The Case for Legal Personhood for Nonhuman Animals and the Elimination of their Status as Property in Canada

by

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Abstract

This article proposes that the legal relationship between humans and nonhuman animals in Canada must be redefined. It will be shown that the current Canadian legal system is based on the assumption of human superiority, which has resulted in the interests of nonhuman animals being given little to no legal consideration since at law they are merely property. This conceptualization of our relationship with nonhuman animals, and the resulting harm that it causes to them is in direct conflict with developments over the last century in science, ethics, and the laws, policies and jurisprudence of various countries. These developments support the argument that nonhuman animals are entitled to have their interests considered in law. This article proposes that the relationship in Canada be redefined to eliminate the property status of nonhuman animals, and that the new relationship should take the form of nonhuman animals being granted the status of legal persons.
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Chapter 1
Introduction

“But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.” -Thomas Jefferson

In early 2012 a small group of experts in philosophy, conservation and dolphin behaviour met in Vancouver, Canada at the annual meeting of the American Association for the Advancement of Science to canvass support for a Declaration of Rights for Cetaceans. The group stated that dolphins deserve to be treated as nonhuman persons whose rights to life and liberty should be respected. They argued that dolphins and whales are sufficiently intelligent and self-aware to justify the same ethical considerations that are given to human beings. According to ethics expert, Professor Tom White from Loyola Marymount University in Los Angeles in the United States of America (“U.S.A.”), “science has shown that individuality, consciousness, self-awareness, is no longer a unique human property”.

Later that year, an international group of prominent scientists gathered at the Francis Crick Memorial Conference on Consciousness in Human and Non-human Animals and reached a unanimous decision that nonhuman animals are conscious beings. They signed the Cambridge Declaration on Consciousness on July 7, 2012, which proclaims their support for the statement that nonhuman animals are conscious.

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3 Ibid.
4 Ibid.
These are just two examples from the large amount of evidence demonstrating the fundamental biological kinship between human beings and nonhuman animals, and the complex and sophisticated lives of nonhuman animals. This knowledge served as the basis for increased public attention, and provides the basis for growing ethical and legal interest in nonhuman animals that is occurring in Canada. Despite this knowledge, Canadian law makes a categorical distinction between humans and nonhuman animals. Nonhuman animals are classified as property and lack legal personhood. The legal status of nonhuman animals as property is often not even directly asserted or proved but is the premise from which Canadian laws are created and interpreted. This premise is supported by the belief that nonhuman animals are made for human use, and serves to structure how the law permits humans to treat and use them. This belief holds that humans are morally superior to nonhuman animals and as a result are entitled to use them. In contrast, human beings are “persons” under the law. Humans have the right to own property and to enjoy all of the rights accompanying this status, which includes the right to own certain nonhuman animals. The legal classification of being either property or a person establishes a hierarchy between beings, and under its current form in Canada this distinction amounts to a legal classification based on species distinction.

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11 Ibid.
12 Ibid. at 4.
15 Bisgould, supra note 10 at 7.
18 Letourneau, supra note 13 at 1048.
19 Bisgould, supra note 10 at 7.
21 Letourneau, supra note 13 at 1048.
The legal status of nonhuman animals as property is problematic for several reasons. First, as property nonhuman animals do not have direct standing to assert their interests at law\textsuperscript{22}. As nonhuman animals do not have legal personhood and do not have legally enforceable rights they typically cannot bring suits on their own behalf\textsuperscript{23}. Consequentially, they are forced to rely on humans who are personally interested in their welfare to make a claim in court in order to protect their interests\textsuperscript{24}, and on the state to enforce animal laws to which it has jurisdiction. Judicial decisions and the lacuna in legislation that serves to deny standing to nonhuman animals ignore the principle that standing doctrine exists to ensure that litigants are those entities most directly affected by the issue, which results in a disconnect between the harm caused and possible remedies\textsuperscript{25}. For politically powerless groups such as nonhuman animals the law is merely a suggestion unless members of the powerless group who are protected by the law have standing to use those laws in court for their own protection\textsuperscript{26}. Second, the status of property serves as a significant impediment to the serious consideration of one’s interests because even when the interests of the property are considered they are balanced against the rights and interest of humans\textsuperscript{27}. Thus, any balancing exercise is rigged to render a result unfavourable to nonhuman animals\textsuperscript{28}, which results in their most basic and fundamental interests being ignored\textsuperscript{29}. The failure to adequately consider nonhuman animal interests, if they are even considered at all, contradicts evidence demonstrating that they have interests capable of being represented in law. Third, property nonhuman animals do not have rights\textsuperscript{30}. The importance of being a moral and legal person is that they are holders of rights\textsuperscript{31}. Some of these rights are moral rights, which every person is entitled to enjoy\textsuperscript{32} while others are those enshrined in law. Moral rights provide persons with strong \textit{prima facie} protection that cannot be compromised without compelling reasons\textsuperscript{33}. The law thus does not formulate considerations of the inherent needs of nonhuman animals as evidenced by their

\textsuperscript{23} Magnotti, \textit{supra} note 14 at 465.
\textsuperscript{24} Kelch, \textit{supra} note 22 at 535, and Magnotti, \textit{supra} note 14 at 465.
\textsuperscript{26} Elizabeth L. DeCoux, “In the Valley of the Dry Bones: Reuniting the Word “Standing” with its Meaning in Animal Cases” (2005) 29 Wm. & Mary Envtl. L. & Pol’y Rev. 681 at 746 [Decoux].
\textsuperscript{27} Kelch, \textit{supra} note 22 at 537.
\textsuperscript{28} \textit{Ibid.}, at 537.
\textsuperscript{29} Rattling the Cage, \textit{supra} note 16 at 4.
\textsuperscript{30} Kelch, \textit{supra} note 22 at 532, and Dunayer, \textit{supra} note 13 at 171.
\textsuperscript{31} Letourneau, \textit{supra} note 13 at 1048.
\textsuperscript{32} \textit{Ibid.}.
nonexistent rights in Canada. Fourth, the property status of nonhuman animals adversely affects the ability of legislatures to impose constraints on the human uses of nonhuman animals that cause great suffering to them. As property, the law sanctions their enslavement and murder. For example, animal laws generally perpetuate the abuse of nonhuman animals as they continue to permit vivisection, slaughter, and the sale of nonhuman beings. Last, the legal status of nonhuman animals as property indicates and reinforces the idea that nonhuman animals are considered inferior to humans. This implicitly enshrines the idea that the standard to which anyone or anything else should be compared to is humans and one receives greater legal protection compared to how similar he or she is to humans. This standard is arbitrary and discriminatory as it is based on assigning moral worth and legal protection on the basis of personal characteristics. This argument will be discussed further in Chapters 3 and 4. All of these issues are problems because given what humans now know about the biology and inner lives of nonhuman animals the property distinction is no longer tenable.

The amount of evidence proving the intelligence and emotional complexity of nonhuman animals is continuing to grow, which makes it clear that humans must alter their relationship with nonhuman animals. Their status as property is dependent on two illusions, which are: the human separateness from nonhuman animals, and the dominion of humans over them. These two claims are invalidated by the growing body of evidence showing that humans are not different and superior to nonhuman animals. They are also invalidated by the fact that over the last century nonhuman animals have enjoyed a steady increase in legal protections that has resulted in them being treated differently from inanimate property such as family members and companions. Thus, it is necessary to form a new legal relationship between humans and other sentient life forms in order to remedy this significant problem with Canadian law. This article proposes that this new

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34 Letourneau, supra note 13 at 1049.
35 Bryant, supra note 17 at 254.
36 Dunayer, supra note 13 at 170.
37 Ibid.
38 Letourneau, supra note 13 at 1048.
40 Ibid.
41 Ibid. at 230.
43 Berdik, supra note 39.
44 Bisgould, supra note 10 at 2.
legal relationship take the form of amending and creating procedural and substantive laws to redraw the boundary between humans and nonhuman animals by eliminating their status as property and by granting nonhuman animals the status of legal personhood. The granting of legal personhood to nonhuman animals is grounded in the claim that they have attributes as persons that make them worthy of greater legal protection. This article claims that sentience is the sufficient attribute for moral and legal personhood. As Lesli Bisgould argues, humans have a moral imperative to change the legal classifications of nonhuman animals, which arises from the transformation of knowledge about nonhuman animals through post-Darwinian science\(^45\). Moreover, the common law can be said to have the liberty and duty to migrate to higher ground when facts and moral awareness dictate\(^46\), which justifies changing the legal relationship between humans and nonhuman animals in order to reflect the knowledge about their interests and inherent value. The boundary between legal persons and property should be drawn between beings and things, not between humans and nonhuman animals\(^47\).

The treatment of nonhuman animals as legal persons is not beyond the scope of existing law since one of its axioms expresses a dualism\(^48\), which is that there is property and there are persons\(^49\). Courts are increasingly viewing nonhuman animals as more than “things” such as when they recognize the intrinsic value of nonhuman animal companions\(^50\). International case law, local ordinances in the U.S.A. and popular attitudes are changing to reflect the understanding that they have the capacity to live full mental and emotional lives\(^51\). Trends in legislation and case law from different countries show a natural progression toward personhood. Legal personhood for nonhuman animals provides a solution to the problem of how to treat other species in a legal system that lumps everything into the categories of persons or things\(^52\). For the purposes of this article, a broad definition of legal personhood will be used. A broad definition of legal personhood for nonhuman animals refers to the extent to which nonhuman animals have the sufficient characteristic(s) that result in the law recognizing them as beings with interests that should legally protected even in cases where the protection of these interests conflict with the interests of humans in

\(^{45}\) *Ibid.* at 8.
\(^{46}\) Kelch, *supra* note 22 at 532.
\(^{47}\) Dunayer, *supra* note 13 at 171.
\(^{49}\) Kelch, *supra* note 22 at 581.
\(^{50}\) Newell, *supra* note 13 at 179.
\(^{51}\) *Ibid.*
\(^{52}\) Berdik, *supra* note 39.
using nonhuman animals\textsuperscript{53}. This definition of legal personhood recognizes that beings identified as legal persons are entitled to inclusion in the moral community resulting in the prohibition of acts that humans could not commit on equally situated humans\textsuperscript{54}. This definition also refers to a being with the capacity to have his or her interests represented in law and to possess any legal right\textsuperscript{55}. The term, nonhuman animal, is used to reference all members of the animal kingdom with the exception of humans.

Chapter 2 of this article provides a brief overview of the development of the underlying philosophies and beliefs of the Canadian legal system in order to show that it is a system based on the belief of human superiority over nonhuman animals. An analysis of Canadian federal and provincial law will show how this belief manifests itself in the content of legislation with the legal classification of nonhuman animals as property, and the problems created by premising a legal system on this belief. Chapters 3 and 4 argue that the relationship between humans and nonhuman animals must be redefined and that this new relationship should take the form of eliminating the property status of nonhuman animals and in granting them legal personhood. Chapter 3 will outline the argument for moral personhood for nonhuman animals that justifies their entitlement to legal personhood. Chapter 4 outlines the legal case for nonhuman animal personhood, and discusses alternatives to legal personhood in order to remedy the problems with Canadian law. Chapter 5 provides a proposed framework for creating legislation and policies that give effect to legal personhood for sentient nonhuman animals. This article will conclude by examining the implications of granting nonhuman animals the status of legal personhood in Canada.

Chapter 2
Animal Law and Policy in Canada

An examination of the development of the philosophy and values underlying current Canadian law regarding nonhuman animals is necessary in order to show that the current law is problematic in that it does not reflect current knowledge about the sentience of nonhuman animals. It will be shown that the Canadian legal system is based on the belief of human superiority over nonhuman animals. An analysis of Canadian federal and provincial law will show how this belief manifests itself in the content of legislation with the legal

\textsuperscript{53} Bryant, \textit{supra} note 17 at 258.

\textsuperscript{54} \textit{Ibid.} at 253.

\textsuperscript{55} Nonhuman Rights, \textit{supra} note 14 at 1281.
classification of nonhuman animals as property, and the problems created by premising a legal system on this belief. Chapters 3 and 4 will show that this presumption is no longer tenable, and will propose a redefinition of the relationship between nonhuman animals and humans in order to reflect changes in ethics, law and science.

1. Historical Overview of the Underlying Beliefs in Canadian Law

1.1 Early Philosophy

Steven M. Wise argues that for 4,000 years a legal wall has separated humans from nonhuman animals\(^\text{56}\). Legal personhood is restricted to the human side of the wall whereas on the other side of the wall are only legal things\(^\text{57}\). The idea that all entities in the world can be divided into the categories of persons and things for moral and legal purposes is inherited from Roman law\(^\text{58}\). In law a “person” is the subject of rights and obligations whereas a thing can be owned as property\(^\text{59}\). In ethics, a “person” is an object of respect to be valued for his or her own sake and never used as a means to an end while a thing can be used as a means to some person’s end\(^\text{60}\). Western legal thought regarding the status of nonhuman animals is based on a mixture of religious and secular thought. The biblical interpretation of the different classification of humans and nonhuman animals is based on the argument that God gave dominion over all nonhuman animals to humans, and dominion is to be understood as ownership\(^\text{61}\). Many traditional Western secular philosophies also view nonhuman animals as categorically distinct from humans, which they generally justify on the basis that they are inferior in terms of their capacities in comparison to humans\(^\text{62}\). Some secular philosophers have even argued that harming nonhuman animals does not matter since humans are the superior being and human interests trump the interests of nonhuman animals in any event\(^\text{63}\).

Aristotle (384-322 BCE) believed that humans differ from nonhuman animals because humans have life, sense perception and the ability to reason\(^\text{64}\). According to Aristotle, the differences between plants, nonhuman animals and humans create a hierarchy in nature.

\(^{56}\) Rattling the Cage, supra note 16 at 4.
\(^{57}\) Ibid. at 4.
\(^{58}\) Christine M. Korsgaard, “Personhood, Animals, and the Law” (2013) 12 (23) Think at 25 <http://dx.doi.org/10.1017/S1477175613000018> [Korsgaard].
\(^{59}\) Ibid.
\(^{60}\) Ibid.
\(^{61}\) Bisgould, supra note 10 at 15.
\(^{62}\) Ibid. at 15.
\(^{63}\) Ibid.
\(^{64}\) Ibid. at 36.
whereby reason serves a role in determining who should govern others. He believed that since nonhuman animals are not capable of reason and are ruled by their instincts it is only proper that they should be used for human purposes. Aristotle’s views of the human superiority over nonhuman animals were eventually incorporated into religious doctrine. For example, Saint Thomas Aquinas (1225-1274), a Catholic theologian, interpreted Aristotle’s views for medieval Europe. He argued that humans were made in the image of God and possessed rationality and prudence and it is for this reason that it was natural to understand life as a hierarchy with humans at the top as the masters over nonhuman animals.

1.2 Cartesian Dualism

Rene Descartes continued to develop the view of nonhuman animals as inferior to humans and devoid of reason. Descartes (1596-1650) was strongly influenced by the line of Catholic doctrine that viewed nonhuman animals as inferior to humans, and applied rational inductive methods of science to philosophy in order to argue that as nonhuman animals do not exhibit linguistic behaviour they cannot be seen as sentient beings. He argued that reason requires consciousness and consciousness is demonstrated by language. Thus, nonhuman animals are comparable to automata since they are constructed by nature, and they would be classified robots if it were not for their natural origin. This view, which is also known as Cartesian dualism, is largely believed to serve as the underlying principle of current laws dealing with nonhuman animals. Cartesian dualism maintains that nonhuman animals are fundamentally different and categorically inferior to humans and as a result the only concern that humans have for them is to whom they belong, to what purposes they serve and how harm to nonhuman animals would affect other humans. As new evidence emerged demonstrating that some nonhuman animals are sentient the Cartesian dualist view was amended to hold that nonhuman animals are still irrational and irrelevant and as a result their inferior status in ethics and law is justified.
1.3 Modern Interpretation of Property Rights

Thomas Hobbes (1588-1679) created an argument based on contract for the exclusion of nonhuman animals from moral consideration. He argued that prior to the establishment of the political state, life was nasty, brutish and short, and everyone constantly posed a threat to each other. Hobbes held that the only right action in this state of liberty is to do whatever is necessary for one’s own protection. People eventually realized that this situation was not to anyone’s benefit so they agreed among themselves to institute the political state where each person would give up some freedom in exchange for security, which would result in a better life. Thus, in Hobbes’ view, morality amounts to an agreement between rational people to behave in certain ways. Since nonhuman animals are not rational they cannot be contractors in this agreement and as a result they remain in the original state of nature, which means that humans have a right to use them. This right is based on the right that existed in basic natural liberty, which is to do whatever humans feel is necessary to make their lives more secure. John Locke (1632-1704), who is regarded as the primary architect of Western theory of property rights, also adopted an argument for the inferior status of nonhuman animals based on a state of nature argument. Nonhuman animals were produced by nature, and God gave humans dominion over them so that they could be of use to humans so it is necessary to appropriate them in some way. He proposed a theory of property that helped to embed the property status of nonhuman animals in law. He argued that a property right gives the owner exclusive use and control of an object. This idea forms the cornerstone of modern property law.

1.4 Immanuel Kant

Philosopher Immanuel Kant (1724-1804) rejected the view that nonhuman animals were machines and held that they were sentient and could suffer. However, he still found that no moral obligations were owed to nonhuman animals because they were not rational or
self-aware. Thus, nonhuman animals are excluded from the moral community and thus can be instruments to serve human purposes. Kant believed that there are two types of beings, which are persons and things. Human beings are persons because they are ends-in-themselves as they are self-governing, able to rationally consider different courses of action and to choose among them on a basis of understanding right and wrong. As a moral agent, a human being has intrinsic worth and deserves to have his or her autonomy respected by other moral agents. Kant’s basic rule of morality holds that one must act so as to treat humanity always as an end and never as a means only. Since nonhuman animals are excluded from the moral community and are not persons it follows that they are things. In combination with the preceding theories, Kant’s philosophy helped to justify the expanded use of nonhuman animals without consideration being given to the idea that people may have legal duties to the nonhuman animals themselves.

1.5 The Property Status of Nonhuman Animals in Law and Nonhuman Animal Welfare

This underlying system of values and philosophies led to nonhuman animals being assigned the legal status of property. William Blackstone relied on the story of Creation in the Book of Genesis and the divine grant of authority to humans over nonhuman animals as the primary justification for the property rights that humans have in nonhuman animals. However, social pressure later developed in Western society to impose constraints on the harms caused by humans to nonhuman animals. Although these measures were an improvement in terms of developing legal protections for nonhuman animals, they were still insufficient to adequately protect the interests of nonhuman animals. This is because they maintained a lower standard for nonhuman animals, which was justified on the grounds that they had lesser capacities in comparison to humans. Stronger animal welfare legislation was created in response to the work of Jeremy Bentham (1748-1832). Bentham dismissed the idea that the absence of characteristics such as language, self-
awareness and the ability to reason were justifiable grounds for excluding nonhuman animals from the sphere of moral consideration. Bentham saw animal suffering as significant for its own sake, and argued that sentience is the only necessary characteristic for a being to have moral significance. Bentham’s views contributed to the nonhuman animal welfare movement gaining greater attention and support in the nineteenth century. Gary Francione argues that the nonhuman animal welfare position is the prevailing contemporary paradigm. The welfare position holds that it is acceptable to use nonhuman animals for human purposes but there is a moral and legal obligation to treat them “humanely” and to avoid imposing “unnecessary suffering” on them.

1.6 Charles Darwin

The most significant development in terms of changing traditional thinking about nonhuman animals was Charles Darwin’s (1809-1892) theory of evolution, which made it more difficult to defend the categorical distinctions between humans and nonhuman animals. In the On the Origin of Species and The Descent of Man Darwin confirmed that humans are animals and that there is no such thing as a uniquely human characteristic. He argued that the differences between humans and nonhuman animals in mind is one of degree and not kind. Darwin claimed that many nonhuman animals have the capacity for abstract thought and can form general concepts. Evolutionary theory built on Darwin’s discoveries and over the years the study of nonhuman animals has shown that they live in complex social systems and can process information in sophisticated and complicated ways that are relevant to the nonhuman animal’s life circumstances. Research has established that nonhuman animals such as mammals, birds and even fish possess considerable intelligence, are self-conscious, invent and use tools, reason, grieve for deceased companions and family members, have sophisticated languages and act altruistically. Research has also confirmed that nonhuman animals feel pain in ways similar to humans.

102 Ibid.
103 Ibid.
104 Ibid. at 26.
106 Ibid.
107 Ibid. at 1.
108 Bisgould, supra note 10 at 36.
109 Ibid. at 36.
110 Ibid.
111 Taylor, supra note 71 at 53.
112 Bisgould, supra note 10 at 39.
113 Ibid.
and that many nonhuman animals exhibit signs of pain that humans recognize as implying pain in another human such as moaning, attempts to flee the source of the pain and facial contortions. Furthermore, many nonhuman animals produce the same biochemistry that are known to be associated with pain in human beings, and have similar physiological responses to pain such as elevated blood pressure. These findings contributed to the rise of the animal rights movement in the 1960s.

In Oxford, a group of academics, which included Richard Ryder, began to see the type of exploitation that they and others were subjecting nonhuman animals to as unacceptable. Ryder became an advocate for nonhuman animals. Peter Singer built on Ryder’s work by writing, Animal Liberation, which brought the subject to widespread public attention and is viewed as the stimulus of the modern animal rights movement. Singer maintains that there is no logical basis for only counting humans in calculations for determining ethically correct actions. Singer brought Ryder’s term of speciesism into greater public attention, which refers to discrimination against a nonhuman animal on the basis of the morally irrelevant distinction that the animal is not a member of the human species. Singer argued that the principle of equal consideration of interests should include nonhuman animals as they share the most significant interest that merits their consideration of interests, which is sentience. Despite the questions raised by these philosophies, findings in science and a public demand to improve the treatment of nonhuman animals, none of these philosophies have been incorporated into Canadian society.

2. Canadian Law

The use and treatment of animals in Canada is presently regulated by the Constitution, and federal, provincial and municipal governments. The problem created by current legislation in Canada dealing with nonhuman animals is that it does not reflect society’s understanding of nonhuman animals that has been developing since the days of Darwin. The Canadian legal system treats nonhuman animals as property, which means that they are

114 Ibid. at 40.
115 Ibid.
116 Ibid. at 42.
117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid.
121 Ibid. supra note 3 at 43.
122 Peter Singer, Animal Liberation (London: Pimlico, 1995) at 8 [Singer].
123 Bisgould, supra note 10 at 44.
124 Ibid. at 57.
commodities with only extrinsic or conditional value. Canadian law concerning nonhuman animals is still based on the notion of human superiority. The current manifestation of this view is that nonhuman animals are fundamentally different to humans and are thus subject to the domination of humans. The assumption of human superiority is problematic as the level of “humane” treatment required under animal welfare laws will generally be limited to what is required to exploit nonhuman animals in an efficient manner as nonhuman animal interests are usually only protected to the extent that humans derive an economic benefit from doing so. This claim is supported by the fact that in order to determine what constitutes “humane” treatment the law usually looks to those who engage in the use nonhuman animals for guidance, which assumes that animal users would not impose more pain and suffering than is required for a particular use. This approach is inconsistent with Darwin’s findings and subsequent research that provides evidence that nonhuman animals are capable of sensing pain and pleasure, and some nonhuman animals lead complex, and emotionally rich lives. Furthermore, it is also inconsistent with developments in legislation and policies that reflect this evidence and research, which recognize that nonhuman animals at the minimum have a morally significant interest in not suffering. The property status of nonhuman animals thus prevents the law from developing to give effect to current knowledge and values attributed to nonhuman animals. A brief overview of Canadian federal and provincial law will now be provided in order to discuss these problems in the context of specific legislative provisions. The legislation of the provinces of Ontario and Quebec will be analysed in order to provide an overview of the range of protection available to animals in Canada. Ontario was chosen as an example of one of the provinces falling in the top tier of an assessment regarding the strength and comprehensiveness of its animal protection laws. Quebec was chosen as it falls into the third tier of ranking regarding the strength and comprehensiveness of its animal protection laws.

125 Francione, supra note 105 at 8.
126 Rattling the Cage, supra note 16 at 4.
127 Fouts, supra note 42 at 104.
128 Kelch, supra note 22 at 556.
129 Francione, supra note 105 at 8.
130 Ibid.
131 Ibid. at 61.
133 Ibid. at 4.
2.1 Constitutional Law

Jurisdiction over the environment is not a single matter assigned by the Constitution exclusively to one level of government. The protection of the environment can be construed as a public purpose that would support federal laws under the criminal law power such as the Canadian Environmental Protection Act when issues of jurisdiction arise. Section 91(27) of the Constitution Act, 1867 provides the federal government with the authority to prohibit activities that are harmful to the environment whereas section 91(12) provides the federal government with the power over fisheries, which includes jurisdiction over international and interprovincial rivers. Section 91(1A) gives the federal government the power to control activities on federal public lands, which can be used to make laws in relation to nonhuman animals. In contrast, the source of provincial and territorial jurisdiction over the environment lies in section 92(13) of the Constitution Act, 1867, which authorises them to regulate the use of land. Furthermore, sections 92(8), which authorises municipal regulation of local activity that affects the environment, and section 92(5), which enables provinces to control activities on provincial public land, provide additional means of making laws in relation to nonhuman animals. The property status of nonhuman animals is reflected in the Constitution as its provisions have been interpreted to view nonhuman animals as natural resources. For example, in A.G. Can. v. A.G. B.C. (Fish Canners) [1930] the Privy Council held that once fish were caught they were a commodity like any other and their processing and marketing fell within provincial jurisdiction over property and civil rights in the province in section 92(13).

2.2 Federal Law

Canada uses a system of categorical protection for nonhuman animals in welfare legislation. For example, there are different standards of regulation for a companion animal in comparison to wildlife in captivity. Regarding the use of nonhuman animals in research, there is no federal oversight to the use of animals in this area and there is minimal
protection at the provincial level\textsuperscript{144}. The main legal instrument for the protection of nonhuman animals at the federal level is the \textit{Criminal Code}\textsuperscript{145} (“the Code”), and its scope is not generally limited to specific categories of animals. The \textit{Code} sets down the minimum standard of permissible behaviour required regarding animals by creating a list of offences that attempt to limit or eliminate a nonhuman animal’s exposure to pain and suffering\textsuperscript{146}. These animal cruelty laws set out the country’s concern for animals’ well-being, however this concern remains secondary and qualified in accordance with the interests of humans who own and have a financial interest in them as evidenced by the fact that anticruelty provisions were enacted in the part of the \textit{Code} concerning property offences\textsuperscript{147}. Presently, the \textit{Code} contains provisions in four separate sections (445.1, 446, 447, and 447.1) that address cruelty to nonhuman animals although it does not provide a definition for cruelty\textsuperscript{148}, which creates uncertainty in the application of the relevant provisions. Sections 444 and 445 prohibit the killing or injuring of animals such as cattle for lawful purposes\textsuperscript{149}. Section 444 covers the killing of stray cattle not shown to have been “owned” by anyone per \textit{R. v. Brown} (1984)\textsuperscript{150}, which reflects and reinforces the property status of nonhuman animals. Section 445 does not apply to stray nonhuman animals since “kept for a lawful purpose” contemplates a keeper of the nonhuman animal and a measure of control exercised by that person\textsuperscript{151}. This leaves nonhuman animals who are not owned without the benefit of the prohibition against injuring or endangering other nonhuman animals outlined in section 445. Section 445.1 is also problematic as it requires the pain, suffering or injury to the nonhuman animal to be “wilful” and “unnecessary”\textsuperscript{152}. Unnecessary is generally interpreted as meaning that a person in pursuit of his or her legitimate purpose is obliged not to inflict pain, suffering or injury which is not inevitable but the purpose sought and the circumstances of the particular case are taken into account\textsuperscript{153}, which provides a low threshold for the determination of what is unnecessary. The provisions concerning cruelty are of general application and could apply in any context such as to the use of animals in industries\textsuperscript{154}. The property status of nonhuman animals is also reflected in section

\textsuperscript{144} \textit{Ibid.} at 57.
\textsuperscript{146} Bisgould, \textit{supra} note 10 at 58.
\textsuperscript{147} \textit{Ibid.} at 59.
\textsuperscript{148} \textit{Ibid.} at 67.
\textsuperscript{149} \textit{Ibid.}
\textsuperscript{150} 11 C.C.C. (3d) 191 (B.C.C.A.).
\textsuperscript{151} \textit{R. v. Deschamps} (1978), 43 C.C.C. (2d) 45 (Ont. Prov. Ct.).
\textsuperscript{152} \textit{Code}, \textit{supra} note 145.
\textsuperscript{154} Bisgould, \textit{supra} note 10 at 71.
264.1(1)(c), which provides that anyone “commits an offence who...receive a threat to kill, poison or injure an animal or bird that is the property of any person”\textsuperscript{155}.

There are six main deficiencies with using the \textit{Code}\textsuperscript{156} as a means of providing protection to nonhuman animals. First, the term, cruelty, connotes a malevolent intention that creates a high threshold to pass in order to prove a significant element of the offence\textsuperscript{157}. Second, the application and scope of the current laws remain ineffective\textsuperscript{158}. Third, it is difficult to prosecute acts of cruelty under these provisions\textsuperscript{159}. Fourth, nonhuman animals do not receive equal protection under the \textit{Code} as protections are given according to membership of an identified species of nonhuman animals\textsuperscript{160}. As previously shown, the \textit{Code} offers virtually no protection for wild and stray animals\textsuperscript{161}. Fifth, the \textit{Code} does not provide protection for nonhuman animals who are being trained to fight one another as it is not an offence to train nonhuman animals to fight\textsuperscript{162}. Last, the two most commonly applicable provisions are problematic as the term “wilful infliction of unnecessary suffering” in section 445.1(a) and “wilful neglect” in section 446(1)(b) require a high level of mens rea\textsuperscript{163}. This claim is supported by the case of \textit{R. v. Heynan} [1992]\textsuperscript{164} where a horse owner was acquitted for letting horses starve to death on the grounds that he had a mistaken belief that the horses were able to obtain their own food when left in a pasture for the winter\textsuperscript{165}.

2.3 Provincial and Territorial Law

In addition to protection at the federal level, provinces and territories have enacted their own animal welfare legislation. Some provinces have enacted legislation that establish humane societies or societies for the prevention of cruelty to animals and limit their authority to cases where nonhuman animals have been abandoned or are in distress, and for offences relating to animal welfare\textsuperscript{166}. Since 1822, every province and territory, with the

\textsuperscript{155} Code, \textit{supra} note 145.
\textsuperscript{156} \textit{Ibid}.
\textsuperscript{157} Bisgould, \textit{supra} note 10 at 279.
\textsuperscript{159} \textit{Ibid}.
\textsuperscript{160} \textit{Ibid}.
\textsuperscript{161} \textit{Ibid}.
\textsuperscript{162} \textit{Ibid}.
\textsuperscript{163} ALDF Report, \textit{supra} note 132.
\textsuperscript{165} \textit{Ibid}.
\textsuperscript{166} Bisgould, \textit{supra} note 10 at 97.
except of Quebec, has enacted some form of animal welfare legislation. Like federal legislation, the concept of cruelty is the focus of the majority of the legislation. However, provincial and territorial legislation is problematic as there is a wide range of disparity currently existing across the country in terms of nonhuman animal protection. The animal laws of Ontario and Quebec will now be examined in order to illustrate the state of nonhuman animal protection at the provincial. Ontario was chosen because a study has ranked its nonhuman animal protection laws as number 3 across Canada, whereas Quebec was chosen because its laws were ranked as number 12 based on their overall strength and comprehensiveness in protecting nonhuman animals.

Ontario’s anticruelty legislation is the *Society for the Prevention of Cruelty to Animals Act*. The Act establishes the humane society and its powers, designates officers to exercise authority under the Act, and powers of inspection, investigation and enforcement are provided in relation to the “distress” of a nonhuman animal. Distress is a broad term that can include a state where the nonhuman animal is deprived of adequate space, food, water or reasonable protection from injurious heat or cold. In 2009, the Act was amended to include extensive exemptions and broad authority for regulations prescribing mandatory standards of care. Furthermore, problems with this Act are caused by the fact that prohibitions against causing or allowing a nonhuman animal to be in distress do not apply to activities that are permitted under provincial wildlife legislation or to activities carried out in accordance with generally accepted practices, to prescribed classes of nonhuman animals living in prescribed circumstances or conditions, or prescribed activities. Penalties under the Act include fines, imprisonment, and the prohibition of owning, having control or custody of a nonhuman animal. In contrast, Quebec is the only province that

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168 Bisgould, *supra* note 10 at 105.


170 ALDF Report, *supra* note 132.

171 RSO 1990, c O. 36.

172 Bisgould, *supra* note 10 at 104.


has not enacted some form of animal welfare legislation. Quebec has legislation authorising the creation of societies for the prevention of cruelty to nonhuman animals but does not grant them any powers. The property status of nonhuman animals in Quebec is evidenced by a 2006 dispute involving a humane society that had found two lost dogs and placed them in an adoptive home. The issue of who was the owner of the dogs was resolved by relying on the general property provisions in legislation regarding lost or forgotten moveable goods.

Chapter 3
Moral Personhood and Legal Personhood for Nonhuman Animals

In Chapter 2 it was shown that the legal relationship between nonhuman animals and humans in Canada is based on the assumption of human superiority. This chapter will show that this argument is invalid, and that developments in science, and ethics support the claim for nonhuman animal moral and legal personhood. This article proposes that the sufficient characteristic for the granting of moral and legal personhood is sentience. This article defines a moral person as a being who has morally significant interests, is subject to the principle of equal consideration of interests, and is not a thing. This chapter will conclude by arguing that the moral personhood of nonhuman animals grounds their claim for legal personhood.

1. Nonhuman Animal Moral Personhood

1.1 Humans as Superior Beings

The assumption that humans are superior to nonhuman animals is used as a justification by humans to treat nonhuman animals as objects on the basis that it is morally permissible to give lesser weight to their interests in comparison to the interests of humans due to their difference in moral status. The differences between nonhuman animals and humans is said to entitle humans to legal personhood because these differences are morally relevant characteristics for the determination of one’s entitlement to personhood, and rights. The claim that humans are superior to nonhuman animals will be defeated by showing that

177 Ibid. at 103.
178 Ibid. at 117.
179 Perreault c Societe pour la prevention contre la cruauté envers les animaux (SPCA) de l’Ouest du Quebec inc, 2006 QCCQ 6670.
180 Ibid.
181 Francione, supra note 105 at 61.
humans do not possess any morally relevant characteristics that clearly distinguish humans from nonhuman animals. This will be achieved by examining some of the common arguments made for distinguishing nonhuman animals from humans in order to show that they are invalid. The common arguments that will be examined are as follows: the place of humans in evolutionary hierarchy, human rationality, the linguistic abilities of humans, and human intelligence. It will be shown that nonhuman animals possess these characteristics in different degrees to humans and that these characteristics cannot serve to distinguish nonhuman animals from humans in a morally relevant way that would entitle humans to a superior status and rights. Any arguments that attempt to justify the entitlement of humans to a morally and legally superior status on the basis that even if one acknowledged that nonhuman animals possess these characteristics to a certain degree they are still not worthy of moral and legal personhood because they do not possess them to the degree that humans do are unsound. This argument establishes a need for a threshold of similarity to human capacities. The threshold requirement is problematic as not all humans possess these characteristics to the same degree, which raises the question of what the standard would be for a “humanlike” characteristic in order to cross this threshold. Not all mentally incompetent persons and children can be said to possess the same level of rationality, linguistic ability, and intelligence as competent adults. If humans wish to retain the inclusion of humans with lower levels of rationality, intelligence and linguistic ability then it follows that the standard for possessing these characteristics that would entitle a being to moral personhood would be humans with the minimum level of possession of these characteristics. As discussed in Chapters 1, and this Chapter, some nonhuman animals have demonstrated greater capacities than this minimum standard and as a result they would be entitled to inclusion in the moral community. Thus, this argument does not serve to maintain the barrier of things and persons on the basis of membership in the human species.

Furthermore, the similarity to human capacities argument can be used to support the argument for awarding different levels of rights within the human species based on one’s abilities since the degree that one possesses this characteristic is a morally relevant consideration. Any attempts to exclude humans from this analysis on the basis that they are humans is arbitrary as it is based on a personal characteristic that has not been shown to be morally relevant, and circular since the purpose of the argument is to provide justification for human superiority. Thus, rationality and language do not explain the scope of moral

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183 Kelch, supra note 22 at 558.
concern since it is hard to show how infants, children, persons in persistent vegetative states, and individuals who are otherwise not mentally competent can be considered objects of moral concern\textsuperscript{184} while nonhuman animals cannot. The fact that human beings who possess these characteristics are legitimate objects of moral concern demonstrates that rationality and language are not a necessary condition for moral concern\textsuperscript{185}. It also shows that individuals can have legal and moral rights that they neither understand nor claim without assistance\textsuperscript{186}.

Some people have argued that humans are “higher” on the evolutionary ladder than nonhumans and it is for this reason that they can exploit nonhuman animals\textsuperscript{187}. Proponents of this view argue that natural selection chooses the fittest individuals to survive, and that the fittest individuals have value due to their ability to survive\textsuperscript{188}. Another argument is that evolution is goal-oriented and that humans have reached the top of this progression, which provides them with inherent value\textsuperscript{189} and entitles them to superior legal treatment. These arguments are defective in a number of ways. First, evolutionary theory as propounded by Darwin removes humans from a privileged position in the world of creatures since the differences between humans and nonhuman animals is one of degree and not kind\textsuperscript{190}. Evolution does not assign value in terms of “best”, “good”, or “bad” for the beings who survive\textsuperscript{191}. The beings who survive and evolve in response to the conditions that they are subjected to in the system\textsuperscript{192}. Evolution is not a normative process\textsuperscript{193}. Second, the claim that humans are at the top of the evolutionary chain is simply a prejudicial statement, which states that “I believe that my group is superior to all others”, and is made without any supporting evidence from evolutionary theory\textsuperscript{194}. Evolution does not assign value by temporal or other placement in the evolutionary scheme and there is no moral value in a particular position in the scheme\textsuperscript{195}. This is supported by the fact that it is traditionally held

\textsuperscript{185} Ibid. at 72.
\textsuperscript{186} Daniel A. Dombrowski, Babies and Beasts: The Argument from Marginal Cases (Chicago: University of Illinois Press, 1997) at 39 [Dombrowski].
\textsuperscript{187} Kelch, \textit{supra} note 22 at 559, and Rollin, \textit{supra} note 184 at 72.
\textsuperscript{188} Kelch, \textit{supra} note 22 at 560.
\textsuperscript{189} Ibid. at 560.
\textsuperscript{190} Ibid. at 559.
\textsuperscript{191} Ibid. at 561.
\textsuperscript{192} Ibid.
\textsuperscript{193} Ibid.
\textsuperscript{194} Ibid.
\textsuperscript{195} Ibid.
that there can be no value implication from a statement of fact. Thus, evolution as a scientific fact cannot supply any morally significant information. Darwin’s theory of evolution by natural selection only shows that it operates through a process of gradual change, and the structure of creatures can be explained as the gradual adaptation of species to change. Species are neither higher nor lower than one another and are merely suited to their environments. Last, the view that evolution is a goal-oriented system is false. There is no evidence to suggest that humans are at the top of a directed and logical process or that evolution has stopped once humans reached their current form. Thus, the argument that humans are different from nonhuman animals in morally relevant and substantial ways is not tenable.

The second argument in favour of awarding humans different and greater protection in comparison to nonhuman animals and for excluding them from the moral and legal personhood community is rationality. This claim is not supported by scientific evidence. Nonhuman animals are able to think and possess many of the same emotional responses as humans. Darwin found that the differences in mental capacities between nonhuman animals and humans is one of degree and not kind. The mental processes of humans have evolved like all other properties of humans, and are a continuation of the same type of process that exists in nonhumans animals. A further difficulty with rationality as a justification for the exclusion of nonhuman animals from moral and legal personhood is that the term, rationality, is used in many senses. In one view of rationality it refers to the ability to see and respond to relationships. A secondary view of rationality refers to the possession of the capabilities of introspection and self-awareness, and the ability to engage in self-analysis. Neither conception of rationality results in a characteristic that morally distinguishes humans and nonhuman animals. Regarding the relational view of rationality, nonhuman animals are able to see relationships and respond to them as evidenced by the

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197 Kelch, supra note 22 at 561.
198 Rattling the Cage, supra note 16 at 21.
199 Ibid.
200 Kelch, supra note 22 at 562.
201 Ibid.
202 Rachels, supra note 196 at 101-02.
203 Francione, supra note 105 at 55.
204 Kelch, supra note 22 at 563.
205 Rollin, supra note 184 at 32-33.
206 Kelch, supra note 22 at 564.
207 Ibid. at 564-5.
208 Ibid. at 565.
fact that this is the way they learn. Furthermore, they appear to act from desire and belief based on past experiences. As a result this definition cannot serve to distinguish nonhuman animals from humans. If the understanding of rationality as deliberative rationality is adopted to distinguish between nonhuman animals and humans it creates problems with regards to humans. Some humans do not possess rationality according to this definition. For example, humans with mental handicaps do not possess this type of rationality, which would exclude them from the moral community and moral consideration. Most humans would find this conclusion immoral and abhorrent.

Attempting to justify the inclusion of humans with mental handicaps nevertheless on the basis that they are human is not a valid argument as the grounds for inclusion is based on an arbitrary personal characteristic, which is species membership. Membership to a particular species is not a morally relevant characteristic that serves as justification for treating nonhuman animals as property just as race is not a justification for human slavery.

Furthermore, this justification would make the species the object of moral concern and not individuals, which is contrary to Canadian values of providing legal rights to individuals as evidenced by the Canadian Charter of Rights and Freedoms (“Charter”). This interpretation of rationality could be modified to state that it is not necessary for each individual member of the species to possess it in order to give that species and its members a right to special moral and legal consideration. In reply it is argued that the foundation of Canadian jurisprudence holds that individual characteristics are what should be valued and not those of a group. This modified version of rationality can also result in the arbitrary exclusion of beings who possess this level of rationality simply on the basis that other members of their species do not possess his or her level of rationality. For example, a chimpanzee could be found to have the intelligence and communication skills that qualify her to attend college but would be excluded from the moral community on the basis that the other members of her species did not possess her level of rationality, which is unjust.

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209 Ibid.
210 Rachels, supra note 196 at 101.
211 Kelch, supra note 22 at 565.
212 Ibid. at 566.
213 Ibid.
214 Francione, supra note 105 at 61.
215 Rollin, supra note 184 at 72.
216 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 [Charter].
217 Kelch, supra note 22 at 565.
218 Ibid. at 567.
219 Rachels, supra note 196 at 108-9.
unfair and arbitrary. Scientific evidence also shows that at least some nonhuman animals possess faculties that most humans would consider to be rationality. For example, dolphins can understand generalized concepts of objects. Moreover, it may actually be the case that the majority of humans do not deliberate in the sense required by the idea of deliberative rationality or at the minimum do so infrequently. The use of species as a dividing line is problematic as species is not a clearly defined group that would enable one to consistently refer to the same group over a period of time. As argued by Darwin the term, species, is used simply as a labelling device for convenience. For example, lions and tigers can interbreed.

The third ground for supporting the claim that there are significant distinctions between nonhuman animals and humans is language. The claim for human superiority based on language is premised on the idea that only those with the ability to express themselves in language are entitled to moral consideration. There is substantial evidence that this cannot serve as a ground to distinguish between humans and nonhuman animals. Chimpanzees are often cited as examples of nonhuman animals demonstrating linguistic abilities since they have been shown to be able to learn and teach other chimpanzees sign language. The possibility also exists that other nonhuman animals possess linguistic abilities that humans do not understand. For example, in 2013 it was discovered that dolphins use labels to address social companions during natural communications by assigning them different clicks. It is also obvious that some nonhuman animals understand certain signals and as a result it can be posited that they must have some level of linguistic ability. One example is that of Alex the African grey parrot. When Alex was

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220 Kelch, supra note 22 at 569.
222 Kelch, supra note 22 at 567.
223 Ibid. at 568.
225 Richard D. Ryder, Speciesism, Painism and Happiness: A Morality for the Twenty-First Century (Charlottesville: Societas Imprint Academic, 2011) at 50 [Ryder].
226 Rollin supra note 184 at 51.
228 Kelch, supra note 22 at 570.
229 Rollin, supra note 184 at 23-106.
230 Kelch, supra note 22 at 570.
232 Kelch, supra note 22 at 571.
233 Dunayer, supra note 13 at 15.
left at an unfamiliar veterinary office for surgery he cried out, “Come here. I love you.”, “I’m sorry”, and “Wanna go back”, as his carer was leaving the office without any cues being given by the carer. Thus, the linguistic abilities of nonhuman animals are much the same as their mental abilities in that they differ from humans only in degree and not kind. Science and the implications of science on moral theory show that the traditional view of humans as clearly distinguishable and thus superior to nonhuman animals on which Canadian law is based is fundamentally flawed.

The final ground for alleging human superiority and its moral relevance in denying moral and legal personhood to nonhuman animals is intelligence. The same grounds for rejecting the criterion of rationality apply equally to the argument that intelligence is the morally relevant criterion justifying human superiority. Proponents of this view may argue that intelligence is the relevant criterion because it allows humans to control, vanquish, dominate and destroy all other creatures. If this justification is accepted as a valid argument then it is power that places humans at the top of the hierarchy of beings since power provides the grounds for including or excluding beings from the scope of moral concern. This argument is essentially stating that “might makes right”. If this argument is accepted then it extends to all humans as well and can be used to justify muggers preying “on old people, the majority to oppress the minority, and the government to do as it sees fit to any of us”. One might reply that the “might makes right” claim is valid since it is limited to the relationship between humans and other beings and objects, and thus it will not result in scenarios where vulnerable persons are mistreated for the gain of the more powerful. This argument is invalid and unsound on the basis that to limit this theory to beings and things that are not humans is arbitrary. In the case of excluding insulating humans from this argument but leaving it open to justify the use of nonhuman animals as humans see fit is speciesist as it is based on a personal characteristic of a being that has no moral relevance in determinations for how they should be treated by others. It is simply a description of an attribute of a being. Moreover, if an extraterrestrial civilization was

234 Ibid. at 15.
235 Kelch, supra note 22 at 571.
236 Ibid. at 572.
238 Ibid.
239 Ibid.
240 Ibid.
241 Ibid.
242 Ibid.
intellectually, militarily, and technologically superior to human beings then they would be justified in enslaving, eating, or experimenting with human beings based on this argument, which is not a desirable consequence of the argument. The implications flowing from this view are at odds with values of Canadian society, which include minimum protections for individuals as evidenced by the constitutional protections for individuals in the Charter, and due to the fact that it can be used to justify undesirable acts such as the ones previously discussed. Acceptance of the principle that might makes right renders meaningless any claims about what ought to be the case.

1.2 Sentience

This section sets out why nonhuman animals matter morally. This article proposes that the sufficient condition for recognition as a moral person who is entitled to respect and value, and inclusion in the moral community with humans is sentience. In this article, sentience, or subjective awareness, is defined as the ability to experience subjective sensations including pain and suffering. A sentient being is self-aware that he or she is the one experiencing the sensation and not another who is feeling those sensations. Methods for determining whether a being possesses sentience already exist as demonstrated by the discussion in Chapter 1 regarding declarations of nonhuman animal consciousness and in the preceding section. These scientific methods and any new ones developed over time can be used to determine which beings possess sentience. The threshold for determining whether a being is sentient does not depend on degree. Once a being has been determined to be sentient it is this characteristic and not the degree to which they are sentient that is the sufficient condition for being granted moral and legal personhood. Mark Rowlands argues that any defence for moral claims for nonhuman animals requires that they possess at least some sorts of mental states such as states of pleasure and pain. He argues that the boundaries of moral consideration coincide with those of sentience. This characteristic is sufficient to admit nonhuman animals into the moral community as persons if they have been shown to possess it because it demonstrates that they have interests. The term,
interests, is defined broadly to include one’s needs, desires, goals, aims or wants. A being who is sentient is someone who has an interest in continuing to live, who desires, prefers or wants to continue to live. Any being who is sentient necessarily has an interest in life because sentience is a means to the end of continued existence. The feeling of pleasure and pain are interests for those beings possessing sentience since they are interests that can be helped or hindered by others, or by their own actions. Thus, there is no basis for arguing that only humans or beings who possess human-like self-awareness have an interest in continuing to live. Nonhuman animals who have demonstrated that they are sentient possess interests that entitle them to be counted as moral persons. As moral persons, this means that their interests merit equal consideration, which is otherwise known as the principle of equal consideration. It is widely agreed as a fundamental principle of ethics and Canadian society that humans should not be used exclusively as a means to the ends of others. If nonhuman animals are moral persons like humans then the principle of equal consideration must be applied to nonhuman animals who have been shown to be moral persons. An analysis of the application of this principle will show that there is no valid reason for continuing to classify nonhuman animals as property in the law, and nonhuman animals should be granted moral and legal personhood due to the principle of equal consideration of interests.

The view that the interests of nonhuman animals merit the same consideration as the similar interests of humans was argued by Peter Singer in Animal Liberation. To exclude nonhuman animals from any consideration of interests on the basis of species alone is to commit speciesism. According to Richard Ryder, speciesism is a form of prejudice that shows a selfish disregard for the interests and suffering of others and is unjustifiable discrimination against nonhuman beings. Singer’s argument is supported by Angus Taylor’s claim that the moral community should be characterised as consisting of all those beings whose interests should receive the same consideration as our similar interests. Taylor argues that this does not mean that all members of the community necessarily have

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251 Human Morality, supra note 237 at 95.
252 Francione, supra note 105 at 10.
253 Ibid. at ix-x.
254 Human Morality, supra note 237 at 96.
255 Francione, supra note 105 at 11.
256 Ibid. at 12.
257 Ibid.
258 Ibid.
259 Singer, supra note 105.
260 Taylor, supra note 71 at 8-9.
261 Ibid. at 19.
the same interests, but that when a being is said to be part of the moral community it means
that the interest of that being is entitled to the same consideration as the interests of
humans\textsuperscript{262}. The principle of equal consideration of interests does not mean that there will
not be times when it is legitimate to favour the interests of some beings over others\textsuperscript{263}. The
equal consideration of interests simply requires that like cases are treated alike\textsuperscript{264}. The
argument that the interests of nonhuman animals should be considered based on the
principle that like cases be treated alike is justified by the fact that sentient individuals, no
matter their species, are entitled to have their interests considered. The criteria of sentience
as the sufficient condition for having one’s interests considered and being treated alike is
justified by various philosophies such as Ryder’s theory of painism. Ryder’s theory is
consistent with the science and implications of Darwinism\textsuperscript{265}. Painism is based on the idea
that it is usually wrong to cause suffering to others, and all things capable of experiencing
suffering should be included within the scope of morality\textsuperscript{266}. The fundamental aim of
painism is to increase the individual happiness of all suffering beings by seeking to reduce
their individual pains\textsuperscript{267}. Ryder defines the capacity to feel pain as the ability to feel any
sort of suffering, which includes cognitive, affective or sensory suffering\textsuperscript{268}. It is this
capacity that qualifies an individual for moral personhood and justifies the claim that their
pains deserve equal consideration with the pains of every other painient individual
regardless of species\textsuperscript{269}. To exclude nonhuman animals from moral considerations on the
grounds that they are not humans is to be guilty of speciesism, which is a prejudice no more
morally justifiable than sexism or racism\textsuperscript{270}. Taylor also argues that simply having a life
that matters to oneself should be enough to make one entitled to not merely be treated as a
means to another\textsuperscript{271}. He argues that if one is self-conscious in some way that this may be
sufficient qualification for being seen as an end-in-oneself\textsuperscript{272}. Other philosophers also argue
that it is not necessary to be able to reason about moral principles in order to be worthy of
respect if one is a being with some minimal degree of self-consciousness\textsuperscript{273}. If one has the
ability to act in accordance with one’s preferences then one deserves to be treated with

\textsuperscript{262} Ibid.
\textsuperscript{263} Ibid.
\textsuperscript{264} Francione, supra note 105 at 12.
\textsuperscript{265} Ryder, supra note 225.
\textsuperscript{266} Ibid. at Summary.
\textsuperscript{267} Ibid. at 74.
\textsuperscript{268} Ibid. at 56.
\textsuperscript{269} Ibid.
\textsuperscript{270} Ibid. at Summary.
\textsuperscript{271} Taylor, supra note 71 at 49.
\textsuperscript{272} Ibid.
\textsuperscript{273} Ibid. at 22.
respect. Arthur Schopenhauer attacked the view that nonhuman animals are things simply because they lack the faculty of reason that characterises humans. Schopenhauer identified the capacity to suffer as the key factor for our analysis of morality. Schopenhauer argues that right conduct is based on compassion for all beings.

These arguments are strengthened by the fact that in many cases humans fall significantly below the level of mental ability generally exhibited by adult humans yet are still considered moral persons and are protected in Canadian law. Due to the overlap in capacities between humans and nonhuman animals, in order to keep humans within the scope of the moral community and to be logically consistent in our reasoning for doing so, one must either include at least some nonhuman animals in the moral community or exclude some humans who do not have the general level of mental ability exhibited by adult humans. If the criterion for belonging to the moral community is sentience this permits the inclusion of all humans but also makes it necessary to include at least some nonhuman animals. As most humans would arguably be against the idea of disqualifying any humans such as infants from the moral community logical consistency demands the recognition of many nonhuman animals as well if they have been shown to be sentient. If one attempts to argue that rationality is the morally relevant criterion for membership in the moral community but all humans are admitted even if they do not possess it by virtue of the fact that they belong to the human species then that argument fails on the ground that it is speciesist. Membership in a particular species is an irrelevant consideration for determining who belongs to the moral community as it is an arbitrary characteristic determined by nature as much as gender and ethnicity is for humans. Hence, nonhuman animals who are conscious of pain matter morally, and are thus persons who are deserving of the respect and rights flowing from personhood. Since sentient nonhuman animals can be said to be moral persons this grants them a right to not be treated as property.

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274 Ibid.
275 Ibid. at 52.
276 Ibid. at 51.
277 Ibid. at 52.
278 Taylor, supra note 71 at 27.
279 Ibid.
280 Ibid.
281 Ibid. at 28.
282 Ibid. at 40.
283 Ibid. at 60.
284 Ibid. at 61.
In Chapter 1, arguments made during canvassing for the *Declaration of Rights for Cetaceans* in Vancouver and the *Cambridge Declaration on Consciousness* were shown to serve as evidence that it is meaningful to speak about the sentience of some nonhuman animals. Further evidence in support of the view that some nonhuman animals are sentient is provided by drawing an analogy between how one views how other humans experience pain and pleasure\textsuperscript{285}. The pain and pleasures of other humans cannot be experienced directly by others yet few humans would doubt that other humans are capable of feeling pain and pleasure\textsuperscript{286}. This conclusion is based on the fact that one can infer that they are experiencing pain or pleasure based on their behaviour, which resembles one’s own behaviour when feeling those sensations\textsuperscript{287}. Peter Singer relied on the analogical argument for nonhuman animal pain to claim that it is reasonable to believe that nonhuman animals, especially mammals and birds, can experience pain because they manifest the same types of physical behaviour that humans manifest when they are in pain such as writhing, facial contortions, moaning, in addition to the fact that many of these beings have nervous systems that respond in similarity physiologically to humans in response to pain such as dilated pupils and increased pulse rates\textsuperscript{288}. Moreover, research focusing on the sentience of nonhuman animals indicates that mammals, birds and other vertebrates such as fish, reptiles and amphibians feel pain, although the evidence is much weaker in the case of invertebrates with the exception of cephalopods such as octopi and squid\textsuperscript{289}. Despite this evidence and in reply to the analogical argument, Peter Harrison argues that pain behaviour is not proof that the being involved is actually experiencing pain\textsuperscript{290}. He argues that even single-celled organisms withdraw from harmful stimuli and that insects struggle feebly after being crushed but few humans would argue that these behaviours indicate the experience of pain\textsuperscript{291}.

In reply, Singer argues that the principle of Occam’s Razor should be followed, which results in the following conclusion: the hypothesis that nonhuman animals feel pain is simpler than the idea that despite the physiological similarities between humans and nonhuman animals there are different explanations for similar behaviours \textsuperscript{292}. Marian Dawkins, who specialises in the field of nonhuman animal cognition, suggests that

\textsuperscript{286} *Ibid.*
\textsuperscript{287} *Ibid.*
\textsuperscript{288} *Ibid.*
\textsuperscript{289} *Ibid.*
\textsuperscript{290} *Ibid.* at 14.
\textsuperscript{291} *Ibid.*
\textsuperscript{292} Taylor, *supra* note 71 at 15.
Occam’s razor supports the claim that the emotional lives of many nonhuman animals includes the capacity to experience pain and pleasure. Colin McGinn, in attacking Harrison’s claim that nonhuman animals cannot experience pain because they have no sense of self, argues that the idea of ownerless experience is illogical. McGinn argues that all experience must be experience for some subject or self even if that self is unable to reflect on the experience, and this remains true whether or not the subject is human.

Rollin adopts a different line of reasoning to reject Harrison’s claim and points out that if it is true that the consciousness of nonhuman animals is locked into the present moment then it stands to reason that things are worse for them since when they are in pain, their whole world is consumed by pain and they are unable to remember or anticipate its absence. Even if pain is fleeting or forgotten, it is still pain for nonhuman animals as it is for newborn humans, so nonhuman animals are still experiencing pain. Thus, there is a significant amount of evidence that support the claim that some nonhuman animals are sentient, which makes an argument for their legal and moral personhood based on sentience feasible, logical and valid. These examples also show that methods exist for determining whether a nonhuman animal is sentient and thus entitled to moral and legal personhood. These methods can be adopted in new legislation giving effect to nonhuman animal legal personhood as a legal test for establishing which nonhuman animals pass the threshold of the divide between sentient and non-sentient nonhuman animals.

2. Moral Personhood to Legal Personhood

Nonhuman animals who have met the criteria for moral personhood are entitled to no longer be classified as property since they are entitled to equal moral consideration of their interests as members of the moral community. The property status of nonhuman animals cannot be retained for nonhuman animals who qualify as moral persons as it does not reflect the fact that they are entitled to equal consideration of interests, and the property status is incompatible with an entity being a moral person. The principle of equal consideration of interests has no meaningful application to nonhuman animal interests if they remain the property of humans since their interests will always count for less than the

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293 Ibid.
294 Ibid.
295 Ibid.
296 Ibid.
297 Ibid.
298 Ibid. at 61.
interests of their owners. Nonhuman animals have an interest in not suffering, especially with regards to their use by humans no matter how “humane” that use may be said to be. Canadian law recognizes that a mentally disabled human being has an interest in his or her life and in not being treated “exclusively as a means to the ends of others even if...” As Gary Francione points out, “Indeed, to say that a mentally disabled person is not similarly situated to all others for purposes of being treated exclusively as a resource is to say that a less intelligent person is not similarly situated to a more intelligent person for purposes of being used, for instance, as a forced organ donor. The fact that the mentally disabled human may not have a particular sort of self-consciousness...has no relevance to whether we treat her exclusively as a resource and disregard her fundamental interests, including her interest in not suffering and in her continued existence.”

Nonhuman animals who have been shown to be sentient are in a comparable situation to infants, and persons who are mentally incompetent. As they are protected from being used as a resource, and comparable sentient nonhuman animals are not awarded the same protections it can be said that Canadian society is failing to adhere to the principle of equal consideration of interests. Thus, as there is no morally relevant characteristic that distinguishes humans from nonhuman animals for the purpose of denying them moral personhood, and the application of the principle of equal consideration of interests has shown that they are entitled to be treated as moral persons, sentient nonhuman animals are entitled to have their status as property removed.

Sentient nonhuman animal persons have a claim to legal personhood, which is grounded in the fact that they have morally significant interests that are capable of being represented in law, and that the principle of equal consideration of interests requires that they be represented in law. Evidence for the claim that nonhuman animals have interests and they are capable of being represented in law is provided by Canadian animal law. As shown
in Chapter 2, federal and provincial and territorial anticruelty and welfare legislation recognize that nonhuman animals have a morally and legally significant interest in not suffering. Furthermore, the idea that nonhuman animals have their own legal interests has been recognized in varying degrees in the U.S.A. and internationally, which will be discussed further in Chapter 4. The interests of sentient nonhuman animals can be said to include avoiding mental suffering, physical suffering, injury and death. Courts have already dealt with these interests under the heading of pain injury in American civil law, which shows that courts are competent to provide remedies to successful claims should nonhuman animals be granted legal personhood. The characteristic of sentience as the sufficient condition for legal personhood is justified on the grounds that suffering is the appropriate measure for standing determinations because case law demonstrates that a showing of physical injury or suffering can constitute a claim of action. Second, the history of North American laws, culture and religion demonstrates that the guiding principles that Canadian and American society is based on are that humans do no harm to others, and a just system will treat like cases alike. Thus, nonhuman animals who are identified as moral persons will be granted legal personhood if the legal system is to be seen as just by treating like cases alike. As humans are moral persons and are entitled to legal personhood it can be said that nonhuman animal moral persons are also entitled to legal personhood. This is supported by the fact that they have interests that are capable and ought to be represented in law. Their interests in not suffering are morally significant interests that deserve legal protection as justified by the guiding principle of do no harm to others, and the equal consideration of interests. The claim for legal personhood for sentient nonhuman animals is further strengthened by the fact that legal personhood is not inherently limited to human beings in Canada. For example, the Crown has been recognized as a legal person as have corporations.

308 Ibid.
309 Magnotti, supra note 14 at 490.
310 Decoux, supra note 26 at 750.
311 Ibid. at 755.
312 Ibid.
313 Ibid. at 762.
315 Hogg, supra note 138 at 817.
Chapter 4
The Legal Case for Nonhuman Animal Legal Personhood

In 2005, an application was made in Brazil for a writ of habeas corpus on behalf of a lone chimpanzee named Suica who was living in a zoo. The Court found that this was a highly complex issue that deserved discussion and in-depth examination. As a result, the Court requested further information from Suica’s advocates, which was produced within 72 hours, but in that interim period Suica was found dead in her cage. The Court dismissed the application but observed that the criminal law is not static, new decisions have to adapt to new times, and that this topic would not die with the writ. This case illustrates the growing movement and recognition that legal principles exist to support the claim for nonhuman animal legal personhood. Chapters 1 and 3 showed that the beliefs on which Canadian legal assumptions rest no longer have a factual base and a new legal relationship must be formed between nonhuman animals and humans. Chapter 3 demonstrated that nonhuman animals possess moral personhood, which served as a basis for arguing that they are entitled to legal personhood. Chapter 4 will show that there are Canadian, and international legal principles that support the claim for legal personhood for sentient nonhuman animals. The argument in Chapter 4 in support of legal personhood for nonhuman animals is limited to nonhuman animals who have been shown to be sentient because as sentient beings they have interests capable of being represented in law and that ought to be represented in law as outlined in Chapter 3.

1. Legal Principles

1.1 Natural Law

Classical and modern theories of natural law support the claim for legal personhood for sentient nonhuman animals. According to classical natural law theory, morally objectionable laws and legal systems are not laws and legal systems. The theory holds that morality and the law are logically inseparable, that moral notions and ideals are part of the law, and that the law in society must ultimately embody and reflect certain absolute notions of right and wrong. There is little doubt that at one level the law and morality are

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316 Bisgould, supra note 10 at 282.
317 Ibid. at 283.
318 Ibid.
319 Ibid.
321 Human Morality, supra note 184, at 144.
linked. According to Tony Honore, it is “always possible to argue against a certain interpretation of the law that is morally indefensible and there is always a certain pressure within a legal system to render it morally defensible. In that way critical morality necessarily becomes a persuasive source of law.” Natural law theory has been used to justify the development and existence of international human rights. For example, the text of the *The Universal Declaration of Human Rights* states that “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights” and “in the dignity and worth of the human person.” Case law shows that Canadian judges are also influenced by theories of natural law in their decision-making. One can apply the same principles that support the claim for universal human rights to the argument for legal personhood for animals. Since sentient nonhuman animals are moral persons they are deserving of legal protection in order to protect their dignity and worth. As there is a necessary connection between law and morality to continue to exclude nonhuman animals from having the status of legal personhood is unjust and contrary to the principles of morality. Humans have been awarded human rights, which is justified on the basis of protecting the inherent dignity and worth of a person. Legal personhood is linked and based on the principles of protecting the inherent dignity and worth of a person. As nonhuman animals are moral persons the principles of reason and fairness demand that sentient nonhuman animals be granted legal personhood since they have interests in having their dignity and worth protected in the same manner as humans. To refuse to grant nonhuman animals legal personhood solely on the basis that they are nonhuman is speciesism, which is unjust and morally wrong because it is based on an arbitrary personal factor that has no bearing on determining one’s worth.

Evidence in support of natural law arguments for the entitlement of sentient nonhuman animals to legal personhood is provided by the case of *Reference re: British North America Act 1867 (UK) Section 24*, [1929], where the Privy Council held that the term, person, in section 24 of the *British North America Act, 1867* regarding a person’s eligibility to be appointed to the Senate included women despite a unanimous finding from the Supreme

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323 Honore, *supra* note 320 at 489.
325 Craik, *supra* note 322 at 8, and the case of *Re Drummond Wren* [1945] OR 778 (HC).
Court of Canada that it did not\textsuperscript{326}. The Privy Council stated that the exclusion of women from the meaning of “person” in section 24 was a “relic of days more barbarous than ours”\textsuperscript{327}, and that “customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared”\textsuperscript{328}. The Privy Council rejected the historical regard for women as an outdated custom that was not valid as a basis of modern statutory interpretation\textsuperscript{329}. A parallel can be drawn between the Privy Council’s arguments in this case to the situation of sentient nonhuman animals in Canada. Chapters 1, 2 and 3 have demonstrated that the legal relationship between nonhuman animals and humans in Canada must be redefined to reflect developments in ethics, and science. Chapter 3 argued for the legal relationship to be redefined so as to eliminate the property status of nonhuman animals and to award them legal personhood.

The natural law argument supporting sentient nonhuman animals’ claims to legal personhood is also supported by the case of \textit{Somerset v. Stewart}\textsuperscript{330}. This case concerned the capture of James Somerset in Africa who was purchased as a slave by Charles Stewart in the U.S.A. in the 1700s\textsuperscript{331}. Twenty years after he was purchased, Somerset accompanied Stewart to England and attempted to escape but was caught after one month\textsuperscript{332}. Before Somerset could be taken away from England, Granville Sharp and several other English citizens pleaded for a writ of habeas corpus from Lord Mansfield in the King’s Bench\textsuperscript{333}. On June 22, 1772 Lord Mansfield held that, “The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law....It is so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say that this case is allowed or approved by the law of England: and therefore the black must be discharged”\textsuperscript{334}. Lord Mansfield believed that the common law was continually working itself pure as it responded to changes in morality, experiences and facts\textsuperscript{335}. In the case, Lord Mansfield also stated, “[F]iat justicia, ruat coelumtet”, which is translated as “let justice be done whatever

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\textsuperscript{327} \textit{Ibid} at para. 9.
\textsuperscript{328} \textit{Ibid} at para. 36.
\textsuperscript{329} \textit{Ibid.} at paras. 43-46, and 78.
\textsuperscript{330} 98 Eng. Rep. 499 (K.B. 1772) [Somerset].
\textsuperscript{331} Rattling the Cage, \textit{supra} note 16 at 49.
\textsuperscript{332} \textit{Ibid.} at 50.
\textsuperscript{333} \textit{Ibid.}
\textsuperscript{334} \textit{Ibid.}
\textsuperscript{335} Nonhuman Rights, \textit{supra} note 14 at 1288.
the consequence”336. The Court’s decision relied on the principles of natural law to reject the arguments from Somerset’s owner337. These principles can serve to support a claim for legal personhood for nonhuman animals as it was shown in Chapters 1, 2 and 3 that sentient nonhuman animals are deserving of greater legal protections than they currently have in Canadian law, and there exists a valid argument to eliminate their property status in law and it is time that the law reflect this. This claim is further supported by a 2002 case where the Supreme Court acknowledged that the nonhuman animal rights legal perspective is a valid perspective that is entitled to consideration in Canadian courts338.

The cases of Re British North America Act 1867339, Somerset v. Stewart340, and Harvard College v. Canada341, and the other natural law arguments outlined above support the argument that the redefined relationship between humans and nonhuman animals should be one of personhood as sentient nonhuman animals have been shown to have moral worth as persons and their own interests that are capable and ought to be represented at law. Similar to the situation in Re British North America Act 1867342 where judges acknowledged that the category of legal person has to adapt to changing knowledge and values over time343, it is now time for the legal definition of person to change in order to recognize sentient nonhuman animals as persons. Sentient nonhuman animals are the only sentient beings who remain characterised as legal things while inanimate constructs such as trusts, corporations and estates have legal rights and can assert their interests in law344, which supports the argument that their exclusion from personhood is unjust, unfair, and unsound. It is unjust, unfair and unsound because sentient beings with fundamental interests that are comparable to the interests the law seeks to protect for humans are prevented from doing so345. There is a single state of justice belonging to all sentient beings and the exclusion from nonhuman animals from this sphere is incoherent346. In a just society comparable human and nonhuman interests would carry equal weight and would be capable of being represented in

339 Ibid.
340 Somerset, supra note 330.
341 Harvard, supra note 338.
342 Ibid.
343 Bisgould, supra note 10 at 52.
344 Ibid.
345 Ibid. at 281.
346 Cupp, supra note 337 at 21.
law in similar ways. It is time for the legal system to use its flexibility to respond to post-Darwinian knowledge about nonhuman animals and award them legal personhood whatever the inconveniences in order to be in accordance with the principles of natural law.

1.2 Canadian Legal Principles and Values

Equality is held to be a fundamental value in democratic societies. As a legal concept, it is understood to refer to the fact that every individual is entitled to dignity and respect under the law. As an ethical principle it means that like cases should be treated alike. Section 15(1) of the Canadian Charter of Rights and Freedoms gives legal effect to this value by guaranteeing that every individual is equal before and under the law, and has the right to equal protection and benefit of the law without discrimination, and in particular, without discrimination based on race, national, or ethnic origin, colour, religion, sex, age or mental or physical disability. The Charter forms a part of the Canadian Constitution, which means that section 15 demonstrates that a fundamental value of Canadian society is the equal considerations of interests as a constitution is a statement of a country’s most fundamental values as evidenced by the fact that section 52(1) of the Constitution Act, 1982 provides for the supremacy of the Constitution over all federal and provincial legislation.

The values and wording of section 15(1) can be used to invalidate arguments that rest on the justification of excluding nonhuman animals from legal personhood on the basis that they are not human. This claim is supported by two arguments, which are a value argument and an argument that Canadian laws that classify nonhuman animals as property are invalid because they breach section 15 of the Charter.

The value argument holds that as equality is a fundamental value in Canadian society, and that section 15 of the Charter protects this value in law, sentient nonhuman animals are entitled to equal consideration of their interests as persons under the law. The discussion and arguments in Chapter 3 showed that sentient nonhuman animals are moral persons and entitled to have their interests considered in law based on the principle of equal consideration of interests. The law confers personhood on infants, young children, the

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347 Dunayer, supra note 13 at 176.
348 Bisgould, supra note 10 at 52.
349 Robert J. Sharpe et al., The Charter of Freedoms, 2nd ed. (Toronto: Irwin Law, 2002) at 245 [Sharpe].
350 Ibid. at 245.
351 Rattling the Cage, supra note 16 at 82.
352 Charter, supra note 216.
anencephalic, those in persistent vegetative states and mentally incompetent humans. In Chapter 3 it was shown that nonhuman animals are indistinguishable from humans with these characteristics in terms of sentience, and sentient beings have individual welfare that is of import to them regardless to their usefulness to others. Any attempt to exclude nonhuman animals from comparison to this group on the grounds that humans with these characteristics are distinguishable from nonhuman animals on the basis that they have the potential to reach comparable capabilities such as rationality, and language that are possessed by mentally competent adult humans is invalid. The argument from human potential fails because it does not take into account the fact that they are awarded personhood and treated according to their present condition. It is also noted that persons in permanent vegetative states, and adults identified as mentally incompetent do not have or have a low likelihood of having the potential to become rational adults. Persons who are in a persistent or permanent vegetative state beyond one year have extremely low chances of regaining consciousness. Furthermore, individuals who put forth this argument are making a large assumption about future contingencies when they argue that infants and small children will become rational adults. For this reason, individuals with these characteristics can be said to be a legitimate and sound comparative group for the purposes of an argument based on the values protected in section 15. Thus, the exclusion of sentient nonhuman animals from the realm of legal personhood does not adhere to one of Canada’s most fundamental values.

Second, the legal argument under section 15 is based on the claim that there is nothing in the text of the section that precludes “individual” from being interpreted to include sentient nonhuman animals. An analysis of Charter litigation shows that its scope is not limited to human beings. For example, in Hunter v. Southam [1984] section 8 of the Charter was applied to a suit of a corporation, and in Edmonton Journal v. Alberta (AG) [1989] section 2 was applied to the suit of a corporation. Sentient nonhuman animals can be said to have a strong claim to fall within the scope of the meaning of ‘individual’ due to their

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354 Rattling the Cage supra note 16 at 255.
355 Dombrowski, supra note 186 at 40.
356 Ibid. at 80.
358 Dombrowski, supra note 186 at 81.
359 2 SCR 145.
360 Ibid.
361 2 S.C.R. 1326.
362 Ibid.
sentience, their possession of interests, and because humans with similar characteristics such as infants fall within the scope of the term. The claim that “individual” can be interpreted to include sentient nonhuman animals is further supported by jurisprudence examined later in this Chapter, which details how some courts treat nonhuman animals as individuals. If sentient nonhuman animals are individuals for the purposes of falling within the scope of section 15, then an argument can be made that any laws that treat them as property breach section 15 of the Charter since they fall within the scope of section 15’s protection. As such laws breach section 15 they can apply for a remedy under section 24. It is argued that the appropriate and just remedy in the circumstances would be to eliminate their status as property and to award them legal personhood. Remedies under section 24 of the Charter are for “anyone” whose rights or freedoms as guaranteed by the Charter have been infringed or denied. Jurisprudence has shown that corporations come within the scope of “anyone” in section 24 and thus they can apply for a remedy for Charter breaches, which supports a claim for the term applying to nonhuman animals, especially since they are sentient beings whereas corporations are inanimate legal constructs. It is argued that statutes classifying and treating sentient nonhuman animals as property cannot be saved under section 1 of the Charter because the harm caused to sentient nonhuman animals outweighs any benefits to humans, and they have a claim to not be treated as property as outlined in Chapter 3 and section 1.1 of Chapter 4.

Statutes classifying and treating sentient nonhuman animals as property can be said to breach section 15(1) as the exclusion is on the basis of not being human, which is a personal characteristic of a being. The classification of sentient nonhuman animals in statutes as property infringes section 15(1) as they are based on discrimination. This discrimination takes the form of the exclusion being based on differences in mental and physical capacities between humans and nonhuman animals, and species membership, which can be said to be analogous to enumerated characteristic of race. In Andrews v. Law Society B.C. [1989] the Supreme Court held that the purpose behind section 15 is to protect vulnerable groups from discrimination. Sentient nonhuman animals can be said to be such a vulnerable group as they currently have no means of direct standing or legal rights to protect their interests in Canada, and are subject to much suffering and injustice as

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363 Charter, supra note 216.
365 Bisgould, supra note 10 at 4.
366 1 S.C.R. 143.
367 Ibid.
outlined in Chapters 1, 3 and 4. The Court stated that in order to be able to claim the protections provided by section 15, one must show the following: that there has been a denial of one of the four equality provisions such as equality under the law, and that the differential treatment was discriminatory on the basis of a personal characteristic constituting either a listed ground within section 15. It is submitted that the classification of nonhuman animals as property results in a denial of all four of the equality provisions. It has been shown in Chapters 1 and 3 that nonhuman animals have interests capable of being represented in law, and that the principle of equal consideration of interests applies to them because they are part of the moral community. The classification of nonhuman animals as property prevents the equal consideration of the interests of sentient nonhuman animals with the interests of humans and denies them recognition as persons even though they possess the sufficient condition for being classified as such. It is argued that this is due to discrimination on an analogous ground, which is species, and is equivalent to the enumerated ground of race. Species can be said to be a valid analogous ground as it is a characteristic that cannot be changed. Quoting McIntyre J. in Andrews, the Court stated that discrimination is a “distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing....disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society”.

The classification of sentient nonhuman animals as property while humans are legal persons is a distinction made on the basis of prejudice for a group and unjustified stereotypes about the capacities of sentient nonhuman animals as supported by the arguments in Chapter 3, and causes disadvantages, and limits access to benefits, opportunities and advantages available to other members of society, especially when compared to humans with similar mental capacities. As a result the distinction is arbitrary, unjust and breaches section 15 and they are entitled to a remedy under section 24 as outlined above.

Furthermore, Canadian courts have begun reflecting the paradigm shift from nonhuman animals as property to viewing them as persons. In the law of torts and family law, courts have begun to rely on the consideration of a nonhuman animal’s best interests in custody

368 Ibid.
370 Ibid.
371 Sharpe, supra note 349 at 252.
372 Ibid. at 283.
decisions, which recognizes the law’s interest in protecting a sentient nonhuman animal for his or her sake.\textsuperscript{373} First, in \textit{R. v. Power}\textsuperscript{374} the Ontario Court of Appeal confirmed that in criminal offences concerning nonhuman animals the offences relate to the nonhuman animal himself or herself regardless of whether a human has any interest in him or her.\textsuperscript{375} Second, the case of \textit{Boschee v. Duncan}\textsuperscript{376} is the first example of nonhuman animals being elevated above chattel status in divorce proceedings.\textsuperscript{377} The ex-husband was ordered to pay his ex-wife monthly support payments for their dog and was not granted visiting rights.\textsuperscript{378} Last, in \textit{R. v. Rodgers}\textsuperscript{379} Justice P. Kowalysyn stated that, “As a pet owner, there was a trust imposed upon you not to cause injury, pain or death to any animal in your custodianship. The cases which have been cited by the Crown and your lawyer confirm this in the case and situations of pet owners...You breached this trust in the worst possible way. You took from this animal something that was not yours to take-its life.”\textsuperscript{380}

1.3 American Case Law

An analysis of American case law shows that the traditional legal view that treats all nonhuman animals as property is beginning to erode and transition to a system that views nonhuman animals as being fundamentally different from inanimate property.\textsuperscript{381} A brief examination of standing law, tort law, and custody decisions will demonstrate this change in status and show that the principles that can support a claim of legal personhood for sentient nonhuman animals already exist in the U.S.A.

First, the cases of \textit{Northern Spotted Owl et al. v. Hodel}\textsuperscript{383} and \textit{Marbled Murrelet, Envtl. Prot. Info. Ctr. V. Pac. Lumber Co.}\textsuperscript{384} illustrate that nonhuman animals have been granted direct standing in the U.S.A. and that it is possible for Canada to adopt this approach in law. In \textit{Northern Spotted Owl et al. v. Hodel}\textsuperscript{385} the Northern Owl brought an action asserting that the Secretary of Interior’s failure to list this species of owl as a threatened

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\begin{itemize}
\item \textsuperscript{373} \textit{Ibid.}
\item \textsuperscript{374} (2003) 176 CCC (3d) 209.
\item \textsuperscript{375} \textit{Ibid.}
\item \textsuperscript{376} [2004] 133 ACWS (3d) 683.
\item \textsuperscript{378} \textit{Ibid.}
\item \textsuperscript{379} 2012 ONCJ 808 (CanLII) <http://canlii.ca/t/fvm7>.
\item \textsuperscript{380} \textit{Ibid.}
\item \textsuperscript{381} Susan J. Hankin, “Not a Living Room Sofa: Changing the Legal Status of Companion Animals” (2007) 4(2) Rutgers Journal of Law & Public Policy at 317 [Hankin].
\item \textsuperscript{382} \textit{Ibid.} at 318.
\item \textsuperscript{383} 716 F. Supp. 479 (W.D. Wash. 1988) [Owl].
\item \textsuperscript{384} 880 F. Supp. 1343 (N.D. Cal. 1995) [Murrelet].
\item \textsuperscript{385} Owl, supra note 383.
\end{itemize}
species was arbitrary and capricious, and the Secretary should be required to reconsider the
determination and give reasons if he persisted in the non-listing of the species.\textsuperscript{386} This suit
was successful\textsuperscript{387} and the Owl’s representatives sued again in 1991 to require the Secretary
to designate the Owl’s critical habitat in order to provide them with protection\textsuperscript{388}. In both of
these cases the lawyers’ assertions on behalf of the Owl were sufficient to grant standing to
the Owl\textsuperscript{389}. In \textit{Marbled Murrelet, Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.}\textsuperscript{390} the Court
granted direct standing to an endangered nonhuman animal under the \textit{Endangered Species Act}
when a suit was brought against a lumber company to prohibit the taking of the marbled
murrelet’s habitat\textsuperscript{391}. The Court granted injunctive relief and held that as a protected species
under the Act the marbled murrelet has standing to sue in its own rights\textsuperscript{392}. In addition to
showing that nonhuman animal legal personhood is feasible and can be given effect in law,
these cases can be used to support a claim of nonhuman animal legal personhood based on
the implicit principles that the judges used to make the determination to grant these
nonhuman animals direct standing. In granting nonhuman animals direct standing these
judges have acknowledged that nonhuman animals have interests that are capable and ought
to be represented in law. Nonhuman animal legal personhood is necessary to give effect to
consideration of these interests because in order to give the interests of nonhuman animal
equal consideration at law they must be on equal footing with other legal persons.

Second, in addition to the law of standing, other areas of law have been shown to be
receptive to the idea that nonhuman animals are qualitatively different from other types of
property\textsuperscript{393}. Developments in the law of tort indicate that judges recognize that nonhuman
animals have a greater worth than other items of personal property\textsuperscript{394}, which shows that the
legal principles leading to nonhuman animal personhood are developing in American
jurisprudence. In the law of tort, courts have acknowledged that the emotions,
companionship, and sentimentality attached to companion animals in making their
decisions\textsuperscript{395}. For example, in \textit{Stettner v. Graubard}\textsuperscript{396} the Court held that in making the
valuation of the injury of a nonhuman animal having been wrongfully killed, the courts will

\begin{thebibliography}{99}
\bibitem{386} Decoux, \textit{supra} note 26 at 730.
\bibitem{387} Owl, \textit{supra} note 383 at 483.
\bibitem{389} Decoux, \textit{supra} note 26 at 730.
\bibitem{390} Murrelet, \textit{supra} note 384.
\bibitem{391} Decoux, \textit{supra} note 26 at 731, and Murrelet, \textit{supra} note 384.
\bibitem{392} Murrelet, \textit{supra} note 384.
\bibitem{393} Magnotti, \textit{supra} note 14 at 482.
\bibitem{394} \textit{Ibid.}
\bibitem{395} \textit{Ibid.}
\bibitem{396} 82 Misc. 2d 132, 133, 368 N.Y.S.2d 683, 685 (Harrison Town Ct. Westchester County, 1975).
\end{thebibliography}
consider any special value or particular characteristics of the nonhuman animal\textsuperscript{397}. The strongest claim grounded in legal principles for legal personhood for sentient nonhuman animals lies in the judgment of Corso v. Crawford Dog and Cat Hospital Inc.\textsuperscript{398}. Judge Friedman stated that a pet occupies a special place in law between a person and a piece of property\textsuperscript{399}. Judge Andell expanded on Judge Friedman’s view of animals in the case of Bueckner v. Hamel\textsuperscript{400} when he held that animals are not merely property, but sentient and emotive beings who belong to a unique category of property that statute and case law have not yet recognized\textsuperscript{401}. Judge Andell stated that, “law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, mere property. The law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live\textsuperscript{402}. Thus, family law courts can be said to have recognized that nonhuman animals have their own interests that the law can protect\textsuperscript{403}, which can ground a claim for nonhuman animal personhood.

The legal paradigm shift towards recognizing nonhuman animals as legal persons and raising the possibility of granting them legal rights is also evident in a case from the Louisiana Supreme Court. The Court heard the appeal of two men convicted of cruelty to nonhuman animals in 1897\textsuperscript{404} and rejected their argument that a statute prohibiting cruelty to nonhuman animals interfered with their property rights in their nonhuman animals\textsuperscript{405}. The Court held that the “statute relating to animals is based on “the theory, unknown to the common law, that animals have rights, which, like those of human beings, are to be protected. A horse, under its master’s hands, stands in a relation to the master analogous to that of a child to a parent”\textsuperscript{406}. Support for the claim that nonhuman animals have inherent value, and that their interests should be considered at law was also acknowledged in the case of Stephens v. State\textsuperscript{407} where it was held that the purpose of anticruelty statutes is to

\textsuperscript{397} Magnotti, supra note 14 at 482.
\textsuperscript{398} (415 NY Supplement, 2d ser 182-83 City Civ. Ct. 1979).
\textsuperscript{399} Dunayer, supra note 13 at 173.
\textsuperscript{400} (886 South Western Reporter 2d ser. 368-78 Tex App. Houston 1st Dist. 1994) [Bueckner].
\textsuperscript{401} Dunayer, supra note 13 at 173.
\textsuperscript{402} Bueckner, supra note 400 at para. 378.
\textsuperscript{403} Magnotti, supra note 14 at 482.
\textsuperscript{404} Decoux, supra note 26 at 713.
\textsuperscript{405} Decoux, supra note 26 at 713-4.
\textsuperscript{406} Ibid.
\textsuperscript{407} 3 So. 458 (Miss. 1887) [Stephens] and ibid. at 714.
remedy the common law’s failure to recognize the rights of nonhuman animals. The Court stated that to “disregard the rights and feelings of equals is unjust and ungenerous, but to wilfully or wantonly injure or oppress the weak and helpless is mean and cowardly. Human beings have at least some means of protecting themselves...but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve for these considerations alone, kindly treatment. This case serves as strong evidence for the argument for nonhuman animal legal personhood based on the criteria of sentience as the sufficient characteristic to entitle one to personhood. The Court makes explicit reference to the principle that the capacity to feel pain and pleasure entitles nonhuman animals at the very minimum to kind treatment.

Over the years, the concept of nonhuman animals as legal things has also been eroding in family law. Judges are transitioning from the notion of awarding the custody of nonhuman animals based on which spouse rightfully owns them as property to a view that custody should be awarded based on a determination of the nonhuman animal’s best interests. The case of Raymond v. Lachmann illustrates the transition to the consideration of a nonhuman animal’s best interests in these cases as a legal principle. In the New York Appellate Division, First Department, the custody of the family cat was awarded based on the cat’s best interests. The Court determined that the cat should live out the rest of her years in the home where she had lived for the past four years as this was where she had “lived, prospered, loved and been loved”. In Zovko v Gregory the Circuit Court of Arlington County in Virginia Judge Kendrick held that it would make a determination of custody for Grady based on “what is in the best interest of Grady”.

2. Marginal Cases

One of the most persuasive arguments in favour of granting legal personhood to nonhuman animals is the argument from marginal cases. Human beings with diminished decision-making capabilities...
making capacities such as children, the mentally ill, and persons in persistent vegetative states are treated as persons in law. The argument that societies must draw a sharp line between legal personhood for humans and nonhuman animals is unpersuasive when the fact that humans with less intellectual, emotive, and communicative abilities than many nonhuman animals are awarded this status\textsuperscript{417} is taken into account. This argument is strengthened by the fact that ships and corporations are granted legal personhood even though they are inanimate objects\textsuperscript{418}. This shows that the argument for the sanctity of legal personhood as a justification for limiting it to human beings is invalid since the law grants this status to non-thinking, non-feeling lifeless things\textsuperscript{419}. Thus, it is arguable that a living, thinking, communicative, and feeling nonhuman animal should have a stronger claim to legal personhood than a permanently unconscious human being or lifeless object\textsuperscript{420}. The example of children and incompetent adults possessing legal personhood also serves to show that even though they are incapable of exercising moral responsibility they are still entitled to legal personhood and as a result it can be said that one does not need to have the capacity for reciprocal duties to be a person in law\textsuperscript{421}.

3. International Comparative Law and Policies

International law, and case law, legislation and policies from legal jurisdictions provide support for the argument that nonhuman animals are entitled to legal personhood. As a party to international treaties Canada recognizes the values proclaimed in the treaties and contracts to fulfil the responsibilities outlined in the text of the treaties. An analysis of the Convention on International Trade in Endangered Species of Wild Fauna and Flora\textsuperscript{422} and the Convention on Biological Diversity\textsuperscript{423} will show that Canada has acknowledged on an international platform values that can be used to support the claims of nonhuman animals for legal personhood. An analysis of the policies, case law and legislation from different legal jurisdictions will be used to further support a claim for nonhuman animal legal personhood in Canada.

\textsuperscript{417} Cupp, supra note 337 at 17.
\textsuperscript{418} Cupp, supra note 337 at 17, and Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 409 (1886).
\textsuperscript{419} Cupp, supra note 337 at 17.
\textsuperscript{420} Ibid.
\textsuperscript{421} Ibid. at 29.
3.1 International Law

Canada is a party to two international treaties that advocate for the greater protection of specific nonhuman animals. Canada ratified the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* on April 10, 1975 and the *Convention* entered into force on July 9, 1975. Implementation and administration of the *Convention* is shared among federal and provincial and territorial agencies. As a party to the *Convention*, Canada recognizes that wild fauna and flora are an “irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come.” Paragraph 2 of Article II, which outlines the fundamental principles of the *Convention*, states that Appendix I includes a list of all species threatened with extinction who may or are affected by trade and that the trade of those species must be subject to strict regulation in order to not further endanger their survival and must only be authorised in exceptional circumstances. These values can serve to contribute to the argument for legal personhood for sentient nonhuman animals as they recognize the inherent value of nonhuman animals and the need for their legal protection.

Canada has also signed, and ratified the *Convention on Biological Diversity* in 1992. As a party to the *Convention*, Canada acknowledges the “intrinsic value” of biological diversity and the “ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.” Moreover, Canada acknowledges that it is conscious of the importance of “biological diversity for evolution and for maintaining life sustaining systems of the biosphere.” Parties affirm that the “conservation of biological diversity is a common concern of human kind.” Parties to the *Convention* also note that the “fundamental requirement for the conservation of biological diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.”

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426 CITES, supra note 422 at Preamble.
427 Ibid.
428 Diversity, supra note 423.
429 Ibid.
431 Diversity, supra note 423 at Preamble.
432 Ibid.
433 Ibid.
434 Ibid.
In order to give effect to its commitments under the Convention Canada enacted the *Species at Risk Act* ("SARA")\(^{435}\). These provisions illustrate that Canada has acknowledged on an international platform values that can be used to support the claims of legal personhood for sentient nonhuman animals.

3.2 Europe

An analysis of policies and legislation in place in various countries in Europe shows that nonhuman animals have greater legal protection in some countries compared to those in Canada, and some countries provide that there is a need to consider their interests at law as individuals. These policies and legislation can be used to support a claim for legal personhood in Canada for sentient nonhuman animals. In Switzerland, nonhuman animals are treated as sentient beings in law\(^{436}\). In 1992, Switzerland’s Constitution was amended to formally acknowledge nonhuman animals as “beings”\(^{437}\). For example, prospective dog owners must complete a four hour course before purchasing a pet, and social species such as birds and fish must have companionship\(^{438}\). In contrast, the United Kingdom (“U.K”) has had a ban on fur production since 2003\(^{439}\). In 2002, Germany passed a bill that includes nonhuman animals in a clause in its constitution\(^{440}\). The clause to which nonhuman animals were added obliges the state to respect and protect the dignity of humans\(^{441}\). The amendment provides direct protection to nonhuman animals\(^{442}\). Article 20(a) of the German Constitution reads as follows: the “State, in a spirit of responsibility for future generations, also protects the natural living conditions and the animals within the framework of the constitutional rules through the legislation and as provided by the laws through the executive power and the administration of justice”\(^{443}\). This amendment does not grant rights to nonhuman animals but the Directive of the State declares the protection of nonhuman animals as a value and goal of the state and mandates the state to exercise this value in all of its official capacities\(^{444}\). The impact of these statements and the wording of the

\(^{435}\) *Species at Risk Act*, S.C. 2002, c. 29 (assented to 12 December 2002) [SARA].


\(^{437}\) Magnotti, *supra* note 14 at 490.

\(^{438}\) Ball, *supra* note 436.


\(^{441}\) Ibid.

\(^{442}\) Magnotti, *supra* note 14 at 490.

\(^{443}\) Magnotti, *supra* note 14 at 490.

\(^{444}\) Ibid.
amendment show a commitment to protecting nonhuman animals, and that this commitment holds the state to a high standard for fulfilling its obligations to nonhuman animals. One of the implications of these legal provisions regarding nonhuman animals is that the protection of nonhuman animals as a goal of German society now carries constitutional weight and as a result where the protection of nonhuman animals and the rights of humans conflict, organs of the state will be compelled to consider the constitutional status of animal protection laws. Regarding general European policy, states that are parties to the Treaty of Lisbon have agreed to recognize that nonhuman animals are sentient beings and that member states shall “pay full regard to the welfare requirements of animals” in agriculture, fisheries, research and development and space policies.

3.3 India

The strongest evidence in support of a claim for nonhuman animal legal personhood in Canada is supplied by developments in India. In 2013, India’s government declared that dolphins should be seen as nonhuman persons and banned their captivity for entertainment purposes. The state passed national standards to outlaw dolphinariums, and the directive prohibiting dolphinariums in India issued by the Central Ministry of Environment and Forests acknowledges that research supports the claim that dolphins should be viewed as nonhuman persons. India’s protection of nonhuman animals and acknowledgement of their inherent is also evident in the country’s decision to ban nonhuman animal testing for...

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445 Ibid.
446 Ibid.
448 Mark Bekoff, “Animals are conscious and should be treated as such” NewScientist (26 September 2012) online: NewScientist <http://www.newscientist.com/article/mg21528836.200-animals-are-conscious-and-should-be-treated-as-such.html#.Ue9RtvlKSp>.
451 Ibid.
cosmetics and ingredients. The Bureau of Indian Standards approved the removal of nonhuman animal tests from the country’s cosmetics’ standard and replaced the invasive nonhuman animal tests with the mandatory use of non-nonhuman animal alternative tests. The country has already banned the use of big cats, bears and monkeys in all performances, which includes circuses and has invested in resources to enable them to live out their years in peace and safety. The Prevention of Cruelty to Animals Act 1960 and the Wildlife Protection Act prohibit the displays of nonhuman animals and birds for amusement. The recognition of the inherent value of nonhuman animals is also evident in Nair v. Union of India No. 328/2001, which dealt with a challenge of a notification issued under India’s Prevention of Cruelty to Animals Act, which prohibited the training and exhibition of bears, monkeys, tigers, panthers, and lions. The Court upheld the notification and the High Court of Kerala held that it is not only the fundamental duty of humans to show compassion to nonhuman animals but also to recognize and protect their rights. This shows that the Court acknowledged that nonhuman animals should be protected because they have a right to such protection.

4. Alternatives to Legal Personhood

One of the objections to eliminating the property status of sentient nonhuman animals and in granting them the status of legal persons is that it is unnecessary as there are alternatives available that can achieve the same level of protection for nonhuman animals and enable their interests to be represented in law. David Favre has proposed that nonhuman animals retain the status of property but that this status be amended to be one of quasi-property. Favre argues that nonhuman animals will still be held to be property for ownership purposes, but will also have the status of juristic persons. This system is premised on the

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454 Chauhaun, supra note 450.

455 Ibid.

456 Magnotti, supra note 14 at 491.

457 Ibid.

458 Ibid.

459 Huss, supra note 48 at 196.

460 Ibid.
idea that living objects have self-ownership\textsuperscript{461}, and that nonhuman animals would possess self-ownership for some purposes with legal title remaining in human owners\textsuperscript{462}. Human owners would owe duties to them based on existing anticruelty laws\textsuperscript{463}. Nonhuman animals would have their own legal interests that could be asserted against third parties\textsuperscript{464}.

The problem with retaining the property status of nonhuman animals is that the classification of a being as property “in a legal sense is to say that the thing is to be regarded solely as a means to the end determined by human property owners...If we say that an animal is property, we meant that the animal is to treated under the law primarily (if not exclusively) as a means to human ends, and not as an end in herself”\textsuperscript{465}. It follows from this reasoning, and as supported in discussion in Chapter 1 about the problems with being property, that nonhuman animals will be subordinate to human interests when conflicts arise and that legal constraints will not fully protect, if they protect at all, the interests of nonhuman animals. Their property status renders any balancing exercise meaningless because what is being balanced is the interest of property owners against the interests of their nonhuman animal property\textsuperscript{466}. The sanctity of the owner’s property interest ultimately prevails over any perceived interest of nonhuman animals\textsuperscript{467}, which includes human interests taking precedence over the lives of nonhuman animals\textsuperscript{468}. Human interests are protected by claims of right whereas nonhuman animals only exist as a means to the ends of humans, which gives humans the right to use them and to determine what uses they can be put to with only the possibility of some limitations being put on their use\textsuperscript{469}. The self-regulation of human use of nonhuman animals is also problematic as the vast majority of harms and suffering inflicted on nonhuman animals is caused by owners who justify their actions by claiming that their actions are necessary\textsuperscript{470}, which is evident in use of nonhuman animals in the production of food, and scientific experimentation.
Moreover, the characterisation of nonhuman animals as property embodies the moral judgment that they and humans are not of equal worth\(^{471}\). If nonhuman animals are not legal persons they are prevented from being able to define their own lives independently of humans, and cannot protect themselves from harm\(^{472}\). This holds true even if nonhuman animals are granted the status of *quasi*-property. Another important consequence of eliminating their property status and in granting them legal personhood is that it serves as a statement of value to society. Legal personhood is part of Canada’s normative structure for how to treat beings at law and the type of values associated with this categorisation. The granting of legal personhood to a being acknowledges that the being has inherent value, he or she has his or her own interests, and that he or she deserves to have them protected.

Any protections given by the law are meaningless unless one has the standing to vindicate those protections in court\(^{473}\), which is why legal personhood is necessary for nonhuman animals. Legal personhood serves to legally and symbolically direct the nation’s values regarding how the relationship between humans and nonhuman animals should look. The current nature of the Canadian legal system makes it necessary to award nonhuman animals the status of legal persons in order to be able to weigh their interests with humans in cases of conflict and to declare the values of respect and inherent worth of nonhuman animals. The combination of words in “legal personhood” implies respect for nonhuman animals as individuals who should receive more protection under the law than they currently receive\(^{474}\). Nonhuman animals were shown to have the ability to engage in various mental processes such as the ability to suffer emotionally and physically as a direct result of pain and trauma\(^{475}\). These characteristics are sufficient to merit the legal protections that their human counterparts enjoy\(^{476}\). Prohibitions for unnecessary pain and suffering create a situation where it is permissible to cause pain and suffering that is necessary\(^{477}\). In other words, humans have granted themselves permission to use nonhuman animals as they see fit because they create the laws and interpret them\(^{478}\). While nonhuman animals remain
property they cannot have their interests fully represented in law\(^\text{479}\) since it is difficult to speak about the equal consideration of interests when beings have unequal standing\(^\text{480}\).

**Chapter 5**

**Proposed Framework for Implementing Nonhuman Animal Legal Personhood in Canada**

One of the objections raised in response to the argument that nonhuman animals should be granted legal personhood is that the legal system is unable to balance competing nonhuman animal interests and human interests. This objection is not valid as once the property status of nonhuman animals is eliminated many of these conflicts will disappear\(^\text{481}\). Many of the alleged conflicts between human and nonhuman animal interests arise from seeing nonhuman animals as property as they concern human use of nonhuman animals for the purposes of convenience, pleasure or amusement\(^\text{482}\). Once it is acknowledged that nonhuman animals are part of the moral community, which legal personhood entails, this membership precludes their use by humans\(^\text{483}\). A second objection is that if nonhuman animals were persons there would be no method for determining their interests\(^\text{484}\). This article proposes a possible structure for giving effect to nonhuman animal legal personhood based on the creation of legislation and the designation of advocates to provide for the determination of the interests of nonhuman animal persons and for representing their interests at law.

1.1 Nonhuman Animal Advocates

One of the possible means of enabling nonhuman animal persons to have their interests represented in law is to establish special advocates for nonhuman animals. The canton of Zurich in Switzerland has had a state-funded, nonhuman animal lawyer whose responsibility is to represent the interest of nonhuman animals in courts\(^\text{485}\) since 1992\(^\text{486}\). Canada could adopt a similar system of having nationwide state-funded lawyers to

\(^{479}\) *Ibid.* at 281.

\(^{480}\) *Ibid.* at 282.

\(^{481}\) Francione, *supra* note 105, at 63.

\(^{482}\) *Ibid.*

\(^{483}\) *Ibid.* at 64.

\(^{484}\) Kelch, *supra* note 22 at 584.

\(^{485}\) Imogen Foulkes “Swiss ask whether animals need lawyers” *BBC News* (6 March 2010) online: <http://news.bbc.co.uk/2/hi/europe/8550028.stm> [Foulkes].

represent the interests of nonhuman animal legal persons in court\textsuperscript{487}. Antoine Goetschel, who holds this position in Zurich at the time of writing this article, argues that appointing lawyers to speak for those who cannot speak for themselves is the essence of justice\textsuperscript{488}. His responsibilities include making certain that judges take the cases seriously by explaining the animal protection code, reviewing the files and suggesting fines based on precedent and appealing verdicts\textsuperscript{489}. A proposal to extend the Zurich nationwide included provisions that gave nonhuman animals the right to be represented by lawyers in court and if they could not afford a lawyer one would be appointed for them at the government’s expense\textsuperscript{490}. Canada could adopt a similar system with the federal government assuming responsibility for the development and structuring of the system of special advocates for nonhuman animals. The provinces could maintain responsibility over the administration of the system as they are in the best position to understand local issues. These positions could be state-funded unless the opportunity arose where lawyers requested the court to be appointed as special advocates at their own expense. This proposal is supported by the fact that a system for appointing lawyers to assist the court already exists in Canada. Section 92 of the \textit{Rules of the Supreme Court of Canada} enables the Court or a judge to appoint an \textit{amicus curiae} for appeals\textsuperscript{491}. The special nonhuman animal advocate would assume a partisan role on behalf of nonhuman animals, and Canadian case law governing the role and appropriate circumstances for the appointment of an \textit{amicus curiae} can serve as the basis for creating legislation specific for nonhuman animal lawyers who are not funded by the court to serve as special advocates as a supplement to the state-funded lawyers or as an alternative in appropriate circumstances.

Furthermore, as a state responsibility a department dedicated to the oversight and development of nonhuman animal law and special advocates could be established based on the current models for provincial ministries of the environment. For example, Ontario’s Ministry of the Environment is responsible for protecting the province’s environment through the use of regulations, targeted enforcement and a variety of programs and initiatives\textsuperscript{492}. An analogous department could be created for dealing with the protection and enforcement of nonhuman animal interests with responsibility being assigned to special

\textsuperscript{487} Foulkes, \textit{supra} note 485.  
\textsuperscript{488} \textit{Ibid.}  
\textsuperscript{489} Ball, \textit{supra} note 436.  
\textsuperscript{490} \textit{Ibid.}  
\textsuperscript{492} “About the Ministry” online: Ontario Ministry of the Environment <http://www.ene.gov.on.ca/environment/en/about/index.htm>. 
advocates to determine, represent and enforce those interests. Alternatively, the SARA can serve as an example of how to structure a less extensive level of oversight and administration at the federal level. As opposed to creating a specific department overseeing nonhuman animal interests and special advocates, Ministers of the Environment, Fisheries and Oceans and Parks Canada Agency, and the ministers of the government of a province or a territory responsible for the conservation and management of a wildlife species in that province or territory⁴⁹³, and/or the attorney generals of the federal and provincial governments could be assigned the responsibility of overseeing the special advocates system. They could establish a committee of experts to assess and determine what are the interests of nonhuman animal persons, what the law says about their interests and to advise and manage the enforcement of their interests. The SARA’s example of the Committee on the Status of Endangered Wildlife in Canada’s role in designating species at risk by assessing the biological status⁴⁹⁴, and the Federal Cabinet then deciding which species will be added to the legal list of species at risk in order to be awarded legal protection under the Act⁴⁹⁵ can serve as a model for structuring the means for determining which nonhuman animals meet the sufficient condition of sentience. Decisions regarding the protection of the interests of nonhuman animals can follow from the outcome of the application of a nonhuman animal’s best interest test and by following the welfare principle, which are outlined below.

1.2 Legislative Framework

Chapters 3 and 4 discussed the parallels between nonhuman animals and persons who have been determined to lack mental capacity. In the U.K., the issue of medical treatment for mentally incompetent individuals is governed by legislation, a code of practice and the common law. The Mental Capacity Act 2005 (“MCA”) came into force in 2007 and covers decisions about the medical treatment of persons lacking capacity, questions about the management of property and financial affairs, and decisions about where they should live⁴⁹⁶. The MCA can be used as a guide for creating guidelines and principles outlining the method for determining the interests of nonhuman animals. In medical law in the U.K., if a patient is determined to be incompetent then they can be treated without his or her

⁴⁹³SARA, supra note 435 at section 7(1).
⁴⁹⁵Ibid. at 11.
There are two approaches to the assessment of capacity: status (where certain categories of patients are treated as incompetent because of their status) and function (where an individual’s actual capabilities are assessed). With regards to nonhuman animals the status approach would be used in order for the scope of the legislation to cover nonhuman animals that meet the criteria for legal personhood previously discussed. Section 1 of the MCA outlines the principles that apply for the purposes of the Act. The most important assumptions underpinning the Act as identified in section 1 are that people lacking capacity should be protected. Of particular relevance to nonhuman animals are section 1(5), which states that an act done or decision made under the MCA for or on behalf of a person who lacks capacity must be done or made in his or her best interests, and section 1(6), which states that before the act is done or the decision is made regard must be given to whether the purpose for which it is needed can be effectively achieved in a manner that is less restrictive of a person’s rights and freedoms of action. These principles can be used as the basis for creating the fundamental principles for similar nonhuman animal legislation.

Decisions regarding animals could be governed by a best interests test that is laid out in the legislation. The possibility of using a best interests test was raised in the American case of Morgan v. Kroupa. The trial court noted that it was possible to analyze the issues before the Court under several theories, one of which is the “best interests” test to determine how to resolve the issue of an action to recover a lost dog who was found after being raised for one year by someone else. Similar to the MCA the nonhuman animal legislation could be augmented by a code of practice, which would set out how the principles and legislative provisions of the statute such as the best interests test would apply in practice. Section 1 of the MCA sets out the best interests test and holds that when deciding between possible courses of action there should be a presumption in favour of the least intrusive action and consideration should be given as to whether to act at all. Section 4 of the MCA lists the

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497 Ibid. at 223.
498 Ibid.
499 Mental Capacity Act 2005 (U.K.), c. 9 [MCA].
500 Jackson, supra note 496 at 226.
501 MCA, supra note 499.
502 702 A.2d 630 (Vt. 1997).
503 Ibid.
505 Jackson, supra note 496 at 227.
506 Ibid. at 235.
factors to be considered in making a determination of a person’s best interests\textsuperscript{507}. Section 4 is not an exhaustive list of relevant factors, and the \textit{Code of Practice}\textsuperscript{508} makes it clear that the checklist is the starting point\textsuperscript{509} and in many circumstances additional factors will need to be considered\textsuperscript{510}. The best interests test has subjective and objective elements. For example, section 4(6) of the \textit{MCA} states that a person making the determination must consider so far as is reasonably ascertainable: (a) a person’s past and present wishes and feelings, and (c) the other factors that he or she would likely consider if he or she was able to do so, and section 4(7) states that one should take into account if it is practicable and appropriate to consult them, the views of (a) anyone named as someone to be consulted, (b) anyone engaged in caring for the person or who is interested in his or her welfare, and (d) any deputy appointed for the person by the court\textsuperscript{511}. These factors could be adapted to a nonhuman animal specific context by identifying animal welfare organizations or groups who are to have standing, making provision for the participation of a special advocate, experts who would be able to identify needs such as habitat size and behaviours specific to that species, and enable the participation of federal and provincial parks staff who will have practical experience in assessing the needs of both humans and nonhuman animals with regards to particular situations. In determining the best interests for a nonhuman animal, section 4(6) could be amended to take into account the reasons for granting legal personhood to nonhuman animals such as the interest in avoiding pain or suffering as a general fundamental principle. The subjective part of the test\textsuperscript{512} can be amended to take into account a species and/or the nonhuman animal in question’s basic needs and the factors can be built on this foundation such as giving consideration to what the nonhuman animal might consider as necessary as living a good life or what is necessary to pursue certain goals from within their natures\textsuperscript{513}.

In addition to the best interests test, decisions concerning nonhuman animals with legal personhood should be guided by the welfare principle. In the U.K., section 1 of the \textit{Children Act 1989} states that for any question affecting a child’s upbringing his or her welfare must be the paramount consideration\textsuperscript{514}. The welfare principle applies to medical

\textsuperscript{507} \textit{Ibid}.
\textsuperscript{508} \textit{Code of Practice, supra} note 504.
\textsuperscript{509} \textit{Jackson, supra} note 496 at 235.
\textsuperscript{510} \textit{Code of Practice, supra} note 504 at para 5.6.
\textsuperscript{511} \textit{MCA, supra} note 499.
\textsuperscript{512} \textit{Jackson, supra} note 496 at 237.
\textsuperscript{513} \textit{Kelch, supra} note 22 at 584.
\textsuperscript{514} \textit{Children Act 1989 (U.K.)}, c. 41.
treatment decisions involving children. English law holds that children do not possess the same capacity as adults for making decisions. In Gillick v West Norfolk and Wisbech AHA [1986] AC 112 the House of Lords held that children of any age may have the capacity to consent to treatment provided that they fulfil certain requirements, however, for the purposes of nonhuman animals the approach followed in law that would serve as a guide would be the approach taken by courts for children who fail to demonstrate competency. Regarding determining the best interests of a child, the court takes a highly fact-specific approach by balancing the advantages and disadvantages of an action, and is flexible in its approach. The Court in Re T (A Minor) (Wardship: Medical Treatment) [1997] 1 WLR 242 CA stated that a court must exercise independent and objective judgment on the basis of all available evidence. Regarding conflicts between human and nonhuman animal interests such as in the case of expanding an urban area resulting in the destruction of habitat and possible loss of life, the strong presumption in favour of preserving the life of a child that courts take in medical law could be applied to this situation. The standard for determining the best interests could be of a high degree of probability or a higher standard of beyond a reasonable doubt. This proposed model would also allow for the use of expert evidence in determining a nonhuman animal person’s best interests by providing the court with detailed information about the physical and psychological needs of the nonhuman animal person in question. Over a period of time and with the use of relevant experts the courts can gain the knowledge necessary to make determinations about the best interests of nonhuman animal persons.

1.3 Nonhuman Animal Guardians

The MCA, its Code of Practice and the common law can serve as a model for the creation of legislation in Canada that establishes a legal test for granting standing to groups or individuals for making representations on behalf of animals. Groups or individuals who meet the requirements of such a test could be used to supplement the special advocate’s role, or be used as an alternative to the special advocate if provisions were in place to appoint a guardian where no applications had been made by groups or individuals to act as

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515 Jackson, supra note 496 at 257.
516 Johnston, supra note 357 at 57.
517 Gillick v West Norfolk and Wisbech AHA [1986] AC 112.
518 Johnston, supra note 357 at 80.
519 Re T (A Minor) (Wardship: Medical Treatment) [1997] 1 WLR 242 CA.
520 Huss, supra note 48 at 227.
521 MCA, supra note 499.
522 Code of Practice, supra note 504.
guardians. Under Part 2 of the *MCA* a public guardian can be appointed, and section 57 provides that the Public Guardian is appointed by the Lord Chancellor. Section 58 outlines the functions of the Public Guardian, which include establishing and maintaining a register of lasting powers of attorney, supervising deputies appointed by the court, dealing with representations about the way in which a donee of a lasting power of attorney or deputy appointed by the court is exercising his powers, and reporting to the court on such matters relating to the proceedings under the Act as the court requires. Section 49 provides that the court may require a Public Guardian to make a report to the court when a question there is a question in relation to the patient. Section 49 also provides for visitation access for the guardian to determine the patient’s situation, which could be adapted to the specific case of nonhuman animals for assessing their condition, needs and the relevant legal issues. Furthermore, sections 35-41 of the *MCA* outline the functions, appointment, powers and responsibilities of independent mental capacity advocates. Section 35(1) states that the appropriate authority must make arrangements that it considers reasonable to enable the advocates to be available to represent and support persons regarding acts or decisions under sections 37, 38 and 39. Section 35(2) states that the appropriate authority can make regulations as to the appointment of independent mental capacity advocates, and section 35(4) outlines the governing principle for appointing advocates, which is that the person to whom a proposed act or decision relates should as far as practicable be represented and supported by a person who is independent of any person who will be responsible for the act or decision. These provisions could be adapted to the context of nonhuman animals in order to make a guardianship order in respect of a specific animal and per the provisions proposed above the tests for who can apply for guardianship can be a qualifying group or individual that has been granted standing or the special advocate. Under this guardianship model nonhuman animal advocacy organizations could apply to serve as guardians to protect their statutory rights. The guardian would be responsible for making representations on behalf of the specific nonhuman animal to the court and for ensuring his or her interests were protected.

524 *MCA*, supra note 499.
531 Hogan, *supra* note 25 at 532.
One of the components of the test could be that in order to be considered as a guardian, the group or individual must have demonstrated a long commitment in the organization or individually in preventing inhuman treatment of nonhuman animals as appeared to be suggested in the American case of Animal Lovers Volunteer Association v Weinberger. The Court in Animal Lovers suggested that the guardianship model is a possible means of dealing with the representation of nonhuman animal interests in law by indicating that the Animal Lovers Volunteer Association may have obtained standing in its own right if it had had an established history of dedication to the cause of the humane treatment of nonhuman animals. In order to demonstrate a commitment to animal rights and welfare courts can take into consideration the various activities and educational efforts by the group or individual, and their relevant expertise that indicate an established and enduring interest in protecting nonhuman animals. This method of determining the commitment of organizations or individuals in order to assess their suitability as guardians is supported by the model in place in Italy regarding environmental protection. In Italy, the legal system grants certain powers to environmental organizations to intervene in some environmental matters and to challenge government actions in their own right. Legislation provides for the Minister of the Environment to certify national organizations based on their programmatic goals, internal democratic nature, and demonstrated history of involvement in environmental activism. Successful groups then receive certification, which indicates that the organizations are valid representatives of the environment and are permitted to essentially bypass standing requirements. In the case of nonhuman animals in Canada, applicants who met the criteria for guardianship could be awarded certification confirming their competency and court approval to act as guardians for the nonhuman animal person in question. Canada could also choose to set up a certification system where the certificate is general in nature for the representation of the entire species, or for that one specific instance. Procedures for the removal and substitution of guardians, avoiding conflicts of interest and the termination of guardianship can form part of this legislation and precedent from human guardianship cases can be used to create the substantive content of these provisions. Thus, the guardianship model is a feasible method of enabling the interests of

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533 Ibid.
534 765 F.2d 937 (9th Cir. 1985).
535 Hogan, supra note 25 at 518.
536 Ibid.
537 Ibid. at 533.
538 Ibid.
539 Ibid.
nonhuman animal persons to be represented in law, which will ensure the proper administration of justice.

Chapter 6
Conclusion

The intent of this article is to make an argument for granting legal personhood to nonhuman animals, and to outline proposals for how nonhuman animal legal personhood could be given effect in Canada. The arguments in Chapters 1, 2, 3 and 4 show that Canadian law has not evolved to reflect developments in science, ethics and jurisprudence regarding nonhuman animals that support claims for the elimination of their status as property. The Supreme Court of Appeals of West Virginia has stated that “Obviously, courts heeded the teachings of Lord Mansfield and Justice Boggs that stare decisis does not require static doctrines but instead permits law to evolve and to adjust to changing conditions and notions of justice”\(^\text{540}\), and this principle can be said to apply to the context of Canada’s relationship with nonhuman animals. It is time that Canadian laws and institutions reflect the discoveries, changing values, and evidence regarding nonhuman animals as outlined in Chapters 1, 3 and 4 in order to prevent civilized society from remaining “ever under the regimen of their barbarous ancestors”\(^\text{541}\). In addition to amending its legal system to eliminate the property status of nonhuman animals, and grant them legal personhood, Canada will need to discuss the implications of granting them legal personhood.

One of the implications of legal personhood for sentient nonhuman animals is that it provides them with standing, which allows for the possibility that courts can consider substantive rights arguments for nonhuman animals\(^\text{542}\) on the merits of the claim. The greatest initial effect of granting them standing is that it will increase access to courts for nonhuman animals. Legal personhood will result in new legal protections for nonhuman animals. The recognition of personhood provides them with the opportunity to develop legal rights\(^\text{543}\) since legal personhood is defined in this article as a container that can be filled with rights. Steven M. Wise argues for fundamental rights for nonhuman animals on the basis that the sufficient condition for having fundamental rights is dignity, which is a

\(^{\text{541}}\) Kaminski, supra note 1.
\(^{\text{542}}\) Cupp, supra note 337 at 24.
\(^{\text{543}}\) Ibid. at 26.
quality imbued with intrinsic and incomparable value\textsuperscript{544}. The arguments supporting nonhuman animals’ claim to legal personhood as outlined in this article and in other works can be said to make an argument that nonhuman animals meet this condition. Once the rights argument has been raised, the starting point for the redefinition of this relationship is to determine the basic needs of nonhuman animal persons. These basic needs arguably include interests in living in peace and safety, without fear of human inflicted pain and suffering, and a right to life. The most basic right that advocates for nonhuman animals could seek to have granted to them is the “right to be left alone”\textsuperscript{545}.

A possible guiding principle for establishing the content of rights is to grant nonhuman animal legal persons the rights necessary for them to fulfil their telos\textsuperscript{546} where telos is defined as the ability to live in accordance with one’s nature, instincts and intellect\textsuperscript{547}. As the telos of each nonhuman animal is different the rights of different nonhumans will correspondingly differ\textsuperscript{548}. It is suggested that at the minimum the substantive rights of nonhuman animals include freedom from restraint except where the restraint is necessary for the protection of the nonhuman animal, and the freedom from human interference with the physical conditions of their habitat\textsuperscript{549}. The protection of nonhuman animal legal persons raises the possibility of using legal rights for nonhuman animals to protect natural objects, entire ecosystems, and their inhabitants as humans would be prevented from destroying habitats identified as being necessary for allowing them to live their lives\textsuperscript{550}.

Legal personhood may entitle sentient nonhuman animals to be represented at the political level. The involvement of the federal government in representing the interests of species at risk in the SARA shows that there is precedent for establishing special committees or Cabinet portfolios to represent nonhuman animal interests at the political level. This claim is further supported by the fact that Elections Canada reports that the Animal Alliance Environment Voters Party of Canada has been registered as a political party since 2005\textsuperscript{551}. The possibility of political representation for sentient nonhuman animals becoming a necessity as a result of their legal personhood is evidenced by the fact that in 2006 two

\footnotesize
\begin{itemize}
  \item\textsuperscript{544} Nonhuman Rights, supra note 14 at 1282.
  \item\textsuperscript{545} Hill v Colorado, 530 U.S. 703, 716-17 (2000), Winston v. Lee, 470 U.S. 753, 758-59 (1985), and Decoux, supra 26 at 229.
  \item\textsuperscript{546} Kelch, supra note 22 at 582.
  \item\textsuperscript{547} \textit{Ibid}.
  \item\textsuperscript{548} \textit{Ibid}, at 583.
  \item\textsuperscript{549} Kelch, supra note 22 at 583.
  \item\textsuperscript{550} Dunayer, supra note 19 at 172.
  \item\textsuperscript{551} “Registered Political Parties and Parties Eligible for Registration” (5 July 2013) online: Elections Canada <http://www.elections.ca/content.aspx?section=pol&dir=par&document=index&lang=e>.
\end{itemize}
animal rights political candidates won seats in the Dutch parliament, which shows that the voters felt that the interests of sentient nonhuman animals needed to be given a voice in the government.

The final significant implication of granting legal personhood to nonhuman animals is the need to amend and create new legislation in Canada in order to give effect to their legal personhood and any legal rights that they have been shown to possess. Canadian constitutional law will potentially serve as a barrier in some respects to giving full and equal consideration to nonhuman animal interests when balanced with the interests of humans in its present stated due to the fact that it is the supreme law of the land and amending the Constitution is a complex process. First, the division of powers between federal, and provincial and territorial governments will need to be discussed in relation to nonhuman animals in order to establish jurisdiction for each issue. Second, the Constitution guarantees certain hunting rights. Section 35 of the Constitution gives constitutional protection to rights created by treaties entered into with Indian tribes or bands, which can contain hunting rights. Furthermore, the Natural Resource Agreements are part of the Constitution of Canada and apply to the three prairie provinces. They protect the right of Indians to take game and fish for food, which can conflict with rights to a nonhuman animals’ right to life if they were established to possess this right. However, treaty rights can be extinguished in the same two ways as aboriginal rights, which are by voluntary surrender to the Crown, and by constitutional amendment. Any conflicts can be resolved through the amendment of the Constitution however these issues and potential conflicts will require a discussion process between all of those whose interests are involved.

553 CA, supra note 136.
555 Ibid. at 28-9.
557 Student, supra note 554 at 28-15.
558 Ibid. at 28-15.
559 Student, supra note 554 at 28-40.
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