMP officer shines his flashlight into the car, I quickly wedge my hand into the gap between the car door and the barrel to imitate having my arm in the dragon.



Luckily, he falls for it and doesn't remove the barrel.

to keep them from view of the RCMP who are patrolling the road.

I call to Alaska, who remains hidden in the trunk. She radios the "decoy" dancers for help.

The dancers arrive and surround the car. The RCMP's view is blocked, which allows the work necessary to shift the barrel into place. I lock my arm into the dragon.

Locked into place, I turn to watch the dance party. At 4 a.m., I finally settle in for a couple hours of sleep.

The next morning, the first team of loggers shows up. Upon seeing the roadblock, they stare and yell at us in anger before turning away. A similar scene plays out several more times over the next two days. Loggers and logging trucks arrive, and then turn away in anger. Thankfully, I receive a lot of support from our fellow land defenders and visitors. Elder Bill Jones wishes me courage and power. I am starstruck when Dr. Suzanne Simard offers words of encouragement.

By the end of the third night in the car, I am getting stir crazy. I get a feeling that the RCMP will begin our extraction in the morning. I wake up at 4am to have a small breakfast and prepare.

At 8:30 a.m., a large procession of RCMP vehicles arrives. In addition to six trucks carrying RCMP officers, there is a van with extraction tools, a processing station, and a large lock-up wagon. The officers get out of their trucks and immediately set up an exclusion zone to block anyone from viewing the extraction.

It takes an hour before they break into the car. Two officers smash through a window and unlock the doors. Another officer pries open the trunk. I remain sitting in the car, my arm in the sleeping dragon. The car is literally surrounded by RCMP officers and their vehicles.

An officer pulls out a document and reads it to me. He then asks me to leave the car.

I refuse.

I am taking a stand.

The officer announces that I am under arrest for contempt of a court order.

Two large male officers grab Alaska and try to pull her out of the trunk. The officers had not noticed Alaska's arm was also locked into a dragon. Alaska's shoulder is injured, and she is in pain.

The RCMP leave Alaska and turn to me.

An officer shows up with a jackhammer. He starts to jackhammer the concrete-filled barrel in which my sleeping dragon (and arm) are secured. The barrel jumps and rocks as he works. It feels like it is going to tip over and snap my arm off. I ask them to hold the barrel. They don't. It hurts. I am really scared (. . . I may have cried), but this is so important.

The officer finally removes enough concrete to expose my dragon. He cuts through the pipe. I am unclipped and they carry me to an RCMP lock-up wagon.

> Alaska tells me later that after I was carried off, the RCMP turned to her. They were eventually able to move the car. Alaska was not arrested. She went to town to have her shoulder looked at by a doctor.
>
> The doors to the back of the RCMP wagon are opened and I am told to enter and sit. We drive down the road. I sit in the wagon for hours. Eventually an officer enters the back of the wagon to "process" me: a mug shot and fingerprints.

Evy is required to appear in court on November 15th. On that day, an "atmospheric river" floods roads and the highway on Vancouver Island and disrupts power to the courthouse.[34] Evy's hearing, and that of dozens of other protesters, is delayed. It is difficult not to see some irony in unprecedented floods caused by climate change disrupting the prosecution of those who are attempting to protect the planet from climate change.

Evy's legal case remains ongoing.

III. A Father's Words—in Defence of the Trees

Two months of living in the old growth forests of Fairy Creek taught my daughter many things. Perhaps the greatest lesson she learned was not of science or nature, but about the law.

Evy's arrest was a stark lesson of the vital importance the rule of law plays in our society and the extent to which our institutions will go to ensure it is protected. Her education was further enhanced as we listened to the lawyers' submissions to the Court of Appeal and then we read with disappointment the Court of Appeal's decision extending the injunction through another logging season.[35]

Evy and I discussed her arrest and the events at Fairy Creek within the context of our courts' function and the rule of law. I explained that the court is an instrument through which society maintains the order necessary for us to carry out our daily lives. While Evy and the other land defenders may strongly disagree with the logging of an old growth forest, the court's role was not to provide an opinion on that issue. Based on the current state of the law, the protesters' objections needed to be raised in another way, in compliance with the law by which all citizens of Canada are to abide.

As we discuss the rule of law, Evy reminds me of my promise to advocate for the trees and to explain how our courts might engage in, rather than ignore, the plight of our ancient ecosystems and their role in mitigating climate change. She notes that while the protesters' actions at Fairy Creek have

34. *Washed out roads, highway flooding caused by extensive rain*, Nanaimo News NOW (Nov. 15, 2021), https://nanaimonewsnow.com/2021/11/15/washed-out-roads-highway-flooding-caused-by-extensive-rain [https://perma.cc/RHP9-E5C5].

35. *Teal Cedar*, 2022 BCCA 26 (Can.).

brought public attention[36] and even a shift in government policy,[37] logging is scheduled to continue.

It is therefore time to fulfill my promise. I set out below the case for recognizing Ancient Forest Rights.

A. *Introduction*

Legal rights for nature is not a new or radical thought.

For millennia, Indigenous Peoples have conceptualized our relationship with nature as one of interconnection and reciprocity, not of property and ownership.[38] Indigenous cultures speak of nature having an equal share in this planet, with rights to a continued existence.[39] Indigenous academic and advocate Professor Leroy Little Bear has written that "the land is a sacred trust from the Creator".[40]

In 1972, Dr. Christopher Stone provided compelling justification for legal reform in his foundational paper, *Should Trees Have Standing?*[41] Over the next five decades, the concept of legal rights for nature has been debated by academics and before courts around the world. Canadian scholar and UN Special Rapporteur on human rights and the environment, David Boyd, has written a book advocating for legal rights for nature.[42] Legal reform, however, has been

36. *See e.g Canopy Planet Advertisement*, The Globe and Mail October 11, 2021, at A8-A9 (Statement by over two hundred Indigenous leaders, political figures, scientists, authors, artists, business leaders, and Olympians including Grand Chief Stewart Phillip, Greta Thunberg, former Prime Minister Brian Mulroney, former Governor General Adrienne Clarkson, and former Premier of Ontario David Peterson: "British Columbia used to be the land of giants with trees up and down the coast towering 250 feet tall. Today, only a fraction of these vital, old growth forests remain. They are our shield against climate crisis, yet are being logged across the province. For thousands of years, these forests have protected us. Now, we need to protect them. Premier Horgan, protect the irreplaceable.") https://canopyplanet.org/200-dignitaries-call-for-immediate-protection-of-british-columbias-large-old-growth-forests/ [https://perma.cc/6XDX-BZFW].

37. Press Release, Gov't of B.C., Ministry of Forests, Lands, Nat. Res. Operations and Rural Dev., Gov't taking action on old-growth deferrals (Nov. 2, 2021), https://news.gov.bc.ca/releases/2021FLNRO0068–002088 [https://perma.cc/A5E7-ZQU3].

38. Rachel Garrett & Stepan Wood, *Rights of Nature Legislation for British Columbia: Issues and Options*, (Peter A. Allard Sch. Of L. Ctr. For L. & the Env't Working Paper Series, Paper No. 1, 2020).

39. John Mohawk, *Animal Nations Right to Survive*, Daybreak, 1988, at 1, 3, http://blogs.nwic.edu/briansblog/files/2015/04/Animal-Nations-Right-to-Survive.pdf. [https://perma.cc/F2S5-Z72E].

40. Leroy Little Bear, *Naturalizing Indigenous Knowledge, Synthesis Paper* Univ. of Sask. Aboriginal Educ. Rsch. Ctr., 1, 21 (2009). *See also* Enrique Salmón, *Kincentric Ecology: Indigenous Perceptions of the Human-Nature Relationship*, 10 Ecological Applications, 1327 (2000).

41. Stone, *supra* note 3.

42. David R. Boyd, The Rights of Nature: A Legal Revolution That Could Save The World (ECW Press, 2017).

limited. In Canada, the concept of legal rights for nature has not been considered by any court.

The law views humans as separate and superior to nature. Only humans, or human-created entities such as corporations, are entitled to seek a remedy from a court of law. Developing a legal argument on behalf of an ancient forest, therefore, raises unique challenges. There is no legal precedent and there are no defined rules or procedures. Land is viewed as neither a plaintiff nor defendant, but rather as "property" to be owned. To recognize legal rights for nature requires Canadian courts to change their anthropocentric perspective. To convince a court to make such a foundational shift requires not only compelling reason, but also a legal basis founded on principle. My analysis, which follows, seeks to address both.

In presenting the case for recognition of Ancient Forest Rights, I first provide a definition. A clear definition of these rights, both their scope and nature as well as the criteria for when they can be recognized, is the starting point for the analysis. Second, I address the facts supporting Ancient Forest Rights. As courts need to adapt the law to changing societal standards, I discuss the evidence of how the threat of, and the need to address, climate change has become part of life in Canadian society and, in fact, around the world. I refer to the latest science regarding climate change, the important mitigating role of ancient forests, statements and commitments by our governments and world leaders as well as recent findings of the Supreme Court of Canada. Finally, I present the legal principles upon which legal rights for an ancient forest can be recognized. In particular, the Article draws parallels between legal concepts developed by our courts in their consideration of Aboriginal rights and title and the legal basis upon which Ancient Forest Rights can be founded.

B. *Defining Ancient Forest Rights*

The core purpose of Ancient Forest Rights is the protection of Canadian society and humanity from the increasing threat of climate change. More specifically, recognition of Ancient Forest Rights would create a legal instrument by which courts could consider and protect the vital role ancient forests play in mitigating climate change.

This Article therefore defines Ancient Forest Rights with criteria that are directly and causally connected to climate change. In particular, it is proposed that a forest must meet the following criteria to trigger Ancient Forest Rights:

1. geographical boundaries defined with legal precision;
2. continual existence without significant human disturbance[43] from before the imposition of British sovereignty and rules of law; and

43. Ancient Forest Rights are not intended to apply to second (or third) growth forests. They are intended to protect the country's remaining original old growth forest. For example, the remaining portions of a partially logged old growth forest could qualify for Ancient Forest Rights, as could an old growth forest that has a logging road running through it.

3. significant and stable carbon storage.

The first criterion will ensure a court and all affected parties have certainty regarding the lands at issue. The evidence establishing the geographical boundary of an ancient forest could come from a variety of sources including a survey, satellite imagery or government mapping.[44]

The second criterion establishes with certainty the required age of an ancient forest. The rationale for the cut-off date is a legal one. As discussed in detail below, the law supports recognition of Ancient Forest Rights for those ancient forests that pre-existed imposition of British sovereignty and rules of law.[45]

The third criterion will establish the standards to be met in relation to the forest's importance to climate mitigation. The standards to apply can be established by reference to existing science and expert evidence. For example, a 2020 study authored by three senior forest ecologists identifies the most important old growth forests in British Columbia from a biodiversity and climate mitigation perspective.[46] The study recommends a moratorium on the logging of certain categories of old growth forests based on specific scientific criteria.[47] Old growth forests that fall within these categories could be entitled to Ancient Forest Rights.

This Article also proposes the scope of Ancient Forest Rights be limited to the right to exist, free from destruction by human activity. Ancient forest ecosystems would have legal standing to challenge any decision or act directed at their destruction. An ancient forest, for example, could seek an injunction to stop its destruction from logging, a judicial review of a government decision to issue a logging licence or an order striking down provincial legislation that authorizes its destruction. These forests would not, however, have additional rights and remedies, such as being able to advance a claim for damages. Recognition of these limited Ancient Forest Rights would provide ancient forest ecosystems with access to the courts' powers and processes to seek protection, while minimizing the potential for mischief that might arise if greater rights were recognized.

This measured and principled approach removes any risk of opening the "floodgates" to indeterminate future claims by any and all plants and animals.[48]

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44. For example, maps identifying the locations and boundaries of various types of old growth forest are found online. Old Growth Maps, B.C., https://www2.gov.bc.ca/gov/content/industry/forestry/managing-our-forest-resources/old-growth-forests/old-growth-maps (last visited June 11, 2023).

45. See section III. D. 3. b.

46. Karen Price, Rachel Holt & Dave Daust, *BC's Old Growth Forest: A Last Stand for Biodiversity* (Apr. 2020), https://veridianecological.files.wordpress.com/2020/05/bcs-old-growth-forest-report-web.pdf [https://perma.cc/M53H-Q9GT].

47. *Id*. at 43.

48. Ultramares Corp. v. Touche, 174 N.E. 441 (1932). The criteria for Ancient Forest Rights are intended to avoid the principle from being extended to address concerns beyond climate change. For example, the limits created by the criteria would prevent the potential

Further, such an approach is consistent with promoting policy considerations of the highest priority - society's current need to protect our environment in ways that address the threat of climate change.

C. *The Facts Supporting Recognition of Ancient Forest Rights*

Recognition of Ancient Forest Rights by our courts is founded on the inarguable proposition that the laws made by our courts must adapt to the changing needs of society. This concept was well-expressed by the Privy Council approximately one hundred years ago:[49]

> . . . their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasonings therefor which commended themselves [. . .] to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.

Accordingly, our courts must reevaluate decisions and legal principle made in times past when society (and our planet) did not face the threat of climate change.

More recently, the Supreme Court of Canada expressed the principle as follows:[50]

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.

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for a litany of lawsuits by house plants or pets for lack of care by their owners, or a claim for monetary damages by a neighbourhood tree that is damaged by a careless gardener.

49. Reference Meaning of Word "Persons" in Section 24 of British North America Act, 1867, [1930] A.C. 124 (PC).

50. R. v. Salituro, [1991] 3 S.C.R. 654 (Can.) para. 39. There are constraints on the courts' authority to change the law. Courts must protect the rule of law. Change must also be incremental and founded on principle. In *Salituro* the court adopted the followings statement from the House of Lords:

> The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation."

Citing Myers v. Director of Public Prosecutions, [1965] A.C 1001 (HL), the court suggested even further judicial restraint may be necessary:

> . . . there are significant constraints on the power of the judiciary to change the law. . . . in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

See also Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52 (Can.); Watkins v. Olafson, [1989] 2 S.C.R. 750 (Can.); Symes v. Canada, [1993] 4 S.C.R. 695 (Can.).

This principle provides a strong premise for recognizing Ancient Forest Rights. As discussed below, there is no longer a social foundation supporting destruction of an ancient forest ecosystem. Science tells us such action significantly increases greenhouse gases and exacerbates the damaging effects of climate change. Our Prime Minister,[51] the Supreme Court of Canada,[52] provincial governments,[53] most Canadians[54] and all world leaders[55] agree climate change is a serious threat requiring immediate action.

1. The Threat of Climate Change

Statements about the threat of climate change and need for urgent action are now ubiquitous. Climate change is the subject of thousands of studies and scientific papers and a stated priority for our politicians and world leaders. For present purposes, it is not necessary to review in detail the science of climate change or the history of political efforts to address it. Rather, to provide the necessary context for my analysis, I reference statements from the most recent report of the United Nations Intergovernmental Panel on Climate Change (IPCC)[56], the Paris Agreement, the Glasgow Climate Pact and a recent decision of the Supreme Court of Canada. These statements make it clear that living with, and taking steps to address, climate change is now a part of living in Canadian society.[57]

a. IPCC's Sixth Assessment Report

The IPCC was established in 1988 and is supported by 195 member countries. Hundreds of scientists from each of the 195 countries fulfill the IPCC's mandate to prepare comprehensive assessment reports about the state of scientific, technical, and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate

51. Prime Minister Justin Trudeau, Speech delivered at COP26 (November 1, 2021): "The science is clear. We must do more and faster." (transcript available online https://pm.gc.ca/en/news/speeches/2021/11/01/prime-ministers-remarks-delivering-canadas-national-statement-cop26-summit).

52. *Re Greenhouse Gas Pollution*, [2021] S.C.R. 11, para. 167 (Can.).

53. *Id.*

54. Darrell Bricker, *Canadians Agree We Need to Do More on Climate, But Divided on Whether Economy Should Suffer as a Result*, Ipsos News and Polls (Aug. 26, 2021), https://www.ipsos.com/en-ca/news-polls/canadians-agree-we-need-to-do-more-on-climate [https://perma.cc/ESL6-C98L].

55. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow*, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 (Nov. 13, 2021) [hereinafter *Glasgow Climate Pact*].

56. The Intergovernmental Panel on Climate Change, https://www.ipcc.ch [https://perma.cc/9PLD-52VH] (last visited Oct. 26, 2022).

57. *See e.g.* City of Vancouver, *Climate Action Plan*, https://vancouver.ca/green-vancouver/vancouvers-climate-emergency.aspx [https://perma.cc/6LJ2-ND5Y] (last visited Oct. 25, 2022) (on November 17, 2020 the City of Vancouver announced its Climate Change Emergency Plan).

change is taking place. IPCC reports are neutral and policy-relevant, but not policy-prescriptive. The IPCC's Sixth Assessment Report, dated February 27, 2022, concluded:

> The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all.[58]

In other words, there is a worldwide scientific consensus that significant steps must be taken immediately to avoid a world irreparably damaged by climate change.

b. Paris Agreement and Glasgow Climate Pact

On December 12, 2015, at the United Nations' COP21[59], the Paris Agreement was signed.[60] In this agreement, 196 countries, including Canada, recognized the "urgent threat of climate change" and undertook to drastically reduce their greenhouse gas emissions in order to mitigate its effects.

Despite the strong language of the Paris Agreement, concerns with respect to climate change have only increased. Six years later, on November 13, 2021, after the conclusion of COP26, the same countries agreed to the Glasgow Climate Pact. By that international agreement, each country:

> *Acknowledges* that climate change has already caused and will increasingly cause loss and damage and that, as temperatures rise, impacts from climate and weather extremes, as well as slow onset events, will pose an ever-greater social, economic and environmental threat;
>
> *Emphasizes* the importance of protecting, conserving and restoring nature and ecosystems to achieve the Paris Agreement temperature goal, including through forests and other terrestrial and marine ecosystems acting as sinks and reservoirs of greenhouse gases and by protecting biodiversity, while ensuring social and environmental safeguards;

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58. IPCC, Summary for Policymakers in Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 33 (H.O. Pörtner et al. eds) (2022), https://www.ipcc.ch/report/ar6/wg2/chapter/summary-for-policymakers/ [https://perma.cc/S8ZP-YFL2]. (The quotations are taken from the Summary for Policymakers which provides a high-level summary of the key findings of the report and is approved by the IPCC member governments line by line).

59. The origins of COP go back to 1992, when 197 countries joined the United Nations Framework Convention on Climate Change (UNFCCC). The purpose of these meeting is to provide a means to work together to limit global temperature increases that drive climate change. The term "COP" stands for 'Conference of the Parties'. The number "26" indicates that the November 2021 meeting was the twenty-sixth.

60. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session, held in Paris*, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter *Paris Agreement*].

> *Expresses* alarm and utmost concern that human activities have caused around 1.1 °C of warming to date, that impacts are already being felt in every region, and that carbon budgets consistent with achieving the Paris Agreement temperature goal are now small and being rapidly depleted.[61]

These declarations by our world leaders sent a strong call to action to find ways to protect, conserve and restore important natural ecosystems to mitigate the ever-increasing effects of climate change. Evy and the other land defenders at Fairy Creek acted. It is now time for our courts to act—to adapt their processes and reconsider their precedents in light of urgent circumstances facing not only Canadian society, but all of humanity.

c. The Supreme Court of Canada

While Canadian courts recognize the serious threat posed by climate change, they have been slow to adapt and move away from past precedents, developed when society was not facing a global climate crisis. The Supreme Court of Canada, whose decisions are binding on all courts across the country, has only recently accepted that climate change poses an existential threat.[62] In a 2021 decision, the Court considered the scientific evidence and held:

> Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. …
>
> Since the 1950s, . . . the concentrations of GHGs [greenhouse gases] in the atmosphere have increased at an alarming rate, and they continue to rise. As a result, global surface temperatures have already increased by 1.0°C above pre-industrial levels, and that increase is expected to reach 1.5°C by 2040 if the current rate of warming continues. …
>
> These temperature increases are significant. As a result of the current warming of 1.0°C, the world is already experiencing more extreme weather, rising sea levels and diminishing Arctic sea ice. Should warming reach or exceed 1.5°C, the world could experience even more extreme consequences, …
>
> The effects of climate change have been and will be particularly severe and devastating in Canada.[63]

The Court went on to describe the future effects of climate change should warming reach or exceed 1.5 degrees Celsius. These effects include higher sea levels and greater loss of Arctic sea ice, a 70 percent or greater global decline of coral reefs, the thawing of permafrost, ecosystem fragility and negative effects on human health, including heat-related and ozone-related morbidity and mortality.[64] The Court noted that Canada is expected to experience extreme weather events such as floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of

61. *Glasgow Climate Pact*, *supra* note 55.
62. *Re Greenhouse Gas Pollution*, *supra* note 52, para. 167.
63. *Re Greenhouse Gas Pollution*, *supra* note 52, paras. 2, 7 and 10.
64. *Re Greenhouse Gas Pollution*, *supra* note 52, para. 9.

heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases.[65]

Other Canadian courts have adopted and applied the Supreme Court of Canada's observations. For example, in 2023 the Ontario Superior Court applied the same findings in a decision addressing a constitutional challenge critical of the province's unambitious greenhouse gas emission reduction target.[66] While the court dismissed the challenge, the judgment held that it was "indisputable" that climate change is causing residents of that province to experience "an increased risk of death and increased risk of security of person." These recent decisions highlight that the crucial question for our courts now is not whether there is a climate change emergency, but rather the role our courts should, or must, play in addressing this new reality.

2. Ancient Forests' Role in Mitigating Climate Change

While billions of dollars and much intellectual capital is being expended seeking new technologies to remove and sequester atmospheric carbon dioxide,[67] ancient forests already provide (and for millions of years have been providing) an elegant and sophisticated technology, free of charge.

Ancient forests use photosynthesis, a 3.8-billion-year-old mechanism,[68] to accomplish what present day scientists strive to achieve. Photosynthesis takes carbon dioxide from the atmosphere and, using water and energy from the sun, transforms it into food for the forest ecosystem and oxygen, which is released back into the air.[69] In other words, ancient forests remove from the atmosphere the most prevalent greenhouse gas resulting from human activities.[70] Photosynthesis "fixes" billions of tons of carbon each year from carbon dioxide in the air.[71]

Ancient forests are also significant carbon "sinks".[72] The carbon is stored in various components of an old-growth ecosystem including the above and

65. *Re Greenhouse Gas Pollution*, *supra* note 52, para. 10.

66. Mathur v. Ontario, [2023] O.N.S.C. 2316 (Can.); *See also* Mathur v. Ontario, [2020] O.N.S.C. 6918 (Can.); La Rose v. Canada, [2020] FC 1008 (Can.).

67. *See eg* Carbon Engineering, https://carbonengineering.com [https://perma.cc/TU43-BFNB] (last visited Oct. 25, 2022); Colin Cunliff & Linh Nguyen, Federal Energy RD&D: Carbon Renewal, 1-5 (2021); Energy Futures Initiative, Clearing the Air: A Federal RD&D Initiative and Management Plan for Carbon Dioxide Removal Technologies (2019); Sahag Voskian & T. Alan Hatton, *Faradaic electro-swing reactive adsorption for CO2 capture*, 12 Energy & Env't Sci. 3530, 3530 (2019).

68. Jean-Francois Morot-Gaudry & Jacques Joyard, *The Path of Carbon in Photosynthesis*, Encyclopedia Env't, (2020).

69. *See id.*

70. *Re Greenhouse Gas Pollution*, *supra* note 52, at para. 7.

71. Smith, S. M. et al., The State of Carbon Dioxide Removal - 1st Edition, The State of Carbon Dioxide Removal (2023), https://www.stateofcdr.org [https://perma.cc/5EKU-EMDN]; *See also* Morot-Gaudry & Joyard, *supra* note 68.

72. Jens Wieting & Dave Leversee, Sierra Club BC, Carbon at Risk: B.C.'s Unprotected Old-Growth Rainforest (2013) (The Sierra Club estimates that the

below-ground plant biomass (tree stem wood, branches, leaves, shrubs, herbs, roots, fungi, bryophytes, lichens and soil microbiota) and organic carbon in the soil (known as humus). The locations of Canada's most significant carbon sinks have recently been mapped by researchers. The findings confirm that the most concentrated areas of carbon storage are found in undisturbed old growth forests, including in the Fairy Creek area.[73]

Logging in old growth forests releases carbon that has taken centuries to accumulate. In other words, logging an old growth forest not only removes an important and active system of carbon dioxide removal, it *adds* carbon dioxide back into the atmosphere.[74] Experts estimate that logging old-growth forests releases, in an unnaturally short timeframe, 40 percent to 65 percent of the forest's stored carbon back into the atmosphere.[75]

Ecological experts have considered the climate change impacts of logging the ancient forest at Fairy Creek.[76] Five key concerns are identified.

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unprotected British Columbia old-growth rainforest ecosystems on Vancouver Island and the South Coast with a high likelihood of getting logged cover 600,000 hectares and store over 225 million tonnes of carbon (equivalent to over 800 million tonnes of carbon dioxide or over 13 times B.C.'s annual emissions)).

73. Camile Sothe et al., *Large Soil Carbon Storage in Terrestrial Ecosystems of Canada*, 36 Global Biogeochemical Cycles at 1 (Jan. 2022).

74. Nancy Harris & David Gibbs, *Forests Absorb Twice as Much Carbon as They Emit Each Year*, World Resources Institute, (Jan. 21, 2021), https://www.wri.org/insights/forests-absorb-twice-much-carbon-they-emit-each-year [https://perma.cc/A9HP-N6SV].

75. While old growth forests slowly release some carbon back into the atmosphere over decades or centuries through natural processes (e.g., through death, decomposition, fires, etc.), logging causes a more immediate release of an old-growth's stored carbon as the forest's carbon-rich soils are disturbed, the forest life is decimated and the products created from the old-growth lumber are consumed; Pojar Aff., Ex. B, *supra* note 9; See also Lindsay Duncombe, Harvey Chashore & Lynette Fortune, *Wood from B.C. forests is being burned for electricity billed as green — but critics say that's deceptive* (CBC News, Oct. 6, 2022), https://www.cbc.ca/news/canada/wood-pellets-bc-forests-green-energy-1.6606921#:~:text=They%20were%20cut%20from%20trees,to%20produce%20fuel%20for%20electricity [https://perma.cc/47QR-AFCU]; M. E. Harmon, W. K. Ferrell, & J. F. Franklin, *Effects on Carbon Storage of Conversion of Old-Growth Forests to Young Forests*, 247 Science 699 (1990).

76. Pojar Aff., Ex. B, *supra* note 9; Wood Aff., Mar. 19, 2021, Ex. B, Teal Cedar Products v. Rainforest Flying Squad, [2021] B.C.S.C. 605 (Can.). Dr. Pojar and Dr. Wood prepared expert reports that were filed with the court in the Fairy Creek Injunction legal proceedings. Dr. Pojar is a senior professional biologist who spent most of his career as a Forest Ecologist and Forest Science Officer with the British Columbia Forest Service. Dr. Pojar has analyzed the how logging in the Fairy Creek Ancient Forest impacts the areas carbon fixation capabilities and storage capacity. Dr. Wood is an expert in the field of forestry management. He has advised the provincial government on their forestry practices and been consulted by organizations around the world on issues relating to sustainable forest management. Dr. Wood analyzed how logging creates a cycle of increasing destruction of an old-growth forest through its impact on climate change.

a. Ancient Forests are Irreplaceable

Once logged, old-growth forests such as those at Fairy Creek disappear irrevocably. While forests can be replanted, new secondary forests grow with a new mix of species and different soils, as compared to old-growth forest ecosystems. Even if allowed to grow for centuries, these secondary forests will not recover to their original condition. Dr. Pojar writes:

> As BC's climate continues to warm, the young forests and regenerating cutblocks and clearing today will *not* eventually replace old-growth stands that have been logged or removed. . . . Recovery of old-growth forest has become an inappropriate concept, given rapid climate change, system unpredictability, and scientific uncertainty. Nowadays, old-growth forest is effectively a non-renewable resource.[77]

b. Most of the Province's Ancient Forests are Gone

A 2020 study found that of the approximately 50 million hectares of forest lands in British Columbia, only one percent, or approximately 400,000 hectares, of large-treed and richly biodiverse old growth forest remain and, of those, only 35,000 hectares are the most carbon-dense and biodiverse forest ecosystems.[78] The study's authors highlight that, in contrast to many of the other forests in British Columbia, these rare, remaining ecosystems play a "critical role" in climate mitigation, as they capture and store high amounts of carbon.[79]

The 2020 study recommends an immediate moratorium on the logging of these rare, important and irreplaceable old growth forest.[80] Despite this recommendation, the logging continues.[81]

c. Ancient Forests are a Vital Component of the Planet's Defence Against Climate Change

The ancient forests of British Columbia are the linchpin of carbon dynamics in the province and play a significant part in mitigating climate change.[82]

The forest at Fairy Creek has for thousands of years removed carbon dioxide from the atmosphere and stored tons of carbon in its ecosystem. As previously indicated, logging an old growth forest releases unnaturally large amounts of stored carbon back into the atmosphere—at a time when

77. Pojar Aff., Ex. B, *supra* note 9, at 16.
78. Price, et al., *supra* note 46, at 23.
79. *Id*.
80. Price, *supra* note 46, at 43.
81. Government of British Columbia, *Old Growth Definitions and Values*, https://www2.gov.bc.ca/gov/content/industry/forestry/managing-our-forest-resources/old-growth-forests/old-growth-values [https://perma.cc/Q746-X5VU] (last visited Oct. 25, 2022). *See also* Pojar Aff., Ex. B, *supra* note 9, at 17 (discussing the enormous reversal in age class distribution of forests on Vancouver Island).
82. Pojar Aff., Ex. B, *supra* note 9, at 12, 13 and 19–21.

humanity is struggling to reduce greenhouse gas levels and faces imminent deadlines to do so.[83]

d. Logging Ancient Forests Leads to a Cycle of Increasing Wildfire and Worsening Climate Change

Logging old growth forests leads to a cycle of increasing destruction from wildfires and worsening climate change: (i) the logging leads to increased climate change; (ii) climate change leads to increased temperatures; (iii) the increased temperatures lead to forest fires; (iv) the forest fires destroy forests; (v) the destruction of forests leads to more climate change; and (vi) this cycle of destruction begins again.[84]

e. Logging Ancient Forests Leads to a Cycle of Increased Flooding, Landslides and Worsening Climate Change

Clearcutting an old growth forest compromises topsoil and root structure leading to slope instability. It also reduces the forest's ability to moderate water flow, leading to faster and more concentrated runoff and thus flooding. As climate change is expected to cause higher intensity precipitation, more old growth forest will be lost through increased flooding and landslide activity. With the loss of more old growth forest, there will be more climate change, more flooding and landslides, and the cycle will continue and worsen.[85]

D. *The Legal Basis for Ancient Forest Rights*

As illustrated above, a clear factual basis and rationale exists for recognizing Ancient Forest Rights. Scientists, politicians, world leaders and courts now accept the urgent need to address climate change and that preservation of our ancient forests should be a vital component of such efforts. With these facts established, the issue remaining for our courts is a legal one: Can the law be developed and applied to address what society needs and what common sense demands? In other words, is there a legal basis for recognizing Ancient Forest Rights?

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83. *Id.* at 26. *See also* Simard Presentation, 2021, *supra* note 14. (Dr. Simard reports that recent studies of the forests in British Columbia have identified that old growth forests have significantly deeper humus layers (and hence hold a much higher concentration of carbon) that second and third growth forest.).

84. Wood Aff., Ex. B, *supra* note 76, at 6–7 ("Clearcut logging . . . introduces vulnerability to fire. . . . Second growth forests, particularly in early stages of regrowth, are more susceptible to fire, due to smaller sized trees, thinner bark, and low branches that provide flammable "ladder fuel" towards the canopy. . . . Scientists have identified the importance of "refugia" in the face of climate change. These are landscape elements that remain unburned or minimally affected by fire, thereby supporting ecosystem function and resilience, and lowering risk to surrounding communities. They are strongly associated with old and intact forests, which tend to be cooler, moister and less subject to drought and desiccation than younger forests. . . . During a fire, these old-growth refugis provide an island of safety for species, but also a firebreak that can reduce risk to communities.").

85. *Id.* at 7–9.

1. Adopting a New Legal Perspective

Recognition of Ancient Forest Rights requires the court to open its perspective to a new line of legal reasoning. New legal concepts, rules and justifications must be considered.

The intellectual challenge of defining and conferring legal rights has been a part of the common law since its inception. As noted by Professor Stone:

> . . . the best medieval legal scholars had spent hundreds of years struggling with the notion of the legal nature of those great public "corporate bodies," the Church and the State. How could they exist in law, as entities transcending the living Pope and King? It was clear how a king could bind himself - on his honor - by a treaty. But when the king died, what was it that was burdened with the obligations of, and claimed the rights under, the treaty his tangible hand had signed? The medieval mind saw (what we have lost our capacity to see) how unthinkable it was, and worked out the most elaborate conceits and fallacies to serve as anthropomorphic flesh for the Universal Church and the Universal Empire.
>
> It is this note of the unthinkable that I want to dwell upon for a moment. Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless "things" to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions.[86]

Put succinctly, the intellectual challenge of recognizing and defining a new right should not be a bar to doing so. History provides many examples of courts conferring rights on new entities in circumstances which, generations earlier, would have been unthinkable. It is useful to consider the following past statements of Canadian judges.

In 1928, five justices of the Supreme Court of Canada unanimously held that a woman was not a "person" under the Canadian Constitution and therefore could not hold the position of senator in the federal government (the "Persons Decision").[87] The Court relied on earlier judicial precedent which held:

> I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public functions.[88]

The Court concluded that judicial precedent "is conclusive . . . on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada."[89]

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86. Stone, *supra* note 3, at 453.

87. In the Matter of a Reference as to Meaning of Word "Persons" in Section 24 of British North America Act, 1867, [1930] AC 124 (PC) (appeal taken from Can.) (*Re Persons*).

88. *Id.* at 283.

89. *Id.* at 290.

In 1970, a judge of the British Columbia Court of Appeal held that the provincial government, by passing legislation, took ownership of traditional First Nations lands and rendered all Indigenous people occupying those lands "trespassers" under the law (the "*Calder* Decision"):

> As a result of these pieces of legislation the Indians of the Colony of British Columbia *became in law trespassers* on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians. [emphasis added][90]

The above decisions are examples of a social foundation that no longer exists and which our courts no longer perpetuate or, in fact, tolerate.

The resolution of these issues is not one solely for the legislature. At those times in history when the legislature, and even the Constitution, have fallen out of step with social standards, the courts have been a steward of legal change.

In Canada, the Persons Decision was overturned. The Supreme Court of Canada's decision was appealed to the English Privy Council.[91] The Privy Council held:[92]

> [the] exclusion of women from all public offices is a relic of days more barbarous than ours [. . .] and to those who ask why the word [persons] should include females, the obvious answer is why should it not.

The *Calder* Decision was also appealed. The Supreme Court of Canada held that the Court of Appeal's conclusion that Indigenous people could be trespassers on their own traditional lands was "fallacious" and "self-destructive".[93] The Supreme Court of Canada has subsequently recognized that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty".[94]

With today's societal standards now demanding change to address a climate emergency, our courts can utilize the reasoning in the *Persons* and *Calder* decisions to again expand their interpretation of legal rights and to whom they can apply. Just as, a century ago, the Privy Council's legal analysis justifying its recognition of a woman's right to hold public office required no more than to say such an approach is "a relic of days more barbarous than ours", our courts today can—even in the absence of legislative intervention—expand their interpretation of legal rights to ancient forests. And to those who would ask why rights should be extended to these ancient forests, the Privy Council's decision provides the answer: Why not?

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90. Calder v. B. C. (Att'y Gen.), (1970) 13 D.L.R. 3d 64, 94 (Can.) (B.C. C.A.) (Tysoe, J.A.).

91. At the time of the *Persons* Decision and up until 1949, a decision of the Canadian Supreme Court could be appealed to the English Privy Council.

92. *Re Persons*, [1930] AC 124 at 99 (PC).

93. Calder v. B. C. (Att'y Gen.), [1973] S.C.R. 313, 414 (Can.).

94. Delgamuukw v. B. C., [1997] 3 S.C.R. 1010, 1014 (Can.); *See also* Roberts v. Can., [1989] 1 S.C.R. 322, 340 (Can.) and Guerin v. The Queen, [1984] 2 S.C.R. 335, 378 (Can.).

2. Recognition of Legal Rights for Nature by Courts Outside Canada

To date, no court in Canada has been asked to recognize legal rights for nature. There is no judicial precedent. In jurisdictions outside of Canada, however, judicial recognition of this concept is growing. Courts around the world are beginning to recognize that the future of our planet and humanity require a move away from purely anthropocentric rules of law.

As early as 1972, the concept was addressed in a dissenting judgment of Justice Douglas of the United States Supreme Court:

> Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary, and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.
>
> So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents, and which are threatened with destruction.[95]

More recently, in 2016, Colombia's highest courts have issued two landmark decisions recognizing the Atrato River[96] and the Amazon Rainforest[97] as "*sujeto de derechos*", entities in their own right entitled to rights of protection,

95. Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting).

96. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16 (Colom.) (*Atrato River Case), translated in* Dignity Rights Project (Delaware Law School 2019), translation available at: http://files.harmonywithnatureun.org/uploads/upload838.pdf [https://perma.cc/YYX3-CALJ] (*Atrato River Case Translation)*. *See also* Cyrus R. Vance Center, Earth Law Center, and International Rivers, Rights of Rivers: A global survey of the rapidly developing Rights of Nature jurisprudence pertaining to rivers at 22–24 (2020).

97. Demanda Generaciones Futuras v. Minambiente, Columbian Constitutional Court, No. 11001–22–03–000–2018–00319–015, (April 5, 2018) (*Amazon Rainforest Case)*, *translated by* Dejusticia, *Future Generaltions v Ministry of the Environment and Others, (Amazon Rainforest Case Translation)*, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001–22–03–000–2018–00319–00_decision.pdf [https://perma.cc/7JH4-WUY2] (last visited Nov. 1, 2022); *See also* Steve Curwood and David Boyd, *The Amazon as a Legal Person*, living on earth: Public Radio's Environmental News Magazine, (Apr. 20, 2018), https://www.loe.org/shows/segments.html?programID=18-P13–00016&segmentID=1 [https://perma.cc/6HWF-C4H9]; Rights of Rivers, *supra* note 96, at 24–25.

conservation, maintenance and restoration.[98] The courts were concerned with the effect on climate change of continued destruction of these important ecosystems. The Colombia Supreme Court discussed the effects of deforestation in the Amazon as follows:

> . . . [D]eforestation in the Amazon, caus[es] short, medium, and long term imminent and serious damage to the children, adolescents and adults who filed this lawsuit, and in general, all inhabitants of the national territory, including both present and future generations, as it leads to rampant emissions of carbon dioxide (CO2) into the atmosphere, producing the greenhouse gas effect, which in turn transforms and fragments ecosystems, altering water sources and the water supply for population centers and land degradation.[99]

To address this situation, the Colombian courts recognize the need for a legal tool which "offers greater justice to nature and its relations with human beings".[100] The courts apply an ecocentric and biocultural approach in which exists "a new socio-legal understanding in which nature and her components are taken seriously and granted with full rights".[101] As the court states in the Atrato River decision:

> . . . now is the time to begin taking the first steps to effectively protect the planet and its resources before it is too late, or the damage is irreversible, not only for future generations, but for the human species.[102]

In Brazil, the country's Superior Court issued a 2019 ruling also recognizing rights of nature. The Court recognized that "nonhuman animals as well as life in general" are deserving of rights recognition. The Court called for the adoption of a biocentric or ecocentric "jurisprudential matrix", stating:

> . . . it is necessary for us to be able to confront "new ecological values that feed contemporary social relations and that demand a new ethical conception, or, perhaps more correctly, the rediscovery of an ethical respect for life."[103]

In Bangladesh, the High Court issued a decision in 2016 granting all rivers in the country legal personhood.[104]

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98. Rights of Rivers, *supra* note 96, at 11, 23, and 25.

99. *Amazon Case Translation, supra* note 97, at 34.

100. *Atrato River Case Translation, supra* note 96 at 99, para. 9.30.

101. Paola Villavicencio Calzadilla, Case Note, *A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia*, 15, Law Environment, and Development Journal 49, 54 (2019), http://lead-journal.org/content/19049.pdf https://perma.cc/UCD4-N47G].

102. *Atrato River Case Translation, supra* note 96 at p. 99, para. 9.29.

103. S.T.J., Recurso Especial No. 1.797.175 – SP, Relator: Ministro OG Fernandes 21.3.2019 (Braz.), http://files.harmonywithnatureun.org/uploads/upload820.pdf [https://perma.cc/MQ6G-S6PJ], *summarized in* Rights of Rivers, *supra* note 96, at 37.

104. Court of Bangladesh, High Court Division, Writ Petition 3839 of 2016 (Feb. 2019), *summarized in* Rights of Rivers, *supra* note 96, at 47.

In Bhutan, the Royal Court of Justice established a "Green Bench" in 2018 which has jurisdiction over environmental cases and allows legal rights of nature to be advanced by any person as a "trustee".[105]

3. The Legal Basis Upon Which Courts in Canada Can Recognize Ancient Forest Rights

The analytic path towards recognizing Ancient Forest Rights requires consideration of three foundational issues: (a) whether and how a court can take into account a different (non-anthropocentric) perspective; (b) the legal basis upon which the existence of Ancient Forest Rights can be founded and legally recognized; and (c) Ancient Forest Rights' place within Canada's constitutional framework and the associated question of whether these rights can be extinguished by provincial forestry management legislation.

a. Recognizing and Adopting a Previously Unknown Legal Right

Even though Canadian law has not, to date, recognized legal rights for an ancient forest, does not mean such rights do not exist. Courts have previously considered, and recognized, unique legal concepts that pre-existed, and were unfamiliar to, English law.[106]

For example, in 1921, the English House of Lords considered a case involving claims by an Indigenous nation of Southern Nigeria seeking recognition of legal rights to lands they had occupied for centuries.[107] The rights sought were unfamiliar to the English courts, having been established prior to and outside of English law. In concluding that the Indigenous nation's customary right to the land should be recognized in law, the court warned of the risk of unconscious bias that might influence a judge's consideration of such rights.

> There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which

105. Hon. Chief Justice Lyonpo Tshering Wangchuk, Speech delivered at the Opening Ceremony of the Workshop on Environmental Adjudication for the Judiciary of Bhutan, Thimphu (July 18, 2018), https://www.ajne.org/sites/default/files/event/7237/session-materials/opening-ceremony-speech-environmental-adjudication-workshop.pdf [https://perma.cc/GM29-S6E7]. *See also* Rights of Rivers, *supra* note 96 at 47.

106. The authors reference English law as Canadian law (with the exception of Quebec and self-governing First Nations) is originally based on the English legal system.

107. Amodu Tijani v. Sec'y, S. Nigeria, [1921] 2 AC (appeal taken from Nigeria) (Haldane, L.J.). The plaintiff was the Chief of an Indigenous nation that had occupied lands for centuries. The Chief sought compensation for land taken by the Government of the Colony of Southern Nigeria pursuant to the Public Ordinance of 1903. The lower courts concluded that the Chief was not an owner of the land as contemplated by the Ordinance and therefore he could not claim compensation. The Privy Council considered the "real character of the native title to the land" and reversed the decision of the lower courts. In its reasons, the Privy Council applied the "native" notion of communal land ownership for the purposes of interpreting the Public Ordinance of 1903.

> have grown up under English law. But this tendency has to be held in check closely.[108]

In other words, there is an understandable initial reaction to want to dismiss the idea of a legal right that is unknown and previously undefined in established legal rubric. The court must guard against such views and engage in a broader analysis.

In a 1919 decision, the House of Lords discussed the importance of being open to understanding legal conceptions different from our own:[109]

> . . . there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

In 1997, the Supreme Court of Canada further developed this concept in its *Delgamuukw* decision.[110] The court recognized that Canadian common law is not all encompassing, but rather a collection of laws which must be understood by reference to other rights and perspectives, as they become known to the courts.[111] In the context of considering Aboriginal title,[112] the court stated:

> Aboriginal title has been described as *sui generis*[113] in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.[114]

The concept of Ancient Forest Rights is also *sui generis* and therefore, through application of these same legal principles, can be informed by more than a traditional common law perspective. In other words, there is a sound legal basis for a court to adopt a perspective that seeks justice that is not based solely on anthropocentric rights, but also on nature's relationship with humanity. Just as courts in other countries, such as Brazil and Colombia, have used

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108. Amodu Tijani v. Sec'y, S. Nigeria, [1921] 2 AC 399, 402–404 (appeal taken from Nigeria) (Haldane, L.J.).

109. Re Southern Rhodesia, [1919] AC 211, 233 (Sumner, L.J.).

110. *Delgamuukw*, [1997] 3 S.C.R. 1010 (Can.).

111. *See also* Nfld. (Att'y Gen.) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam) (2020), 1 S.C.R. 14, paras. 26, 29–34 (Can.) (warning "against conflating Aboriginal title with traditional civil or common law property concepts, or even describing title using the classical language of property law" as "Aboriginal title has unique characteristics that distinguish it from civil law and common law conceptions of property…. " and "Aboriginal perspectives shape the very concept of Aboriginal title…").

112. "Aboriginal title" is described in Inuit of Nunavut v. Can. (Att'y Gen.), A.R. 75, para. 44 (Can.) as: " . . . the type of collective interest that aboriginal communities had in the lands they traditionally occupied before the arrival of European settlers."

113. *Sui generis* means unique or one of its own kind.

114. *Delgamuukw*, 3 S.C.R. at para. 112 (Can.) at para. 114.

this perspective to grant rights to nature, such a perspective could be the basis for Canadian courts to recognize Ancient Forest Rights.

b. The Legal Basis for Recognizing Ancient Forest Rights

The Canadian jurisprudence relating to Aboriginal rights and title provides a legal framework through which courts can consider and recognize Ancient Forest Rights. Just as Canadian courts have recognized rights arising from the unique and historic relationship between Aboriginal Peoples and their lands, this same legal approach can be applied to recognize legal rights arising from ancient forests' unique, historic, and vital relationships with their lands and the global environment.

Guidance is again found in the Supreme Court of Canada decision in *Delgamuukw*. In that case, the Gitksan and Wet'suwet'en People advanced a claim for Aboriginal title to 58,000 square kilometres in British Columbia. The province disputed the claim. Addressing the concepts of Aboriginal rights and title, the Court explained that the common law recognizes and accommodates *sui generis* rights which pre-existed British sovereignty.

The Court's determination of whether the pre-existing rights asserted by the Gitksan and Wet'suwet'en should be recognized in law entailed an examination of the "source" of those rights. In particular, the nature or character of the source must provide a principled justification for legal recognition of the pre-existing right. In the context of a claim for Aboriginal title, the Court found that occupation of the lands prior to the assertion of British sovereignty could be a sufficient source. The Court stated:

> Another dimension of aboriginal title is its *source*. It had originally been thought that the source of aboriginal title in Canada was the Royal Proclamation, 1763: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples. . . . Thus, [aboriginal title is] "a legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward . . . [115]

This same analytical approach can be applied to recognize Ancient Forest Rights. In addition to relying upon its own occupation of land for thousands of years before British sovereignty, an ancient forest can also justify its claim to Ancient Forest Rights based on its vital role—past, present and future—in using those lands to mitigate climate change. In other words, the source of Ancient Forest Rights arises from both an ancient forest's occupation of lands before assertion of British sovereignty and the vitally important use to which it puts those lands.

115. *Delgamuukw*, 3 S.C.R. at para. 14 (Can.).

For example, the origins of the ancient ecosystem at Fairy Creek date back thousands of years, perhaps to the last ice age, around 10,000 years ago.[116] During that time, the ecosystem lived and evolved as part of the land, while maintaining an intimate interrelationship with the global environment. It is not only the life force of billions of living beings; it is a vital component of the world's delicate climate balance that supports humanity's survival.

The billions of organisms currently living in ancient forests have received from their ancestors the legacy of a rich, diverse, and complex ecosystem. Humanity has also inherited a legacy from the forest's ancestors. Humanity has received, but is in the process of destroying, the legacy of a moderate climate, to which the forest contributes by maintaining a balance of greenhouse gases in the atmosphere. Over millennia, ancient forests in Canada have worked continuously to maintain a stable and livable environment. They have removed and transformed millions of tons of carbon dioxide and used the byproducts to create and support life within their ecosystems.

The scientific evidence tells us that, once destroyed, these ancient ecosystems are lost forever. The logging kills the land's life force, established over millennia. Further, from a climate change perspective, the forest will no longer remove carbon dioxide from the atmosphere, and, over an unnaturally short period of time, substantial amounts of its carbon stores will be released back into the atmosphere. In other words, at a time when humanity is searching for ways to reduce the atmospheric concentration of greenhouse gases, the logging of an ancient forest increases it.

Finally, in addition to the legal principles and science of climate change discussed above, recognition of Ancient Forest Rights may also find support in the historic traditions of Aboriginal People. For millennia before British colonization, Aboriginal People recognized the importance of protecting forests through concepts of reciprocity, respect, balance, and connection to nature and the land. The Assembly of First Nations writes:

> First Nations peoples' have a special relationship with the earth and all living things in it. This relationship is based on a profound spiritual connection to Mother Earth that guided indigenous peoples to practice reverence, humility, and reciprocity. It is also based on the subsistence needs and values extending back thousands of years. Hunting, gathering, and fishing to secure food includes harvesting food for self, family, the elderly, widows, the community, and for ceremonial purposes. Everything is taken and used with the understanding that we take only what we need, and we must use

116. Old Growth Technical Advisory Panel, OG TAP Old Growth Deferral: Background and Technical Appendices, 3 (Province of British Columbia, 2021), https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/stewardship/old-growth-forests/og_tap_background_and_technical_appendices.pdf [https://perma.cc/N3GH-8LAR]; David Tindal, *Why people are risking arrest to join old-growth logging protests on Vancouver Island*, The National Post (May 28, 2021), https://nationalpost.com/pmn/news-pmn/why-people-are-risking-arrest-to-join-old-growth-logging-protests-on-vancouver-island [https://perma.cc/GV23-WN5U].

> great care and be aware of how we take and how much of it so that future generations will not be put in peril.[117]

Ongoing efforts in Canada toward reconciliation have led, in some circumstances, to the recognition of certain First Nations as stewards for ancient ecosystems.[118] To the extent First Nations are in a position to speak for the forest in accordance with their traditional practices and customs, there may be no need to consider Ancient Forest Rights as distinct from the nation's existing rights.

In certain circumstances, however, recognition of Ancient Forest Rights distinct of a First Nation's rights or title may be important. For example, application of Ancient Forest Rights could prevent the irrevocable loss of an old growth forest while an ongoing dispute or negotiation over Aboriginal rights or title proceeds (which may take many years to resolve).[119] Ancient Forest Rights could also be engaged to protect an old growth forest from logging activities inconsistent with pre-existing Aboriginal practices, traditions and culture, whether undertaken by a forestry company, government or a First Nation entity.[120]

The 2004 Supreme Court of Canada decision of *Haida Nation v. British Columbia (Minister of Forests)*[121] provides useful context to illustrate how Ancient Forest Rights could be applied within the existing legal framework of Aboriginal rights and title. The circumstances before the court were as follows:

> The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.
>
> The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second growth forest. In some areas, old-growth forests can still be found. …
>
> The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers

117. *Honouring Earth*, Assembly of First Nations, https://www.afn.ca/honoring-earth [https://perma.cc/M29X-MC8M] (last visited Oct. 20, 2022).

118. For example, the Gitanyow Hereditary Chiefs have established an environmental and cultural monitoring role in teh Lax'yip territory: https://www.gitanyowchiefs.com/programs/wildlife [https://perma.cc/8DX2-T89D].

119. *See Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (Can.).

120. Recognition of Ancient Forest Rights could also prevent the Province from using the potential financial benefits of logging old growth forests as a negotiating chip in negotiations with First Nations relating to Aboriginal rights and title.

121. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (Can.).

> judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.
>
> The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.[122]

The court held that because the Haida had not proven their claims for rights or title, they were not the final decision-maker with respect to the future of the forests. The Haida's strong claim, however, entitled them to be consulted before decisions regarding future logging were made. History has revealed that this right to be consulted, while valuable, was inadequate to prevent the irrevocable loss of old growth forest on the Haida lands. In 2017, the logging rights to sacred cedar forests on the Haida's traditional territories were sold against the wishes of Haida.[123]

Recognition of Ancient Forest Rights could fill this gap. These rights provide a legal basis from which the court could have granted an injunction to protect the ancient forests at issue and also promoted the Haida's role as the stewards of nature on their traditional lands.

c. The Interrelationship Between Ancient Forest Rights, the Constitution, and Provincial Legislation

The final component of the legal analysis is to consider the interrelationship between Ancient Forest Rights and the constitutional and legislative basis for a provincial government to authorize the logging of ancient forests. From a practical perspective, recognition of Ancient Forest Rights will accomplish nothing, and the *status quo* will continue, if the provinces' decisions regarding the logging of ancient forests are not subject to Ancient Forest Rights.

At its core, this analysis presents two conclusions.

First, through the application of well-known constitutional principles, there is a sound legal basis to argue that provincial forest management legislation would be inoperable against, and unable to extinguish, Ancient Forest Rights.

Second, recognition of Ancient Forest Rights could address a constitutional and legislative gap that exists in the current framework through which our governments manage old growth forests' important role in mitigating climate change. In particular, while our federal government makes international declarations and agreements aimed at protecting the country's forests as a part of coordinated international efforts to mitigate climate change, it currently has no recognized constitutional jurisdiction to fulfill those promises.[124]

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122. *Haida Nation, supra* note 119, at paras. 2 and 3.

123. Andrew Kurjata, *On Haida, Logging Plans Expose Rift in Reconciliation*, CBC (Dec. 9, 2017), https://www.cbc.ca/news/canada/british-columbia/haida-gwaii-reconciliation-logging-clear-cut-1.4429532 [https://perma.cc/5U3P-KQYR].

124. See for example: UN Climate Change Conference UK 2021, *Glasgow Leaders'*

The great majority of Canada's forests fall on provincial lands and, therefore, under the Constitution responsibility for their management currently is the exclusive jurisdiction of the province. A court decision recognizing Ancient Forest Rights could provide a legal avenue to fulfill Canada's international commitments.

Two well-known principles of constitutional law can be used to achieve these outcomes. First, based on the national concern doctrine, our courts can declare ancient forests' role in mitigating climate change as a "national concern" and, in turn, rule that provincial governments, no longer have legislative jurisdiction to authorize their destruction. Second, through application of the constitutional doctrine of interjurisdictional immunity, courts can rule that current provincial laws which authorize the logging of ancient forests are *ultra vires*[125] and inoperable against Ancient Forest Rights.

A discussion of this legal analysis, along with the relevant case authorities, follows below. The analysis is not intended to be an exhaustive discussion of the constitutional law principles, but rather an overview of how these principles may apply to Ancient Forest Rights.

i. National Concern Doctrine

The Supreme Court of Canada has held that the national concern doctrine can apply where society's understanding of a historically provincial matter has in some way shifted, so as to bring out its inherently national character.[126] More specifically, through application of the doctrine, a provincial matter, which over time is recognized to have significant extra-provincial or global effects, can become a matter of national concern and therefore fall within exclusive federal jurisdiction.[127] Accordingly, while management of forestry resources on provincial lands has historically been an exclusively provincial matter,[128] there is now a strong basis for courts to find that ancient forests' role in mitigating the extra-provincial and global effects of climate change is a national concern and, therefore, Ancient Forest Rights should fall under exclusive federal jurisdiction.

Two Supreme Court of Canada decisions support this conclusion.

The 1988 decision of *Crown Zellerbach*[129] dealt with an analogous factual scenario, albeit in relation to pollution of provincial waters, rather than increasing greenhouse gas in our air. In that case, the Court considered whether preventing the extra-provincial and international effects of provincial marine

Declaration on Forests and Land Use (Nov. 12, 2021) https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use [https://perma.cc/RK4Q-P6F8].

125. If a statute is found to be *ultra vires*, it means the government has acted beyond its constitutional jurisdiction.

126. *Re Greenhouse Gas Pollution*, *supra* note 52, para. 136.

127. R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 (Can.).

128. Sections 92 and 92A, Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

129. R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 (Can.).

water pollution was of sufficient national concern to justify exclusive federal jurisdiction. In considering Ancient Forest Rights, a court will similarly need to consider whether mitigating the effects of climate change beyond provincial borders by protecting ancient forests located on provincial lands, is also a national concern.

The Court in *Crown Zellerbach* concluded that because of marine pollution's "predominantly extraprovincial as well as international character and implications" its regulation, even in provincial waters, was a valid national concern .[130] The court considered the following factors to justify federal jurisdiction over the polluting activities: (i) marine pollution is a distinct form of water pollution with its own scientific considerations; (ii) the federal government is a party to international agreements with commitments to control pollution of international marine waters; and (iii) inadequate provincial control of the pollution of their marine waters would have significant adverse extra-provincial and international effects. As discussed below, these same factors are applicable to Ancient Forest Rights.

The 2021 decision of *References re Greenhouse Gas Pollution Pricing Act* is also particularly relevant to the analysis of Ancient Forest Rights as it addresses the same subject matter—greenhouse gas emissions and climate change. In that decision, the court explained why the regulation of greenhouse gas emissions is a matter of national concern:

> To begin, this matter's importance to Canada as a whole must be understood in light of the seriousness of the underlying problem. All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world. This context, on its own, provides some assurance that in the case at bar, Canada is not seeking to invoke the national concern doctrine too lightly. The undisputed existence of a threat to the future of humanity cannot be ignored. . . .
>
> This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.[131]

Having satisfied this threshold question, the court went on to identify other factors that support federal jurisdiction: (i) greenhouse gases are a specific and precisely identifiable type of pollutant whose harmful effects are known; (ii) greenhouse gas emissions are predominantly extra-provincial and international in their character and implications; (iii) greenhouse gas is a diffuse atmospheric pollutant that causes global climate change; (iv) the federal government is a party to international agreements with commitments to address greenhouse gas emissions and climate change; and (v) the federal legislation is specific, limited and seeks to change behaviour to address climate change.

130. *Id.* para. 37.

131. *Re Greenhouse Gas Pollution*, *supra* note 52, paras. 167, 171.

Additionally, the court considered the impact of a province's failure to effectively address greenhouse gas pollution:

> [A] province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests. It is uncontroversial that GHG [greenhouse gas] emissions cause climate change. It is also an uncontested fact that . . . every province's GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life.[132]

In light of the similar considerations that arise in a constitutional analysis of Ancient Forest Rights, the courts' decisions in *References re Greenhouse Gas Pollution Pricing Act* and *Crown Zellerbach* provide a strong basis for finding Ancient Forest Rights fall under federal jurisdiction based on application of the national concern doctrine.

The threshold question of whether the protection of ancient forests to address climate change is a matter of national concern appears to be readily satisfied. The core purpose of recognizing Ancient Forest Rights is to minimize carbon dioxide concentration in the atmosphere and lower the risks of climate change. As such, the logging activities that destroy an ancient forest are directly analogous to the pollution-causing activities at issue in *Crown Zellerbach* and the industrial activities considered in *References re Greenhouse Gas Pollution Pricing Act*. They take place on provincial lands; however, their effects have significant global implications. As stated by the court in *References re Greenhouse Gas Pollution Pricing Act*: "[climate change is] a truly global pollution problem with grave extraprovincial consequences".[133]

Further, beyond this threshold question, the additional factors applied by the Court in both *Crown Zellerbach* and *References re Greenhouse Gas Pollution Pricing Act* are directly relevant to Ancient Forest Rights: (i) the nature of ancient forests' role in the reduction and storage of carbon dioxide, and the mitigation of climate change, has its own distinct scientific considerations; (ii) carbon dioxide is a specific and precisely identifiable type of pollutant whose harmful effects are known; (iii) atmospheric concentrations of carbon dioxide are predominantly extra-provincial and international in their character and implications; (iv) carbon dioxide is a diffuse atmospheric pollutant that causes

132. *Re Greenhouse Gas Pollution, supra* note 52, at para. 187.
133. *Re Greenhouse Gas Pollution, supra* note 52, at para. 211.

global climate change; (v) the federal government is a party to international agreements with commitments to address greenhouse gas emissions and climate change by protecting forests; and (vi) Ancient Forest Rights are specific, limited and seek to change behaviour to address climate change.

Accordingly, the Court's decisions in *Crown Zellerbach* and *References re Greenhouse Gas Pollution Pricing Act* provide a strong basis for finding Ancient Forest Rights fall under federal jurisdiction based on application of the national concern doctrine. If such a finding is made, then the next question is whether provincial legislation that authorizes the logging of ancient forests, and which therefore is directed at extinguishing Ancient Forest Rights, can continue to be viewed as *intra vires*[134] the province and constitutionally valid.

ii. Interjurisdictional Immunity

Canadian courts can apply the doctrine of "interjurisdictional immunity" to consider whether provincial legislation may extinguish Ancient Forest Rights. This doctrine insulates the core powers of each level of government from the operation of laws enacted by other levels of government.[135] The doctrine recognizes that valid, generally worded legislation enacted by one order of government cannot constitutionally be applied in contexts falling within a core area of another government's legislative jurisdiction.[136]Accordingly, if Ancient Forest Rights are, through the operation of the national concern doctrine, exclusively within federal jurisdiction, then provincial legislation cannot extinguish those rights.

More specifically, the provincial government of British Columbia has passed valid, generally-worded provincial legislation directed at the management of forestry resources.[137] Through the *Forest Act*,[138] the province grants rights to log forests on provincial lands through a scheme of licenses, agreements and permits. If this legislative scheme, however, authorizes activities that extinguish Ancient Forest Rights, i.e., the destruction of old growth forests, then those provincial laws can be said to have exceeded the province's constitutional jurisdiction and intruded upon a core area of federal legislative jurisdiction.

While the Supreme Court of Canada has held that courts should take a "restrained approach" to the application of interjurisdictional immunity,[139] the Court also stated that the circumstances to which interjurisdictional immunity

134. "Intra vires" means to be within the jurisdictional power of the government.

135. Rogers Commc'ns Inc. v. Châteauguay (City), 2016 SCC 23 [2016] 1 SCR 467 (Can.) para. 59.

136. Peter W. Hogg, Constitutional Law of Canada, § 15:16 (Carswell, 5th ed. 2007); *see also* Ordon Estate v. Grail, [1998] 3 S.C.R. 437 (Can.).

137. Haida Nation v. British Columbia (Minister of Forests) (1997) 45 B.C.L.R. (3d) 80, para. 36 (Can. B.C.C.A.).

138. Forest Act, RSBC 1996, c.157 (Can.).

139. *Re Greenhouse Gas Pollution*, *supra* note 52, at para. 124.

might apply will be guided by "situations already covered by precedent",[140] requiring a case-specific inquiry into whether the recognition of a particular matter of national concern is reconcilable with the division of powers in the scale of impact analysis.[141] In this regard, the Court's decisions in *Crown Zellerbach* and *References re Greenhouse Gas Pollution Pricing Act* provide a strong precedential basis for its application here, i.e., to support a finding that protection from grave extra-provincial and international consequences of greenhouse gas pollution—achieved through the recognition of Ancient Forest Rights—is a purpose for which the application of interjurisdictional immunity is appropriate. As discussed above, in *Crown Zellerbach*, the court applied interjurisdictional immunity in an analogous context. Further, while the Court in *References re Greenhouse Gas Pollution Pricing Act* did not apply the doctrine, the decision confirmed the importance of recognizing federal jurisdiction in similar circumstances.[142]

A determination of Ancient Forest Rights' place within the federal and provincial division of powers also raises issues unique from those considered in *Crown Zellerbach* and *References re Greenhouse Gas Pollution Pricing Act*. Instead of addressing whether existing federal legislation is intruding upon provincial jurisdiction (as was the issue in both of those cases), the court must analyze whether provincial legislation can extinguish an ancient "right" that falls under federal jurisdiction.

This type of constitutional evaluation is uncommon, but not unknown. In *Delgamuukw*, for example, the court undertook this analysis in the context of Aboriginal rights and title.[143] The Court's analysis in *Delgamuukw* can be applied, by analogy, to Ancient Forest Rights. In both circumstances, the issue is whether provincial legislation can extinguish a right that falls within federal jurisdiction.

In *Delgamuukw*, the province argued that by exercise of its legislative powers in relation to crown lands, it had extinguished Aboriginal rights and title. The court disagreed. It held that as Aboriginal rights and title were a matter that fell within federal jurisdiction, they could only be extinguished by federal action.[144] The provincial legislation which sought to extinguish Aboriginal rights and title was held to be *ultra vires* and therefore inoperative against such rights. The court held as follows:

> The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands . . . , operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for

140. Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3 (Can.) para. 77.

141. *Re Greenhouse Gas Pollution*, *supra* note 52, para. 124

142. *Id.* The Court had available to it a different remedy, which made the application of interjurisdictional immunity unnecessary. The Court applied the paramountcy doctrine to protect the federal jurisdiction at issue.

143. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.) paras. 172–176.

144. *Id*. at 173-175.

> special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction . . .
>
> [A] provincial law could never, *proprio vigore*[145], extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.[146]

Similarly, it can be argued that federal jurisdiction over Ancient Forest Rights through application of the national concern doctrine operates to preclude provincial laws that seek to extinguish those rights. More specifically, where a provincial law authorizes the logging of an ancient forest, and hence intends to extinguish its Ancient Forest Rights, that intention would take the law outside provincial jurisdiction.[147]

iii. The Interrelationship Between Ancient Forest Rights and Provincial Forestry Legislation

Finally, just as the courts' constitutional analyses of Aboriginal rights and title must respect the complexity of modern society and recognize that effective regulation requires cooperation between interlocking federal and provincial schemes,[148] so too must a court's recognition of Ancient Forest Rights. Application of Ancient Forest Rights cannot lead to legislative vacuums or patchwork regulation of forests, which would make it difficult to deal effectively with problems such as pests and fires.

Courts have a legal tool to address this concern. Courts can "read down" provincial legislation to the extent it conflicts with a matter of national concern. Accordingly, in circumstances in which provincial forest management legislation conflicts with Ancient Forest Rights, the court can allow the provincial legislation to remain in force and operable in all respects except those directed at the destruction of ancient forests.

An example of this approach is in the area aeronautics. Our courts have held that through application of the national concern doctrine, the management of airports, aircrafts and air travel is a matter of exclusive federal jurisdiction. In recognition of this exclusive federal jurisdiction, courts have "read down" valid provincial legislation where it tread upon the area of aeronautics.[149] For

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145. *Proprio vigore* is Latin for "by its own strength" or "by its own force".

146. *Delgamuukw*, 3 S.C.R. at para. 179.

147. *Id.* at para. 180 (drawing "a distinction between laws which extinguished aboriginal rights, and those which merely regulated them."). Provincial laws directed at extinguishment are *ultra vires* and inoperable. Provincial laws which regulate, and potentially infringe upon, an Aboriginal right require a different analytical approach. A provincial law that infringes upon an Aboriginal right can be justified if the province shows a "compelling and substantial" legislative objective. This infringement analysis is not applicable to a circumstance in which provincial laws authorize the logging of an ancient forest. These laws do not seek to merely regulate Ancient Forest Rights; their application leads to direct extinguishment.

148. Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 257 (Can.) para 148.

149. Greater Toronto Airports Authority v. Mississauga (City), [2000] 192 D.L.R. (4th)

example, in *Greater Toronto Airports Authority*, the Ontario Court of Appeal did not strike down the provincial building code on the basis that its scope was too broad. Rather, the court read down the legislation so that it remained in force, but did not apply to the construction of an airport. In doing so, the court stated:

> A provincial law, valid in most of its applications, must be read down not to apply to the core of the exclusive federal power. The application of this principle differs from the paramountcy doctrine in that it does not require conflicting or inconsistent federal legislation, or even the existence of federal legislation.[150]

This same legal approach can also be applied to address the interrelationship between Ancient Forest Rights and provincial forest management legislation. In particular, general provincial regulatory legislation aimed at managing ancient forests in a way that protects their ecosystems, such as addressing pest invasions or preventing forest fires, can remain operable,[151] whereas legislation directed at the destruction of ancient forests and negatively impacting the climate would be read down.

E. *Who Speaks for an Ancient Forest?*

While ancient forests such as Fairy Creek have highly sophisticated communication networks,[152] they obviously cannot speak for themselves in a court of law. Accordingly, if Ancient Forest Rights are recognized, who is to speak for the forest? In other words, who should be legally authorized to make the decisions necessary to advance the ancient forest's position?

This is a question that engages the law of both private interest and public interest standing.

1. Private Interest Standing for An Ancient Forest

The law recognizes private interest standing for a plaintiff who alleges "interference with a private right and special damage peculiar to oneself".[153] In most cases standing is not in issue. If a plaintiff has a reasonable cause of action against a defendant, then the plaintiff has standing. The Supreme Court of Canada has recognized the interrelationship between the existence of a cause of action and standing:

> The issues of standing and reasonable cause of action are obviously closely related, and . . . tend in a case such as this to merge. Indeed, I question

443 (Can. O.N.C.A.); Quebec (Att'y Gen.) v. Lacombe, 2010 SCC 38, [2010] 2 S.C.R. 453 (Can.); Johannesson v. West St. Paul (Rural Municipality), [1952] 1 S.C.R. 292 (Can.).

150. *Greater Toronto Airports Authority*, 192 D.L.R. (4th) (Can.) para. 39.

151. *Tsilhqot'in Nation*, 2014 SCC 44, [2014] 2 S.C.R. 257 (Can.) para 147 (discussing this approach).

152. Suzanne Simard, *Mycorrhizal Networks Facilitate Tree Communication, Learning and Memory*, *in* Memory and Learning in Plants 191 (Frantisek Baluska, Monica Gagliano, & Guenther Witzany eds., 2018).

153. Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 (Can.).

> whether there is a true issue of reasonable cause of action distinguishable, as an alternative issue, from that of standing.[154]

The legal analysis set out in this Article establishes the basis for an ancient forest to have legal rights. Accordingly, based on the well-established legal principle discussed above, an ancient forest can assert a cause of action based on interference with those rights and special damage suffered by the forest. In other words, if Ancient Forest Rights are found to exist, then an ancient forest could have standing to be a plaintiff in a lawsuit.[155]

The remaining question is: who should be legally authorized to make the decisions necessary to advance the ancient forest's case? There is no legal authority that provides the answer to this question. However, the law relating to public interest standing, discussed below, provides guidance.

2. Public Interest Standing for a Representative of an Ancient Forest

Public interest standing allows parties without private rights at stake to bring cases respecting public interest matters in support of the "legality principle": the idea that government action must be based in the law, and there must be a reasonable and effective means of challenging the legality of government action. The concept of public interest standing provides a legal basis for an individual or organization to advance a case asserting Ancient Forest Rights on behalf of an ancient forest. Such a case might, for example, seek an injunction to prevent the logging of an ancient forest within the context of an action that challenges the constitutionality of the forest management legislation authorizing that logging.

The leading case on public interest standing is the 2012 Supreme Court of Canada decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society.*[156] In that case, a public interest group sought standing to challenge legislation directed at sex workers in the city of Vancouver. In its decision to grant standing, the Supreme Court of Canada discussed the three factors to be considered: (i) whether the case raises a serious justiciable issue; (ii) whether the plaintiff has a genuine interest in the litigation; and (iii) whether the case is a reasonable and effective means to bring the challenge to court. How each factor applies in the context of a case based on Ancient Forest Rights is discussed below.

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154. *Id.* at pp. 636.

155. Notably, in the context of developing of the law relating to Aboriginal rights and title, the courts were faced with determining whether a First Nations band – an entity not previously recognized in law – should be granted standing. In Roberts v. R., [1991] 3 F.C. 420 (Can. Fed.T.D.) at 430 the court stated, "There seems to be no logical reason why Indian Bands, as such, should not possess the same rights to sue as corporations . . . Although no general statutory enactment so provides, common sense seems to dictate it." Upon recognition of Ancient Forest Rights, the same common sense approach can be applied to recognize standing for ancient forests.

156. Canada (Att'y Gen.) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 524 (Can.) (*Downtown Eastside Sex Workers*).

a. A Serious Justiciable Issue

The legal analysis of Ancient Forest Rights set out in this Article presents the basis for a serious justiciable issue. For the reasons discussed, there exist sound legal bases for recognizing Ancient Forest Rights and for finding provincial forestry management laws *ultra vires* with respect to the logging of ancient forests.[157]

b. A Genuine Interest in The Litigation

This factor is concerned with whether the plaintiff has a real stake in the proceedings and is engaged with the issues they raise.[158]

Every Canadian citizen has an interest in addressing climate change. Every Canadian citizen has an interest in the court's determination of whether provincial legislation which authorizes the logging of ancient forests is *ultra vires*. The Supreme Court of Canada has stated:

> Today, we are more conscious of what type of an environment we wish to live in and what quality of life we wish to expose our children [to]. . . . This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society".[159]

Further, in proceedings in which the issues relate to potentially *ultra vires* legislation, such as in legal proceedings relating to Ancient Forest Rights, the courts are inclusive in their approach to granting public interest standing. The Supreme Court of Canada has emphasized the importance of ensuring the right of Canadian citizens to challenge the constitutionality of legislation that potentially affects them. The Court commented:

> . . . in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "*it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication*" (p. 145 (emphasis added [by the Court]))[160]

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157. Notably, the legal threshold to satisfy the requirement of "serious justiciable issue" is low: a serious justiciable issue is one that is appropriate for judicial determination and clearly not frivolous: *Canadian Society for the Advancement of Science in Public Policy v Henry,* 2022 BCSC 724 at para. 34 (Can.).

158. *Downtown Eastside Sex Workers*, 2012 SCC 45 (Can.) para. 43.

159. 114957 Canada Ltee v. Hudson (Town), 2001 SCC 40 (Can.) para. 1, *citing* Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 (Can.); Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R 3 (Can.).

160. *Downtown Eastside Sex Workers*, 3 S.C.R. 675 (Can.) para. 31.

The Courts' comments in this regard are supportive of the argument that any Canadian citizen ought to be granted standing to challenge legislation that contributes to the destruction of the natural environment and increases the global effects of climate change. To hold otherwise would effectively immunize such legislation from challenges brought by Canadian citizens with a real stake in the proceedings. Accordingly, it appears this factor could be readily satisfied in a case relating to Ancient Forest Rights.

c. A Reasonable and Effective Means to Bring The Challenge to Court

This factor provides the court with discretion to consider whether the party seeking standing is appropriately qualified to advance the case and whether litigation is the most appropriate avenue to address the issue. Considerations include: (i) the plaintiff's capacity to bring forward a claim such as the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting; (ii) whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action; (iii) whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination; and (iv) the potential impact of the proceedings on the rights of others who are equally or more directly affected.[161]

None of these considerations present a bar to an appropriate party advancing a claim based on Ancient Forest Rights. Rather, and importantly, they establish a basis for the court to ensure in a particular case that an ancient forest's rights are advanced in a *bona fides*[162] and competent manner, and that the interests of other interested parties are heard.

For example, a First Nation with claims to Aboriginal rights and title to the lands at issue may wish to take a position in a case based on Ancient Forest Rights. Many First Nations will have traditions, practices, and culture tied to the ancient forests on their traditional lands. Some also will have significant business and economic interests tied to the forestry industry. These interests need to be considered. Importantly, the purpose of introducing the concept of Ancient Forest Rights is not to undermine efforts towards resolving claims for Aboriginal rights and title or reconciliation. Rather, recognition of Ancient Forest Rights is proposed in order to promote the adoption of an ecocentric perspective and application of concepts of reciprocity, respect, balance, and connection to nature and the land within a context that accounts for the vital importance of ancient forests in addressing climate change.[163]

161. *Id.* at para. 51.

162. "Bona fides" means to be advanced in good faith or a legitimate purpose.

163. Ancient Forest Rights would protect only that small percentage of vital and non-renewable ancient forest that remains. Their recognition within a particular area would not bring an end to logging of second and third growth forests and the associated economic development for First Nations and others.

3. Other Options for Representing an Ancient Forest

In British Columbia, the court has broad powers under the Supreme Court Rules and its *parens patriae*[164] jurisdiction to protect vulnerable parties who are not legally competent to look after their own interests and appoint an appropriate litigation representative.[165] The court's *parens patriae* powers can also be exercised to appoint an *amicus curiae*[166] or take other steps in the best interests of such a party. The court's procedural rules[167] also provide for the appointment of a *guardian ad litem*.[168] While these powers have never been applied to a non-traditional entity such as an ancient forest, if Ancient Forest Rights are recognized, then there is no reason these protective powers cannot be exercised to ensure an appropriate representative is appointed to speak on the forest's behalf.

F. *A Future with Ancient Forest Rights*

Analysis of any proposed change to the law requires a consideration of its future impact. What will happen if the courts recognize Ancient Forest Rights?

First, our legal institutions and rule of law will not be undermined. While recognition of Ancient Forest Rights would mark a substantive shift in the perspective of Canadian courts, the change represents an incremental expansion of established legal principle.

Ancient Forest Rights will create a legal path, respectful of the rule of law, to advance a challenge in court to prevent logging of old growth forests based on considerations relating to climate change. In other words, rather than continuing the cycle of protester arrests and associated court proceedings in which protesters raise, and the courts ignore, the effects of logging on climate change, the recognition of Ancient Forest Rights would enable this important issue to be directly adjudicated.

The court process will also ensure all interests relevant to the debate over whether an ancient forest should survive will have an opportunity to be heard. Recognition of Ancient Forest Rights will not silence or disregard other interests; recognizing these rights will simply provide a voice for the interests of the ancient forest, placing them on the same legal playing field with those of other interested parties.

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164. *Parens patriae* is Latin for "parent of the country or homeland". Parens patriae is the inherent jurisdiction of the court to protect those who cannot protect themselves.

165. E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388 (Can.), paras. 73–75.

166. *Amicus Curiae* is Latin for "friend of the court". It refers to an individual or organization who is not a party to a legal case, but who is permitted to assist a court by offering information, expertise, or insight that has bearing on the issues in the case.

167. Supreme Court Civil Rules, B.C. Reg. 149/2022, Rule 6(2) (Can.).

168. *Guardian ad litem* is Latin for "guardian for the suit". In law, it refers to the appointment of a party to act in a lawsuit on behalf of another who is deemed incapable of representing themselves.

Importantly, recognition of Ancient Forest Rights will also expose the basis for a province's decision to log an ancient forest. History tells us that judicial scrutiny of provincial decision-making can reveal a lack of any compelling justification. In the *Tsilhqot'in Nation* case, for example, the court found:

> [T]he issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. *I agree with the courts below that no compelling and substantial objective existed in this case*. The trial judge found the two objectives put forward by the Province—the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation—were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle [emphasis added].[169]

At a time when climate change is "a threat of the highest order to the country, and indeed to the world",[170] provincial decision-making that worsens climate change, and which lacks any compelling or substantive objective, cannot be tolerated.

Addressing Ancient Forest Rights through our courts' processes will provide access to an effective, timely, and targeted remedy.[171] Our world leaders and scientists have made it clear that climate change needs to be addressed now. Destruction of ancient forests, and the associated detrimental impact on climate change, is also happening now. To avoid irreparable harm, neither the forests, nor humanity, can wait years for the outcome of future elections, further legislative debate, or the conclusion of ongoing private negotiations[172].

For years, IPCC scientists have advised governments that preservation of old growth forests is a key component to mitigating climate change.[173] The

169. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 126 (Can.).

170. *Re Greenhouse Gas Pollution*, *supra* note 52, at para. 167.

171. As discussed above, an ancient forest could seek an injunction to stop logging, or a judicial review to overturn a government decision to authorize logging.

172. The reference to private negotiations relates to ongoing negotiations between First Nations, the Province and the Federal Government regarding Aboriginal title and rights to lands on which ancient forests exist. The discussion earlier in this Article regarding the sale of logging rights to a sacred forest on the Haida People's lands, illustrates how destruction of ancient forests can continue while these important negotiations are ongoing.

173. *See* Intergovernmental Panel on Climate Change [IPCC], Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007 (B. Metz et al eds., 2007), https://archive.ipcc.ch/publications_and_data/ar4/wg3/en/contents.html [https://perma.cc/NBV6-UK57]: "The theoretical maximum carbon storage (saturation) in a forested landscape is attained when all stands are in old-growth state, but this rarely occurs as natural or human disturbances maintain stands of various ages within the forest. . . . Reduced deforestation and degradation is the forest mitigation option with the largest and most immediate carbon stock impact in the short term per [hectare] and per year globally . . . because large carbon stocks . . . are not emitted when

importance of stopping deforestation was recently addressed at the November 2021, COP26 global leaders' summit. On November 2, one hundred and twenty countries, including Canada, signed the Glasgow Leaders' Declaration on Forests and Land Use in which it was agreed:

> We therefore commit to working collectively to halt and reverse forest loss and land degradation . . .
>
> We will strengthen our shared efforts to: Conserve forests and other terrestrial ecosystems and accelerate their restoration; . . .
>
> Together we can succeed in fighting climate change, delivering resilient and inclusive growth, and halting and reversing forest loss and land degradation.[174]

Yet, on the same day Canada signed this declaration, clear cut logging at Fairy Creek continued under the protection of a court ordered injunction. Dozens of old growth trees were felled.

By taking the step of recognizing Ancient Forest Rights, our courts can start the process of adapting the law to meet the demands on society caused by climate change. With the recognition of Ancient Forest Rights, ancient forests, such as those at Fairy Creek can be saved, and the words of our world leaders can be actualized.

IV. Final Words From a Father and Daughter

It bears repeating that the Fairy Creek land defenders, our world leaders, and the Supreme Court of Canada all agree that climate change is a threat of the highest order. While our world leaders and the Supreme Court have expressed their views in strong words, destruction of rare ancient forests—and the irrevocable loss of their unique capacity to transform and store greenhouse gas—continues. The protesters at Fairy Creek, including Evy, took action, but our government and courts have told them those actions are against the law.

One of the first articles my legal research uncovered was written by Dr. David Suzuki some forty years ago. Dr. Suzuki wrote a prescient message to the legal profession. His article forewarned of a time when the law and science would become disconnected. While he did not identify climate change by name, he was concerned the law was ill-prepared to adapt to new scientific knowledge and discoveries in a rapidly changing world:

> . . . I wonder whether we have the mechanics for even beginning to anticipate the nature of these technological and scientific impacts on society. How are you as professionals in the application of law going to deal with them? I wonder whether our existing structures and organizations are really equipped to handle them. And yet there is a revolution happening right now.

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deforestation is prevented."

174. UN Climate Change Conference UK 2021, *Glasgow Leaders' Declaration on Forests and Land Use* (Nov. 12, 2021) https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use [https://perma.cc/RK4Q-P6F8].

> It is going on, day after day, and it has to be dealt with in some way. Perhaps it is a start when you, as non-scientists, become as aware of what is going on in this area and I, as a scientist, should become more aware of what the constraints and possibilities are in your profession. If we begin to demystify our activity and make it more accessible to each other and to the general public, maybe we can muddle our way through the coming change.[175]

The events at Fairy Creek are an example of a disconnect between our legal structures and organizations and current scientific knowledge. Based on the science, *we know* that preservation of the Fairy Creek ancient forest will assist humanity with its struggle against climate change and *we know* its destruction will worsen climate change. Yet, with climate change posing a threat of the highest order, destruction of this ancient forest continues.

It is hoped that the discussion in this Article contributes to narrowing the gap between the science of climate change and the law. It is further hoped that the concept of Ancient Forest Rights provides a basis for further legal debate regarding our courts' role in addressing climate change.

In our latest conversation, Evy wondered what could be done to bring the case for Ancient Forest Rights to court. So, perhaps, our story will continue.

As this journey started with Evy, I will leave the final words to her.

> Living in the forest is to experience abundant life.
>
> Colourful fungi express themselves, from the vibrant orange peel fungus to the deep red lobster mushrooms. Sunrises are accompanied by bird calls of dozens of families, joined occasionally by the distinctive whistle of the endangered marbled murrelet. Blackberry, raspberry, and salmonberry patches feed fauna. Violet foxgloves pop up in sunny clearings, full of colour but poisonous to the touch. Salmon fight up the rivers that cut through the forest. They lay their eggs and then die from exhaustion, becoming food for the bears and otters. Nutrients from the salmon's bodies will return to soil around the river, where the mycelium network will absorb and disperse them across the forest. What was once a salmon is now travelling up the trunk of an 800-year-old red cedar, feeding the green sprigs at the tree's tip. Standing over a hundred feet high, the branches of this old cedar are home to an endangered western screech owl. Below, its tree limbs drip with Old Man's Beard lichen.
>
> The old growth forest at Fairy Creek is an amazing vibrant life force.
>
> It needs our protection.

175. David Suzuki, *Science and the Law*, 37 Advoc. (B.C.) 113, (1979).