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John MacCormick*

The Animal Protection Commission:
Advancing Social Membership for Animals
through a Novel Administrative Agency

If the state sought to improve law's treatment of nonhuman animals, what form should its intervention take? This paper questions the assumption that the state would have to choose between incremental welfare reforms and an immediate transition to animal personhood. Drawing on Martha Nussbaum's capabilities theory and on Sue Donaldson and Will Kymlicka's political approach to animal rights, it argues that the focus should be on how the relationship between human and nonhuman animals can be improved. It suggests that the state could intervene by creating an administrative agency with just this task; and that it could look to labour boards and human rights commission for inspiration. The paper draws comparisons with animal protection agencies in countries such as Austria, Switzerland and New Zealand, and argues that an agency with both regulatory and adjudicative functions could be developed out of Nova Scotia's current animal protection legislation.

Si l'État cherche à améliorer le traitement des animaux non humains par la loi, quelle forme devrait prendre son intervention ? Le présent document remet en question l'hypothèse selon laquelle l'État devrait choisir entre des réformes progressives du bien-être social et une transition immédiate vers l'état de personne animale. S'appuyant sur la théorie des capacités de Martha Nussbaum et sur l'approche politique de Sue Donaldson et Will Kymlicka en matière de droits des animaux, il soutient que l'accent devrait être mis sur la manière d'améliorer la relation entre les animaux humains et non humains. Il laisse entendre que l'État pourrait intervenir en créant un organisme administratif chargé précisément de cette tâche et qu'il pourrait s'inspirer des commissions du travail et des droits de la personne. Le document établit des comparaisons avec les organismes de protection des animaux de pays comme l'Autriche, la Suisse et la Nouvelle-Zélande, et soutient qu'un organisme doté de fonctions réglementaires et décisionnelles pourrait être créé à partir de la législation actuelle de la Nouvelle-Écosse sur la protection des animaux.

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Introduction

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Introduction

This paper proposes a novel administrative agency with the purpose of fostering a better relationship between human and nonhuman animals. This proposal is incremental in that it is meant to grow out of existing welfare-oriented provincial laws but radical in that it provides for the representation of animal interests before the agency and their adjudication against those of entrenched animal-use industries. Drawing on the work of Sue Donaldson and Will Kymlicka and that of Martha Nussbaum, it is motivated by a relational theory of animal ethics aimed at allowing animals to actualize their capabilities within a shared human-animal society. At the same time, it is tempered by the recognition that such a society could only gradually emerge out of changes in public opinion and negotiations between opposing interests. The proposed agency looks to human rights commissions and labour boards as agencies that facilitate these very processes within human society, while also drawing on promising models from countries seen as world leaders in animal protection law, such as Austria, Switzerland and New Zealand.

The paper has three parts. The first part sets out the philosophical motivations for this project and explains why a capability-oriented, relational approach to animal law can help to resolve the impasse in the ethical debate between animal welfare and animals rights, and the related opposition, on the legal level, between property and personhood status for animals. The second part sketches the outlines of a proposal for a provincial administrative agency with the purpose of advancing capabilities for

nonhumans. The third and final part elaborates on that proposal and shows how it could grow out of the current *Animal Protection Act in Nova Scotia*.¹

I. *Philosophical Foundations*

1. *Animal capabilities: beyond rights and welfare*

The animal advocacy movement is polarized by a now-familiar debate between “animal rights” and “animal welfare.”² Partisans of animal welfare hold that the movement should focus, not on eliminating the exploitation of nonhumans by humans—whether because they think this exploitation is justified, or because they think that it is futile to oppose it, at least for now—but rather on mitigating, to the extent possible, the conditions under which exploited animals live and die. Proponents of animal rights, by contrast, hold that any exploitation of nonhuman animals is unjustified, no matter how “humane,” and that welfare-oriented reforms are at best beside the point and at worst counterproductive. The animal welfare perspective is a consequentialist approach, in that it permits a reckoning of the aggregate benefits and harms of a given course of action, while the animal rights perspective is non-consequentialist, in that it holds that overall utility does not justify overriding fundamental entitlements.³

On an ethical level, rights and welfare offer a stark and unwinnable choice. Consequentialist welfare approaches are not serious enough about individual animal lives, in that they authorize fundamental deprivations as long as an overall accounting comes up in their favour.⁴ By a fallacious multiplication of utility, consequentialism makes each reform seem more significant than it is: if each cage gets just one square centimetre bigger, the gain to each animal is tiny, but if this gain is multiplied by the millions of animals in cages, it starts to seem very important. This kind of reasoning is misleading in that, by focussing on the aggregate, it attempts to evade the insignificance of the gain at the individual level, where the privation is really felt. If every homeless person were given a scarf, we would still not be justified in saying we had made real progress in improving the plight of

1. *Animal Protection Act*, SNS 2008, c 33.

2. For the outlines of this debate, see Cass R Sunstein, “Introduction: What Are Animal Rights?” in Cass R Sunstein & Martha Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004); for a critical perspective, see Peter Sankoff, “The Animal Rights Debate and the Expansion of Public Discourse: Is It Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?” (2012) 18:2 *Animal L* 281 at 283-285.

3. On the distinction between consequentialist and non-consequentialist approaches in animal ethics, see Tom Regan, *The Case for Animal Rights*, updated ed (Berkeley: University of California Press, 2004) at 141-142.

4. See Martha C Nussbaum, “Beyond ‘Compassion and Humanity’: Justice for Nonhuman Animals” in Sunstein & Nussbaum, *supra* note 2, 299 at 302-305 [Nussbaum, “Beyond ‘Compassion and Humanity’”].

the homeless—no matter how many people were made just the smallest bit better off. Such solutions, which are meaningless when measured against the scale of the problems, risk promoting public complacency, offering as they do the false impression that the problems are being addressed.⁵

Rights-based approaches are serious about individual animals, but they suffer from other problems. Recognizing the inviolability of animal rights gives each person a reason not to harm animals (or, by means of contract, have them harmed in his or her name), which furnishes an argument for personal veganism.⁶ The force of these arguments should not be discounted, but absent a wildly successful effort at public persuasion, personal veganism is not enough to effect social change. To be vegan is to be a conscientious objector in a one-sided war waged by humans against nonhumans. However, unless the number of conscientious objectors dramatically increases, their mere presence will not on its own be enough to stop the war. Perhaps even more critically, because non-consequentialist approaches preclude an overall assessment of harms and benefits, they make it difficult to think about degrees of improvement in the condition of animals or about progress toward an overall social goal. On the societal level, an imperative against the violation of animal rights will often yield prescriptions that are too inflexible to apply in the world as we know it, particularly since they leave little room for second-best solutions.

The capabilities approach as developed by Martha Nussbaum offers a solution to these problems. The capabilities approach is a unified theory that can apply to humans and nonhumans with built-in variations across species. It is built on the idea that it is good when a creature can flourish by living actively in accordance with the kind of thing that it is. Nussbaum writes: “Intuitively, it seems to me that the idea of doing injustice to an animal makes sense in much the way that the idea of doing injustice to a human being makes sense: both can experience pain and harm, and both are attempting to live and act, projects that can be wrongly thwarted. The notion of justice is conceptually bound up with the idea of experienced harm and thwarting, or so I believe.”⁷ On the capabilities approach, a

5. For an argument that incremental welfare reforms really do little for animals and may even make their exploitation more efficient, see Gary L. Francione & Anna E. Charlton, “Animal Law: A Proposal for a New Direction” in Anne Peters, Saskia Stucki & Livia Boscardin, eds., *Animal Law: Reform or Revolution?* (Zürich: Schulthess, 2015) 33.

6. The view that personal veganism is central to any meaningful animal advocacy movement is associated especially with Gary Francione. See Gary Francione, “The Paradigm Shift Requires Clarity about the Moral Baseline: Veganism,” *Animal Rights: The Abolitionist Approach*, online: <<http://www.abolitionistapproach.com/the-paradigm-shift-requires-clarity-about-the-moral-baseline-veganism/>>.

7. Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass: Belknap, 2011) at 158-159 [Nussbaum, *Creating Capabilities*].

being's capacities for action, and its attempt to realize those capacities, gives it inherent worth and an entitlement to justice. For Nussbaum, "The notion of dignity is closely related to the idea of active striving."⁸

At the same time, Nussbaum's notion of the "tragic choice" allows for meaningful second-best solutions. This is the regrettable choice that must be made, against the claims of justice, in situations where it is simply not possible for capabilities to be realized according to the dignity of each being. Unlike consequentialism, the notion of the tragic choice recognizes that fundamental entitlements are violated when such a choice is made—and that that is a bad thing. As Nussbaum writes, "The situation of tragic choice is not fully captured in standard cost-benefit analysis: the violation of an entitlement grounded in basic justice is not just a large cost; it is a cost of a distinctive sort, one that in a fully just society no person has to bear."⁹ The capabilities approach is non-consequentialist in that the aggregate consequences of a course of action are not enough to make it desirable—if anything, they justify the act under the threat of something worse.

By countenancing the inevitability of tragic choices, the capabilities approach recognizes that real situations of genuine conflict will arise. In the case of nonhuman animals, they could have to do with disease research or the need to maintain a global food supply.¹⁰ Nussbaum does not offer a comprehensive method for resolving these conflicts, and this is in keeping with the tendency of Aristotelianism (an important source of the capabilities approach) and ancient philosophy generally to leave a lot to be determined on a situational basis.¹¹ Virtues like compassion will probably be part of the answer, along with certain civic virtues that promote deliberation and justice. The proposal put forward here is meant to promote this kind of deliberation.

Nussbaum's capabilities approach combines Aristotelian and Stoic elements to articulate a comprehensive theory of the good for both humans and nonhumans. It takes from Stoicism the idea of equal and intrinsic worth, and interprets it in light of an Aristotelian focus on life and activity in contrast to the Stoic obsession with rationality. Aristotelian ethics, like ancient ethics generally, is more flexible than rights theory, in that it attends to the nuances of particular situations, but is more interested in fundamental values than consequentialism, in that happiness and flourishing

8. *Ibid* at 31.

9. *Ibid* at 37.

10. Nussbaum, "Beyond 'Compassion and Humanity,'" *supra* note 4 at 318.

11. *Ibid* at 306.

characterize individuals, not aggregates.¹² However, neither Aristotle nor Nussbaum makes the mistake of thinking about individuals in splendid isolation from the societies in which they live. In contrast to Stoicism, Aristotelianism accepts the importance of circumstances to flourishing.¹³ Moreover, Stoicism's insistence that happiness is possible in every circumstance hangs on its devotion to the central importance of rationality. If rationality is rejected as the fundamental criterion of worth—as really it must be if animals are to be part of the moral community—Stoic disregard for circumstances, which stands with the unique importance accorded to rationality, must also fall with it. To promote animal flourishing, we must attend to the political conditions that make it possible.

2. *Interspecies relations: beyond property and personhood*

Much as the sphere of animal ethics is divided by the line between rights and welfare, the sphere of animal law advocacy is divided by the line between property and personhood. The property-personhood dichotomy, like the rights-*versus*-welfare debate, is focussed on the fundamental entitlements of animals, or their intrinsic moral and legal status. Important as this kind of inquiry is, it does not effectively address the pressing political and legal question of how humans should structure their relationship to nonhuman animals.

A political approach to the animal question is important to animal law for the reason that it focuses on just this question. This is why some model like the one that Sue Donaldson and Will Kymlicka propose in *Zoopolis*—which uses citizenship theory to analyze the relationship of nonhuman animals to the polity, and calls for consideration of animal interests in questions of the public good—must be right.¹⁴ Whether or not we think in terms of citizenship, we should be focussing on the place of animals in society and on how our political decisions affect them. This is a real question of practical ethics which is open to discussion at the social or political level.

A political approach to animal law is a natural fit for a capability-oriented account of why animals matter, since the capabilities approach carries with it an interest in how political conditions contribute to the

12. See Nussbaum's discussion of the classical sources of her version of the capabilities approach, *Creating Capabilities*, *supra* note 7 at 125-131.

13. This is a focus of Nussbaum's own work in Martha Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton: Princeton University Press, 2009), especially Chs 2, 3, 9 & 10.

14. Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011). In what follows, I am also drawing on Will Kymlicka, "Social Membership: Animal Law beyond the Property/Personhood Impasse" (2017) 40:1 Dal LJ 123.

flourishing (or otherwise) of individuals. Affiliation is one of the ten central capabilities for both humans and nonhumans which Nussbaum situates at the heart of her approach, and this includes an explicitly political and relational dimension:

[Nonhuman animals] are entitled to relations with humans, where humans enter the picture, that are rewarding and reciprocal, rather than tyrannical. At the same time, they are entitled to live in a world public culture that respects them and treats them as dignified beings. This entitlement does not just mean protecting them from instances of humiliation that they will feel as painful. The capabilities approach here extends more broadly than utilitarianism, holding that animals are entitled to world policies that grant them political rights and the legal status of dignified beings, whether they understand that status or not.¹⁵

An important part of the reason animal flourishing is thwarted in society as we know it is that humans have ordered their society in a way that does not accord them a dignified place within it.

This approach is part of relational theory. Jennifer Nedelsky, a leading relational theorist explains that a relational approach to law should inform human beings' relationship with beings that are not human: "The relational approach would ask how human actions are currently structuring patterns of relations among the diverse entities of our world and where these can be easily identified as harmful. [...] The project would be to try to discern how human action could have as positive (or as minimal) an impact as possible while fostering wise relations between humans (both individuals and in the aggregate) and the other entities, broadly conceived."¹⁶ Donaldson and Kymlicka, too, are explicit about the relational quality of their theory.¹⁷ This helps to situate the approach to animal law set out here within a broader theoretical approach to law in general. What bears emphasis in this context, however, is not the importance of being relational, but the importance of being practical. The relational approach helps us to rephrase the animal question in the active voice: thinking about how we as a society should relate to animals does more to guide action than thinking about what, in the abstract, animals are owed.

A relational approach to animal law helps us to go beyond now-traditional dichotomies of the animal advocacy movement. The difficulty of achieving personhood for nonhuman animals can make it seem as if incremental welfare reforms were the only viable option, while the failure

15. Nussbaum, "Beyond 'Compassion and Humanity,'" *supra* note 4 at 316.

16. Jennifer Nedelsky, *Law's Relations* (Oxford: Oxford University Press, 2011) at 196.

17. *Zoopolis*, *supra* note 14 at 207.

of welfare reforms to achieve meaningful change for animals makes personhood seem like the only legitimate goal. The dilemma is unworkable because there are such strong arguments against either alternative.¹⁸ In contrast, the question of how humans should relate to nonhumans is much more open-ended, leaving greater room for creativity and, it is to be hoped, more productive legal and political debate.

This is especially important if a focus of animal advocates is to be on bringing animals and animal issues into the public discourse, as Peter Sankoff has suggested.¹⁹ A benefit of this approach is that it stands to win the support of both rights and welfare partisans within the animal advocacy movement. A penchant for principled infighting has long been one of the movement's weaknesses, and yet any of its factions would surely be glad to see the debate about nonhuman animals taking place among a broad section of society, rather than a small and comparatively isolated group of activists.²⁰

In short, rather than pursuing incremental welfare reforms or holding out for inviolable animal rights, animal-oriented law reform efforts should aim to improve human-nonhuman relationships in ways that enhance animal capabilities. In redesigning their legal relationship with animals, humans must start with something more effective than welfare reforms, but an immediate transition to nonhuman animal personhood is a non-starter. What animal advocates need is effective measures for fostering societal change.

II. *The Animal Protection Commission*

As Gregory Smulewicz-Zucker has convincingly argued, only the state has the power to intervene effectively in the human-animal relationship.²¹ The animal exploitation industry has power and money, and so far it has had the state's cooperation.²² As long as both industry and the state are aligned against animals, there is little hope for meaningful reform: since

18. Cf Sankoff, *supra* note 2 at 287-288.

19. Sankoff, *supra* note 2.

20. On the need for a broader, more inclusive animal advocacy movement and greater public deliberation, see also Sue Donaldson & Will Kymlicka, "Make It So: Envisioning a Zoopolitical Revolution" in Paola Cavalieri, ed, *Philosophy and the Politics of Animal Liberation* (New York: Palgrave Macmillan, 2016) 71.

21. Gregory Smulewicz-Zucker, "Bringing the State into Animal Rights Politics" in Cavalieri, *ibid*, 239.

22. In the Canadian context, see John Sorenson, "Some Strange Things Happening in Our Country: Opposing Proposed Changes in Anti-Cruelty Laws in Canada" (2003) 12:3 Soc & Leg Stud 377; on the equally bleak picture in the USA, see David J Wolfson & Mariann Sullivan, "Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable" in Sunstein & Nussbaum, *supra* note 2, 205.

the animal exploitation industry has little incentive to improve the plight of animals on its own, it is to the state that animal advocates must turn. To this end, it is worth asking: if the state did decide to intervene to make the legal relationship between humans and nonhumans more just, what measures would it make sense for the state to adopt?

Were nonhumans to be granted the rights of natural persons, the change would be so dramatic and wide-ranging that it is hard to imagine how it could come about immediately. Moreover, if, as Kymlicka suggests, we take the number of vegans in the population as a quick proxy—on the plausible assumption that a commitment to animal personhood seems to entail an obligation to renounce animal products, or at least to stop eating animals—it seems like there is just not nearly enough support for a move like that to make it happen.²³ Even if personhood really is in reach for chimpanzees, elephants or cetaceans, it is far, far away for cattle, pigs and chickens.²⁴ At the same time, Jonathan Lovvorn, while supplying statistics that are hardly more encouraging as far as the prospect of animal personhood is concerned, notes that there is widespread public support for some degree of change to the way the law treats nonhuman animals.²⁵ This lends both legitimacy and an air of reality to the prospect of state intervention.

Despite the substantial obstacles to personhood status for nonhumans, there may be more the state can do to adjust the human-nonhuman relationship, beyond mere welfare-oriented reforms. For inspiration we should consider the solutions that the state has chosen when, in the fairly recent past, it has intervened to correct injustice in existing relationships. Two prominent examples are labour boards and human rights commissions. Could a specialized administrative agency play a similar role in adjusting the relationship between humans and nonhumans? What follows is an argument that it could.

Like most of Canada's animal protection schemes, such an agency would be a matter of provincial jurisdiction. This is largely because

23. Kymlicka noted that the number is estimated to be 1 or 2% of the population in most Western countries: Will Kymlicka, "Social membership," *supra* note 14 at 131. The results of a recent Dalhousie University survey suggest that 2.3 per cent of Canadians are vegan and 7.1 per cent are vegetarian, with numbers significantly higher in the under-35 age group: Sylvain Charlebois, "Young Canadians lead the charge to a meatless Canada," *The Conversation* (14 March 2018), online: <<https://theconversation.com/young-canadians-lead-the-charge-to-a-meatless-canada-93225>>.

24. In mentioning the prospect of personhood for the "highest" species of animals, I am of course thinking of the work of Steven Wise and the Nonhuman Rights Project, online: <nonhumanrights.org>.

25. Jonathan Lovvorn, "Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform" (2006) 12 *Animal L* 133 at 136-138.

nonhuman animals are property under the law, so that laws governing human treatment of nonhumans are a matter of property and civil rights.²⁶ This paper envisions such an agency as it might come to exist in Nova Scotia, but of course any province could implement the idea.

In fact, Nova Scotia's animal protection legislation already includes an administrative tribunal, namely the Animal Cruelty Appeals Board, which currently exists under the *Animal Protection Act*.²⁷ The mandate of the Animal Cruelty Appeals Board, however, is starkly circumscribed: it merely reviews decisions to seize an animal in distress at the request of an "owner or custodian of an animal who considers himself or herself aggrieved" thereby.²⁸ Limited as this function is, it could grow into something more robust. The Board, even as constituted at present, is effectively tasked with deciding what is and is not acceptable in the conduct of humans toward nonhumans, insofar as it decides what human behaviour warrants the state's protective intervention. For now, however, the Board's mandate is principally concerned with the legitimacy of the state's decision in individual cases to limit, through the operation of animal protection legislation, the private rights of ownership that are normally enforced against animals. The agency proposed here would have a much wider mandate, namely to begin restructuring the human-nonhuman relationship in such a way as to promote animal capabilities.

Such an agency might be styled the "Animal Protection Commission." The term "animal protection" is neutral between animal welfare and animal rights. Compared to "animal welfare," "animal protection" seems to imply more active duties toward animals, which is in keeping with the proposal to focus on society's obligations toward nonhumans. At the same time, while "animal protection" does not imply that animals have rights, it is hard to deny that animals with rights will still need protection.²⁹ Moreover, the fact that the term is consistent with the name given to the current statutory framework in Nova Scotia could help to emphasize the continuity between existing law and the proposal made here.³⁰

26. *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(13).

27. *Animal Protection Act*, *supra* note 1, s 31(1).

28. *Ibid.*, ss 31(1), 32(1).

29. The expression corresponds to the German word *Tierschutz*, and it could be noted in this connection that German-speaking countries, as a bloc, have perhaps the world's strongest animal protection laws, all of which are called *Tierschutzgesetze*. (See the World Animal Protection Index, online: <api.worldanimalprotection.org>, which gives a grade of A to Austria and Switzerland and a grade of B to Germany. The other two A's go to the UK and New Zealand. Canada, like the USA, receives a grade of D.)

30. *Animal Protection Act*, *supra* note 1.

For reasons to be explained shortly, an agency with these goals might be structured to include the following: a Commissioner authorized to receive complaints and to work with humans suspected of violating the act and help them to achieve compliance; an Interspecies Relations Board authorized to conduct investigations and hearings, to be composed of the Commissioner or her deputy and an equal number of representatives of animal use and animal advocacy groups; and a Prolocutor for Nonhuman Animals authorized to bring complaints before the Commission and to represent the interests of nonhuman animals at hearings before the Board. The role of the Commission would be both regulatory and, through the activities of the Board, adjudicative. So constituted, the Commission would advance animal protection by providing a forum for the renegotiation of the human-nonhuman relationship. The following sections explain how the design of a Commission to accomplish this goal is modelled on existing institutions both in Canada and abroad.

1. *The Commission*

Human rights commissions provide a valuable example, because they too were designed to restructure relationships. The purposes of the Nova Scotia Human Rights Commission, which include a mission “to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons,” clearly align it with the goal of human capability development.³¹ As a model for the proposed agency, it is worth considering the duties that Nova Scotia’s *Human Rights Act* assigns to the Human Rights Commission:

24 (1) The Commission shall

- (a) administer and enforce the provisions of this Act;
- (b) develop a program of public information and education in the field of human rights to forward the principle that every person is free and equal in dignity and rights without regard to race, religion, creed, colour or ethnic or national origin;
- (c) conduct research and encourage research by universities and other bodies in the general field of human rights;
- (d) advise and assist government departments and co-ordinate their activities as far as these activities concern human rights;
- (e) advise the Government on suggestions, recommendations and requests made by private organizations and individuals;
- (f) co-operate with and assist any person, organization or body concerned with human rights, within or outside the Province;
- (g) report as required by the Minister on the business and activities

31. *Human Rights Act*, RSNS 1989, c 214, s 2(e).

of the Commission; and

(h) consider, investigate or administer any matter or activity referred to the Commission by the Governor in Council or the Minister.³²

A provision just like this one outlining the duties of the Animal Protection Commission could be included in the *Animal Protection Act*, with “animal protection” replacing “human rights”, and “the pursuit of a dignified existence for all creatures” replacing “the principle that every person, etc.” Because the purpose of this agency is to promote the enhancement of animal capabilities by fostering societal change, the educational component would be especially central to its mandate.

A novel administrative agency like this one could help to actualize animal capabilities within society by enforcing capability-enhancing laws in a way that combines education with sanctions for wrongdoing (like a human rights commission) and facilitates negotiation when conflicting interests are at stake (like a labour board). Administrative agencies are an appropriate vehicle for delivering basic entitlements, like the right to equality or the freedom of association, where constitutions do not apply because the relevant claims are between private parties. The agency could, moreover, be designed in a way that enhances human capabilities as well as those of nonhumans. It should, for instance, conduct research into and promote alternatives for those whose livelihood might be affected by animal-friendly change. A provincial agency is a good place for experimental innovations, and the relative autonomy of administrative agencies gives them more opportunity to implement relational and capabilities-based approaches than the general courts.³³

2. *The Prolocutor for Nonhuman Animals*

The effectiveness of this scheme depends on its incorporation of an advocate for animal interests. Ours is an adversarial system, and the expectation is that the Animal Protection Commission would operate on a similar basis: for this to be possible, someone would need to represent the side of the nonhumans. The advocate who plays this role might be styled the “Prolocutor for Nonhuman Animals,” literally meaning the person who *speaks on their behalf*.

Other jurisdictions have already developed their own versions of such an office. The most prominent is the Austrian example, in which the federal animal protection law requires each Land or province to appoint

32. *Ibid.*, s 24(1).

33. Bruce P Archibald, “The Significance of the Systemic Relative Autonomy of Labour Law” (2017) 40:1 Dal LJ 1 at 21-23, 29-44.

an animal protection ombudsperson (*Tierschutzombudsperson*).³⁴ The ombudsperson is automatically a party to proceedings under the act, and has the duty of representing the interests of animal protection.³⁵ The ombudsperson must be a person trained in veterinary medicine, zoology or agricultural sciences, with additional training in animal protection.³⁶ The Swiss Canton of Zürich also provides for the representation of animal interests by a lawyer from the cantonal government: until 2011, there was a dedicated *Tieranwalt*, or animal lawyer, employed for just this purpose.³⁷

Donaldson and Kymlicka, though expressing interest in Zürich's *Tieranwalt* in particular, offer an appropriate caution: "[T]his is more about ensuring the effective enforcement of existing legal protections against cruelty and harm than about political representation. The animal advocate is not authorized to renegotiate the terms of membership by representing animals as co-citizens in legislative processes."³⁸ This, however, is another reason why Austria's *Tierschutzombudspersonen* are interesting. The same animal protection law also provides for two advisory bodies. The ombudspersons of the nine provinces belong to the *Tierschutzrat*, or Animal Protection Council, along with representatives of government, agriculture, veterinary medicine and academia. This body is charged with submitting opinions on draft regulations made under the act, as well as with producing an annual report with recommendations on advancing animal protection law.³⁹ This is in addition to the *Tierschutzkommission* (Animal Protection Commission), which is a cross-party parliamentary working group, which must make its own report to Parliament every two years.⁴⁰

Unlike Austria's *Tierschutzombudspersonen*, but like Zürich's *Tieranwalt*, the Prolocutor should be a lawyer specializing in nonhuman animals, rather than a veterinarian (though the commission should of course have recourse to veterinarians when evidence about animal bodies is required). The role of the Prolocutor is that of an advocate, not a physician. Lawyers are much better placed to serve this function.

34. *Tierschutzgesetz* [Animal Protection Law] [TSchG], BGBl I 118/2004 §41(1), translation online: <https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2004_1_118/ERV_2004_1_118.pdf>.

35. *TSchG*, *ibid.*, §41(3), (4).

36. *TSchG*, *ibid.*, §41(2).

37. *Kantonales Tierschutzgesetz* [Cantonal Animal Protection Law] (Zürich), 554.1/1991 §17. Leo Hickman, "The Lawyer who defends animals," *The Guardian* (5 March 2010), online: <www.guardian.com/world/2010/mar/05/lawyer-wo-defends-animals>; "Amtsjuristin ersetzt Tieranwalt" ["Government jurist replaces animal lawyer"], *Der Tagesanzeiger* (23 December 2010), online: <www.tagesanzeiger.ch/zuerich/region/Amtsjuristin-ersetzt-Tieranwalt/story/26088900>.

38. Donaldson & Kymlicka, *Zoopolis*, *supra* note 14 at 154.

39. *TSchG*, *supra* note 34, §42.

40. *TSchG*, *ibid.*, §42a.

Moreover, the goal of the commission is to effect long-term legal change in favour of nonhumans, whereas the employment of veterinarians as animal representatives may reflect the idea that animals should have basic bodily welfare, rather than social membership. In an important sense, Steven Wise is a spokesperson for the clients of the Nonhuman Rights Project, but the Prolocutor's role as I am envisaging it within this agency would be wider-ranging than Wise's focus on personhood and basic liberty rights.⁴¹ In Canada, this broader legal representation of animal interests is a project of Animal Justice, a non-profit animal advocacy group.⁴² By seeking—and gaining—intervener status in cases that involve animal interests, Animal Justice gives voice to animal interests in legal decisions that affect them.⁴³ Animal Justice, however, relies on charitable donations and the work of volunteers; I am suggesting that a state that was committed to improving animal law would create an institutional role for this kind of representation.

3. *The Interspecies Relations Board*

Labour Boards are another institution that serves as a model for this proposal. Some scholars, such as Alisdair Cochrane, have argued for labour rights for nonhuman animals, including the creation of animal trade unions.⁴⁴ Even on a fundamental level, there is something to this insight, in that animals toil for the (usually economic) ends of human beings.⁴⁵ There are, however, difficulties arising from the fact that it is just not clear how animal labour can be “organized.” In this sense, the matter of animal work has more to do with employment standards legislation than with unionization. This is because it is a question of whether there should be a basic floor of rights, not a question about bargaining power. A further problem with applying labour law to nonhuman animals is that strikes are essential to realizing the bargaining power of the union, and these depend on union democracy in one way or another. In order to apply labour law (rather than employment standards law) to nonhuman animals, we would need a way for nonhumans to call a strike.⁴⁶

Still, there is at least something we can take from labour law, which is the idea of the tripartite constitution of an administrative agency,

41. The Nonhuman Rights Project, online: <www.nonhumanrights.org>.

42. Animal Justice, online: <www.animaljustice.ca>.

43. Animal Justice has intervened in *R v DLW*, 2016 SCC 22, [2016] 1 SCR 402 and *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395; it is currently intervening in the Vancouver Aquarium's lawsuit against the Vancouver Parks Board's ban on the confinement of cetaceans in Stanley Park.

44. Alisdair Cochrane, “Labour Rights for Animals” in Robert Garner & Siobhan O'Sullivan, eds, *The Political Turn in Animal Ethics* (London: Rowman & Littlefield, 2016) 15.

45. Kymlicka, *supra* note 14 at 147-151.

46. *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 54, [2015] 1 SCR 245.

comprising representatives from opposing interest groups as well as an impartial chairperson.⁴⁷ Even if the traditional structures of bargaining cannot be neatly applied, there is still a bargain to be struck between human and nonhuman animals. Part of the problem now is that animals have no say in this bargain at all. This is the reason for constituting the agency in a way that allows for the representation of both animal and animal-use interests, through a Board that would include both animal advocates and animal-use industry representatives, as well as a neutral government chair.

This is the point of looking to labour law interventions as a model for the proposed agency. There the point is to intervene in the exercise of common law rights (such as freedom of contract and the master-servant relationship) with a view to promoting social justice. Maybe more importantly, this happens by restructuring the relationship between employees and employers. In the labour law context, this is a matter of adjusting bargaining power, but bargaining is not necessarily relevant in the human-nonhuman context (and to the extent that it is, it depends on the intervention of a representative for nonhumans). The problem is not that animals are currently concluding unfair contracts with industry because of an inequality in bargaining power which the state could intervene to correct. They do not have any bargaining power at all, or a meaningful capacity to bargain. Instead, the bargain has to be altered on their behalf. As Daniel Davison-Vecchione and Kate Pambos have observed, nonhumans need not be excluded from the social contract just because it is humans who strike the bargain: they could effectively become third-party beneficiaries of the social contract.⁴⁸ Here too there is a parallel with labour law, since workers are third parties to the contract between their union and their employer.⁴⁹

III. *Transforming Animal Protection in Nova Scotia*

Nova Scotia's *Animal Protection Act* already includes a broad prohibition on causing or permitting an animal to be in distress.⁵⁰ It also lets the responsible minister make regulations designating activities that will be deemed to cause an animal to be in distress.⁵¹ A productive way for the Commission to advance animal protection would be by exercising power to develop regulations under the act and propose them to the

47. See, e.g., *Trade Union Act*, RSNS 1989, c 475, s 16(1).

48. Daniel Davison-Vecchione & Kate Pambos, "Steven M. Wise and the Common Law Case for Animal Rights: Full Steam Ahead" (2017) 30:2 Can JL & Jur 287 at 304-305. On minimal rights and social contract theory, see also Nussbaum, "Beyond 'Compassion and Humanity,'" *supra* note 3 at 306-307.

49. *Trade Union Act*, *supra* note 47, s 41.

50. *Animal Protection Act*, *supra* note 1, ss 21(1)-21(2).

51. *Ibid*, ss 39(1)(ac), 40(1)(n).

minister. The breadth of the prohibition on causing or permitting an animal to be in distress would allow the Commission to develop the law protecting animals by interpreting that provision in respect of situations not envisaged in the regulations, as well as by defining them in advance through the regulations. In fact, it is not only the prohibition on causing an animal to be in distress that calls for interpretation or elaboration. Several of the provisions in section 2 which specify the meaning of “distress” contain normative terms like “adequate ventilation,” “conditions that are unsanitary,” “undue hardship” and “abused.”⁵² A specialized commission would be well placed to give concrete meaning to all of these terms. Perhaps most significantly, the exemption from the prohibition on distress applies to “*reasonable and generally accepted* practices of animal management, husbandry or slaughter or an activity exempted by the regulations.”⁵³ This wording puts a great deal of weight on the regulations, and is also open to a considerable degree of interpretation regarding which practices count as both generally accepted and reasonable—both terms offering some potential for progressive application in favour of animals.

1. *A regulatory role for the Commission*

The tripartite structure of the Commission (including government, animal users and animal advocates) would make for balanced regulations. It could take input from industry while avoiding regulatory capture. Currently, only humans, and generally speaking only industry, have a place at the table when our relationship with nonhumans is negotiated. Even those who are supposed to protect animals often stand for human interests.⁵⁴ This is why animals need a partisan representative of their own. The Commission can provide a forum for informed negotiation. Being experts in both animals and their exploitation, the Commission would be well placed to make informed decisions. The Commission can attend to animal capabilities while also making sure human needs are addressed. Often the Commission might be unanimous—since interests between animals and exploiters do sometimes converge, as they do between workers and employers. In situations that call for a tragic choice, the neutrality of the Commissioner would make this possible.

There is value in including representatives of animal-use industries because the project is to negotiate a better relationship. Those who are involved in making the relationship the way it is now should be part of

52. *Ibid.*, ss 2(a)–2(d).

53. *Ibid.*, s 21(4) [emphasis added].

54. Sorenson, *supra* note 22 at 383, citing House of Commons, Standing Committee on Justice and Human Rights, Evidence (17 October 2001).

the renegotiation: this restorative approach gives a better prospect for gradual change over the long term. Moreover, it should be remembered that there are real human interests at stake which need to be accounted for. These are not just the taste of meat or the feel of fur—as society is currently organized, matters of health and livelihood also depend on animal exploitation. It is important to have input on how these needs could continue to be met as the oppression of animals is phased out. Moreover, there needs to be some kind of political compromise across the aisle, as it were, in order for something like the commission to come into being at all.

This brings us back to Nussbaum's notion of the tragic choice. In its regulatory role, the Commission would have the job of making tragic choices. A choice can be tragic even when the violation it envisions is not strictly necessary: it may be politically necessary in the interests of the broader animal rights movement. Animal advocates may have to make trade-offs to advance the overall situation of animals. This should not be understood as a utilitarian calculus, since real entitlements are being violated. Not everyone can be saved from the war on animals, and this leaves animal advocates with hard choices.

There are international parallels for such a commission playing a regulatory role. These include the *Tierschutzrat* in Austria, the National Animal Welfare Committee in New Zealand (NAWAC), and the Farm Animal Welfare Committee (FAWC) in the United Kingdom. FAWC is an advisory committee to the Minister of the Environment, Food and Rural Affairs.⁵⁵ NAWAC is a statutory body established under New Zealand's *Animal Welfare Act*, which advises the minister in matters affecting animals except those used in research.⁵⁶ The National Animal Ethics Advisory Committee (NAEAC) performs the same role with respect to animals used in research.⁵⁷ The two committees in New Zealand have an especially robust regulatory role, in that they are charged with drafting regulations for consideration by the minister. Peter Sankoff has drawn attention to the important role of these bodies in promoting public discourse on issues affecting nonhumans: every year, the detailed "Codes of Welfare" which NAWAC develops (of which there will eventually be at least twenty-one), are subject to revision every ten years, meaning that the committee will regularly be revising two codes every year in a process that includes robust public consultation. This means that animal protection is on New

55. "Farm Animal Welfare Committee (FAWC)," GOV.UK, online: <<https://www.gov.uk/government/groups/farm-animal-welfare-committee-fawc>>.

56. *Animal Welfare Act 1999* (NZ), 1999/142 ss 56, 57.

57. *Ibid.*, ss 62, 63.

Zealand's legislative agenda at all times, prompting a sustained increase in the level of public discussion about animal issues.⁵⁸

2. *An adjudicative role for the Commission*

Criminal and civil legal actions aimed at advancing the status of animals have so far had little success in Canada, but a specialized agency is in a position to countenance the interests of nonhumans more adequately than the general courts.⁵⁹ The Commission offers a way of getting animal issues heard which, while falling short of personhood, avoids such problems of standing as blocked the efforts to have Lucy the elephant saved from her lonely captivity in *Reece v Edmonton*.⁶⁰ In the system proposed here, the Prolocutor would be entitled to represent the interests of an animal in such a case.

Because the criminal law is meant to outlaw only the worst behaviour, it is not suited to setting new norms of what ought to happen most of the time. Effective animal protection legislation needs to confront the fact that violence against animals is widely accepted in society as we know it. In the human rights context, early experience with criminal and quasi-criminal prohibitions on discrimination proved ineffective for some of the same reasons that the criminal law has not been effective in advancing animal interests: prosecutors were reluctant to apply it, and even when it was applied the high standard of proof got in the way.⁶¹ Decades ago, Walter Tarnopolsky explained why the cause of anti-discrimination was better served by persuasion and conciliation than by criminal sanctions, in terms which, appropriately altered, might make the same case for animal protection:

[H]uman rights legislation is a recognition that it is not only bigots who discriminate, but fine "upright, gentlemanly" members of society as well. It is not so much out of hatred as out of discomfort or inconvenience, or out of the fear of loss of business, that most people discriminate. As far as possible, these people should be given an opportunity to re-assess their attitudes, and to reform themselves, after being given the opportunity of seeing how much more severe is the injury to the dignity and economic well-being of others, than their own loss of comfort or convenience. However, if persuasion and conciliation fails, the law must be upheld, and the law requires equality of access and equality of opportunity. This

58. Sankoff, *supra* note 2 at 303-313.

59. Sankoff, *ibid* at 315-316.

60. *Reece v Edmonton (City)*, 2011 ABCA 238, 335 DLR (4th) 600; see also Katie Sykes & Vaughan Black, "Don't Think about Elephants: *Reece v. City of Edmonton*" (2012) 63 UNB LJ 145.

61. Walter S Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46 Can Bar Rev 565 at 585-586.

is the “iron hand in the velvet glove.”⁶²

Animal protection law would benefit from a similar recognition that what motivates harm to animals in our society is usually not *cruelty*: most of the time, it is “discomfort or inconvenience, or the fear of the loss of business” that gets in the way of animal-friendly reform. A scheme of progressive, even restorative, sanctions would promote change in what is accepted, by helping people to realize “how much more severe is the injury to the dignity” of nonhuman animals than the “loss of comfort or convenience.” (This is not to assert that every form of animal exploitation will be amenable to such a clear-cut comparison; nor is it to deny that criminal law protections for nonhumans should be strengthened, or that the criminal law should continue to be applied in cases of deliberate cruelty.)

Conclusion

Violence against animals is a massive problem in society as it is currently structured. Solving it will require large-scale public engagement and the cooperation of the state. Transitioning away from a society that relies heavily on animal exploitation will be a long and complex process, and the state needs to take action in a way that will allow it to supervise and manage the transition. The state will need to restructure our legal relationship to nonhumans, and doing this effectively will require extensive public deliberation. The proposal I have put forward is just one way in which this could be encouraged; in the largely unregulated field of human-nonhuman relations in Canada, creative proposals are desperately needed. Instead of consuming their energy in a never-ending debate between animal welfare and animal rights, advocates should focus on fostering discussion about how our society’s relationship to animals can change.

62. *Ibid* at 572-573.

