

ANIMALS AND SECTION 7: HOW EARLY *CHARTER* JURISPRUDENCE SUPPORTS PROTECTIONS FOR ANIMALS

SAMANTHA SKINNER

ABSTRACT

In Canadian law, animals hold an interesting legal status. On a metaphorical spectrum from property to personhood, some consider animals to be (1) pure property, (2) somewhere in the middle of the spectrum, or (3) a little bit of both property and person. The leap to full personhood is regarded as highly aspirational and not realistically viable at the present time. Despite this, advocates continue to develop novel legal arguments which shift animals closer to achieving full legal personhood, and the benefits which stem therefrom.

This paper adds a novel – and admittedly highly aspirational – approach to animal personhood: entitlement to protections under section 7 of the *Canadian Charter of Rights and Freedoms*. Early Supreme Court jurisprudence defining ‘everyone’ within section 7 is explored. Although the conclusion of the Court states that only humans are deserving of section 7 protections, the *ratio* behind that conclusion leaves room for an argument for nonhuman animals to be included. Using the language of the Court, I argue that section 7 not only protects the human experience, but protects the *sentient* experience. Therefore, all sentient creatures are deserving of the protection of life, liberty, and security of the person.*

* An earlier version of this paper was presented at the Canadian Animal Law Conference (September 13th 2020) on the panel “Accounting for Animal Interests” and benefitted from the discussions therefrom.

1 INTRODUCTION

In June 2019, three historic pieces of federal legislation were passed which increased protections for certain animals in Canada.¹ Following this momentum, Senator Sinclair introduced the *Jane Goodall Act (Bill S-218)* in the Senate in November 2020, which would also increase protections for certain animals.² Unfortunately, none of the new legislation recognizes the sentience of animals. Although criminalizing specific human actions which harm animals does provide some legal recourse for those who abuse animals, there are necessary additional steps to further protect animals from abuse and harm from humans. Indeed, the resounding lack of protections for animals is quickly becoming a subject of Canadian scholarship.³

There is incredible merit for these small and incremental bills which signal that the Canadian government recognizes that some animals are more than things – that they are protection-deserving creatures. The first 2019 bill criminalized the captivity of whales and orcas; the second bill ended Canada’s participation in the shark finning industry; and the third bill added to the existing laws criminalizing the abuse of animals in sexual and fighting situations.⁴ *Bill S-218* would further criminalize the captivity of great apes and elephants.⁵ In criminalizing these human actions, the government *de facto* increased protections for the targeted animals. Although these small and targeted bills have been successful at being passed at the governmental level, the litigation side of the animal welfare movement is not forgotten.

One attractive way to enhance animal protections would be to progress the status of animals beyond the legal definition of property. In this way, rather than addressing human action and punishing humans for mistreating animals, the animals would have a right to legal protections. I am particularly inspired by litigators such as Clayton Ruby for Lucy the Elephant,⁶ Gary Grill and James Silver in the Pig Trial,⁷ and the work of the Nonhuman Rights Project in the US.⁸ Litigation has fought to give animals a voice in court as well as advance the legal status of animals in the process. Their efforts are noble and aspirational for establishing animal protections and animal rights at law.

There is merit in both the small and incremental protections for animals and pursuing larger aspirational legal protections for nonhuman animals. Both of these methods exist to advance the legal status of animals in Canada. In this paper, I attempt to add a novel – and admittedly highly aspirational – approach to animal personhood and animal legal rights in Canada. My research question asks whether animals could ever have

¹ See *Ending the Captivity of Whales and Dolphins Act*, S-203 2019, c. 1; Received Royal Assent June 21st, 2019; *An Act to Amend the Fisheries Act and other Acts in Consequence*. Bill C-68 2019, c. 14; Received Royal Assent June 21st, 2019; *An Act to Amend the Criminal Code (bestiality and fighting)*. Bill C-84 2019, c. 17; Received Royal Assent June 21st, 2019.

² *Bill S-218, Jane Goodall Act*, passed first reading November 17th 2020.

³ See, generally, Lesli Bisgould, *Animals and the Law* (Toronto; Ontario: Irwin Law Inc, 2011); Peter Sankoff, Vaughan Black, & Katie Sykes, *Canadian Perspectives on Animals and the Law* (Toronto; Ontario: Irwin Law Inc, 2015).

⁴ *Supra* note 1.

⁵ *Supra* note 2.

⁶ See *Reece v Edmonton (City)*, 2011 ABCA 238; *Reece v Edmonton (City)*, 2010 ABQB 538.

⁷ See *R v Krajnc*, 2017 ONCJ 281.

⁸ See the litigation efforts, generally, at <https://www.nonhumanrights.org/litigation-2/>

legal protections under section 7 of the *Canadian Charter of Rights and Freedoms*, which states “everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁹ In doing so, I explore the early *Charter* jurisprudence which defines the term ‘everyone’ and describes who falls under the protective umbrella of ‘everyone’ for the purposes of section 7.

2 ANIMALS AS MEMBERS OF SOCIETY IN THE CONSTITUTIONAL STATE

Before getting into the discussion of section 7, this section explores selected academic works which addresses (a) animals and constitutions, and (b) the spectrum/continuum of the legal status of animals from property to personhood.

2.1 ANIMALS IN THE CONSTITUTIONAL STATE

In her thorough article “Animals and the Constitution”, Jessica Eisen explores eight constitution-based nations which include animals in their constitutions.¹⁰ The constitutional states include Switzerland, India, Brazil, Slovenia, Germany, Luxembourg, Austria, and Egypt. She describes underlying constitutional motivations for animal protections, and explores various institutions which either advance or frustrate animal welfare. In doing so, she presents legal institutions through practical and theoretical politics.¹¹ Regarding motivations for constitutional animal protections, Eisen recognizes a wide range of human-driven interests throughout the world which have influenced lawmakers, including religion and deontology,¹² human virtue and human experience,¹³ minority persecution,¹⁴ and the animal experience.¹⁵ Despite these motivations for constitutional animal protections, Eisen returns to the fact that constitutions and jurisprudence primarily address human action and the human experience.¹⁶ This is consistent with laws addressing animals in Canada. For example, the *Criminal Code* does not state that animals have the right to be free from harm, rather, it criminalizes human acts of cruelty towards animals.¹⁷

With reference to Walter Murphy’s writings on human dignity as a core principle of constitutional theory, Eisen goes on to illustrate two gaps in constitutional

⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, at s. 7. [*Charter*]

¹⁰ Jessica Eisen, “Animals and the Constitution”, (2018) *International Journal of Constitutional Law*, 15:4, 909.

¹¹ *Ibid* at p. 924.

¹² *Ibid* at p. 913.

¹³ *Ibid* at p. 914.

¹⁴ *Ibid* at p. 916.

¹⁵ *Ibid* at p. 918.

¹⁶ *Ibid*.

¹⁷ *Criminal Code*, R.S.C., 1985, c. C-46 at s. 445 - 447. [*Criminal Code*]

practice.¹⁸ The first is the *citizen-subject gap*, where although all persons are the subjects of constitutions, marginalized humans often cannot fully engage with the legal systems creating those protections (i.e. children and persons with reduced mental capabilities).¹⁹ Although not humans, animals fall into the *citizen-subject gap*, whereby the state imposes laws and limits on how human ‘citizens’ interact with animal ‘subjects’. As marginalized groups began establishing their human dignity through human rights claims, the dominant enforcers of constitutional protections were forced to increase the amount of marginalized groups and individuals who could benefit from those constitutional protections.²⁰ Therefore, in addition to the *citizen-subject gap*, there is also a *enforcer-beneficiary gap*, where those enforcing the legal protections act as gatekeepers for those who may benefit from the protections.²¹

Both gaps raise problems of representation and accountability with the legal systems of the constitutional state. Eisen uses the example of legal representatives of children in class action litigation.²² It is difficult for advocates to advance the position of a class of individuals who do not speak the language of the law and cannot clearly articulate their suffering in the language the law demands.²³ This analogy applies easily to animals, as although they can communicate, they cannot do so in a way that a court can easily recognize.

As animals are subjects and beneficiaries, not citizens or enforcers of law, animals remain vulnerable in society. Because animals cannot engage in electoral politics or legal proceedings, constitutional protections become necessary to address both the *citizen-subject* and the *enforcer-beneficiary gaps*.²⁴ In order to advance the law and protect such vulnerable individuals, the law must develop protective doctrines as transformative, or in some way remedial.²⁵ In doing so, institutions must develop in such a way that allows for promotion of animal interests while decreasing the potential for continued abuse of this profoundly vulnerable group.²⁶ Unlike the suffragettes or the civil rights movement, the state cannot wait for animals to raise their own voices and challenge the systems in place.

Animals are a vulnerable group in all societies, even the ones which include animal protections in their constitutions. In Canada, the term ‘animal’ does not appear

¹⁸ Eisen, *supra* note 10 at p. 933. See also Walter Murphy, “Consent and Constitutional Change” in *Human Rights and Constitutional Law: Essays in Honor of Brian Walsh*, 123 (James O’Rielly ed., 1992).

¹⁹ *Ibid* at p. 925 – 926.

²⁰ *Ibid* at p. 937.

²¹ *Ibid*.

²² *Ibid* at p. 939.

²³ I distinguish these concepts because there are non-legal and non-verbal ways of communicating, for example, painful suffering. A typical adult, a young infant, an animal, and a tree can experience cancer and communicate that they are suffering, whether through words, cries, or physical abnormalities. Although an animal cannot say “my caretaker breached their duty of care which caused me to unnecessarily suffer”, does not mean that the law should ignore clear indicators of harm and suffering.

²⁴ Eisen, *supra* note 10 at p. 943 - 944.

²⁵ *Ibid* at p. 946. Transformative constitutionalism comes from South Africa’s post-apartheid approach to constitutionalism as a revolution in favour of substantive social and economic equality. See Justice Pius Langa, “Transformative Constitutionalism” (2006) 17 *Stellenbosch L. Rev.* 351. Whereas remedial constitutionalism has been associated with Canada’s *Charter* jurisprudence. Such was stated by the Supreme Court in *Reference re Supreme Court Act, ss S and 6*, 2014 SCC 21 at pp. 88 - 89.

²⁶ Eisen, *Ibid* at p. 949 – 950.

anywhere in our constitutional documents. Therefore, research and litigation has attempted to define the status of animals in Canada with various conclusions.

2.2 THE SPECTRUM FROM PROPERTY TO PERSONHOOD

Will Kymlicka explores the social dynamics between humans and nonhuman animals in his article “Social Membership: Animal Law Beyond the Property/Personhood Impasse.”²⁷ The article specifically addresses the dichotomy which exists between those who view animals as pure property, and those which believe animals should have full legal personhood. He states that although the ‘pure property’ opinion may be becoming an idea of the past, full legal personhood is utopian and impossible for the foreseeable future.²⁸ This is what he describes as the property/personhood impasse where on one side animals exists as pure property, and on the other side is the aspiration for animals to exist as legal persons. He explores the development of animals as the ‘subjects’ and ‘beneficiaries’ of law.

Beginning with a welfarist perspective, Kymlicka discusses how some laws seek to raise the floor of how animals are treated in society, a ‘negative right.’²⁹ An example of a negative right would state that animals have the right to be free from harm.³⁰ The second approach seeks to raise the ceiling for the ethical treatment of animals, and would include ‘positive rights’ which allow animals to thrive within society.³¹ Whether by raising the floor or raising the ceiling, it is possible to slowly shift the treatment of animals in a positive upward direction toward increased welfare protections and practices.

Kymlicka argues that social recognition is the current politically feasible option to advance and develop legal protections for animals.³² Recognition through social membership exists within the gap between property and personhood which illustrates society’s acceptance of some animals as deserving of rights. Animals have gained social recognition through (1) positive relations as companion animals, and (2) value as co-workers.

Beginning with companion animals, Kymlicka describes several traditional areas of law in which the subject of a family pet is becoming more common. He first discusses companion animals as more than property when (a) relationship dissolutions include custody disputes,³³ (b) when animals appear as beneficiaries of trusts,³⁴ (c) when animals attract legal liability for actions (i.e. dog bites),³⁵ and (d) when the wellbeing of an animal is disputed in tort claims (i.e. veterinary malpractice).³⁶ He then discusses the social recognition of animals as co-workers.³⁷ Such recognition occurs for military and

²⁷ Will Kymlicka, “Social Membership: Animal Law Beyond the Property/Personhood Impasse” (2017) *Dalhousie L. J.* 40 (1): 123.

²⁸ *Ibid* at p. 125.

²⁹ *Ibid* at p. 127.

³⁰ *Ibid*.

³¹ *Ibid* at p. 128.

³² *Ibid* at p. 125.

³³ *Ibid* at p. 136 -138.

³⁴ *Ibid* at p. 139.

³⁵ *Ibid* at p. 140.

³⁶ *Ibid* at p. 140 – 141.

³⁷ *Ibid* at p. 147.

police dogs who have gained the rights to rehoming and pensions depending on the service.³⁸ More broadly, such employee rights could attach to goats who carry Google Earth cameras up mountains and pigeons who carry pollution sensors.³⁹

In this way, the legal status of animals which exists somewhere between property and personhood, may be shifted from property to personhood by structured incremental progress, being the slow acceptance socially recognized animals as deserving of rights. In this way, Kymlicka illuminates that the dichotomy of property vs personhood may not necessarily be a dichotomy.

This idea was further explored by Angela Fernandez.⁴⁰ Citing Steven Wise, Maneesha Deckha, and Anna Pippus, Fernandez recognizes that the designation as property and a designation as person are not mutually exclusive, and that the property/personhood dichotomy is actually a spectrum.⁴¹ Fernandez describes how, somewhat like corporations, animals can exist on the spectrum between property and person.⁴² In accepting that animals can exist as ‘quasi’ property *and* ‘quasi’ persons, the conversation surrounding the legal status of animals may shift away from the debate of the dichotomies.

Using this concept of quasi property and quasi person, researchers have further written about certain animals which attract a different understanding of their legal status. For example, in their book *Zoopolis*, Donaldson and Kymlicka discuss how domesticated animals should be considered co-citizens with humans.⁴³ Additionally, Fernandez discusses the ‘quasi’ property label of Canadian-born wild animals, meaning that wild animals already exist somewhere on the spectrum beyond simply property.⁴⁴

Aside from advancement of the law through social membership, the legislation passed by Canada’s federal government in June 2019 reflects the expansion of animal law beyond socially recognized animals.⁴⁵ Indeed, although captive cetaceans, sharks, and fighting animals have not gained recognition as members of families or valued coworkers, the government recognized that legal advancement was necessary for these animals. In doing so, the Canadian government distanced Canada from the harmful and unnecessary practices of keeping cetaceans in captivity, shark finning, and animal abuse through sexual acts or fighting.

Legislators may be addressing animal issues because of the animal’s social membership or the legislature’s political interest in distancing Canada from certain harmful practices. In either situation, laws which address animals as subjects and beneficiaries can be seen to shift the legal status of animals on the property/personhood spectrum. Individual cases litigated and small pieces of legislation passed by the government do serve to advance animal law in Canada. However, as predicted by

³⁸ *Ibid* at p. 148.

³⁹ *Ibid* at p. 150 – 151.

⁴⁰ Angela Fernandez, “Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals” (2019) *CJCL* Vol. 5, No. 1, 155 – 231.

⁴¹ *Ibid* at page 218 – 221.

⁴² *Ibid* at pages 226 – 229.

⁴³ Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animals Rights* (Oxford University Press, Oxford 2011).

⁴⁴ *Fernandez, supra* note 40.

⁴⁵ *Supra* note 1.

Fernandez, perhaps animal advocates may not be fully satisfied with the ‘quasi’ property/’quasi’ persons approach.⁴⁶

Although small shifts on the spectrum toward personhood continue, questions remain asking whether animals may eventually achieve the status of legal person, and how can that be achieved. Returning to Eisen’s work, constitutional ratification for protecting animals was achieved in various nations (although enforcement remains an issue).⁴⁷ However, all of those constitutions explored by Eisen had been amended within the 20 years prior to her research. Indeed, the average lifespan of any national constitutional document is 19 years.⁴⁸ By contrast, since the Canadian Constitution was enacted in 1867, it has only gone through one major revision. Although there have been several dozen small amendments, the 1982 amendment which brought the introduction of the *Charter* is the only successful major revision. This 121-year gap between enactment and first major revision suggests that another review seems unlikely to occur in the foreseeable future. In any case, the discussion of constitutional amendment to include animals in the Canadian Constitution shall be saved for another day. Instead, this article will proceed based on the current *Charter* and existing judicial interpretation.

In the world of animal advocacy and litigation, a popular and easy go-to argument is the ‘like us’ argument. The ‘like us’ argument rooted in morality, which seeks to equate the nonhuman animal experience to the human experience. However, the history of the ‘like us’ argument has been opined as unproductive.⁴⁹ As easily as animal advocates can draw similarities between nonhuman animals and humans, opponents can draw differences. Thus arose the frustrations in the property/personhood impasse.⁵⁰ Rather than attempting to establish a new or futuristic concept of personhood which includes nonhuman animals, I look back to the early *Charter* jurisprudence to see if there is any legal precedent which could be helpful in the nonhuman rights argument. The remainder of this paper explores whether the current definition of legal personhood within section 7 of the *Charter* can be expanded to include nonhuman animals.

3 ANIMALS AND SECTION 7 OF THE *CHARTER*

Section 7 of the *Charter* states that “everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁵¹ I will first analyse the definition of ‘everyone’ and discuss the possibility of nonhuman animals falling under the definition of ‘everyone’. Afterward, I will briefly discuss some common practices which currently increase the risk of depriving those protected interests of life, liberty, and security.

⁴⁶ Fernandez, *supra* note 40, at p. 229.

⁴⁷ Eisen, *supra* note 10, at 937.

⁴⁸ Z Elkins, T Ginsburg & J Melton, *The Endurance of National Constitutions* (2009, New York: Cambridge University Press).

⁴⁹ Catherine A. MacKinnon, “Of Mice and Men: A Feminist Fragment on Animal Rights” in Sunstien & Nussbaum, ch. 12 at p. 265.

⁵⁰ Kymlicka, *supra* note 27.

⁵¹ *Charter*, *supra* note 8 at s. 7.

3.1 IRWIN TOY AND THE DEFINITION OF ‘EVERYONE’

Since the enactment of the *Charter* in 1982, there has been little discussion surrounding the definition of ‘everyone.’ However, two early Supreme Court *Charter* cases from 1985 and 1989 sought to define who ‘everyone’ is, and therefore who is entitled to protections under section 7. *Singh v Canada (Minister of Employment and Immigration)*⁵² and *Irwin Toy Ltd. v Quebec (Attorney General)*⁵³ quickly defined which legal entities fell under the protective umbrella of ‘everyone’ within section 7.

The *Singh* decision of 1985 was the first to address which individuals could receive the benefit of section 7 protections. This case decided whether a refugee in Canada who was not a citizen was entitled to the benefits of section 7. The Court simply stated that the term ‘everyone’ “includes every human being who is physically present in Canada.”⁵⁴ The broad takeaway from this case is that everyone in Canada – whether a citizen or not – is entitled to the section 7 protections. The phrase ‘every human being’, unfortunately, clearly does not include any room for the consideration of nonhumans to be included in the definition of ‘everyone.’ This case, as the first case to define ‘everyone,’ is unpromising for any argument for the inclusion of nonhuman animals.

I believe the next case is much more interesting for the discussion of whether animals could be included as ‘everyone.’ In 1989, the *Irwin Toy* decision famously answered the question of whether a corporation is entitled to section 7 protections. Of course, corporations are persons at law – they can sue and be sued, they can be tried for crimes . . . etc.⁵⁵ The question put to the court was whether a law could infringe a corporation’s right to life, liberty, and security of the person. The short answer from the Supreme Court was clear – no. The Court definitively determined that corporations do not fall under the definition of ‘everyone’ and are not entitled to section 7 protections.

Specifically, the majority stated:

A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. “Everyone” then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.⁵⁶

Keeping nonhuman animals at the forefront of my mind, two parts of this passage stood out as promising for the inclusion of nonhuman animals. Despite the Court again stating that section 7 “include[s] only human beings,” I argue that these two passages can be used to distinguish nonhuman animals from corporations for the purposes of section 7 protections.

⁵² *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1. SCR 177 [*Singh*].

⁵³ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927. [*Irwin Toy*].

⁵⁴ *Singh*, *supra* note 52 at pp. 35.

⁵⁵ As a result of this case, corporations exist as both property and as person, putting corporations somewhere in the middle of the property/personhood spectrum. See Fernandez, *supra* note 40.

⁵⁶ *Irwin Toy*, *supra* note 53.

3.1.1 ‘ARTIFICIAL ENTITIES’

The Court first recognizes that corporations are artificial entities, which are not entitled to section 7 protections. When thinking of nonhuman animals, it is clear that they are distinguishable from corporations on this point. All animals – both human and nonhuman - are natural creatures, not artificial entities. Therefore, nonhuman animals are distinguishable from corporations on the basis of being natural entities. In bringing attention to this language, this is one argument in favour of animals to be included as ‘everyone’ in section 7. If corporations and other artificial entities are not deserving of section 7 protections, the converse reasoning would suggest that natural creatures, including nonhuman animals, are deserving of section 7 protections.

3.1.2 ‘ONLY HUMAN BEINGS CAN ENJOY THESE RIGHTS’

The second part of the *Irwin Toy* passage which stood out was the Court’s statement that section 7 “serves to underline the human element involved; only human beings can enjoy these rights.”⁵⁷ The Court here seems to conclude that only humans are capable of enjoying the interests of life, liberty, and personal security. Perhaps in 1989, and in a decision addressing corporate legal status, the Court did not turn its mind to consider what other entities could enjoy life, liberty, and security. But now, 30 years later, we know that not only humans can enjoy the interests in section 7.

Indeed, many social science disciplines have used animals in research to better understand the various human phenomena discussed by the Court. Take, for example, classic psychological studies such as Harlow’s monkeys and Pavlov’s dogs. Harlow’s experiments with monkeys illuminated the evolutionary significance of affectional systems,⁵⁸ and Pavlov’s experiments with dogs help us understand behavioural conditioning and the relationship between humans and their companion animals.⁵⁹ More recently, Helen Proctor, Gemma Carder, and Amelia Cornish conducted an analysis of 2,562 peer-reviewed articles addressing animals published between 1990 and 2012.⁶⁰ They found that 1,765 studies on animals for human benefit specifically measured fear, stress, pain, anxiety, and depression in rats and mice.⁶¹ This suggests an assumption of animal sentience based on robust empirical data.⁶² Indeed, they found that over 99% of the research assumed sentience, and only found 16 studies which explored

⁵⁷ *Irwin Toy*, *supra* note 53.

⁵⁸ See Marga Vicedo, “The Evolution of Harry Harlow: From the nature to the Nurture of Love” (2010) 21:2 *History of Psychiatry* 190 – 205. She expands upon Harlow’s findings of mother-infant emotional bonds to find a broader psychiatric significance of different affectional systems.

⁵⁹ In his recent article, Matthew Adams takes a critical animal studies lens to Pavlov’s experiments with dogs to reframe the experiments as not simply physiological experiments, but deeper psychological experiments of the relationship between human and companion animals. See Matthew Adams, “The Kingdom of Dogs: Understanding Pavlov’s Experiments as Human-Animal Relationships” (2020) 30:1 *Theory & Psychology* 121 – 141.

⁶⁰ Helen S. Proctor, Gemma Carder, & Amelia R. Cornish, “Searching for Animal Sentience: A Systematic Review of the Scientific Literature” (2013) 3 *Animals* 882 – 906.

⁶¹ *Ibid* at p. 893 – 894.

⁶² *Ibid* at p. 894.

the existence of sentience.⁶³ They define animal sentience as the ability to feel subjective emotions (both positive and negative) such as joy, pleasure, pain, and fear.⁶⁴

Further to the scientific studies reviewed above, the basis for animal sentience is also present in the philosophic literature.⁶⁵ Beyond sentience, Angus Taylor discusses the case for legal personhood, and the autonomy and dignity of nonhuman animals.⁶⁶ This follows Steven Wise's work on dignity and autonomy as a precursor for legal personhood.⁶⁷ I do not attempt to critically explore each specie's level of sentience. Rather, I highlight the acceptance of animal sentience in the scientific and philosophical literature as a basis for accepting that nonhuman animals can enjoy life, liberty, and security of the being. As animals can feel happiness and sadness, they can enjoy life. As animals exhibit autonomy and decision-making, they can enjoy liberty. As animals feel pain and stress, they can enjoy security of the person.

Using the court's reasoning, if 'everyone' who is capable of enjoying the section 7 rights are to be protected by the *Charter*, humanity is not the only criterion. The argument becomes clear: Section 7 does not seek to protect the human experience, as the Court suggested; it serves to protect the *sentient* experience. Again, in the 30 years since *Irwin Toy* was decided, we have learned a lot about nonhuman animal sentience. If the question is: Between corporations and humans, who can enjoy life, liberty, and security? The answer is humans. However, if the question more broadly is: Who can enjoy life, liberty, and security? Nonhuman animals are certainly included in the answer.

Although the *Charter* may have been drafted to advance the human rights movement in the mid-twentieth century, as the living tree grows,⁶⁸ the section 7 *Charter* protections may be expanded to protect nonhuman animals in Canada as a result of the animal welfare movement. Although the holding of the Supreme Court in the 1980's was that only humans may legally benefit from section 7 protections, the *ratio* suggests that all who may enjoy life, liberty, and security of the person are entitled to section 7 protections. In the 2020's, this includes animals.

3.2 ADDITIONAL LESSONS FORM *TREMBLAY*

Just as the legal status of corporations illuminates how nonhuman animals could be included in the definition of 'everyone,' it was brought to my attention that the Supreme Court decisions surrounding the legal status of fetuses could be used to refute my argument.⁶⁹ How could animals be afforded section 7 protections but not human

⁶³ *Ibid* at p. 895.

⁶⁴ *Ibid* at p. 883.

⁶⁵ See Angus Taylor, *Animals and Ethics*, 3rd ed (Peterborough; Ontario: Broadview Press, 2009).

⁶⁶ See Angus Taylor, "Philosophy and the Case for Animals" in Peter Sankoff, Vaughan Black, & Katie Sykes, *Canadian Perspectives on Animals and the Law* (Toronto; Ontario: Irwin Law Inc, 2015) 11.

⁶⁷ Steven M. Wise, "Nonhuman Rights to Personhood" (2013) 30 *Pace Environmental Law Review* 1278.

⁶⁸ See *Edwards v Canada (AG)*, [1930] AC 124 (UK PC).

⁶⁹ I had the pleasure of presenting an early version of this paper at the Canadian Animal Law Conference in September 2020. I am extremely thankful to Tyler Totten (Assistant Professor, York University), who sparked this insightful discussion.

foetuses? What do the Supreme Court decisions of *R v Morgentaler*⁷⁰ and *Tremblay v Daigle*⁷¹ have to say about section 7?

I am quick to dismiss *Morgentaler* as being applicable to any argument for nonhuman animal rights. This is because *Morgentaler* was a case which dealt with the issue of women's access to abortions. The case dealt with the rights held by human women, who are already afforded section 7 *Charter* protections. The majority of the Court found that the law in question violated the section 7 rights of women, with different opinions finding infringements of the right to liberty (personal choice) and security of the person (dangers to women's health).⁷² This was not a decision of whether foetuses should have rights, it was a decision of the existing rights of pregnant women.

The *Tremblay* decision is more interesting in the discussion of the entities entitled to section 7 protections. After the *Morgentaler* decision was released a year earlier, the Court took the opportunity in *Tremblay* to answer the question of the legal status of foetuses, and therefore whether a foetus is entitled to the section 7 right to life, liberty, and security. Interestingly, the *Tremblay* decision was released on November 16th 1989, just over seven months after the *Irwin Toy* decision was released on April 27th.

The Court considered whether a foetus was a 'human being' and therefore whether a potential father could bring a claim on behalf of a foetus under section 1 of the *Quebec Charter*, which states that "every human being has the right to life, and to personal security, inviolability and freedom."⁷³ The Court decided in the negative, holding that a foetus is not a human for the purposes of the *Quebec Charter* and *Civil Code*.⁷⁴ The Court found that the arguments for including foetuses within the definition of 'human being' were linguistic in nature, and did not have a legal basis.⁷⁵ The Court drew attention to Anglo-Canadian law, which gives the foundation that a foetus must be born alive in order to be afforded rights. This was another factor against foetuses having legal personhood.⁷⁶

Those in favour of foetal rights also attempted to bring a claim for foetuses to fall into the definition of 'everyone' in section 7 of the *Charter*. The court briefly stated that it was not necessary to consider *Charter* rights for foetuses in this case because the action involved two private parties, and no government action or law which would be necessary for a *Charter* challenge.⁷⁷

Even though the *Tremblay* case does not address foetal rights under section 7 of the *Charter*, the reasoning for not including foetuses as 'human beings' for the purposes of the *Quebec Charter* warrants discussion. In dismissing the linguistic argument that foetuses are clearly human beings, the Court stated:

This argument is not persuasive. A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the

⁷⁰ [1988] 1 SCR 30 [*Morgentaler*].

⁷¹ [1989] 2 SCR 530 [*Tremblay*].

⁷² *Morgentaler*, *supra* note 70.

⁷³ *CQLR* c C-12 at s. 1.

⁷⁴ *Tremblay*, *supra* note 71.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

National Assembly of Quebec to be a person under s. 1. What is required are substantive legal reasons which support a conclusion that the term “human being” has such and such a meaning.⁷⁸

The Court then reviewed passages of the *Civil Code* put forth, and found that none of them suggested a legal basis for foetal personhood.⁷⁹

Similarly to the discussion about *Irwin Toy*, I find hope for the argument for nonhuman animal rights within the distinguishable features of animals from foetuses. Whereas the Supreme Court in *Tremblay* found no legal basis for including foetuses in the definition of ‘human being,’ there is abundant legal precedent establishing nonhuman animals as protection-deserving entities rooted in their sentience.

Firstly, the Canadian *Criminal Code* has explicit provisions prohibiting cruelty to animals.⁸⁰ Specific provisions criminalize causing animals unnecessary suffering,⁸¹ causing injury by wilful neglect,⁸² and using animals for fighting.⁸³ Additionally, almost all provinces have some form of a provincial Animal Welfare Act or Society for Prevention of Cruelty to Animals Act. Indeed, possibly the most advanced version of provincial legislation comes from Quebec. The *Animal Welfare and Safety Act*, enacted in 2019, specifically recognizes that “animals are sentient beings that have biological needs.”⁸⁴ These pieces of both federal and provincial legislation, at a minimum, establishes a legislative intent to protect the lives and wellbeing of nonhuman animals under human care. Beyond this minimum, the recent Quebec legislation recognizes animal sentience and the human responsibility to ensure animal welfare and safety.

Secondly, Canadian jurists have recently begun to recognize the importance legal protections for nonhuman animals beyond existing legislation. Although writing dissenting opinions, both Chief Justice Catherine Fraser (Alberta Court of Appeal) and Justice Lois Hoegg (Court of Appeal of Newfoundland and Labrador) recognized the importance of advancing the legal status of animals in two separate cases.

In *Reece v Edmonton (City)*⁸⁵ Chief Justice Fraser recognized the seriousness of the case of Lucy the Elephant and Lucy’s confinement at the Valley Zoo. In her dissenting opinion, she clearly states:

Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy’s case raises serious issues not only about how society treats sentient animals – those capable of feeling pain and thereby suffering at human hands – but also

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Criminal Code*, *supra* note 17 at s. 445 - 447.

⁸¹ *Ibid* at s. 445.

⁸² *Ibid* at s. 446.

⁸³ *Ibid* at s. 447.

⁸⁴ Ch. B-3.1.

⁸⁵ *Reece v Edmonton (City)*, 2011 ABCA 238, *supra* note 6.

about the right of the people in a democracy to ensure that the government itself is not above the law.⁸⁶

Chief Justice Fraser then conducts her analysis of the intricate case concludes, in opposition to the majority, that “[t]he appellants, for the public and on behalf of Lucy, are intitled to their day in court.”⁸⁷

Next, in *Baker v Harmina*⁸⁸ Justice Hoegg also recognized the seriousness of a pet custody dispute in a relationship dissolution case. The majority in this appeal found that the pet in dispute, a Bernese mountain dog named Mya, was the legal property of Mr. Baker. However, Justice Hoegg recognized the special relationship between companion animals and humans to find that Mr. Baker and Ms. Harmina should share custody of Mya. Justice Hoegg stated:

Determining the ownership of family pets when families break apart can be challenging. Ownership of a dog is more complicated to decide than, say, a car, or a piece of furniture, for as my colleague observes, it is not as though animate property, like a dog, is a divisible asset. But dogs are more than just animate. People form strong emotional relationships with their dogs, and it cannot be seriously argued otherwise. Dogs are possessive of traits normally associated with people, like personality, affection, loyalty, intelligence, the ability to communicate and follow orders, and so on. As such, many people are bonded with their dogs and suffer great grief when they lose them. Accordingly, “who gets the dog?” can pose particular difficulty for separating family members and for courts who come to the assistance of family members when they cannot agree on “who gets the dog”.⁸⁹

After she reached her conclusion that Mr. Baker and Ms. Harmina should share joint ownership of Mya, Justice Hoegg elaborated:

In this regard, I emphasize the emotional bonds between people and their dogs, and say that fair decisions respecting the ownership and possession of dogs can be much more important to litigants and to society than decisions respecting the ownership of a piece of furniture or a few dollars.⁹⁰

Throughout her discussion, Justice Hoegg clearly finds nonhuman animals to exist beyond the simple legal definition of property. At law, she finds animals to have an advanced place in society and the law ought to recognize this enhanced status.

The combination of the animal cruelty crimes, animal protection acts, June 2019 bills, and recent jurisprudence offer a substantive legal basis for the protection of nonhuman animals. In this way, animals can be distinguished from fetuses. Where fetuses are entities which are not protected by the right to life and security because there

⁸⁶ *Ibid* at para 39.

⁸⁷ *Ibid* at para 199.

⁸⁸ *Baker v Harmina*, 2018 NLCA 15 [*Baker*].

⁸⁹ *Ibid* at para 48.

⁹⁰ *Ibid* at para 59.

is no legal foundation for such claims, there is a clear legal foundation for the claim that animals are to be protected by the law. Beyond legislation, *Reece* and *Baker* are clear examples of Canadian courts recognizing animals as deserving of justice through the Canadian legal system. The argument for animal protections under the *Charter* is not merely linguistic, it's rooted in the growing legal landscape.

3.3 CONCLUSIONS ON SECTION 7

Throughout this section, I have explored the early Supreme Court jurisprudence which defined 'everyone' for the purposes of section 7 and found two entities – corporations and fetuses – which do not fall under the protective umbrella of section 7. In exploring the language used by the Supreme Court, nonhuman animals can be distinguished from these entities which are not deserving of section 7 protections. The language used in the decisions support the inclusion of nonhuman animals within the umbrella of section 7. The next section considers the extent of potential section 7 protections for animals.

4 JUSTIFIED REASONABLE LIMITS

Section 1 of the *Charter* states: “The [*Charter*] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In this way, although all *Charter* rights – including section 7 – are guaranteed by section 1, any rights guaranteed in the *Charter* are subjected to 'reasonable limits' through section 1. Therefore, a court may find that even though a law infringes upon a *Charter*-protected right, the infringement may be found reasonable and acceptable under a section 1 analysis.

I narrow this question to a legal pursuit, rather than a philosophical discussion of the morally comparable status between humans and nonhuman animals. In his article, Angus Taylor canvases the philosophical arguments as to the degree of moral equality between humans and animals, which becomes inherent when asking the question whether animals should have the same legal protections as humans versus a lesser degree of protection.⁹¹ He borrows Tom Regan's “much-discussed” example of an overloaded lifeboat containing several humans and dogs questioning how to determine the order of individuals to be sacrificed.⁹² Philosophers have sought to answer this question and morally justify their positions, but I will not. As Lori Gruen explains, to favour humans in the example is unjustifiably anthropocentric.⁹³

From a legal perspective, if a court has determined that nonhuman animals are deserving of *Charter* protection, then they must be so deserving as individuals. Put differently, the degree to which an animal's section 7 rights are to be protected should be

⁹¹ Angus Taylor, *supra* note 66 at p. 24 – 25.

⁹² *Ibid* at p. 24; Citing Tom Regan, *The Case for Animal Rights* (Berkeley CA: University of California Press, 1983).

⁹³ See Lori Gruen, “Animals” in Peter Singer, ed, *A Companion to Ethics* (Oxford: Basil Blackwell, 1991) 374.

determined by an analysis of the law and the effects on the animal, and should avoid any legal comparison to human rights and protections.

4.1 INFRINGEMENT OF SECTION 7

It is important to recall that the Supreme Court has stated that a breach of section 7 will not easily be justified under section 1 of the *Charter*, as the right to life liberty and security of the person “are very significant and cannot ordinarily be overridden by competing social interests.”⁹⁴ Further, the Court has said that the protection of section 7 rights are “basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests.”⁹⁵

The Court has indicated that an infringement of section 7 rights may be justified by important interests in the public good.⁹⁶ This discussion was recently revisited in *Carter v Canada* in which the Supreme Court found that although the law prohibiting assisted suicide sought to protect life, it infringed the section 7 interests in life, liberty, and security for various reasons concerning the terminally ill plaintiffs.⁹⁷ In *Carter*, the infringement of section 7 was not justified by the section 1 interest to protect all life.⁹⁸

Despite the suggestion that a deprivation of the section 7 right may be justified by section 1, at the time of writing this article, the Supreme Court has not yet found a law which does. However, the Ontario Court of Appeal found a section 1 justification of section 7 rights in *R v Michaud*.⁹⁹ The *Michaud* case challenged an Ontario traffic law which imposes a speed limiter in commercial trucks to 105 km/h. The appeal court was persuaded that there could be some instances where a truck driver would need to go faster than the limited speed in order to avoid collisions, and therefore the limiter risked the security of the driver in violation of section 7.¹⁰⁰ In the section 1 analysis, the Court went on to find that the law’s purpose of public highway safety and reduced greenhouse gas emissions justified the infringement of the driver’s occasional need to drive faster than the limiter.¹⁰¹ After arriving at this conclusion, Justice Lauwers devoted some time to reflecting on the *Bedford* framework for establishing a section 7 infringement, stating that he was reluctant to find the section 7 breach, but was bound to do so.¹⁰² Without giving reasons, the Supreme Court dismissed leave to appeal this decision.¹⁰³

Despite the *Michaud* decision, justification of a section 7 infringement remains a mere hypothetical possibility at the Supreme Court level. All this is to say that

⁹⁴ *New Brunswick (Minister of Health and Community Services) v G(J.)*, [1999] 3 S.C.R. 46 at p. 99. See also *Reference Re BC Motor Vehicle Act* [1985] 2 S.C.R. 486 at p. 518.

⁹⁵ *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para 66.

⁹⁶ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 95.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *R v Michaud*, 2015 ONCA 585. [*Michaud*]

¹⁰⁰ *Ibid* at paras 81 – 113.

¹⁰¹ *Ibid* at para. 144 – 145.

¹⁰² *Ibid* at para. 146 – 154.

¹⁰³ 2016 CarswellOnt 7197.

once section 7 rights are established for nonhuman animals, a law which infringed on the right must also necessarily be a rarity – not the norm.

4.2 THE OAKES TEST

The Supreme Court elaborated on the purpose and use of section 1 of the *Charter* in the 1986 case *R v Oakes*.¹⁰⁴ Within the decision, Chief Justice Dickson (as he then was) stated that:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.¹⁰⁵

This list of values and principles is non-exhaustive.

In reading this list of ‘values essential to a free and democratic society,’ there are many which could be thought to support animal welfare through human rights. A commitment to social justice and equality would reasonably include the animal welfare movement. Accommodation for a wide variety of beliefs would include animal welfarists and veganism. Enhancing participation of individuals and groups within society may even include animal representation in the justice system. However, rather than addressing the possible human interests and human use of section 1 for the animals, this paper continues with the focus on individual animal rights under the *Charter*.

The *Oakes* case clarified four criteria which must be satisfied in order for a *Charter*-infringing right to be found justifiable and therefore constitutionally valid. Peter W Hogg simply states the criteria as:

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.
2. Rational connection: The law must be rationally connected to the objective.
3. Least drastic means: The law must limit the right no more than is necessary to accomplish the objective.
4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.¹⁰⁶

¹⁰⁴ [1986] 1 SCR 103. [*Oakes*]

¹⁰⁵ *Ibid* at p. 64.

¹⁰⁶ Peter W Hogg, “R v Oakes: Giving Structure to Section 1 of the Charter of Rights and Freedoms” in *Special Lectures 2017: Canada at 150: The Charter and the Constitution* (Toronto ON: Law Society of Upper Canada, Irwin Law 2017) 665 at p. 669 – 670.

4.2.1 ANIMALS IN TRANSPORT

There are many examples of laws in Canada which deprive animals of their lives, liberties, and personal security. One example comes from Federal animal transportation laws. The *Health of Animals Act* creates a federal offence for anyone who contravenes a provision of the *Act*¹⁰⁷ or the associated *Health of Animals Regulations*.¹⁰⁸ The offence is punishable to a maximum fine of \$250,000 and a term of imprisonment not exceeding two years.¹⁰⁹ Part XII of the *Regulations* describe provisions for the transport of animals. Such provisions regulate the safe handling of animals, protection from severe weather conditions, space requirements and overcrowding, and the maximum amount of time an animal is permitted to travel without access to food, water, and rest.¹¹⁰

Despite the *Act*'s intention of 'respecting the protection of animals'¹¹¹ the *Regulations* create a risk of harm, and thus attracts government liability and invites potential *Charter* scrutiny. For example, s. 152.2(1) of the *Regulations* stipulates that most farmed animals to be transported for up to 24 hours (chickens), 28 hours (pigs), and 36 hours (cows) without water, food, or rest.¹¹² While bringing these times down from the previous 48 hours may create the illusion of protecting animals, former Canadian Food Inspection Agency (CFIA) veterinarian Dr. Maureen Harper criticized the decreased travel times as not being decreased enough to actually has a positive effect on animal health.¹¹³ She writes:

In my opinion, Canada has the worst animal transport regulations amongst developed nations. This is based on current allowable maximum transport times for all animals. And unfortunately, the proposed changes will still leave Canada in this unenviable position. Canadians expect far more of their government with respect to protection of animal welfare, and our animals deserve far better.¹¹⁴

Dr. Harper illuminates that approximately 14 million animals suffer injuries during transport every year, and almost 1.6 million animals are reported dead on arrival after transport.¹¹⁵

Such large numbers of injuries and deaths are distressing, and highlight that the legal transport times put animals at serious risk while being trafficked. Therefore, the

¹⁰⁷ S.C. 1990, c. 21 at s. 65.

¹⁰⁸ C.R.C., c. 296.

¹⁰⁹ *Health of Animals Act*, S.C. 1990, c. 21 at ss. 65 – 73. [*Act*]

¹¹⁰ *Health of Animals Regulations*, (C.R.C. c. 296), at s. 144 – 152. [*Regulations*]

¹¹¹ *Health of Animals Act*, *supra* note 109, long title “An Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals.”

¹¹² *Health of Animals Regulations*, *supra* note 110 a s. 152.

¹¹³ Maureen Harper, “Legalized Cruelty: The Gaps in Canada’s Animal Transport Laws” (2017) *iPolitics*, retrieved from: <https://ipolitics.ca/2017/05/26/legalized-cruelty-the-gaps-in-canadas-animal-transport-laws/>

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

legal transport times infringe a nonhuman animal's right to life (as 1.6 million animals are killed annually during transport), liberty (as they are forcefully trafficked in overcrowded trucks which restrict movement), and security of the person (as 14 million suffer injuries during transport every year).¹¹⁶ Again, this is just one example of how current animal laws are deficient and infringe an animal's section 7 interests.¹¹⁷

Returning to the *Oakes* test, although these transport times may have a sufficiently important objective in protecting animals while easily facilitating transport to slaughter, the laws fail on the other three factors. As Dr. Harper describes, there is no rational connection between these transport times and animal welfare, as the times are still high enough to cause significant injury and death. There are other ways to facilitate transport to slaughter without the risks, such as the initially suggested 12-hour travel maximums, or the suggestion that drivers facilitate access to water, food, and rest during travel. With the reported injuries and deaths of farmed animals during transport every year, there is a severely disproportional effect on the animals. Although brief, this discussion seeks to illustrate that the existing transport laws infringe an animal's s. 7 right in an unjustifiable way.

4.2.2 CRIMINAL CODE ANIMAL CRUELTY PROVISIONS

As previously discussed in this article, the *Criminal Code* contains provisions criminalising human actions which cause the unnecessary pain and suffering of nonhuman animals.¹¹⁸ The section 7 infringement is clear in the term 'unnecessary'. By permitting some degree of pain and suffering, the law increases risk of health infringing an animal's interest in their life, as well as an increase in risk of injury which infringes their right to security of the person.

There are two pre-*Charter* cases which illuminate the legal acceptance of necessary suffering. The first is the 1957 British Columbia Provincial Court case *R v Pacific Meat Co*, where employees who killed pigs in extremely distressing ways was justified because pain is inevitable in the slaughtering process.¹¹⁹ The second case is the 1978 Quebec Court of Appeal case *R v Ménard*, in which the accused was convicted of wilfully causing animals pain after Justice Lamer (as he then was) found that euthanizing dogs by carbon monoxide poisoning caused unnecessary harm.¹²⁰ This case is significant

¹¹⁶ Note that since October 2018, the CFIA has only laid criminal charges once in an animal transport case. See notification of charges laid at: <https://www.inspection.gc.ca/about-cfia/transparency/regulatory-transparency-and-openness/compliance-and-enforcement/notification-of-charges-laid/2018-12-11/eng/1544538991875/1544539154376>. However, the issue of underenforcement of animal laws by the CFIA is an issue beyond the scope of this article. For an excellent discussion of underenforcement, see Peter Sankoff, "Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?" (2019) 5 *CJCL* 1.

¹¹⁷ I recognize that there is a greater issue with respect to the end result being the same - that the animals who arrive alive will inevitably be slaughtered regardless of their physical and mental conditions. To this, I am inclined to separate this concern for life at slaughter with the concern for personal security during transport, as the *Charter* also separates these interests. The issues also need to be separated as not all animals in transport are being transported to slaughter.

¹¹⁸ *Criminal Code*, *supra* note 17 at s. 445.

¹¹⁹ (1957), 24 WWR 37 (BC Co Ct).

¹²⁰ (1978), 43 C.C.C. (2d) 458 (Que. C.A.).

as it established that the ‘necessity’ of animal suffering is to be determined by the ‘purpose sought’ and the ‘means employed’ to achieve that purpose.¹²¹ This *Ménard* Test has since been used to justify hanging a horse to death with an excavator;¹²² the physical abuse of a dog for no purpose (including kicking, striking, and throwing);¹²³ and the severe dehydration and starvation of three horses.¹²⁴

Rather than accepting the outdated and deficient pre-*Charter Ménard* Test, the courts should revisit the *Criminal Code* provisions with an updated understanding of the nonhuman animal experience. In finding that animals have a right to section 7 *Charter* protection, the abuse described above would undoubtedly be found to infringe the right in an unjustifiable way.

4.3 CONCLUSIONS ON SECTION 1

I recognize the highly aspirational nature of my argument, and understand the possibility that a court may nevertheless find that some deprivations of an animal’s section 7 rights are justifiable. Indeed, a court may find justification in deprivation of animal life for human consumption of meat; a deprivation of liberty in keeping companion animals on leashes; or a deprivation of security of the person in medical experiments which do not have non-animal alternatives. Despite any such reasonable limits, the hope persists that if nonhuman animals are found deserving of *Charter* protection under section 7, their interests would be better protected both by governmental agencies creating and enforcing the laws and the courts in providing an enhanced remedial option when deprivations occur. A taxonomic question remains of whether rights would be afforded to the entire animal kingdom, or to certain classes, species, or individuals. I will leave this question for another day.

5 CONCLUSION

Advancement of the legal status of animal in Canada involves advocacy through small incremental changes as well as a demand for sweeping changes in animal welfare. Recent activity in Parliament shows that the federal government is ready and willing to make such incremental changes in animal law, and the courts have begun to acknowledge the frustrations of treating animals as property. As the legal status of animals shifts more toward ‘person’ on the spectrum from pure property to full legal personhood, there is

¹²¹ *Ibid.*

¹²² *R v Cunningham*, 2011 BCPC 358. The horse’s teeth were so shaven down that the horse could not properly chew hay and grass. Although the couple in care of the horse was convicted for failing to provide alternative foods to the horse, the way in which the horse was killed was found not to meet the standard of ‘unnecessary.’

¹²³ *R v McRae*, 2002 CarswellOnt 5679. Because of issues with witness credibility, the Crown had not met the ‘high standard’ needed to establish that the dog actually suffered from the abuse.

¹²⁴ *R v Robinson*, 2018 BCSC 1852. Out of 20 horses within the care of the accused, two had already died from starvation and dehydration, 15 were found not to be so underweight as to be outside the norm, and the court found that the accused deeply cared for all her horses, negating *mens rea* to harm the remaining three horses in consideration.

merit in the animal welfare movement for arguments in favour of both smaller and larger shifts.

This article offers an aspirational and novel argument for protecting nonhuman animals through section 7 *Charter* protections. The Supreme Court's language describing who falls under the definition of 'everyone' and therefore who is entitled to section 7 protections offers insight for nonhuman animals. Although the Court concluded that only humans could benefit from the protections, the *ratio* behind those decisions could support the inclusion of animals. In distinguishing animals from corporations and fetuses, animals should be granted a legal interest in their lives, liberties, and personal security. Although this may not grant animals the exact same legal protections as humans, the aspiration of section 7 protection would invariably increase the quality of life for animals in Canada.