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Pushing the First Domino: Freeing the Whales in Canada

Luc Paul Bourgeois
Dalhousie University Schulich School of Law

PUSHING THE FIRST DOMINO: FREEING THE WHALES IN CANADA

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Luc Bourgeois

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Dalhousie University is located in Mi'kma'ki, the ancestral and unceded territory of the Mi'kmaq. We are all Treaty people.

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Abstract

In 2019, the Canadian Parliament adopted Bill S-203, titled the *Ending the Captivity of Whales and Dolphins Act* [*Whales Act*], to phase-out the captivity of cetaceans − that is, whales, dolphins, and porpoises − mainly for entertainment purposes. This new law reflected scientific knowledge and signaled a shift in public attitudes relating to cetacean captivity. Undeniably, this piece of legislation raises many legal and normative questions.

Drawing on the capabilities approach, espoused by Martha C. Nussbaum, this paper will explore the nature and impact of the *Whales Act* in the Canadian political and legal landscape, as well as the newly introduced Bill S-218, titled the *Jane Goodall Act*, which would end the new captivity of elephants, great apes and other non-domesticated captive animals. I suggest that the principles of Nussbaum's approach should guide the enactment and interpretation of laws relating to animals.

NB. Nothing in this thesis should be construed as rendering any kind of legal advice/opinion to any person.

Chapter 1: Introduction

1.1 Preliminary Background and Purpose of the Thesis

One could hear a pin drop, as I was standing on the deck of the MV Georgie Porgie in the Bay of Fundy, patiently waiting for any potential sign of marine life.[1] An excited young fellow, eagerly pointing to the ocean horizon, suddenly broke the silence and shouted: "look over there"! On that July afternoon, as the sun was slowly setting down off the coast of Long Island, Nova Scotia, three humpback whales were swimming together in an orderly fashion. These whales are ordinarily present in the Bay during the warm summer months to replenish themselves before their long journey back to the south.[2] The presence of whales, roaming freely around in the ocean, was a sight to behold.[3]

Even so, I kept reminding myself that other cetaceans − that is, whales, dolphins, and porpoises − were not so fortunate. In fact, I kept telling myself that Qila, Tuvaq, Nala, Tiqa, Gia, Skoot, Dee, Sasha, and other captive cetaceans who died, mostly prematurely,[4] in Canadian facilities[5] were deprived of many opportunities to exercise their capabilities, such as diving freely in a marine environment.[6] Contrary to their wild counterparts, these captive cetaceans were denied the ability to flourish or thrive.[7]

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[1] See generally "About Us", online: *Freeport Whale & Seabird Tours* <whalewatchersnovascotia.ca>.
[2] See "Whales", online: *Bay of Fundy* <bayoffundy.com/about/whales/>.
[3] Please note that I am approaching this project with a degree of partiality. Undoubtedly, my past experiences shaped my current research interests.
[4] On this issue of cetacean deaths, see "Belugas at Marineland", online: *The Whale Sanctuary Project* <whalesanctuaryproject.org/whales/belugas-at-marineland>; "2nd beluga whale dies at Vancouver Aquarium in less than two weeks", *CBC News* (25 November 2016), online: <www.cbc.ca/news/canada/british-columbia/aurora-beluga-vancouver-aquarium-dies-1.3869241>.
[5] Here, I am referring to the Vancouver Aquarium, situated in British Columbia, and Marineland, situated in Ontario.
[6] Further discussion of this topic will be found in chapter 3, 4, *below*.
[7] *Ibid.* Note that the word "thrive" means "grow vigorously, flourish" (Katherine Barber, ed, *The Canadian Oxford Dictionary,* 2nd ed (Oxford University Press, 2004) sub verbo "thrive").

The scientific literature, for the most part,[8] admits that there is an immense amount of suffering involved in the captivity of these complex social beings.[9] Indeed, cetaceans have repeatedly shown behavioral, psychological or physiological signs of stress in captivity and are prone to certain types of diseases not usually seen in the wild.[10] Our human propensity to dominate, control and manipulate sentient beings,[11] even if it causes them undue suffering, knows no bounds.[12]

While Marineland [ML] and the Vancouver Aquarium [VA], as well as their proponents, argue adamantly that cetacean captivity contributes to scientific research, conservation efforts and public education,[13] the originating purpose of displaying cetaceans in captivity was to entice humans to see these wild creatures as a form of entertainment.[14] Arguably, this was (and, to a lesser extent, still is) the prevalent norm, even if the entertainment aspects of the practice are couched in different terms by the captivity industry.[15]

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[8] There are members of the scientific community who believe that cetaceans fare well in captivity. Further discussion of this topic will be found in chapter 4, *below*.

[9] See e.g. Naomi A. Rose & E.C.M. Parsons, *The Case Against Marine Mammals in Captivity*, 5th ed (Washington, DC: Animal Welfare Institute and World Animal Protection, 2019) [Rose & Parsons, *Case Against Marine Mammals in Captivity*].

[10] *Ibid* at 49–59.

[11] When I am using the word "sentience", I am simply referring to the ability of an animal to be "perceptually aware" (Gary L. Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation* (New York: Columbia University Press, 2010) at 19).

[12] See generally John Sorenson, "Monsters: The Case of Marineland" in Jodey Castricano, ed, *Animal Subjects: An Ethical Reader in a Posthuman World* (Waterloo: Wilfred Laurier University Press, 2008).

[13] Further discussion of this matter will be found in chapter 4, *below.*

[14] See generally Sorenson, *supra* note 12. See also Jason Colby, "Cetaceans in the City: Orca Captivity, Animal Rights, and Environmental Values in Vancouver" in Joanna Dean, Darcy Ingram & Christabelle Sethna, eds, *Animal metropolis: histories of human-animal relations in urban Canada* (Calgary, Alberta: University of Calgary Press, 2017).

[15] See e.g. "Educational Presentation", online: *Marineland* <marineland.ca/plan-a-visit/plan/visitor-information/attractions/educational-presentation/> [Marineland, "Educational Presentation"].

Today, many cetaceans still languish in their concrete tanks at ML or the VA, unable to lead flourishing lives in a natural marine environment.[16] Is there any light at the end of this tunnel? More fundamentally, have we seen any recent legal, political, or social changes in Canada that might address this specific issue?

On December 8, 2015, former Senator Wilfred Moore introduced Bill S-203,[17] titled the *Ending the Captivity of Whales and Dolphins Act* (colloquially referred to as the "Free Willy"[18] bill), in the Senate to essentially phase-out the captivity of cetaceans, mainly for entertainment purposes.[19] This piece of legislation passed third reading in the House of Commons on June 10, 2019,[20] after a tedious legislative process, and received Royal Assent on June 21, 2019. Since then, it is now the law of the land.[21]

In a nutshell, the *Whales Act* amended the *Criminal Code*[22] by forbidding breeding or impregnating cetaceans,[23] possessing (or seeking to obtain) reproductive materials,[24]

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[16] In 2019, ML owned more than 55 beluga whales, five bottlenose dolphins and one orca and the VA owned one pacific white-sided dolphin. See Laura Howells, "A more humane country: Canada to ban keeping whales, dolphins in captivity", *CBC News* (10 June 2019), online: <www.cbc.ca/news/canada/hamilton/whales-1.5169138>. In 2021, ML still owns approximately 50+ cetaceans, despite having transferred 5 beluga whales to a Connecticut aquarium. See Katherine Sullivan, "Is Marineland Emptying Its Tanks? The Transfer of 5 Belugas Is a Good Sign" (25 May 2021), online (blog): *PETA* <peta.org/blog/marineland-transfers-belugas/>.

[17] See "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 1st reading, *Senate Debates,* 42-1, No 3 (8 December 2015) at 13 (Hon Wilfred Moore); *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins),* 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 11.

[18] The bill was named after this movie: "Free Willy", online: *IMDB* <www.imdb.com/title/tt0106965/>.

[19] Note that former Senator Moore introduced an earlier version of the bill titled Bill S-230, *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins),* 2nd Sess, 41st Parl, 2015 (first reading 11 June 2015).

[20] "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 3rd reading, *House of Commons Debates,* 42-1, No 430 (10 June 2019) at 28786 [Third Reading House 10 June 2019].

[21] See *Ending the Captivity of Whales and Dolphins Act,* SC 2019, c 11 [*Whales Act*].

[22] RSC 1985, c C-46.

[23] *Whales Act*, *supra* note 21, s 2; *Criminal Code, ibid*, s 445.2(2)(b).

[24] *Whales Act, ibid*; *Criminal Code, ibid*, s 445.2(2)(c). Concerning this breeding prohibition, "there would have to be some human agency involved in the impregnation of the animals" (Senate of Canada, Standing

using captive cetaceans for performance for entertainment purposes[25] and owning or controlling cetaceans in captivity.[26] These human acts are punishable on summary conviction with a potential fine up to $200,000.[27]

The *Whales Act* was also designed to amend other federal statutes[28] to forbid the import and export of live cetaceans[29] or to move them with the intent to put them into captivity.[30] But, in the end, these provisions were integrated into a government bill, namely Bill C-68,[31] titled *An Act to amend the Fisheries Act and other Acts in consequence*.[32] In this sense, this piece of legislation directly affected the implementation of the *Whales Act*.

Sections 58.1(5) and (8) of the *Act amending the Fisheries Act* repealed sections 3, 4, 5 of the *Whales Act*− that is, the provisions related to the *Fisheries Act* and *Wappriita*[33] − as soon as both these laws came into force on June 21, 2019. However, it did not alter the substantive components of the *Whales Act*, as the import/export ban and the prohibition

Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 18 (8 June 2017) at 18:15 (Joanne Klineberg) [Senate Committee 8 June 2017]).

[25] *Whales Act*, *supra* note 21, s 2; *Criminal Code, supra* note 22, s 445.2(4). Note that this "performance for entertainment purposes" would involve "something more than simply the animals engaging in their natural behaviour" (Senate Committee 8 June 2017, *supra* note 24 at 18:24 (Joanne Klineberg)).

[26] *Whales Act*, *supra* note 21, s 2; *Criminal Code, supra* note 22, s 445.2(2)(a).

[27] *Whales Act, ibid*; *Criminal Code, supra* note 22, s 445.2(5).

[28] *Fisheries Act*, RSC 1985, c F-14; *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52 [*Wappriita*].

[29] *Whales Act*, *supra* note 21, s 4.

[30] *Ibid*, s 3. Note that Fisheries and Oceans Canada has "not issued a licence authorizing the capture of a cetacean for public display purposes since the early 1990s" (Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 10 (2 March 2017) at 10:32 (Sylvie Lapointe) [Senate Committee 2 March 2017]). This fact, among other things, led Rob Laidlaw to conclude that the *Whales Act* "simply formalizes much of what is already happening" (Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 13 (4 April 2017) at 13:7 (Rob Laidlaw) [Senate Committee 4 April 2017]).

[31] *An Act to amend the Fisheries Act and other Acts in consequence,* 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 14.

[32] SC 2019, c 14 [*Act amending the Fisheries Act*].

[33] See *Whales Act*, *supra* note 21, ss 3–5 (being the import and export ban and the prohibition on moving live cetaceans, as noted above).

on capturing live cetaceans are currently in effect, pursuant to sections 23.1(1)–23.2(3) of the *Fisheries Act.*

In regards to section 2 of the *Whales Act* − that is, the provisions related to the *Criminal Code* − section 58.3 of the *Act amending the Fisheries Act* added certain exceptions in an effort to appease ML's alleged concerns about the "criminalization" of its institution if pregnant beluga whales gave birth after June 21, 2019.[34]

Finally, the *Whales Act* provided certain exceptions. For instance, the ownership offence in the *Criminal Code* does not apply to a person who is authorized to keep cetaceans in captivity in the best interests of their welfare,[35] to assistance, care or rehabilitation efforts to injured cetaceans,[36] or to any kind of facilities that held captive cetaceans on June 21, 2019, commonly referred to as the grandfather clause.[37] In other words, cetaceans who were in captivity on June 21, 2019, at ML or the VA, remain in the possession of these facilities, as they are exempted from the ownership offence. Moreover, the ownership, breeding and reproductive materials offences in the *Criminal Code* may not apply to scientific research, if licensed.[38]

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[34] See *Criminal Code, supra* note 22, ss 445.2(2.1)–(2.2). See also Holly Lake, "Marineland seeks late-in-the-game amendments to 'Free Willy' Bill", *ipolitics* (18 March 2019), online: <ipolitics.ca/2019/03/18/marineland-seeks-late-in-the-game-amendments-to-free-willy-bill/>.
[35] *Whales Act*, *supra* note 21, s 2; *Criminal Code, supra* note 22, s 445.2(3)(c).
[36] *Whales Act, ibid; Criminal Code, supra* note 22, s 445.2(3)(b).
[37] *Whales Act, ibid; Criminal Code, ibid*, s 445.2(3)(a).
[38] *Whales Act, ibid*; *Criminal Code, ibid*, s 445.2(3.1). Note that there is a similar exception applicable in the case of the import/export ban (see *Whales Act, ibid*, s 5; *Fisheries Act, supra* note 28, s 23.2(2)(a)).

Cetaceans, like all animals,[39] are still viewed and treated as personal property under Canadian law.[40] To protect their interests, provinces may enact animal welfare laws or regulations,[41] while the federal government may enact criminal offences to prohibit certain human acts or omissions,[42] which Parliament has effectively done in the case of the *Whales Act*.

Although the *Criminal Code* proscribes unnecessary pain, injury and suffering of animals, which by implication includes cetaceans,[43] and Ontario recently adopted welfare regulations to better protect captive marine mammals,[44] the *Whales Act* still goes beyond the scope of these protections.

The *Whales Act* primarily challenges the complicated relationship between humans and captive animals, particularly in the entertainment industry. Ostensibly, this legislation questions the very idea of captivity as it pertains to animals. Therefore, since June 2019, it should come as no surprise that the *Whales Act* received a considerable amount of attention from different stakeholders in Canada.

For example, the Department of Fisheries and Oceans Canada drafted policies to implement the legislative provisions of the *Whales Act* and sought the input of Canadians

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[39] Although the term "nonhuman animal" may be more respectful, I shall use the term "animal" in this thesis to avoid confusing the reader.
[40] See generally Maneesha Deckha, "Initiating a non-anthropocentric jurisprudence: the rule of law and animal vulnerability under a property paradigm" (2013) 50:4 Alta L Rev 783 at 787–790 [Deckha, "Initiating a non-anthropocentric jurisprudence"]).
[41] For instance, the *Provincial Animal Welfare Services Act,* SO 2019, c 13 [*Paws Act*] prescribes the manner in which inspections are conducted in certain types of premises to ensure animals' wellbeing, such as those that maintain captive marine mammals. In fact, the regulation of aquaria rests within the purview of provinces (see Senate Committee 2 March 2017, *supra* note 30 at 10:37 (Joanne Klineberg)).
[42] Note that animal protection is a shared responsibility between the federal government and provinces. See Peter Sankoff, "Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation" (2019) 5:1 Can J Comparative & Contemporary L 299 at 304.
[43] *Criminal Code, supra* note 22, s 445.1 (1)(a).
[44] Further discussion of this matter will be found in chapter 2, *below.*

in the Fall of 2020.[45] More importantly, on the heels of passing this legislation, former Senator Murray Sinclair introduced Bill S-218, referred as the *Jane Goodall Act*,[46] in the Senate on November 17, 2020, to essentially end the new captivity of elephants and great apes in Canada and, if designated, other similar animals.[47] More precisely, the *Jane Goodall Act* seeks to amend the *Criminal Code* and *Wappriita* in much the same way as the "Free Willy" bill and should receive the same kind of scrutiny in the Senate.[48] As this example illustrates, the *Whales Act* may have created a domino effect, triggering a series of other similar legislative initiatives for animals.

This paper examines these developments and its purpose is to unpack the *Whales Act* so as to assess its normative impact. This legislation raises the question of whether we, as a society, are heading towards a situation where cetaceans and other animals might be granted vital legal rights, such as a right to life or bodily integrity. In my view, we cannot adequately answer this question without fully grasping the *Whales Act*.

1.2 Methodology

Understanding the overall merits of the *Whales Act* requires the use of an established theoretical framework. Thus, my analysis of this legislation and its normative

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[45] See Department of Fisheries and Oceans Canada, *Draft: Policies on Fisheries Act Authorizations related to Cetaceans in Captivity and Reproductive Materials of Cetaceans* (Public Consultations), closed (Ottawa: DFO, August 2020). Many stakeholders commented on these draft policies. See Department of Fisheries and Oceans Canada, *What we heard: Public consultations for Policies on Fisheries Act Authorizations related to Cetaceans in Captivity and Reproductive Materials of Cetaceans* (Ottawa: DFO, March 2021).

[46] *An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals),* 2nd Sess, 43rd Parl, 2020 [*Jane Goodall Act*]. Note that this bill was named after the well-known primatologist bearing the same name. See generally Jane Goodall, *Jane Goodall 50 Years at Gombe: A Tribute to Five Decades of Wildlife Research, Education, and Conservation* (New York: Stewart, Tabori & Chang, 2010).

[47] See generally *Jane Goodall Act*, *supra* note 46; "Bill S-218, An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals)", 1st reading, *Senate Debate,* 43-2, No 11 (17 November 2020) at 339 (Hon Murray Sinclair).

[48] Further discussion of this topic will be found in the fifth chapter, *below.*

impact in the political and legal landscape will be guided by two notable theories in the literature: (a) John Kingdon's policy streams model, that offers a compelling way to understand how a piece of legislation gets placed on the policy agenda; and (b) Martha C. Nussbaum's capabilities approach [CA] that seeks to promote and ultimately secure central capabilities for animals, including humans.[49] Both these theories can help in framing the issues related to the *Whales Act*.

While Kingdon's approach will be helpful in contextualizing the introduction of the *Whales Act*, Nussbaum's CA will be useful in unpacking the political discourse associated with this legislation and will help shed light on its potential value for future political and legal endeavours, such as the above-mentioned *Jane Goodall Act*.

These theories should not be considered as the "best", by any means. Indeed, they represent a choice, among many options. That choice was guided by my own scholarly and personal orientations.[50] While I am relying on the CA and the policy streams model, other scholars may assess the *Whales Act* very differently, with their own theories to guide their own thought and analyses. It is vital to have a plurality of views, particularly concerning significant contemporary issues that shape the course of animal lives, either politically or legally.

[49] See e.g. John W. Kingdon, "A Model of Agenda-Setting, with Applications" (2001) 2001:2 Law Rev Mich St U Det CL 331; Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Massachusetts: Harvard University Press, 2006) [Nussbaum, *Frontiers of Justice*].
[50] For instance, my political science degree, including one of my projects, inspired me to use Kingdon's main ideas in this paper.

1.3 Research Questions and Hypotheses

Q. 1: What were the key contextual factors underlying the *Whales Act*?

Hypothesis: Adopting the *Whales Act* in Parliament was not an isolated event. It was, instead, a multifaceted puzzle containing many pieces. Accordingly, in an effort to better understand the sociopolitical and legal context underlying this legislation, Kingdon's approach will assist me in putting those pieces together. The bigger picture will suggest that certain key contextual factors, such as an active involvement of certain political actors, were vital for the emergence of the *Whales Act*. To be clear, I will suggest that three distinct streams − i.e., politics, policies, and problems − came together, thereby opening a "policy window"[51] to introduce this legislation. In short, there are many interrelated pieces to the *Whales Act* and Kingdon's model will help me make sense out of these components, as a whole.

Q. 2: Can an analysis based on capabilities influence law and public policy?

Hypothesis: The discourse related to the *Whales Act*, if viewed with the core principles of Nussbaum's CA, implicitly recognizes the value in thinking of animal lives in terms of their capabilities. I will suggest that parliamentarians who supported the *Whales Act* undertook a form of analysis based on capabilities to ultimately ground their policy choices. Hence, this decision-making process recognizes, at least implicitly, that Nussbaum's CA may be useful in shaping the course of law and public policy in Canada. Overall, an analysis of the political discourse lays the needed foundation to argue that Nussbaum's concepts of "flourishing", "dignity", "capabilities", "tragedy", and the like,

[51] Kingdon, *supra* note 49 at 332.

can and perhaps should guide the enactment and interpretation of laws pertaining to animals.

Q. 3: Does the *Whales Act* represent a vehicle for positive changes for animals?

Hypothesis: The above-noted hypotheses necessarily answer this question in the affirmative. However, to be accurate, my answer needs to be tempered. The *Whales Act* represents a potential vehicle for positive changes for some animals, but perhaps not for all animals. In truth, this legislation did not protect the interests of all animals regularly used for food[52] and it seems highly improbable that the developments associated with the *Whales Act* and, by extension, the *Jane Goodall Act,* would undermine our current treatment of animals used for food. Nonetheless, as illustrated in this thesis, notable scholars have suggested that the main principles of Nussbaum's CA could, if relied upon by lawmakers or other influential institutional actors, have the effect of challenging a plethora of activities we currently deem justifiable. The CA, as I will argue in this thesis, has the potential to unleash a series of positive changes for animals.

1.4 Structure

Chapter 2 explores how certain key publicized events detailing serious problems in the captivity industry have played a vital role in the emergence of the *Whales Act*. Relying on Kingdon's approach, this chapter assesses how some influential political actors and certain public policies provided a necessary foundation to introduce this piece of legislation and ensured its eventual success in Parliament.

[52] On this issue, see Jodi Lazare, "'Free Willy' Law Spotlights Contradictions in How Canadians see Animal Rights", *The Conversation* (8 July 2019), online: <theconversation.com/free-willy-law-spotlights-contradictions-in-how-canadians-see-animal-rights-119583>.

Chapter 3 begins by examining how Nussbaum's CA applies in the human case, before conducting an in-depth assessment of her approach as it relates specifically to animals. This part of the thesis, while including certain criticisms of Nussbaum, sheds light on how this theory can influence law and policy. I will suggest that Nussbaum's ideas are not merely abstract theoretical concepts, but rather, can have practical impacts on the political and legal landscape.

Chapter 4 is an attempt to evaluate the political discourse relating to the *Whales Act* with the help of certain key ideas of Nussbaum's CA to appreciate how this new law might be viewed as a vector of positive changes for certain animals, notably cetaceans.

Last, chapter 5 is, for the most part, focused on assessing the merits or demerits of the newly introduced *Jane Goodall Act,* notably by drawing on my previous assessment of the *Whales Act*. My analysis of the proposed bill will be focused on two distinct grounds: (a) on one potential problem related to the conservation exceptions and; (b) on one potential benefit related to the "Noah" clause that is relevant to Nussbaum's CA.

In conclusion, I present certain observations that, I hope, will be useful in guiding the ongoing deliberations pertaining to the *Jane Goodall Act.*

1.5 Potential Contribution

Knowing that the *Whales Act* has received little attention from legal scholars,[53] my paper arguably fills a gap in the animal law literature by contributing to this debate. In this

[53] But see Katie Sykes, "The Whale, Inside: Ending Cetacean Captivity in Canada" (2019) 5:1 Can J Comparative & Contemporary L 349 [Sykes, "The Whale"].

vein, the purpose of this thesis is to add my voice to the ongoing discussion about the future of animal protection legislation in Canada.

With ongoing pressure from the public to better protect animals,[54] it appears that the *Whales Act* and the *Jane Goodall Act* represent an emergent movement in Canada. Going forward, other parliamentarians and interested stakeholders will surely propose additional legislative initiatives to better protect other kinds of animals. Likewise, any efforts to considerably defend and protect animals' interests will be met with opposition from animal use industries, particularly if the animals are used for purposes such as food or research.

Accordingly, it is my intention that this thesis will clarify the fact that some influential institutional actors − those that have the legal or political power to substantively change the lives of animals − are able to appreciate animals as a form of life of their own, with their own life choices and needs. To be clear, I will suggest that institutional actors can, and should, recognize that animals deserve protections in their own right, independent from our human interests, by valuing the differences that may separate us from them, such as a cetacean's ability to dive deeply. This mode of thinking is not necessarily restricted to those who actively pursue changes for animals in certain political parties, as thinking about animal capabilities can transcend varied political affiliations. By highlighting capabilities, and the importance for the realm of policy-making of recognizing them, it is my intention that this paper may contribute to the field of animal law in Canada.

[54] See Christopher Guly, "From Imported Wildlife to Farms, Canada's Cruelty Laws Run Thin to None", *The Tyee* (8 June 2021), online: <thetyee.ca/News/2021/06/08/Canada-Cruelty-Laws-Run-Thin-None-Imported-Wildlife-Farms/>.

Chapter 2: Understanding the Emergence of the *Whales Act*

2.1 Problems, Policies and Politics: Phasing-out Cetacean Captivity

It is well-known that a bill introduced in Parliament is not a standalone legislative document. Rather, a bill stems from a specific contextual environment which, in turn, is invariably shaped by varied institutional actors. Arguably, it is impossible to appreciate the merits of a bill if its context is not taken into account, as contextual factors help explain the overall significance, relevance and nature of a bill in the public sphere.[55]

In the case of the *Whales Act*, laying out the context serves two primary purposes: (a) to help unveil the fundamental purpose of this piece of legislation, particularly as it is the first of its kind in Canada, at least at the federal level, and (b) to set the stage for effectively interpreting this new law and its discourse in light of Nussbaum's CA. In fact, without a proper understanding of the context surrounding the *Whales Act*, my analysis in chapter 4 may depict an incomplete picture of the situation.

With this in mind, we can ask why the *Whales Act* was first introduced in Parliament, whether it was needed, and how it got placed on the parliamentary policy agenda. These questions, as I intend to argue, are answerable by examining the context surrounding this piece of legislation. In doing so, I will draw on certain principles of the policy streams model, espoused by John W. Kingdon, to guide my reflections as to the contextual components of this new law. It is my contention that Kingdon presents a salient

[55] In short, one cannot understand the text without also appreciating its context. In formulating this argument, I was greatly inspired by the teachings of Professor Richard Devlin, from Dalhousie University.

representation of the inherent dynamics of policymaking, particularly at the preliminary stages of legislative reform, which can be useful for our purposes.

Kingdon claims, among other things, that a public policy will be placed on the legislative agenda only if three independent streams − that is, problems, policies, and politics − are simultaneously joined together, notably with the help of advocates who pursue this union.[56] In other words, a public policy will be placed on the agenda if a "problem is recognized, a solution is available, [and] the political conditions are right"[57] and only if these elements are joined together at an opportune time with the help of advocates.[58]

This opportune moment is described as the "policy window", which opens when a given problem is either "pressing", perhaps nearing the point of a "crisis", or the political streams "changes".[59] In short, a "policy window" is required for advocates to be able to join all three streams together, allowing for a public policy to be placed on the agenda. Arguably, one may draw on these ideas to evaluate why and how the *Whales Act* was placed on the policy agenda. However, before proceeding with this analysis, a minor caveat may be warranted.

My analysis is not intended to be a full-fledged application of Kingdon's model. This type of study would entail an in-depth investigation of data, including, but not limited

[56] See Kingdon, *supra* note 49 at 331–332. See also Vincent Lemieux, *L'étude des politiques publiques : les acteurs et leur pouvoir* (Québec : Les Presse de l'Université Laval, 2009) at 39.
[57] Kingdon, *supra* note 49 at 332.
[58] *Ibid.* These three streams are operating independently from one another. Kingdon explains that: "proposals are generated whether or not they are solving a given problem, the problems are recognized whether or not there is a solution, and political events have their own dynamics" (*ibid*). In other words, solutions are prepared irrespective of whether or not there is a pressing problem to be solved.
[59] *Ibid*.

to, the completion of qualitative research interviews.[60] It would also necessitate expanding on the intricate nuances of the theory, which is not the exclusive purpose of this work. Notwithstanding these limitations, I believe I can still draw on the central ideas of the theory as a way to coherently frame the context surrounding the *Whales Act* and to organize my arguments, without watering down or misstating the theory. On that note, I now turn to the first component of the model as it relates to the *Whales Act*: the problems associated with holding cetaceans in captivity.

2.1.1 The Problems

Public policies are defined, first and foremost, by public problems.[61] A public problem requires the attention and the involvement of political/governmental actors[62] and it is often the case that a problem becomes a public one in the aftermath of a disaster or a crisis.[63] This is especially true where advocates utilize such events to make them "appear" as public problems.[64] These "focusing events" may draw attention to certain issues, particularly if the event in question "reinforce[s] a problem 'already in the back of people's minds'".[65] With this in mind, an advocate's ability to "tell a persuasive story, often by

[60] See e.g. Raphael Lencucha et al, "Opening windows and closing gaps: a case analysis of Canada's 2009 tobacco additives ban and its policy lessons" (2018) 18 BMC Public Health 1, DOI: <doi.org/10.1186/s12889-018-6157-3>; George Atupem, *Applying John Kingdon's Three Stream Model to the Policy Idea of Universal Preschool* (Honors Program Theses and Projects, Bridgewater State University, 2017), online: <vc.bridgew.edu/honors_proj/245/> [unpublished].
[61] Atupem, *supra* note 60 at 8.
[62] *Ibid*.
[63] Lemieux, *supra* note 56 at 35.
[64] *Ibid*.
[65] Paul Cairney & Nikolaos Zahariadis, "Multiple streams approach: a flexible metaphor presents an opportunity to operationalize agenda setting processes" in Nikolaos Zahariadis, ed., *Handbook of Public Policy Agenda Setting* (United Kingdom: Edward Elgar Publishing, 2016) at 90.

making simple emotional appeals or assigning blame to certain social groups"[66] undoubtedly helps to draw added attention to the problems.

While cetaceans have largely entertained Canadians for years, beginning with an orca named Moby Doll in 1964,[67] experts have long documented problems associated with cetacean captivity. The problems, supported by highly specialized knowledge, are many, ranging from the presence of physiological and behavioral issues,[68] to ethical or moral dilemmas[69] (premised on the fact that cetaceans are complex beings that need many things in life and are unable to thrive in captivity[70]) to problems for humans themselves who care for these beings in captivity.[71] Accordingly, "with the increased information available from studies over the last few decades the arguments against keeping cetaceans in captivity are "science-based"".[72]

From as early as the mid/late 1990's, some of these problems were becoming apparent in the daily operations of Canada's biggest marine park, namely ML.[73] Indeed,

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[66] *Ibid*.
[67] Moby Doll, a male orca, was captured off the coast of Saturna Island, British Columbia. See Mark Leiren-Young, "When Killers Whales Got a Rebrand", *The Walrus* (6 October 2014), online: <thewalrus.ca/moby-doll/>.
[68] See e.g. Rose & Parsons, *Case Against Marine Mammals in Captivity, supra* note 9 at 44–47 (indicating that the environments of marine parks and aquariums are inadequate for cetaceans due to their social and biological needs); *ibid* at 49–52 (noting that cetaceans are prone to certain types of diseases and injuries in captive settings); *ibid* at 53–58 (explaining that cetaceans do not have the ability to exercise their natural behaviours in captivity, are prone to stress and may display abnormal behaviours); *ibid* at 67–71 (noting that a captive environment generates higher mortality rates).
[69] See e.g. Sorenson, *supra* note 12 at 197.
[70] See e.g. Lori Marino, "Large brains in small tanks: Intelligence and social complexity as an ethical issue for captive dolphins and whales" in L. Syd M Johnson, Andrew Fenton & Adam Shriver, eds, *Neuroethics and Nonhuman Animals* (Springer, Cham, 2020) at 185; Lori Marino, "Cetacean Captivity" in Lori Gruen, ed, *The Ethics of Captivity* (New York: Oxford University Press, 2014) at 22–37; Rose & Parsons, *Case Against Marine Mammals in Captivity, supra* note 9 at 60.
[71] See Rose & Parsons, *Case Against Marine Mammals in Captivity, supra* note 9 at 77–82 (explaining that certain diseases or injury may afflict humans by interacting with captive cetaceans, notably the death of Dawn Brancheau at SeaWorld in 2010).
[72] Sykes, "The Whale", *supra* note 53 at 359 [footnotes omitted].
[73] See e.g. "Distorted Nature: Exposing the Myth of Marineland" (May 1998), online (pdf): *Zoocheck Canada* <zoocheck.com/wp-content/uploads/2015/06/Distorted-Nature.pdf>. This source has come to my attention

well before 2012, ML faced harsh criticism pertaining to its handling and care of cetaceans – notably its orcas[74] – and was already the site of protests by animal rights activists.[75] Not surprisingly, the VA, which also owned cetaceans during the 1990's and early 2000's, was not spared from the growing public outcry against cetacean captivity.[76] However, it was only during the last decade or so that the issue was put at the forefront of Canadian public discourse. In other words, in Kingdon's words, cetacean captivity became a tangible public problem in the aftermath of certain key events.

In August 2012, the Toronto Star [Star] released an exposé on the plight of cetaceans at ML, as stated by many eye-witnesses, including former staff members.[77] The compelling stories of the suffering of these highly complex beings fueled further protests[78]

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thanks to: Elizabeth Batt, "Why the hell has Marineland Canada not been closed down", Op-ed, *Digital Journal* (25 August 2012), online: <digitaljournal.com/article/331551>.

[74] See *Marineland of Canada v. Niagara Action for Animals*, 2004 CanLII 30880 (ON SC) ("the plaintiff ("Marineland") sues the defendants for libel in the form of a letter … [g]enerally, the letter is critical of the conditions at Marineland and the manner in which Marineland cares for the animals that are kept on its premises" at para 1); *Seaworld Parks & Entertainment LLC v. Marineland of Canada Inc.,* 2011 ONSC 4084 ("[t]he evidence of Seaworld was that by 2009, it had become concerned about Ikaika's physical and psychological health if it remained at Marineland" at para 20).

[75] See "Park or Prison?", *Niagara This Week* (26 July 2007), online: <niagarathisweek.com/news-story/3294815-park-or-prison-/>.

[76] See Colby, *supra* note 14 at 303–305 (also noting that the activists' efforts in Vancouver were pivotal in enacting a municipal by-law in 1996 to limit the importation of cetaceans).

[77] See Sykes, "The Whale", *supra* note 53 at 371–373. Water problems, causing health issues to ML's marine mammals, were identified by former staff members. See Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 14 (11 April 2017) at 14:9–14:11 (Philip Demers) [Senate Committee 11 April 2017]). In response, ML began taking legal action against these individuals. See e.g. Linda Diebel & Liam Casey, "MarineLand sues former trainer Christine Santos for $1.25 million for Toronto Star article", *Toronto Star* (14 December 2012),online:<thestar.com/news/canada/2012/12/14/marineland_sues_former_trainer_christine_santos_for_125_million_for_toronto_star_article>.

[78] See e.g. Carys Miller, "MarineLand stormed by protesters" *Toronto Star* (8 October 2012), online: <thestar.com/news/gta/2012/10/08/marineland_stormed_by_protesters.html>; "Animal advocates hold protest outside MarineLand" *CTV News* (18 August 2012), online: <www.ctvnews.ca/canada/animal-advocates-hold-protest-outside-of-marineland-1.919743>; Graham Slaughter, "Marineland protest gathers more supporters after Star stories" *Toronto Star* (17 August 2012), online: <thestar.com>. See also Elizabeth Sigrún Smith, *"Everyone loves Marineland!" (?) Entertainment Animal Advocacy, Praxis, and Resisting Corporate Repression*, (M.A. Thesis, Brock University, 2014) [unpublished] at 18 (noting, for instance, that "[a]s a result of the dissemination of these testimonials to a mainstream news source, public awareness about the inner workings of the park has been exponentially heightened" (*ibid*)).

and certain individuals, including governmental/political actors, began to take meaningful notice. Indeed, "[i]n the wake of the *Star* investigative series, the Ontario Ministry of Community Safety and Correctional Services … commissioned an expert report on captive marine mammal welfare from a panel chaired by … Dr. David Rosen",[79] which paved the way for the formulation and eventual enactment of regulations governing the practice of keeping captive marine mammals, including cetaceans, in Ontario.[80] This public event functioned as an impetus for sociopolitical change, while also giving advocacy groups and others a valuable platform to advance their narrative.[81] Shortly thereafter, the popular documentary Blackfish[82] added fuel to the already burning fire.

Blackfish depicted the many problems associated with the practice of holding orcas in captivity for entertainment purposes, ranging from the deadly risks to humans − notably the case of Dawn Brancheau who was killed by a captive orca in 2010 − to the many health and welfare related risks to the orcas themselves.[83] The film, which aired on CNN in 2013, fascinated many audiences.[84] For our purposes, what is important to appreciate is that this

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[79] Sykes, "The Whale", *supra* note 53 at 382 [footnotes omitted] [emphasis in original].
[80] *Ibid*. See also Linda Diebel & Liam Casey, "Marineland: Ontario government to bring in regulations for marine animals" *Toronto Star* (10 October 2012), online: <thestar.com/news/canada/2012/10/10/marineland_ontario_government_to_bring_in_regulations_for_marine_animals.html>; "OSPCA Act: A Better Way Forward" (2013) at 22, online (pdf): *Animal Justice* <animaljustice.ca/wp-content/uploads/2014/02/Animal-Justice-OSPCA-Act-A-Better-Way-Forward-FINAL-140119.pdf>. Further discussion of this topic is found in the following pages, *below.*
[81] See e.g. Linda Diebel & Liam Casey, "Famed dolphin crusader takes his fight to Marineland" *Toronto Star* (6 October 2012), online: <thestar.com>. See also "Ric O'Barry Speaks at Marineland Closing Day" (8 October 2012), online (video): *YouTube* <www.youtube.com>; "Phil Demers Speaks at Marineland" (8 October 2012), online (video): *YouTube* <www.youtube.com>.
[82] "Blackfish", online: *IMDB* <www.imdb.com/title/tt2545118/>.
[83] See E.C.M. Parsons & Naomi A. Rose, "The Blackfish Effect: Corporate and Policy Change in the Face of Shifting Public Opinion on Captive Cetaceans" (2018) 13:2/3 Tourism in Marine Environments 73, DOI: <doi.org/10.3727/154427318X15225564602926> at 75 [Parsons & Rose, "Blackfish Effect"].
[84] *Ibid*.

movie created a gigantic wave of notable changes across the globe,[85] colloquially referred to as the "Blackfish Effect".[86]

Although the movie severely impacted the American captivity industry and its governing policies,[87] it also affected the institutionalized practices and policies of other countries, including Canada.[88] The Blackfish Effect inspired, at least to a certain degree,[89] the enactment of policies within the Canadian political system, both at the municipal or the national level,[90] as the overarching public sentiment in Canada drastically shifted to one of opposition to cetacean captivity.[91] In fact, former Senator Wilfred Moore introduced the *Whales Act* in the Senate in direct reaction to watching the film.[92] This is a testament to the power of documentary film, which can be a tool for positive political and legal change.

In Kingdon's language, a growing crisis emerged in the public sphere as a result of the Star investigation and, more notably, the Blackfish Effect. Both events, recounting

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[85] *Ibid* at 74.
[86] *Ibid* ("Blackfish has arguably done the most to raise public awareness of captive orca welfare and trainer safety. It spawned a massive social media response related to captive cetaceans, leading to the so-called "Blackfish Effect"" (*ibid*)).
[87] *Ibid* at 76–77 ("SeaWorld … saw a decrease in attendance at its parks, with 1 million fewer people visiting SeaWorld in 2014 over the previous year … during 2014, SeaWorld lost more than $80 million in revenue (a 6% decrease), according to its annual earnings report" at 76).
[88] *Ibid* at 74, 77–78.
[89] It should be noted that it is still difficult to determine, in a precise manner, the impact of Blackfish in North America. See Genna Buck, "Killer whales in captivity: An idea whose time has passed?" *MacLean's* (26 March 2015), online: <www.macleans.ca/society/science/whales-in-captivity/>.
[90] Parsons & Rose, "Blackfish Effect", *supra* note 83 at 77–78.
[91] *Ibid* at 79 ("for decades, the public display of cetaceans has been accepted as a tool for education, conservation, and research, but the Blackfish Effect has turned the tide: A growing proportion of the general public no longer views keeping cetaceans in captivity for tourism purposes as acceptable" (*ibid*) [footnotes omitted]). See also Sykes, "The Whale", *supra* note 53 at 351–352 (citing a poll conducted in 2018 showing that 47% of respondents oppose cetacean captivity).
[92] Sykes, "The Whale", *supra* note 53 at 355 ("[a]fter watching the film, Senator Moore's son Nicholas asked him to do what he could about the treatment of captive cetaceans in Canada. *Senator Moore's response was Bill S-203*" (*ibid*) [emphasis added]).

stories on the plight of cetaceans, captured the attention of political actors who began to treat the issue as a public problem, requiring their direct involvement.

Furthermore, these publicized events brought to light problems already documented by experts and activists. In a way, then, these events reinforced a "problem 'already in the back of people's minds'".[93] It became clear that institutional actors could not hide behind a veil of ignorance, as these problems were not merely private or administrative issues. Advocates such as Philip Demers, a former ML trainer and whistleblower, took advantage of these events to make them appear as public problems.

To be clear, while it is one thing to recognize a public problem, it is quite another to have an available solution at hand. Occasionally, according to Kingdon, decision makers may notice an issue and be willing to remedy it, but do not have prepared solutions at their disposal, which may threaten the possibility of enacting a public policy.[94] In the following section, I examine, in the context of the *Whales Act*, the importance of having existing policies in the context of drafting and introducing new legislation.

2.1.2 The Policies

Policy solutions are not exclusively produced in circumstances where policymakers are directly faced with an immediate problem. Policy solutions may already be available and ready to be implemented[95] in the event that policymakers are confronted with a particular public problem.[96] In other words, the "solution–production process can be treated

[93] Cairney & Zahariadis, *supra* note 65 at 90.
[94] See Kingdon, *supra* note 49 at 335.
[95] See Atupem, *supra* note 60 at 7.
[96] See Kingdon, *supra* note 49 at 332, 335.

as independent of problem solving".[97] Thus, solutions may be developed by a community of experts in "anticipation of future problems".[98]

A policy, originating from a community of experts, has "usually been tested at either the state or local level of government and can be replicated".[99] As will be discussed in chapter 4 of this thesis, the expert community is still not unanimous on the question of cetacean captivity, including its corresponding problems. Where most experts claim that captivity is detrimental to the overall wellbeing of cetaceans, other leading experts suggest that a captive environment is not an inherent harm, provided that these beings receive the proper care, such as adequate nutrition, proper water filtration, enrichments, and the like.[100] Arguably, these conflicting views influence the type of policy solutions that may be proposed in the public sphere.

In recent years, experts have generated two types of policy solutions with respect to cetacean captivity: (a) transformative policies such as prohibiting/phasing-out the practice altogether, and (b) reformative measures such as adopting standards of care, as in the case of Ontario.[101] As public attitudes have shifted to opposition to the practice due to increasing knowledge of these beings, the former types of policies have steadily gained traction in Canadian public life.

This kind of proposal is not necessarily novel. Before June 2015,[102] policies aiming to phase-out the practice of holding captive members of the cetacean family were already

[97] Cairney & Zahariadis, *supra* note 65 at 90.
[98] *Ibid* at 91.
[99] Atupem, *supra* note 60 at 7.
[100] Further discussion of this topic is found in chapter 4*, below.*
[101] Further discussion of this topic is found in the next section entitled "Domestic Policies", *below.*
[102] See generally Bill S-230, *supra* note 19.

being implemented, both in Canada − municipally and provincially − and internationally. In other words, policy solutions already existed and were already available and ready to be implemented in the case of phasing-out cetacean captivity at the Canadian federal level.

In the following section, I will assess how parliamentarians working to enact the *Whales Act*, confronted with the public problems associated with cetacean captivity, relied on similar measures to justify this legislation. Some of these measures, including Ontario's orca ban, set a valuable precedent for the *Whales Act* by confirming that it may be technically feasible to adopt the cetacean ban.

2.1.2.1 Domestic Policies

2.1.2.1.1 Orca Ban in Ontario

As noted, the Blackfish effect, compounded with other influential events, such as the Star investigation, shed a negative spotlight on the practice of keeping cetaceans in captivity. With mounting public pressure rallying against the practice, as shown above, the Ontario legislature was faced with a dilemma: (a) to persist with the status quo by doing nothing or (b) to enact change. The province ultimately chose change.

On May 28, 2015, the Ontario legislature adopted Bill 80,[103] titled the *Ontario Society for the Prevention of Cruelty to Animals Amendment Act, 2015,*[104] to phase-out orca captivity in the province. Although this law prohibits both the possession and breeding of orcas in captive facilities,[105] a grandfather clause still permits any person to continue

[103] *An Act to amend the Ontario Society for the Prevention of Cruelty to Animals Act and the Animals for Research Act with Respect to the Possession and Breeding of Orcas and Administrative Requirements for Animal Care,* 1st Sess, 41st Leg, Ontario, 2015 (assented to 28 May 2015), SO 2015, c 10.
[104] SO 2015, c 10 [*Animals Amendment Act*]. This law amended the *Ontario Society for the Prevention of Cruelty to Animals Act,* RSO 1990, c O36 [*OSPCA Act*], which was repealed on January 1, 2020, and replaced with the *Paws Act, supra* note 41.
[105] *Animals Amendment Act, supra* note 104, s 3. See also *Paws Act, supra* note 41, s 19(1).

possessing a captive orca if possessed on March 22, 2015.[106] Thus, ML was able to legally keep Kiska, a lone orca, owned on (and prior to) March 22, 2015. Should it wish to do so, ML could keep Kiska until her eventual death. This piece of legislation has been criticized, in part, due to this grandfather clause.[107]

In addition, the *Animals Amendment Act* laid the necessary foundation to enact new regulations to better protect marine mammals in captivity in Ontario, such as the standards of care and administrative requirements.[108] Overall, this legislation was lauded in the public sphere as a form of victory for orcas.[109]

However, practically speaking, Ontario's orca ban did nothing for most cetaceans that are undeniably similar to orcas.[110] In fact, despite recognizing that orcas are beings

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[106] *Animals Amendment Act, ibid*. See also *Paws Act, supra* note 41, s 19(2).

[107] See e.g. Linda Diebel, "New Ontario law bans breeding and sale of orcas" *Toronto Star* (28 May 2015), online: <www.thestar.com/news/canada/2015/05/28/new-ontario-law-bans-breeding-and-sale-of-orcas.html> [Diebel, "New Ontario"]; Lara O'Keefe, "Beachers want province to include 'Kiska' in orca ban" *Beach Metro* (2 November 2016), online: <www.beachmetro.com/2016/11/02/beachers-want-province-include-kiska-orca-ban/>; Ashley Csanady, "People don't love Marineland anymore: Ontario law leaves orca floating alone in Niagara Falls" *National Post* (29 May 2015), online: <nationalpost.com/news/politics/people-dont-love-marineland-anymore-ontario-law-leaves-orca-floating-alone-in-niagara-falls>.

[108] See *Animals Amendment Act*, *supra* note 104, ss 2, 8. See also *Paws Act, supra* note 41, s 13(1), 69(1)(e). In 2016, O. Reg. 438/15 amended O. Reg. 60/09 to prescribe additional standards of care and administrative requirements for captive marine mammals. Although O. Reg. 446/19, s 1, revoked these regulations in the context of enacting the *Paws Act* these standards of care and administrative requirements are currently in force pursuant to O. Reg. 444/19. Further, zoos and aquaria who decide to get accreditation through Canada's Accredited Zoos and Aquariums (CAZA) must follow its standards. See Sykes, "The Whale", *supra* note 53 at 389. Accordingly, CAZA has "adopted the Canadian Council on Animal Care's guidelines for the care and maintenance of marine mammals as part of its standards" (Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 12 (28 March 2017) at 12:7 (Susan Shafer) [Senate Committee 28 March 2017]). Some opponents of the *Whales Act* favoured such initiatives (see Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 13 (6 April 2017) at 13:40 (David Rosen) [Senate Committee 6 April 2017]).

[109] See Diebel, "New Ontario", *supra* note 107. See also Danny Groves, "Ontario government bans acquisition and breeding of orcas", online: *WDC* <uk.whales.org/2015/05/28/ontario-government-bans-acquisition-and-breeding-of-orcas/>.

[110] See Ontario, Legislative Assembly, Standing Committee on Social Policy, "Ontario Society for the Prevention of Cruelty to Animals Amendment Act, 2015" *Official Report of Debates (Hansard)*, 41-1, No SP-17 (11 May 2015) at SP-351–SP-353 (Lynn Kavanagh) [Ontario Committee 11 May 2015]; *ibid* at SP-356 (Rob Laidlaw); *ibid* at SP-354 (Dr Naomi Rose).

worthy of protection, this law had inherent weaknesses[111] and has been publicly described as a "symbolic" measure.[112]

Nonetheless, former Senator Moore explicitly stated that the *Whales Act* was building on the efforts of the Ontario legislature to phase-out orca captivity.[113] The orca ban legitimized the general idea of advancing protections for cetaceans, not just for orcas. By encompassing cetaceans other than orcas, the *Whales Act* tacitly endorsed one of the proposals made at the Standing Committee on Social Policy during the adoption of the orca ban.[114] In some respects, the *Whales Act* filled a gap left by Ontario's orca ban. In short, although the provisions of both these laws do not exactly mirror each other, the orca ban remains a valuable building block for the *Whales Act*. However, the foundations of the *Whales Act* go further than Ontario.

[111] See Ontario committee 11 May 2015, *supra* note 110 at SP-358 (Camille Labchuk)
[112] See Csanady, *supra* note 107.
[113] See "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 2nd reading, *Senate Debates,* 42-1, No 8 (27 January 2016) at 155 (Hon Wilfred Moore) [Second Reading Senate 27 January 2016]. See also Senate Committee 4 April 2017, *supra* note 30 at 13:7 (Rob Laidlaw). Ontario's orca ban was mentioned several times during the legislative proceedings relating to the *Whales Act*. See e.g. Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 17 (30 May 2017) at 17:8 (Hon Elizabeth Hubley) [Senate Committee 30 May 2017]). Incidentally, some witnesses who testified at the Standing Committee on Social Policy during the adoption of the orca ban were also influential during the enactment of the *Whales Act*, as we shall see in chapter 4, *below.*
[114] See Ontario committee 11 May 2015, *supra* note 110 at SP-358 (Camille Labchuk) (suggesting certain courses of action to remedy the weaknesses of the orca ban, such as extending the prohibitions on breeding and importation to other cetaceans).

2.1.2.1.2 By-law Amendment in Vancouver

On May 15, 2017, by adopting a by-law amendment,[115] the Vancouver Board of Parks and Recreation [Park Board] finally[116] prohibited the practice of keeping, importing and displaying cetaceans − that is, baleen whales, narwhals, dolphins, porpoises, killer whales and beluga whales − in parks under its jurisdiction, including Stanley Park where the VA is located.[117] To be clear, the amendment repealed and replaced section 9(e) of the Parks Control by-law to forbid the practice of importing and displaying cetaceans in captivity.[118] This amendment, in some way, formalized the general intentions already formulated by the VA to phase-out its cetacean captivity program.[119]

Nevertheless, the by-law amendment swiftly became the subject of a judicial review, initiated by Ocean Wise.[120] In short, the Supreme Court of British Columbia ruled that the Park Board exceeded its authority by enacting the by-law amendment,[121] a decision that was subsequently overturned by the British Columbia Court of Appeal, which

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[115] See *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2019 BCCA 58 at para 1 [*Ocean Wise*]. See also Vancouver Board of Parks and Recreation*, A By-Law to Amend the Parks Control By-Law Regarding Cetaceans in Parks* (15 May 2017), online (pdf): <parkboardmeetings.vancouver.ca/files/BYLAW-ParksControlBylawRegardingCetaceans-20170515.pdf>; "Regular Board Meeting: Meeting Minutes" (15 May 2017) at 3–4, online (pdf): *Vancouver Board of Parks and Recreation* <parkboardmeetings.vancouver.ca/2017/20170515/MINUTES_PB-20170515.pdf>.

[116] Note that in August 2014, the Park Board already tried to ban the breeding of captive cetaceans, but due to an impeding election, this matter was delayed. The Park Board re-examined the issue only after both Quila and Aurora died in November 2016 at the VA (see *Ocean Wise, supra* note 115 at paras 17–19).

[117] See Justin McElroy, "Vancouver Park Board officially ends display of new cetaceans at aquarium", *CBC News* (15 May 2017), online: <cbc.ca/news/canada/british-columbia/vancouver-aquarium-park-board-cetacean-ban-1.4116721>.

[118] Cetacean captivity is now prohibited by virtue of section 9(e)(f)(g) of the Parks Control by-law as a result of the by-law amendment. See Vancouver Board of Parks and Recreation, *Parks Control By-law* (15 September 2020) s 9, online (pdf): <parkboardmeetings.vancouver.ca/files/BYLAW-ParksBylawsConsolidated-20200915.pdf>.

[119] See Sykes, "The Whale", *supra* note 53 at 369. In 2018, the CEO of the VA explicitly said that the cetacean program would be ending. See Bethany Lindsay, "Vancouver Aquarium will no longer keep whales, dolphins in captivity", *CBC News* (18 January 2018), online: <cbc.ca/news/canada/british-columbia/vancouver-aquarium-will-no-longer-keep-whales-dolphins-in-captivity-1.4492316>.

[120] See *Ocean Wise, supra* note 115 at para 21.

[121] See *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2018 BCSC 196 at para 132.

essentially affirmed that the Park Board was not legislatively barred from exercising this kind of power.[122] Thus, the amendment is still binding.

All things considered, the by-law amendment remains a vital contextual component in the overarching narrative of phasing-out cetacean captivity in Canada. The amendment was referenced multiple times during the legislative proceedings pertaining to the *Whales Act*[123] and, similarly to Ontario's orca ban, it added a certain legitimacy to the policy idea of phasing-out cetacean captivity primarily for entertainment purposes. In terms of policymaking, it is also significant that the *Whales Act* followed other animal friendly legislative initiatives in Canada.[124]

2.1.2.1.3 Animal Welfare Bills in Canada

In recent years, parliamentarians have introduced and, in limited cases, successfully adopted bills to address deficiencies in Canadian law and to give animals certain legislative protections. For instance, in trying to amend the animal cruelty provisions of the *Criminal*

[122] See generally *Ocean Wise*, *supra* note 115 at paras 36–72.
[123] See e.g. "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 3rd reading, *Senate Debates,* 42-1, No 210 (29 May 2018) at 5625 (Hon Murray Sinclair) [Third Reading Senate 29 May 2018]; Senate Committee 4 April 2017, *supra* note 30 at 13:7 (Rob Laidlaw); Senate Committee 11 April 2017, *supra* note 77 at 14:6 (Carly Ferguson); Senate Committee 30 May 2017, *supra* note 113 at 17:9 (Hon Elizabeth Hubley).
[124] See generally Third Reading Senate 29 May 2018, *supra* note 123 at 5625 (Hon Murray Sinclair).

Code, several animal welfare bills failed to pass all the parliamentary echelons,[125] but some of them still received Royal Assent.[126]

Understanding the overarching policy framework of the *Whales Act* requires an understanding of past attempts to legislate in favor of animals. These bills, notwithstanding their legislative status, expand our collective appreciation of animal protection legislation. In other words, they signal the idea that some parliamentarians are progressively recognizing the inherent worth of animals. Thus, they arguably set the stage for introducing and enacting policies like the *Whales Act* in the current Canadian political landscape. For instance, in 2019, a private member's bill was introduced in Parliament to ban the

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[125] See e.g. Bill C-17, *An Act to amend the Criminal Code and to amend other Acts*, 2nd Sess, 35th Parl, 1997; Bill C-15, *An Act to amend the Criminal Code and to amend other Acts,* 1st Sess, 37th Parl, 2001; Bill C-15B, *An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act*, 1st Sess, 37th Parl, 2002; Bill C-292, *An Act to amend the Criminal Code (selling wildlife),* 1st Sess, 37th Parl, 2002; Bill C-280, *An Act to amend the Criminal Code (selling wildlife),* 2nd Sess, 37th Parl, 2003; Bill C-10, *An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act,* 2nd Sess, 37th Parl, 2002; Bill C-10B, *An Act to amend the Criminal Code (cruelty to animals),* 2nd Sess, 37th Parl, 2003; Bill C-22, *An Act to amend the Criminal Code (cruelty to animals),* 3rd Sess, 37th Parl, 2004; Bill C-50, *An Act to amend the Criminal Code in respect of cruelty to animals,* 1st Sess, 38th Parl, 2005; Bill S-24, *An Act to amend the Criminal Code (cruelty to animals)*, 1st Sess, 38th Parl, 2005; Bill C-373, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 39th Parl, 2006; Bill S-213, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 39th Parl, 2007; Bill C-361, *An Act to amend the Criminal Code (law enforcement animals),* 1st Sess, 39th Parl, 2007; Bill C-558, *An Act to amend the Criminal Code (cruelty to animals),* 2nd Sess, 39th Parl, 2008; Bill C-229, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 40th Parl, 2008; Bill C-230, *An act to amend the Criminal Code (cruelty to animals),* 1st Sess, 40th Parl, 2008; Bill C-232, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 41st Parl, 2011; Bill C-274, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 41st Parl, 2011; Bill C-277, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 41st Parl, 2011; Bill C-414, *An Act to amend the Criminal Code (cruelty to animals),* 1st Sess, 41st Parl, 2012; Bill C-592, *An Act to amend the Criminal Code (cruelty to animals),* 2nd Sess, 41st Parl, 2014; Bill C-610, *An Act to amend the Criminal Code (cruelty to animals),* 2nd Sess, 41st Parl, 2015; Bill C-615, *An Act to amend the Criminal Code (cruelty to animals-electric shock collars),* 2nd Sess, 41st Parl, 2015; Bill C-515, *An Act to amend the Criminal Code (law enforcement animals),* 1st Sess, 41st Parl, 2015; Bill C-246, *An Act to amend the Criminal Code, the Fisheries Act, the Textile Labelling Act, the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act and the Canada Consumer Product Safety Act (animal protection),* 1st Sess, 42nd Parl, 2016; Bill C-388, *An Act to amend the Criminal Code (bestiality),* 1st Sess, 42nd Parl, 2019.

[126] See e.g. Bill S-203, *An Act to amend the Criminal Code (cruelty to animals),* 2nd Sess, 39th Parl, 2008 (assented to 17 April 2008), SC 2008, c 12; Bill C-35, *An Act to amend the Criminal Code (law enforcement animals, military animals and service animals),* 2nd Sess, 41st Parl, 2015 (assented to 23 June 2015), SC 2015, c 34; Bill C-84, *An Act to amend the Criminal Code (bestiality and animal fighting),* 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 17.

importation of shark fins[127] and provisions of that bill were integrated into a government bill, namely the above-mentioned Bill C-68. In sum, it is worth appreciating how certain domestic policies influenced the emergence of the *Whales Act*. However, that's not all: policymakers also relied on certain international initiatives.

2.1.2.2 International Policy Initiatives

According to former Senator Sinclair, the *Whales Act* is building on a "trend",[128] as it follows other initiatives, both locally and internationally.[129] It should come as no surprise, then, that some of these policies received a considerable amount of attention from lawmakers and interested stakeholders in the context of adopting and justifying the *Whales Act* in Parliament. Here, I briefly evaluate these international developments,[130] beginning with Canada's southern neighbor, the United States of America (USA).

2.1.2.2.1 United States of America (USA)

There are a number of federal or state-level policies in the USA that influenced the proceedings relating to the *Whales Act*. For instance, parliamentarians explicitly referred to the State of California's ban on the captivity of orcas for entertainment purposes, which

[127] See Bill S-238, *An Act to amend the Fisheries Act and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (importation and exportation of shark fins),* 1st Sess, 42nd Parl, 2019. Also, in recent years, another private member's bill was introduced to ban cosmetic animal testing, but it died at the end of the 42nd parliamentary session. See Bill S-214*, An Act to amend the Food and Drugs Act (cruelty-free cosmetics)*, 1st Sess, 42nd Parl, 2015.
[128] See Third Reading Senate 29 May 2018, *supra* note 123 at 5625 (Hon Murray Sinclair).
[129] *Ibid.*
[130] Note that it is not my intention to evaluate all the international developments related to this question. Undertaking such an analysis is not the focus of this thesis. However, a few words on how these developments influenced the enactment of the *Whales Act* are warranted.

includes a breeding prohibition,[131] to essentially justify adopting the *Whales Act* and to enlighten the legislative process on this specific issue.[132]

During the proceedings, parliamentarians also raised other similar legislative initiatives in the USA to ground their ultimate policy choices, such as the South Carolina ban on displaying and keeping cetaceans in captivity,[133] as well as congressman Adam Schiff's legislative attempt to phase-out the display of orcas at the national level.[134]

Beyond North America, other countries have also enacted policies to address the plight of cetaceans, some of which were also mentioned during the proceedings relating to the *Whales Act*.

2.1.2.2.2 Other Countries

Internationally, particularly in recent years, legislators have taken a more active role to protect cetaceans by limiting and/or prohibiting the practice of keeping cetaceans in

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[131] See Sykes, "The Whale", *supra* note 53 at 398. See also Casey M. Weed, "The World Beyond Seaworld: A Comparative Analysis of International Law Protecting Cetacea in Captivity" (2018) 23:2 Ocean & Coastal LJ 281 at 296–297. Note that SeaWorld did not oppose the ban, as the company already announced that it would "voluntarily end its orca breeding program" (Parsons & Rose, "Blackfish Effect", *supra* note 83 at 77).

[132] See e.g. Third Reading Senate 29 May 2018, *supra* note 123 at 5625, 5628 (Hon Murray Sinclair) (noting, for instance, that the maximum fine of $200,000 for an established violation of the *Criminal Code* offences was inspired by the California ban); Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 10 (28 February 2017) at 10:14, 10:27 (Hon Wilfred Moore) [Senate Committee 28 February 2017]; Senate Committee 28 March 2017, *supra* note 108 (Hon Elizabeth Hubley). See also Senate Committee 30 May 2017, *supra* note 113 at 12:22 (Hon Elizabeth Hubley); Senate Committee 4 April 2017, *supra* note 30 at 13:7 (Rob Laidlaw); Senate Committee 4 April 2017, *ibid* at 13:8 (Naomi Rose); Senate Committee 11 April 2017, *supra* note 77 at 14:6 (Carly Ferguson).

[133] See Senate Committee 4 April 2017, *supra* note 30 at 13:8 (Naomi Rose); Senate Committee 11 April 2017, *supra* note 77 at 14:6 (Carly Ferguson); Third Reading Senate 29 May 2018, *supra* note 123 at 5625 (Hon Murray Sinclair). To be clear, South Carolina has banned the captivity and display of cetaceans since the early 2000's. See Weed, *supra* note 131 at 299–300.

[134] See e.g. Second Reading Senate 27 January 2016, *supra* note 113 at 155 (Hon Wilfred Moore); Senate Committee 11 April 2017, *supra* note 77 at 14:6 (Carly Ferguson); "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 2nd reading, *House of Commons Debates,* 42-1, No 376 (1 February 2019) at 25170 (William Amos) [Second Reading House 1 February 2019]. To be clear, this piece of legislation was introduced both in 2015 and in 2017 to prohibit, at the national level, "captive breeding, wild capture, and import and export of orcas" (Sykes, "The Whale", *supra* note 53 at 398).

captivity for varied purposes, such as entertainment.[135] Indeed, many countries, including Bolivia, Chile, Costa Rica, Croatia, Cyprus and Hungary,[136] have already enacted different policies to protect captive cetaceans.[137] Lawmakers explicitly referred to these international developments as a way to legitimize the *Whales Act* and its underlying principles, arguing that Canada is behind other countries on this specific matter.[138]

All of this illustrates that prior to the introduction of the *Whales Act*, a policy solution already existed and was readily available to be implemented at the Canadian national level. One of the most salient streams in Kingdon's model, however, is that of politics, to which I now turn.

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[135] See Rose & Parsons, *Case Against Marine Mammals in Captivity*, *supra* note 9 at 93 ("[t]he following countries do not allow the display of cetaceans for entertainment. Bolivia, Chile, Costa Rica, Croatia, Cyprus, Hungary (achieved through a trade ban), India, Nicaragua, Slovenia, and Switzerland (achieved through a trade ban)" (*ibid*) [footnotes omitted]).

[136] *Ibid.* Recently, French legislators introduced a new law to prohibit the captivity of cetaceans. See France, *JO,* Assemblée nationale, Débats parlementaires, Compte rendu intégral, 2nd session of 29 January 2021. See also "Les animaux sauvages dans les cirques itinérants « progressivement » interdits, la reproduction d'orques et de dauphins en captivité prohibée", *Le Monde* (29 September 2020), online : <lemonde.fr/planete/article/2020/09/29/les-animaux-sauvages-dans-les-cirques-itinerants-et-la-reproduction-d-orques-et-dauphins-en-captivite-vont-etre-progressivement interdits_60540173244.html>.

[137] Recently, other international jurisdictions are following suit. See e.g. "New South Wales, Australia bans captive dolphin breeding" (26 February 2021), online: *Marine Connection* <marineconnection.org/new-south-wales-australia-bans-dolphin-breeding/>; "Legislation bans captive cetaceans in Brussels Capital Region" (19 April 2021), online: *Dolphinaria-Free Europe* <dfe.ngo/>.

[138] See e.g. "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 2nd reading, *Senate Debates,* 42-1, No 22 (22 March 2016) at 385 (Hon Janis Johnson) [Second Reading Senate 22 March 2016] ("we are behind Costa Rica, China, India, U.K., Italy, New Zealand, Hungary, Mexico and Cyprus" (*ibid*)); Third Reading Senate 29 May 2018, *supra* note 123 at 5225 (Hon Murray Sinclair) (noting the bans on keeping cetaceans in captivity in Chile, Costa Rica, Croatia and India, including the restrictions relating to the practice in the U.K., Italy, New Zealand, Cyprus, Hungary, Mexico City); Second Reading Senate 27 January 2016, *supra* note 113 at 155 (Hon Wilfred Moore) (citing the bans on keeping cetaceans in captivity in Chile and Costa Rica); Second Reading House 1 February 2019, *supra* note 134 at 25170 (William Amos) (citing the developments in countries like India, Chile, Costa Rica and Switzerland). See also Senate Committee 11 April 2017, *supra* note 77 at 14:6 (Carly Ferguson) (noting developments in many countries, such as Hungary, Switzerland, Croatia, Chile, Costa Rica and Greece); Senate Committee 4 April 2017, *supra* note 30 at 13:8 (Naomi Rose). On these international developments, see also Weed, *supra* note 131 at 306–310.

2.1.3 The Politics

Arguably, an issue may not be placed on the political agenda, unless the political environment and its actors are paying a sufficient amount of attention to a recognizable public problem and are receptive to readily available solutions.[139] This might happen in multiple scenarios, as political actors may ultimately "shift on an issue if there is pressure from some type of actor, an interest group, a non-profit, a third party with a vested interest in the issue, *or a shift in public opinion*".[140]

In reality, if the overarching "national mood" in the public sphere, including changes in public opinion and/or the presence of active social movements, has shifted in favor of certain popular ideas, these ideas might have a better chance of being placed on the political agenda,[141] as opposed to others that might be more controversial in nature or have less public support.[142]

Indeed, it should come as no surprise that if the "terrain a lawmaker must traverse is too difficult they will decide to not bring the issue up at all rather than expend a large amount of political capital in a losing cause".[143] The active involvement of institutional actors, including, but not limited to, the development of coalitions amongst political actors, is therefore a common practice in this stream.[144] In short, the wishes of advocates in promoting their policy solutions to a given problem need to align with the political realities

[139] See Cairney & Zahariadis, *supra* note 65 at 91–92. See also Atupem, *supra* note 60 at 9.
[140] Atupem, *supra* note 60 at 9–10 [emphasis added] ("[t]he politics stream is flowing when the political environment provides politicians with the impetus to move in a certain direction" at 9).
[141] See Lemieux, *supra* note 56 at 38. See also Cairney & Zahariadis, *supra* note 65 at 100.
[142] See Atupem, *supra* note 60 at 10.
[143] *Ibid*.
[144] See Lemieux, *supra* note 56 at 38.

of the day and, if they do not, an issue may not be placed on the agenda, unfortunate as that might be.

As alluded to earlier, societal attitudes in both Canada[145] and abroad[146] have shifted in favor of phasing-out cetacean captivity, particularly for entertainment purposes. Broadly speaking, the Canadian "national mood", especially following the events detailed above, shifted in favor of this dominant popularized idea of prohibiting cetacean captivity. Arguably, this overall situation influenced the receptibility of the idea at the national political level, as demonstrated by the political discourse.[147]

Although former Senator Moore was the first federal lawmaker to begin, at least publicly, to pay close attention to the problems related to cetacean captivity, and was receptive to the idea of phasing-out this practice, many parliamentarians ended up agreeing with him.[148] As soon as former Senator Moore introduced the *Whales Act* in the Senate, many of his colleagues, including government officials, took meaningful notice of the

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[145] See Parsons & Rose, "Blackfish Effect", *supra* note 83 at 79; Sykes, "The Whale", *supra* note 53 at 351–352. A poll conducted in 2019 showed that more than half of Canadians opposed keeping animals in zoos or aquariums. See Victoria Shroff, "What Jane Goodall Act could mean for animals", *The Lawyer's Daily* (2 December 2020), online: <thelawyersdaily.ca> [Shroff, "Jane Goodall Act"], citing Mario Canseco, "Majorities of Canadians Oppose Trophy Hunting and Fur Trade" (22 November 2019), online (pdf): *Research Co.* <researchco.ca>. On this question of societal attitudes, see also Laura Kane, "Cetacean ban at Vancouver Aquarium was public's will: park board commissioner", *CTV News* (10 March 2017), online: <ctvnews.ca/canada/cetacean-ban-at-vancouver-aquarium-was-public-s-will-park-board-commissioner-1.3319862> (noting that the by-law amendment in Vancouver was motivated by the favorable public opinion surrounding the issue); Colby, *supra* note 14 at 303–305.

[146] One poll showed that in 2014 more than half of the U.S. population opposed keeping orcas in concrete tanks. See "Poll Shows Big Jump in Percentage of Americans Opposed to Keeping Orcas Captive for Public Display" (29 May 2014), online: *Animal Welfare Institute* <awionline.org/content/poll-shows-big-jump-percentage-americans-opposed-keeping-orcas-captive-public-display>.

[147] Parliamentarians relied on this favorable shift in public attitudes to ground their decisions. See e.g. Second Reading Senate 22 March 2016, *supra* note 138 at 386 (Hon Janis Johnson); Third Reading Senate 29 May 2018, *supra* note 123 at 5625–5628 (Hon Murray Sinclair). See also Second Reading House 1 February 2019, *supra* note 134 at 25169–25170 (William Amos); Second Reading Senate 27 January 2016, *supra* note 113 at 154 (Hon Wilfred Moore).

[148] Some parliamentarians, notably from different political stripes, eventually voted in favour of the *Whales Act*. An extensive discussion of this subject is found in chapter 4, *below.*

problems related to cetacean captivity and most of them were widely receptive to the plan to phase-out the practice.[149]

Indeed, after former Senator Moore's retirement in 2017, former Senator Sinclair actively sponsored the *Whales Act* in the Senate and MP Elizabeth May did the same in the House of Commons.[150] The fact that lawmakers were not faced with an onslaught of opposition from animal use industries, may have simplified their policy choices. Other institutional actors, such as non-governmental organizations like Animal Justice and Humane Canada, also played a pivotal role in advancing the issue in the public sphere and ensuring the eventual success of the *Whales Act*.[151]

The *Whales Act* thus suggests that the Senate can be an indispensable institutional vehicle to enact animal protection laws. The Senate, by adopting this piece of legislation in 2018,[152] signaled that the issue merits serious consideration from members of the House of Commons as well.

In short, the national political environment was particularly ripe for a major policy development on this specific issue, taking circumstances into account, including favorable public opinion, the influence of publicized events, the enactment of local and international policies on the same issue, and so on. Thus, it is reasonable to suggest that many federal

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[149] *Ibid.* Chapter 4 demonstrates that many parliamentarians were receptive to phasing-out cetacean captivity.
[150] See Sykes, "The Whale", *supra* note 53 at 354.
[151] See "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 3rd reading, *House of Commons Debates,* 42-1, No 414 (10 May 2019) at 27651 (Arif Virani) [Third Reading House 10 May 2019]. See also Holly Lake, "MPs calls on senators to stop playing games with animal protection bills", *ipolitics* (19 June 2020), online: <ipolitics.ca/2018/06/19/mps-call-on-senators-to-stop-playing-games-with-animal-protection-bills/>.
[152] See "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 3rd reading, *Senate Debates,* 42-1, No 238 (23 October 2018) at 6570 [Third Reading Senate 23 October 2018].

lawmakers felt confident that they could "expend a large amount of political capital"[153] for a demonstrably persuasive cause, which was not patently controversial in nature. In my view, we are now in a position to assemble the "Free Willy" puzzle, as mentioned in the introduction of this thesis.

To summarize, during the last decade or so, certain problems related to cetacean captivity have increasingly been perceived as pressing public issues, particularly following a series of certain focused events. In turn, borrowing Kingdon's language, these highly publicized events opened a "policy window"[154] for advocates to actively advance their solutions in the public realm.

The *Whales Act*, and its fundamental idea to phase-out cetacean captivity, provided a way to remedy these public problems. Drawing on Kingdon's theoretical ideas, this piece of legislation was placed on the political agenda as a direct result of the union of three policy streams − that is, problems, policies, and politics − at an opportune moment.

Indeed, when the *Whales Act* was first introduced in the Senate in December 2015, a public problem was recognized by lawmakers, a solution already existed and was available to be implemented at the national level, and the political conditions were particularly ideal for proposing such a legislative measure. Against this contextual background, I will now turn to Nussbaum's CA, a theory striving to secure and promote core capabilities, which I will later employ to evaluate the substance of the *Whales Act* and the proposed *Jane Goodall Act.*

[153] See Atupem, *supra* note 60 at 10.
[154] Kingdon, *supra* note 49 at 332.

Chapter 3: A Novel Way to Protect Animals: Nussbaum's Capabilities Approach

3.1 Primer on the Capabilities Approach: The Human Case

Before examining the contours of Nussbaum's version of the CA as it relates to animals, I shall canvass how this approach applies in the human case. I do this because the general principles of the CA relating to humans were extended to the animal kingdom, with slight variations.

Amartya Sen is recognized as the first intellectual to argue in favor of recognizing human capabilities as a decisive marker when assessing the quality of life of individual citizens, as opposed to other criteria, such as "GDP per capita", "average utility" or "economic growth".[155] In short, Sen has actively promoted a "capability approach" as the "best space within which to make comparisons of life quality".[156] In recent decades, Nussbaum and other scholars[157] refined, modified or expanded on Sen's ideas, making the CA a legitimate approach across many different scholarly disciplines.[158]

Broadly speaking, the CA may be defined as "an approach to comparative quality-of-life assessment and to theorizing about basic social justice".[159] Through this prism, the

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[155] Martha C. Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) 9: 2/3 Feminist Economists 33 at 33 [Nussbaum, "Capabilities as Fundamental Entitlements"]; Martha C. Nussbaum, "Working with and for Animals: Getting the Theoretical Framework Right" (2018) 19:1 J Human Development & Capabilities 1, DOI: <10.1080/19452829.2017.1418963> at 9 [Nussbaum, "Getting the Theoretical Framework Right"]. Sen was also influential in designing the Human Development Reports of the United Nations Development Programme. See Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Massachusetts: Harvard University Press, 2011) at 17 [Nussbaum, *Creating Capabilities*].

[156] Nussbaum, *Creating Capabilities, supra* note 155 at 18.

[157] See generally Ingrid Robeyns, "The Capability Approach: a theoretical survey" (2005) 6:1 J Human Development & Capabilities 93, DOI: <10.1080/146498805200034266> at 94.

[158] Many scholars are using the CA for many purposes, as demonstrated by the latest volume in the Journal of Human Development and Capabilities. See "Volume 22, 2021: Issue 1", online: *Journal of Human Development and Capabilities* <tandfonline.com/toc/cjhd20/22/1?nav=tocList>.

[159] Nussbaum, *Creating Capabilities*, *supra* note 155 at 18. Please note that this definition is not unanimously accepted. For instance, Ingrid Robeyns argues that Nussbaum restricts the scope of the CA by classifying it

question becomes, "[w]hat is each person able to do and to be?"[160] and it is the ultimate answer to this question that defines the notion of capabilities.[161] Although Nussbaum has been criticized for espousing an "imperialistic stance",[162] she states that framing the issues in these terms does not necessarily give credence to any particular religion, culture, or the like.[163] The CA, in this respect, is pluralistic in nature.[164]

A capability, when evaluating this notion through the lens of the CA, is not simply one's own personal abilities, trained or not, to accomplish an action. Instead, capabilities are "substantial freedoms" or "opportunities to choose"[165] to accomplish, or not, action X, taking into account one's own sociopolitical or economical environment.[166] This is what Nussbaum refers to as "combined capabilities".[167] To simplify things, I will provide an example.

Let's say I am eligible to vote in an upcoming federal election. Not only do I have trained abilities, notably through my educational background, to exercise an opinion on political issues, but my own environment allows me to freely exercise this ability.[168] Thus,

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as either (a) a theory about social justice or (b) a theory about assessing the quality of individual lives. This definition, according to Robeyns, fails to adequately acknowledge the work of other scholars. See Ingrid Robeyns, "Capabilitarianism" (2016) 17:3 J Human Development & Capabilities 397, DOI: <10.1080/19452829.2016.1145631> at 398–399 [Robeyns, "Capabilitarianism"]). For our purposes, however, this definition is sufficient to understand the basic principles of the CA.

[160] Nussbaum, *Creating Capabilities*, *supra* note 155 at 18.

[161] *Ibid* at 20.

[162] See Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012) 18:2 Animal L 207 at 230, n 134.

[163] See Nussbaum, "Capabilities as Fundamental Entitlements", *supra* note 155 at 39.

[164] *Ibid* at 43.

[165] Nussbaum, *Creating Capabilities*, *supra* note 155 at 20.

[166] *Ibid* (noting that capabilities are "not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social and economic environment" (*ibid*)).

[167] *Ibid* at 20–21; Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 9.

[168] In writing this example, I used Nussbaum's account of the differences between "internal capabilities" and "combined capabilities". See Nussbaum, *Creating Capabilities*, *supra* note 155 at 21; Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 9.

my own environment gives me this "freedom" or "opportunity" to choose such an action. Conversely, one may not reasonably argue that he/she has the "capability", or "substantial freedom", to exercise this ability in the context of a political regime that represses it.[169] It is this symbiotic relationship between "internal capabilities", or trained abilities, and the environmental conditions that "make choice available".[170] Thus, these ideas of "freedom" and "opportunities to choose" together encapsulate the concept of a capability.[171] Differentiating a capability from a "functioning" might further clarify.

According to Nussbaum, functionings are "beings and doings",[172] whereas capabilities are "freedom[s] to choose" or "opportunit[ies] to select"[173] an action. Using my elections example, my act of voting for Person X would be considered a functioning, while my opportunity to vote, or not, during these elections would be considered a capability. In other words, to vote would be the "active realization"[174] of my capability to vote. I am placed in a position where I can choose to achieve, or not, this functioning (i.e., vote). With this in mind, "capabilities, not functionings, are the appropriate political goals, because *room is thereby left for the exercise of human freedom*".[175] Accordingly, to respect this notion of freedom, Nussbaum suggests that we should promote capabilities as opposed to functionings.[176] For instance, a government should not dictate its citizens to vote for

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[169] See Nussbaum, *Creating Capabilities*, *supra* note 155 at 21.
[170] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 9 [footnotes omitted].
[171] See Nussbaum, *Creating Capabilities*, *supra* note 155 at 25 ("[t]o promote capabilities is to promote areas of freedom" (*ibid*)). In other words, Nussbaum suggests that a "capability means opportunity to select. The notion of *freedom to choose* is thus built into the notion of capability" (*ibid*) [emphasis in original].
[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid* at 25–26 [emphasis added].
[176] *Ibid.* But see Robeyns, "Capabilitarianism", *supra* note 159 at 401. Here, I should note that Nussbaum has a slightly different view in terms of protecting animal capabilities. Discussion of this subject is found in the next section, *below.*

person X in an election, but should promote all kinds of opportunities and freedoms to ultimately choose to vote, or not, for person X, should they wish to do so.[177]

Overall, the CA values "*each person as an end*";[178] the focus is on the opportunities available for each individual person.[179] In this respect, the CA "ascribes an urgent *task to government and public policy* – namely, to improve the quality of life for all people, as defined by their capabilities".[180] The approach, in this sense, imposes upon governments an obligation to promote the exercise of capabilities as a way to improve the quality of individual lives. Against this theoretical background, which kinds of "opportunities" or "substantial freedoms" should we, as a society, ultimately promote and secure? An ethical evaluation is needed to determine these sorts of things.[181]

For instance, human X may have propensities to be cruel towards other humans, but this is not an ability that should be actively promoted.[182] Thus, the CA does not merely derive its principles from human nature.[183] An ethical evaluation is of upmost importance if one is to draw on the "idea of capabilities for the purposes of normative law and public policy",[184] as "some capabilities are important and others less important, some good, and some (even) bad."[185] Other than this notion of capability, certain other ideas may also guide this ethical evaluation, one of which is this abstract concept of "dignity".

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[177] On this question, see Nussbaum, "Capabilities as Fundamental Entitlements", *supra* note 155 at 37, 43.
[178] Nussbaum, *Creating Capabilities*, *supra* note 155 at 18 [emphasis in original].
[179] *Ibid.*
[180] *Ibid* at 19 [emphasis in original]. But see Robeyns, "Capabilitarianism", *supra* note 159 at 403.
[181] See Nussbaum, *Creating Capabilities*, *supra* note 155 at 28. In the case of animals, this evaluation is still present, but takes a different form. Discussion of this subject is found in the next section, *below*.
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid* at 27–28.
[185] *Ibid* at 28.

While Nussbaum acknowledges that the notion of human dignity may be perceived as a "vague idea",[186] the meaning behind the idea is clearer when it is placed in conjunction with other ideas, such as the respectful treatment of humans. In the end, "the basic idea is that some living conditions deliver to people a life that is worthy of the human dignity that they possess, and others do not".[187] Dignity, regardless of the circumstances, is "equal in all who are agents … [a]ll, that is, deserve equal respect from laws and institutions".[188] This concept of dignity represents the linchpin of Nussbaum's version of the CA,[189] as her primary aim is to "[protect] … areas of freedom so central that their removal makes a life not worthy of human dignity".[190] This is where Nussbaum's unique list of core capabilities comes directly into play.[191]

In her view, governments must ultimately secure ten central capabilities[192] up to a certain minimum threshold for an individual human life to be worthy of dignity.[193] The categories of her list are as follows: (1) life;[194] (2) bodily health;[195] (3) bodily integrity;[196]

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[186] *Ibid* at 30.
[187] *Ibid.*
[188] *Ibid* at 31.
[189] For a critical perspective on this question, see e.g. Rutger Claassen & Marcus Düwell, "The Foundations of Capability Theory: Comparing Nussbaum and Gewirth" (2013) 16:3 Ethical Theory & Moral Practice 493 at 495, n 3 ("[s]o far, dignity for Nussbaum seems a mere epiphenomenon with respect to the concept of the capabilities. If dignity has higher importance for the understanding of the capabilities approach, this importance has not been theoretically elaborated so far" (*ibid*)).
[190] Nussbaum, *Creating Capabilities*, *supra* note 155 at 31.
[191] By establishing a list of central capabilities, Nussbaum distinguishes herself from Sen. See Nussbaum, "Capabilities as Fundamental Entitlements", *supra* note 155 at 40; Rutger Claassen, "Making Capability Lists: Philosophy versus Democracy" (2011) 59:3 Political Studies 491. Also, note that Nussbaum's list is not necessarily immune from criticism. See e.g. Ingrid Robeyns, "Selecting Capabilities for Quality of Life Measurement" (2005) 74:1 Social Indicators Research 191, DOI: <doi.org/10.1007/s11205-005-6524-1>.
[192] According to Nussbaum, nations may refine these central capabilities as per their own traditions, histories, and so on. See Nussbaum, *Creating Capabilities*, *supra* note 155 at 40.
[193] *Ibid* at 31–32.
[194] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 9 (having the opportunity to live "to the end of a human life of normal length" (*ibid*)).
[195] *Ibid* (having the opportunity to have a "good health" (*ibid*)).
[196] *Ibid* at 10 (having the opportunity to "move freely from place to place" (*ibid*)).

(4) senses, imagination, and thought;[197] (5) emotions;[198] (6) practical reason;[199] (7) affiliation;[200] (8) other species;[201] (9) play;[202] and (10) control over one's environment.[203] Thus, the individual is the primary unit of consideration[204] and the list and its corresponding principles form part of Nussbaum's project to create a "partial approach to basic justice".[205] A society may be defined as "just" only if the list's central capabilities are secured by governments, up to a minimum threshold.[206]

Of course, depending on the circumstances, individuals may not be able to fully exercise their core capabilities. For instance, in a region stricken by poverty, a parent may be faced with a conflicting choice: sacrificing the realization of a capability of their child − for example, educational opportunities − at the altar of another capability, such as working to pay for the basic necessities of life.[207] Nussbaum suggests that this type of situation, where core capabilities compete against each other, is a form of "tragedy", as "any course we select involves doing wrong to someone".[208] Indeed, as a general matter, "there is no choice available that is fully right in the largest ethical sense".[209]

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[197] *Ibid* (having the opportunity to "do these things in a 'truly human' way" (*ibid*)).
[198] *Ibid* (having the opportunity to form "attachments" (*ibid*)).
[199] *Ibid* (having the opportunity to plan "one's life" (*ibid*)).
[200] *Ibid* (having the opportunity to "engage in various forms of social interaction" (*ibid*)).
[201] *Ibid* (having the opportunity to create relationship with other species and the "world of nature" (*ibid*)).
[202] *Ibid* (having the opportunity to play (*ibid*)).
[203] *Ibid* (having the opportunity to "hold property" and the opportunity to "participate … in political choices" (*ibid*)).
[204] See Nussbaum, *Creating Capabilities*, *supra* note 155 at 35.
[205] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 9 [footnotes omitted].
[206] See Nussbaum, *Creating Capabilities*, *supra* note 155 at 40; Nussbaum, "Capabilities as Fundamental Entitlements", *supra* note 155 at 40; Nussbaum, "Getting the Theoretical Framework Right", *ibid* at 9.
[207] See Nussbaum, *Creating Capabilities*, *supra* note 155 at 36–37.
[208] *Ibid* at 37 (suggesting that a tragedy occurs where any given choices involve a "violation of an entitlement grounded in basic justice" (*ibid*)).
[209] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 13. However, Nussbaum says that one choice might be better than another in a tragic situation. See Nussbaum, *Creating Capabilities*, *supra* note 155 at 37.

Having a better understanding of these notions of "capabilities", "functionings", "dignity", "tragedy", and the like, relating specifically to human beings, puts us in a better position to assess how Nussbaum's CA may be extended to animals and, more importantly, to assess its relevance for the *Whales Act*.

3.2 The Capabilities Approach and the Animal Kingdom

3.2.1 Preliminary Methodological Observations

In the early 2000's, Nussbaum began experimenting with the idea of extending the CA to animals. In 2001, in a book review, she explained that as a matter of "integrity" and "completeness", the CA should be extended to the animal kingdom, particularly since the CA already recognizes value and dignity in human animal lives or, in a general sense, "animality".[210] This book review essentially lays the foundation of her theoretical approach as it relates to animals.[211]

In 2004, Nussbaum further developed these thoughts in one book chapter,[212] where she applied the categories of her human list of core capabilities to the animal condition.[213] In an effort to "map out some basic political principles that will guide law and public policy in dealing with animals",[214] Nussbaum considered how the large categories of the human

[210] See Martha C. Nussbaum, "Animal Rights: The Need for a Theoretical Basis", Book Review of *Rattling the Cage: Toward Legal Rights for Animals* by Steven M. Wise, (2001) 114:5 Harv L Rev 1506 at 1538 [Nussbaum, "Need for a Theoretical Basis"].
[211] *Ibid* at 1540–1541 ("[h]ow would I address these questions, generalizing the capabilities view across the species barrier? Here I am only at the beginning, and I have no settled view on many of the most difficult questions. But I can sketch the direction in which my thought is heading" (*ibid*)). It should be noted that this book review is actually not the first time Nussbaum has expressed an interest in animals. See Anders Schinkel, "Martha Nussbaum on Animal Rights" (2008) 13:1 Ethics & Environment 41 at 42.
[212] See Martha C. Nussbaum, "Beyond "Compassion and Humanity": Justice for Nonhuman Animals" in Cass R. Sunstein & Martha C. Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) [Nussbaum, "Justice for Nonhuman Animals"].
[213] *Ibid* at 313–317.
[214] *Ibid* at 313.

list, such as life, bodily integrity, bodily health and play, might apply to animals and subsequently determined what sorts of entitlements and protections should be granted to animals.[215] In that chapter, she framed the categories of her human list as a "good basis for a sketch of some basic political principles" for animals.[216]

Shortly thereafter, the central postulates of her approach as articulated in the above-noted book chapter would serve as the foundational basis of the arguments advanced in her book *Frontiers of Justice: Disability, Nationality, Species Membership*,[217] which are more extensive and far-reaching than her previous writings. Going forward, I will draw primarily on Nussbaum's *Frontiers of Justice*, as it presents an overarching picture of her views on this subject.

3.2.2 Animal Capabilities

To begin, it is important to mention that Nussbaum draws heavily on Aristotle's teachings to develop her own approach, particularly as it relates to animals. Aristotle imparted, among other things, that there is "something wonderful and wonder-inspiring in all the complex forms of life in nature".[218] And so, Nussbaum relies on the "Aristotelian idea" that "each creature has a characteristic set of capabilities … distinctive of that species, and that those more rudimentary capacities need support from the material and social environment if the animal is to flourish in its characteristic way".[219] Thus, Nussbaum

[215] *Ibid* at 313–317.
[216] *Ibid* at 314.
[217] See generally Nussbaum, *Frontiers of Justice, supra* note 49 at 325–407.
[218] *Ibid* at 347 [footnotes omitted].
[219] Martha Nussbaum, "The Capabilities Approach and Animal Entitlements" in Tom L. Beauchamp & R.G. Frey, eds, *The Oxford Handbook of Animal Ethics* (New York: Oxford University Press, 2011) at 237 [Nussbaum, "Animal Entitlements"].

claims that an individual living sentient[220] being should be able to lead a flourishing life "as the sort of thing it is".[221] The CA, in the end, "finds ethical significance in the unfolding and flourishing of basic (innate) capabilities".[222] How does one come to appreciate an animal life as a complex form of life, trying to lead a flourishing existence?

Human imagination is a powerful tool in extending the approach to animals, as it helps us to better understand that "animal lives are many and diverse, with multiple activities and ends both within each species and across species … *imagining the lives of animals makes them real to us in a primary way, as potential subjects of justice*".[223] As was the case with humans, it is the individual being that ultimately counts. As potential subjects of justice, Nussbaum reminds us that the CA prioritizes the well-being of existing individuals, not the viability or survival of a species.[224]

While the species is not the relevant subject of concern, "species-specific norms" may still be used in determining if an animal has many opportunities to "flourish".[225] Under certain circumstances, certain types of animals may find themselves unable to flourish,

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[220] According to Nussbaum, sentience is a threshold for extending the CA to animals. See Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 14.
[221] Nussbaum, *Frontiers of Justice, supra* note 49 at 349 ("no sentient animal should be cut off from the chance for a flourishing life, a life with the type of dignity relevant to that species" at 351).
[222] *Ibid* at 361.
[223] *Ibid* at 355 [emphasis added] (Nussbaum defines "subjects of justice" as: "the conception of a world in which there are many different types of animals striving to live their lives, each life with its dignity" at 356).
[224] *Ibid* at 358. See also Martha C. Nussbaum, "The Moral Status of Animals" (2006) 52:22 Chronicle Higher Education 1 at 4 [Nussbaum, "Moral Status of Animals"] ("the survival of a species may have weight as a scientific or aesthetic issue, but it is not an ethical issue, and certainly not an issue of justice … [w]hen elephants are deprived of a congenial habitat and hunted for their tusks, harm is done to individual creatures, and it is that harm that should be our primary focus when justice is our concern" (*ibid*)).
[225] See Nussbaum, *Frontiers of Justice, supra* note 49 at 365. See also Nussbaum, "Moral Status of Animals", *supra* note 224 at 5 ("[t]he capabilities approach, by contrast, with its talk of characteristic functioning and forms of life, seems to attach some significance to species membership as such" (*ibid*)). But see T.J. Kasperbauer, "Nussbaum and the Capacities of Animals" (2013) 26:5 J Agricultural & Environmental Ethics 977, DOI: <10.1007/s10806-012-9436-5> at 985–986 (arguing that Nussbaum's account of species-specific norms does not adequately capture "latent" skills or abilities that an animal may possess, such as the use of sign language in the case of chimpanzees).

especially in a physical environment that might be too "confining";[226] such cases reaffirm the importance of conducting a "respectful consideration of the species norm of flourishing and a respectful attention to the capacities of the individual".[227] On this point, Nussbaum writes:

> [T]he species norm (*duly evaluated*) tells us what the appropriate benchmark is for judging whether a given creature has decent opportunities for flourishing … what is wanted is a species-specific account of central capabilities … and then a commitment to bring members of that species up to that norm[228]

How should we interpret and understand the words "duly evaluated"? Nussbaum suggests the need to undertake an ethical assessment of animal lives.[229] In this respect, she posits that:

> The same attitude to natural powers that guides the approach in the case of human beings guides it in the case of nonhuman animals: Each form of life is worthy of respect, and it is a problem of justice when a creature does not have the opportunity to unfold its (*valuable*) power, to flourish in its own way, and to lead a life with dignity.[230]

This position leads Nussbaum to conclude that a tiger in a zoo should not be permitted to kill small animals, as this ability does not have "intrinsic ethical value".[231]

It is often argued that captive animals live a comfortable existence, as they are provided with the basic necessities (e.g., food, shelter, veterinary care) without any external

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[226] See Nussbaum, *Frontiers of Justice, supra* note 49 at 378.
[227] *Ibid.*
[228] *Ibid* at 365 [emphasis added].
[229] *Ibid* at 369. See also Nussbaum, "Moral Status of Animals", *supra* note 224 at 5–6 (noting that this task is difficult in the case of animals, because humans do not necessarily know what constitutes a good or a bad animal life).
[230] Nussbaum, "Moral Status of Animals", *supra* note 224 at 4 [emphasis added].
[231] *Ibid* at 6. But see Maleka Momand, "Nussbaum's Capabilities Approach and Nonhuman Animals: The Ecological Implications" (2016) 4 CLA J 218 at 229–230 (noting there might be value in actually killing the prey).

threats, such as predation.[232] The CA, according to Nussbaum, counters this reasoning: a flourishing animal life does not imply a "comfortable immobility".[233] Many animals, notably cetaceans or elephants, live in vast territories and they "characteristically live a life full of movement, space, and complex social interaction".[234] Nussbaum asserts that a life without these components is deeply "distorted and impoverished".[235] Thus, the CA views the lives of sentient beings as widely complex and varied, as "all exhibiting a kind of ordered striving toward survival, flourishing, and reproduction".[236] One ability is not considered superior over another, as animals, like humans, pursue many different things in life which are highly significant.[237]

In this respect, Nussbaum succinctly underlines how the general principles of the CA might apply to the animal condition in the following way:

> [T]he core of the approach … is that *animals are entitled to a wide range of capabilities to function, those that are most essential to a flourishing life, a life worthy of the dignity of each creature*. Animals have entitlements based upon justice. The entitlements of animals are species-specific and based upon their characteristic forms of life and flourishing.[238]

In the literature, some scholars criticize Nussbaum for having extended her notion of capabilities to the animal kingdom. For instance, according to Anders Melin and David Kronlid, Nussbaum wrongfully equates specific animal abilities (e.g., a predatory ability to kill prey) with capabilities, which signifies an ability to make a "rationally considered

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[232] Discussion of this topic is found in chapter 4, *below.*
[233] Nussbaum, "Moral Status of Animals", *supra* note 224 at 3.
[234] *Ibid.*
[235] *Ibid.*
[236] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 5 ("[w]hat we need is the complexity of reality: an approach that looks at the whole of animal nature without a single linear ranking, one that focuses on our evil doing when we cause pain, but also on the complicated capacities of animals for many types of fascinating activity, the need of all animals for full and flourishing lives" at 9).
[237] *Ibid* at 5 ("[t]he idea of superiority is not drawn from looking at nature, and it does not correspond to what we see when we look at nature, if we can put aside our arrogance" (*ibid*)).
[238] Nussbaum, *Frontiers of Justice, supra* note 49 at 392 [emphasis added].

choice".[239] For them, we ought to promote animal functionings instead of capabilities, as "[animals] do not have the same ability as humans to reflect on the purposes of their actions".[240] In other words, it is futile to talk about animal capabilities, as the idea seems to apply to humans – the only ones capable of choosing freely between different things. While there might be merits to this argument, insofar as humans and animals may differ in their abilities, it still reinforces the idea that animals are completely separate from humans and portrays animals as merely reacting to their respective environments without some form of agency. The CA, as argued by Nussbaum, tries to repudiate this kind of reasoning.

The notion of dignity, which was central in justifying the list of capabilities in the human case, also takes a pronounced role in extending the CA to animals. Nussbaum unambiguously says that dignity "belongs to other animals as well: all are worthy of lives commensurate with the many types of dignity inherent in their many forms of life".[241] Nussbaum believes that certain living conditions fundamentally violate animals' basic dignity.

Indeed, Nussbaum says that "[t]he fact that so many animals never get to move around, enjoy the air, exchange affection with other members of their kind … it is not a life in keeping with the dignity of such creatures".[242] Thus, the primary intent of the CA as

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[239] Anders Melin & David Kronlid, "Should We Ascribe Capabilities to Sentient Animals? A Critical Analysis of the Extension of Nussbaum's Capabilities Approach" (2016) 3:2 De Ethica 53, DOI: <doi.org/10.3384/de-ethica.2001-8819.163253> at 59–60.

[240] *Ibid* at 60. On this question of functionings, Nussbaum advocates for a form of respectful "paternalism" in relation to animals. According to her, we have a responsibility to ensure animals' wellbeing given the fact that humans are affecting all aspects of their lives, directly or indirectly. See Nussbaum, *Frontiers of Justice, supra* note 49 at 375–378.

[241] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 11 [footnotes omitted].

[242] Nussbaum, "Moral Status of Animals", *supra* note 224 at 4 (on this notion of dignity: "[i]t is difficult to know precisely what that means, but it is rather clear what it does not mean: the conditions of the circus animals beaten and housed in filthy cramped cages, the even more horrific conditions endured by chickens,

it relates to both humans and animals is to "take into account the rich plurality of activities that sentient beings need – all those that are required for a life with dignity".[243]

Recall that Nussbaum established a list of ten central human capabilities that ought to be secured up to a minimum threshold by any just societies. She extends the list with slight variances to animals[244] who should also have a "set of basic opportunities for flourishing";[245] animals, like humans, should be free to exercise certain core things in life. In essence, we ought to promote and ultimately secure each core capability of animals up to a minimum threshold, below which anything would represent a "failure of justice".[246]

Based on the premise that these entitlements are "grounded in justice", Nussbaum claims that her CA is a "species of a rights-based approach".[247] In this respect, Nussbaum concedes that her approach does not neatly fit into a "rights" framework, which is "loose", "vague", too "abstract", "underdeveloped" and does not provide enough "definiteness",[248] compared to her own CA which can supply a much "thicker account of rights or

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calves, and pigs raised for food in factory farming, and many other comparable conditions of deprivation, suffering, and indignity" at 1).

[243] *Ibid* at 3.

[244] Note that Nussbaum recently added the concept of "biocentric wonder" to her list of capabilities. See Martha C. Nussbaum, "Human Capabilities and Animal Lives: Conflict, Wonder, Law: A Symposium" (2017) 18:3 J Human Development & Capabilities 317 at 320 [Nussbaum, "Human Capabilities"]. To the best of my knowledge, this capability has not received much scrutiny from Nussbaum after the publication of this article.

[245] Nussbaum, "Moral Status of Animals", *supra* note 224 at 4. See also Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 11 ("[a]ll animals, in short, should have a shot at flourishing in their own way" (*ibid*)).

[246] Nussbaum, *Frontiers of Justice, supra* note 49 at 381. The CA recognizes a plurality of animal activities, even those not registered in their sentient experiences (*ibid* at 385).

[247] See Rachel Nussbaum Wichert & Martha C. Nussbaum, "The Legal Status of Whales and Dolphins: From Bentham to the Capabilities Approach" in Lori Keleher & Stacy J. Kosko, eds, *Agency and Democracy in Development Ethics* (United Kingdom: Cambridge University Press, 2019) at 275 [Nussbaum & Wichert, "From Bentham to the Capabilities Approach"].

[248] Nussbaum, "Need for a Theoretical Basis", *supra* note 210 at 1535; Rachel Nussbaum Wichert & Martha C. Nussbaum, "Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission" (2017) 18:3 J Human Development & Capabilities 356 at 364 [Nussbaum & Wichert, "Scientific Whaling"]; Nussbaum, "Human Capabilities", *supra* note 244 at 320.

entitlements".[249] In fact, she says that the language of capabilities "gives important precision and supplementation to the language of rights".[250] Linguistically, according to author Ramona Ilea, talking about capabilities could be more "palatable", as the very idea of animal rights is still "controversial".[251]

Other scholars have suggested that Nussbaum's CA does not neatly fit into either a rights framework or an animal welfare approach.[252] In other words, Nussbaum's CA, and its emphasis on securing capabilities, should be viewed as a distinct theoretical approach, not easily reducible to a "rights" or a "welfarist" framework.[253] In her writings, Nussbaum has criticized authors espousing both these perspectives, such as Jeremy Bentham, commonly associated with the welfarist view, or Steven M. Wise, generally associated with the rights view.[254] With this in mind, Nussbaum conceptualizes animal capabilities as follows:

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[249] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365 [footnotes omitted].
[250] Nussbaum, "Capabilities as Fundamental Entitlements", *supra* note 155 at 37.
[251] See Ramona Ilea, "Rights and Capabilities: Tom Regan and Martha Nussbaum on Animals" in Mylan Engel Jr. & Gary Lynn Comstock, eds, *The Moral Rights of Animals* (United Kingdom, London: Lexington Books, 2016) [Ilea, "Rights and Capabilities"] at 212.
[252] See e.g. John MacCormick, "The Animal Protection Commission: Advancing Social Membership for Animals through a Novel Administration Agency" (2018) 41:1 Dal LJ 253 at 255-258. See also Jessica Eisen, "Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act" (2018) 51:3 U Mich JL Ref 469 at 507, n 170.
[253] Gary L. Francione notes that a "welfarist" perspective accepts that animals may be used in certain contexts "as long as we treat [them] "humanely" and do not impose "unnecessary" suffering on them" (Francione & Garner, *supra* note 11 at 5). This perspective is typically associated with utilitarian thinking, espoused by the likes of Jeremy Bentham, which places emphasis on consequences, contrary to a "rights" view (Francione & Garner, *ibid* at 7–21). In utilitarian ethics, the rightness of an action is the "one that maximizes total (or, in some versions, average) utility, understood as pleasure and/or the absence of pain" (Nussbaum, "Moral Status of Animals", *supra* note 224 at 2). Further discussion of this topic can be found in Tom Regan, *The Case for Animal Rights* (California: University of California Press, 1983); Tom Regan, *Empty Cages: Facing the Challenge of Animal Rights* (Lanham, Md: Rowman & Littlefield, 2004); Peter Singer, *Animal Liberation*, 2nd ed (New York: Avon Books, 1990); Peter Singer, *Practical Ethics*, 3rd ed (Cambridge: Cambridge University Press, 2011). For a critical perspective on this dichotomy between "rights" and "welfare", see Angela Fernandez, "Not Quite Property, Not Quite Persons: A "Quasi" Approach for Nonhuman Animals" (2019) 5:1 Can J Comparative & Contemporary L 155 at 169–173 [Fernandez, "Quasi Property"].
[254] Nussbaum does not believe utilitarian thinking encapsulates the complexity of animal lives, as the focus of this view is limited to certain components, such pain and pleasure. See Nussbaum, "Getting the Theoretical

(1) Life: According to Nussbaum, sentient animals are "entitled to continue their lives, whether or not they have such a conscious interest",[255] but ultimately determines that killing animals for food is still permissible, if animals are killed "painlessly".[256]

It is arguable that if pushed to its conclusions, the CA necessarily justifies ending several animal use industries and practices, contrary to Nussbaum's proposal.[257] Thus, it seems there is an inconsistency in Nussbaum's views.[258] The CA does recognize that animals, like humans, should have opportunities to lead flourishing lives and death seems to be the antithesis of this pursuit.

The CA, however, does not simply rest in the realm of moral abstractions. In reality, the theory is supposed to be interpreted by many actors − political or otherwise − who may disagree as to its proper interpretation and application, depending on the circumstances. The theory is not supposed to be static. To the contrary, the CA is flexible enough to allow differing interpretations and varied outcomes. A distinction, then, must be established

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Framework Right", *supra* note 155 at 7–9; Nussbaum, "Human Capabilities", *supra* note 244 at 320; Nussbaum, *Frontiers of Justice, supra* note 49 at 349, 370. Nussbaum also criticizes the strategy behind Wise's goal, namely through his organization "The Nonhuman Rights Project (NhRP)", to recognize legal personhood for certain types of animal species primarily based on the fact that they demonstrate similar characteristics to humans. She calls this strategy a "so like us" approach. See Nussbaum, "Getting the Theoretical Framework Right", *ibid* at 3–7. For a critical perspective on the "so like us" approach, see Fernandez, "Quasi Property", *supra* note 253 at 194–195; Francione & Garner, *supra* note 11 at 13. For more information on the NhRP, see "2020 Annual Report" (December 2020) at 4, online (pdf): *Nonhuman Rights Project* <nonhumanrights.org/content/uploads/2020-Annual-Report.pdf>; "Frequently Asked Questions: why those animals?", online: *Nonhuman Rights Project* <www.nonhumanrights.org/frequently-asked-questions/> (noting that the NhRP is seeking protections for certain animals because they can demonstrate certain things like the capacity to be self-aware).

[255] Nussbaum, *Frontiers of Justice, supra* note 49 at 393.

[256] *Ibid* at 402.

[257] See Ilea, "Rights and Capabilities", *supra* note 251 at 214–215.

[258] See e.g. Schinkel, *supra* note 211 at 50–54; Jennifer Davidson, "Justice For All?: The Shortcomings and Potentials of the Capabilities Approach for Protecting Animals" (2018) 24 Animal L 425 at 441–445 (arguing that Nussbaum is not entirely consistent with her own theory by advocating for the painless killings of animals for food).

between: (a) the general principles of the approach; and (b) the ultimate interpretation given to these principles and the resulting outcome.

In my view, claiming that Nussbaum misinterpreted or misapplied her approach[259] misses the point. Nussbaum's own interpretation suggests a certain flexibility inherent in the approach. Even if the general principles of the CA were to be included in a legal document, perhaps compelling decision-makers to consider animal lives in terms of their capabilities, there would still be disagreements on the correct interpretation of the CA and its resulting implications for policy.

(2) Bodily Health: Animals, like humans, ought to be entitled to lives with good health. Nussbaum mainly advocates for laws and policies ensuring the proper treatment of animals in human care, such as those that regulate nutrition, space, and so on.[260]

(3) Bodily Integrity: Although Nussbaum advocates for "entitlements against violations of [animals'] bodily integrity by violence, abuse, and other forms of harmful treatment",[261] she would still endorse campaigns of sterilization to prevent cases of overpopulation,[262] among other things.

(4) Senses, Imagination and Thought: Nussbaum asserts that animals should be given "access to sources of pleasure, such as free movement in an environment that is such as to please their senses".[263] In this respect, Nussbaum suggests that this capability would lead

[259] See Ilea, "Rights and Capabilities", *supra* note 251 at 214.
[260] Nussbaum, *Frontiers of Justice, supra* note 49 at 394.
[261] *Ibid* at 395.
[262] *Ibid* at 396.
[263] *Ibid* [footnotes omitted].

to a ban on hunting and fishing for sport and, more importantly, would challenge the confinement of animals and, at least, better regulation of places where animals are kept.[264]

(5) Emotions: Nussbaum, unlike French philosopher René Descartes,[265] acknowledges that animals "have a wide range of emotions".[266] Thus, this capability entails they should be entitled to "lives in which it is open to them to have attachments to others, to love and care for others".[267]

(6) Practical Reason: For certain kinds of animals who display an ability to plan or frame projects − that is, to exercise practical reason, Nussbaum suggests the same types of policies advocated for capability no. 4.[268]

(7) Affiliation: Nussbaum recommends that animals should be treated respectfully, as "dignified beings", and be entitled to "opportunities to form attachments",[269] as suggested in capability no. 5. That said, she advises that "animals are entitled to world policies that grant them political rights and the legal status of dignified beings".[270]

(8) Other Species: Nussbaum envisions an "interdependent world" where "all species will enjoy cooperative and mutually supportive relations".[271] Animals, like humans, are entitled to create and engage in relationships with other species.

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[264] *Ibid* at 397 (criticizing zoos who do not offer opportunities for animals to flourish, which may lead to serious "boredom" (see *ibid*)).
[265] See Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 20.
[266] Nussbaum, *Frontiers of Justice, supra* note 49 at 397.
[267] *Ibid*.
[268] *Ibid* at 398.
[269] *Ibid.*
[270] *Ibid* at 398–399. Here, it is worth mentioning that Switzerland legally recognizes animals as "dignified beings". See generally Gieri Bolliger, "Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives" (2016) 22:2 Animal L 311.
[271] Nussbaum, *Frontiers of Justice, supra* note 49 at 400.

At first glance, this proposition seems unusual. Humans may have the ability to live with other species, but expecting the same from other animal species may not be feasible. However, upon reflection, this capability is perhaps the most attuned to the Indigenous idea of "all my relations". I will return to this point in the following chapter.

(9) Play: Nussbaum affirms that play is "central to the lives of all sentient animals".[272]

(10) Control Over One's Environment: Nussbaum determines that not only should we "respect … the territorial integrity of their habitat",[273] but that, further, animals should also be included in the political sphere to better protect their interests.[274] Accordingly, the principles underlying the list should be included in a nation's constitution to better protect animals' interests. Indeed, Nussbaum notes that:

> [T]he capabilities approach suggests that each nation should include in its constitution or other founding statement of principle an inclusion of animals as subjects of political justice, and a commitment that animals will be treated as beings entitled to a dignified existence. The constitution might also spell out some of the very general principles suggested by this capabilities list.[275]

How can we reconcile this idea with Nussbaum's earlier proposal that, in certain circumstances, animals may be used by humans in a way that denies their dignity? One of Nussbaum's responses is that this is a "tragic" situation.

As described above, humans can find themselves in situations where they feel they need to sacrifice certain capabilities to pursue a particular action. It is a tragic event when all the available choices involve an inability to exercise a core capability. This idea applies

[272] *Ibid*.
[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid* at 400–401.

equally for animals, as "it is a waste and a tragedy when a living creature has an innate capability for some functions that are evaluated as important and good, but never gets the opportunity to perform those functions".[276] In other words, if an animal never gets the opportunity to realize certain valuable life activities, such as being able to form meaningful attachments with members of their own group, this is a "waste and a tragedy".[277]

Obviously, tensions and conflicts may arise between animals and humans.[278] Occasionally, animal lives are sacrificed to achieve certain human goals − for instance, in animal testing for medical research.[279] In certain cases, this sacrifice involves pain and even death to animals.[280] Yet, this state of affairs should still be seen as a tragedy, as it violates basic animal entitlements.[281] Animal testing, or any kind of use that violates their dignity, should not be seen as morally justifiable, even if it is permitted for pragmatic reasons.[282] That said, the principles of Nussbaum's CA, and her list of capabilities, open the path to a new, or renewed, perspective in appreciating animals.

The approach, and the list, essentially "tells us the right things to look for, the right questions to ask … [and] [it] directs our attention to a host of pertinent factors".[283] For instance, drawing on the list, one may ask:

> What is the physical condition of a healthy animal? What human acts invade or impair the bodily integrity of that sort of animal? What types of movement from place to place are normal and pleasurable for that sort of

[276] Nussbaum, "Moral Status of Animals", *supra* note 224 at 3.
[277] *Ibid* at 4.
[278] On this question of conflict, see generally Breena Holland, "Working with and For Animals – A Response to Nussbaum" (2018) 19:1 J Human Development & Capabilities 19, DOI: <10.1080/19452829.2017.1418960>.
[279] Nussbaum, *Frontiers of Justice, supra* note 49 at 403–405.
[280] *Ibid.*
[281] *Ibid* at 405.
[282] *Ibid* at 404.
[283] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 11.

> animal? … What types of affiliations does this animal seek in the wild, what sorts of groups, both reproductive and social, does it form? … Does the animal have meaningful relationships with other species and the world of nature?[284]

Although Nussbaum assessed the human list in light of all animals in *Frontiers of Justice*, she suggests that the list may be used as a "guide" to determine the capabilities of a specific animal species.[285] That said, Professor Thomas I. White, drawing on Nussbaum's list as well as scientific knowledge, created an innovative list of "cetacean capabilities".[286] The cetacean list, in a nutshell, is as follows:

> *Life*. Being able to live to the end of a cetacean life of normal length; not dying prematurely … *Bodily health*. Being able to have good health … *Bodily integrity*. Being able to move freely from place to place and to reside in a natural environment … *Senses, imagination, and thought.* Being able to use the senses, to imagine, think, and reason … in a "truly cetacean" way … *Emotions.* Being able to have attachments to individuals outside themselves … *Practical reason*. Being able to plan and control one's life. *Affiliation*. Being able to live with and toward others consistent with cetacean societies in natural environments … *Play*. Being able to play … *Control over one's environment.* Being free from another species governing one's life.[287]

Professor White is not the only scholar who has written about cetacean capabilities. In fact, both Nussbaum and Wichert reasoned that protecting "whale capabilities" means "protect[ing] *spheres of choices* and *life-activity*".[288] Recall that this emphasis on choice is

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[284] *Ibid*.
[285] *Ibid*.
[286] See Thomas I. White, "Dolphins, Captivity and Cruelty", online (pdf): *In Defense of Dolphins: The New Moral Frontier* <indefenseofdolphins.com>, at 14ff (noting that specialized knowledge relating to cetaceans' ways of life was necessary in establishing the list of cetacean capabilities). In fact, the process of determining if a certain capability applies, or not, to a specific animal might be a question best answered by experts. See Ramona Ilea, "Nussbaum's Capabilities Approach and Nonhuman Animals: Theory and Public Policy" (2008) 39:4 J Social Philosophy 547 at 551 [Ilea, "Theory and Public Policy"] ("whether the capability for affiliation applies to a certain animal—whether an animal is solitary or social—is something that biologists and zoologists can tell us" (*ibid*)).
[287] White, *supra* note 286 at 16–17 [emphasis in original]. White mainly relied on scientific findings relating to the lives of dolphins and orcas to ground his list of cetacean capabilities.
[288] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365 [emphasis added].

an essential pillar of the CA; in short, cetaceans should be given the opportunity to exercise their own core capabilities, such as moving "freely in a large space".[289]

How can Nussbaum's CA be helpful in guiding the interpretation and enactment of laws and public policies in Canada? The next section attempts to illuminate how Nussbaum's approach can and should normatively influence the course of law and public policy to better protect animals' core capabilities, and specifically those of cetaceans.

3.2.3 Thinking about Capabilities: Implications for Law and Public Policy

Nussbaum's CA should not be considered merely as an abstract approach with no salient implications for law and public policy. In truth, most of the principles encapsulated by the theory can, and perhaps should, offer guidance as to how an institutional actor in the political or judicial realm might address the law relating to animals (or, for our purposes, cetaceans).

Nussbaum and Wichert both asked whether the CA can guide law.[290] In response, they stated that a court could "ultimately think"[291] in CA's terms, as it provides a "compelling" account of animal lives.[292] By thinking about animals as "a life-form that seeks certain types of activity and strives for a variegated interactive social life",[293] a court may appreciate in a new way the scope of certain issues in the context of its decision-making process.[294] In essence, Nussbaum suggests that courts could draw on the

[289] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 276 ("[w]hat this approach means in general is that orcas, other whales, and dolphins are entitled to opportunities to exercise their major capabilities … to move freely in a large space, to interact regularly and in an unforced way with other species members, to be free from intrusions into their bodily integrity" (*ibid*)).
[290] *Ibid.*
[291] *Ibid.*
[292] *Ibid.*
[293] *Ibid*.
[294] *Ibid* (for example, by "infusing the legal notion of "personhood" with rich species-specific content" (*ibid*))

overarching ideas of the CA as a way to frame or think about animal issues in a uniquely compelling way, which may influence the decision-making process.

On this point, Nussbaum provides two concrete examples where courts, while not explicitly referring to the CA, indirectly recognized the value in thinking about animals as complex individuals who need and want varied things in pursuit of a flourishing existence.

First, in 2000, the High Court of Kerala, in India, ruled that circus animals are entitled to "dignified existences" by acknowledging that they have their own complex "form of life".[295] The Court found that the circus environment, including the performance of tricks, was an affront to their dignity.

Second, in 2016, the U.S. Court of Appeals for the Ninth Circuit[296] undertook a "capability-based analysis"[297] in assessing the effects of a U.S. Navy sonar program on the lives of whales. In other words, both Nussbaum and Wichert argue that the court considered "whale capabilities" in assessing the impacts of the sonar program.[298] The court acknowledged that whales pursue many life activities in the wild, such as communicating and foraging, and found that the sonar program disrupted these activities.[299] Although the court did not grant any legal rights or standing to whales,[300] it nevertheless recognized that these beings have highly complex lives, implicitly recognizing that they exercise certain capabilities in the wild, such as affiliation.[301]

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[295] *Ibid* at 272, 276; Nussbaum, "Moral Status of Animals", *supra* note 224 at 1. See also *N.R. Nair et al v Union of India (Uoi) et al,* AIR 2000 Ker 340 (India).
[296] See *Natural Resources Defense Council, Inc et al v Pritzker et al*, 828 F (3d) 1125 (9th Cir 2016).
[297] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.
[298] See Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 278.
[299] *Ibid*.
[300] *Ibid* at 279. See also Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 357.
[301] See Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *ibid* at 279. See also Nussbaum & Wichert, "Scientific Whaling", *ibid* at 364.

In Canada, some judges have also undertaken a form of "capability-based analysis" in the context of decisions relating to animals. For example, when Chief Justice Catherine Fraser of the Alberta Court of Appeal assessed the plight of Lucy,[302] a lone elephant at the Edmonton Valley Zoo, she "highlight[ed] the characteristics and capacities of animals that normally go unmentioned in an otherwise anthropocentric legal order".[303] In her lengthy dissent, Chief Justice Fraser carefully reviewed the wide-ranging needs and wants of elephants.[304] Doing so, according to Chief Justice Fraser, was a vital enterprise, as the "law is all about context".[305] Thus, one could argue that contextualizing the capabilities of this highly complex form of life was a necessary step in evaluating the legal issues. Thinking about animals in this way − that is, as a complex form of life, desirous of exercising capabilities − can influence the decision-making process. In other words, the CA can, and does, impact the law.

Broadly speaking, the above-noted decisions indirectly signal that Nussbaum's CA may be an effective approach to deal with animal-related issues. Indeed, for Nussbaum, the U.S. Court of Appeals decision, by undertaking this "capability-based analysis", represents a "harbinger … of a new era in the law of animal welfare".[306]

Given that some judges are able to think about animal lives in terms of their central life activities and "spheres of choices",[307] it is not unreasonable to suggest that lawmakers

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[302] See *Reece v Edmonton (City)*, 2011 ABCA 238 [*Reece*].
[303] Maneesha Deckha, "The Save Movement and Farmed Animal Suffering: The Advocacy Benefits of Bearing Witness as a Template for Law" (2019) 5:1 Can J Comparative & Contemporary L 77 at 107 ("the decision emphasizes animals' sentience, sociality, and the vulnerability their property status creates for them." (*ibid*)).
[304] *Reece*, *supra* note 302 at paras 103–127 (for instance, citing evidence showing that Lucy does not have the opportunity to move freely at the zoo).
[305] *Ibid* at para 119 [footnotes omitted].
[306] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 279.
[307] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.

might be able to do the same. In fact, it my suggestion that the *Whales Act* and its discourse is proof of that ability. However, before addressing this question, it is useful to clarify some of the foundational principles of the anticruelty provisions of the *Criminal Code*.

First, although the *Whales Act* was designed to amend the *Fisheries Act* as well as *Wappriita,*[308] these intended amendments were merely consequential to the main intent of the *Whales Act*, which was to make the "captivity of cetaceans a criminal offence".[309] Thus, the amendments to the *Criminal Code* should be given due attention.

Second, and more importantly, by adding criminal offences relating to cetaceans under Part XI of the *Criminal Code* entitled "Wilful and Forbidden Acts in Respect of Certain Property: *Cruelty to Animals*",[310] it was necessary to prove that cetacean captivity is, in fact, a cruel practice. In the following chapter, I will first discuss the idea that the concept of cruelty has been redefined to mean something more than the application of pain, injury, or suffering.

[308] See preceding arguments in chapter 1, *above,* for more on this topic.
[309] House of Commons, Standing Committee on Fisheries and Oceans, *Evidence,* 42-1, No 135 (18 March 2019) at 2 (Hon Murray Sinclair) [House Committee 18 March 2019].
[310] *Criminal Code, supra* note 22, ss 445.2(1)–(5) [emphasis added].

Chapter 4: Assessing the *Whales Act* Through the Lens of the Capabilities Approach

4.1 Cruelty and Cetacean Captivity

Enacting the *Whales Act* was largely predicated on the broad idea that cetacean captivity, particularly for entertainment purposes, is a cruel and harmful practice that should be outlawed.[311] With this in mind, Joanne Klineberg, Senior Counsel (Criminal Law Policy Section) at the Department of Justice, testified at the Standing Committee on Fisheries and Oceans as follows: "[w]hat I can tell you is that if you find that there is a sound scientific basis for concluding that it is inherently harmful and cruel to the animals to keep them in captivity, that's probably a sufficient basis to ground a federal criminal offence."[312] In other words, lawmakers needed to ground their policy choices in science to be able to amend the *Criminal Code.*

Although cruelty is not currently defined in the *Criminal Code*,[313] scholars and courts have interpreted its legislative meaning as involving deliberate human acts or omissions causing unnecessary pain, suffering or injury to animals.[314] Thus, according to this interpretation,[315] the focus squarely rests on the subjective experience of the animal, as the underlying idea is that "conscious pain is an evil that should be reduced",[316] but not

[311] Discussion of this topic is found in the following pages, *below.*
[312] House Committee 18 March 2019, *supra* note 309 at 13 (Joanne Klineberg).
[313] While the *Criminal Code* remains silent on the definition of cruelty, the anticruelty provisions pertaining to animals are currently under the heading "Cruelty to Animals". See generally James Gacek, "Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals" (2019) 42:4 Man LJ 316 at 322.
[314] See Katie Sykes, "Rethinking the Application of Canadian Criminal Law to Factory Farming" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) at 33, n 3, citing *R v Menard*, (1978) 43 CCC (2d) 458 at 466 (Que CA) [*Menard*]). See also Gacek, *ibid* at 319–320; *Criminal Code, supra* note 22, s 445.1(1)(a).
[315] Note that some scholars take issue with this interpretation given to the *Criminal Code.* See e.g. Bisgould, *supra* note 265 at 3–4.
[316] Vaughan Black, "Beastly Dead" (2019) 5:1 Can J Comparative & Contemporary L 1 at 2.

entirely eliminated if considered to be necessary in pursuing legitimate human purposes.[317] In essence, the *Criminal Code*, as it relates to animals, is an embodiment of the "welfarist" tradition.

In recent centuries, humans have delineated duties owing directly or indirectly to animals mostly "centre[d] on not inflicting bodily pain".[318] In fact, the issue of animal welfare in Canada has largely "focused on minimizing [animal] suffering",[319] closely reflecting utilitarian thinking on animals.[320]

In short, animal cruelty, as the *Criminal Code* has been interpreted, occurs when a given animal experiences bodily pain, suffering or injuries as a result of human conduct, if unnecessary in the specific context of a legitimate human pursuit. Thus, the focus rests on experiences that can be proven by empirical evidence, which raises the question of whether this focus is too restrictive, considering the complexity of animal lives.

According to Nussbaum, if an animal has been kept in captivity throughout its life, that animal may not necessarily feel any kind of pain if he is not able to move freely around, particularly if he has never known anything different.[321] Viewed in light of Nussbaum's ideas, the *Criminal Code* and its focus on pain, sufferings or injuries, embedded, as it is, in a utilitarian tradition that values the minimization of suffering of sentient beings, "reduce[s]

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[317] See generally *Menard, supra* note 314; *R v Pacific Meat Company Limited* (1957), 24 WWR 37. See also Department of Justice Canada, *Crimes Against Animals: A Consultation Paper* (Ottawa: Criminal Law Policy Section, 1998) at 3. Sykes notes that "criminal prosecutions for animal cruelty are usually limited to situations of gratuitous violence and sadistic abuse" (Sykes, "The Whale", *supra* note 53 at 379 [footnotes omitted]).
[318] Black *supra* note 316 at 2.
[319] *Ibid*. See also White, *supra* note 286 at 3 (noting that anti-cruelty laws are generally focused on reducing animal suffering).
[320] Black *supra* note 316 at 4 ("[u]tilitarianism, which as the dominant strain in our ethical relations with animals over the last two centuries, has underwritten most gains in animal welfare law, and requires that nonhumans' interests in not suffering be given some vindication" (*ibid*)). On this question, see also Francione & Garner, *supra* note 11 at 10.
[321] See Nussbaum, "Moral Status of Animals", *supra* note 224 at 3.

the complexity of animal species".[322] Is cruelty nothing more than unnecessary pain, injury or suffering, particularly as it relates to cetaceans?

As described in chapter 1 of this thesis, the *Whales Act* amended the *Criminal Code* by adding anti-cruelty provisions relating to cetaceans. During its adoption, most parliamentarians went beyond simply referring to the bodily pain, injuries or suffering experienced by captive cetaceans in assessing the cruelty of the practice. In truth, cruelty meant more than merely "deliberately inflicting needless pain".[323] The crux of the matter is that most parliamentarians who supported the *Whales Act* undertook an analysis based on capabilities to clarify the concept of cruelty and to ultimately prove the wrongness of captivity.

The discourse relating to the *Whales Act* shows that parliamentarians recognized the complexity of cetacean lives. Drawing on highly specialized knowledge, their policy choices were multifaceted, as they encompassed an evaluation of a whole range of cetacean activities. Implicitly alluding to Nussbaum's CA, most proponents of the *Whales Act* normatively agreed that cetaceans should have opportunities to exercise their fundamental capabilities, such as affiliation. Consideration of their central capabilities meant that an emphasis was essentially placed on their missing freedoms and choices in captivity, which causes immense suffering. Overall, the discourse reveals that these parliamentarians implicitly relied on the same types of inquiries and factors that Nussbaum's CA propels one to consider in the first place.

[322] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 9.
[323] White, *supra* note 286 at 4.

Relying on key aspects of Nussbaum' CA, the remainder of this chapter demonstrates that most parliamentarians acknowledged that cetaceans are not just entertainers for our enjoyment, as they have their own form of dignity and individual lives, independent of humans. Indeed, it is an affront to their dignity to place them in captivity, as they cannot thrive or flourish. Despite competing views, many parliamentarians agreed, explicitly or implicitly, that cetaceans are complex beings who have basic capabilities, although some capabilities, such as health, were considered more important than others, depending on the view of the particular actor.

It is my contention that the discourse shows that thinking about animals as complex beings who need and want many things in life, in pursuit of a thriving or flourishing existence, is, in Nussbaum's words, a "compelling" way to frame animal-related issues.[324] The proceedings relating to the *Whales Act* constitute a recognition that certain institutional actors, fundamentally shaping the course of law and politics, can protect animals by undertaking an analysis based on capabilities. To put it bluntly: the decision-making process relating to the *Whales Act* should be viewed as an indirect recognition that Nussbaum's CA is a theoretical framework that can and perhaps should influence law and public policy in Canada.

4.2 Diving Deeply into the Sea: The *Whales Act* and the Political Discourse

4.2.1 A Consideration of "Cetacean Capabilities"

From the outset, all three sponsors of the *Whales Act*, both at the House of Commons and Senate, explicitly framed cetacean captivity, particularly for entertainment,

[324] See Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 276.

as an "animal cruelty" issue requiring amendments to the *Criminal Code.*[325] Drawing on expert testimony, these parliamentarians set the stage for an evaluation of the capabilities of cetaceans to prove the cruelty of the practice. During the proceedings, most parliamentarians considered a multiplicity of factors relating to cetaceans' ways of life. In truth, approximately twenty of them, both at the Senate and the House of Commons, engaged in an ethical deliberation on the capabilities of cetaceans to ground their policies. By relying on expert evidence, they outlined how captivity prevents cetaceans from exercising their core capabilities, without explicitly referring to Nussbaum's CA.

Many notable experts during the adoption of the *Whales Act*, including professors, veterinarians and marine mammal scientists, testified at the Standing Senate and House Committees on Fisheries and Oceans [Committee].[326] Without reaching a "clear and absolute consensus"[327] on the issue of cetacean captivity, their specialized opinions were essentially divided into two distinct camps: (a) it is not necessarily cruel or harmful to hold cetaceans in captivity, as long as their captive existence serve a justifiable use, such as scientific research, conservation, or education, and as long as they are provided with the

[325] See House Committee 18 March 2019, *supra* note 309 at 2 (Hon Murray Sinclair) ("[t]he bill … works from the presumption that placing these beautiful creatures into the kinds of pens that they have been kept in is inherently cruel and that, therefore, the Criminal Code amendments relating to cruelty to animals should be made applicable" (*ibid*)); House Committee 18 March 2019, *ibid* at 4 (Hon Murray Sinclair) ("this is a cruelty-to-animals approach" (*ibid*)); "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 1st reading, *House of Commons Debates,* 42-1, No 344 (29 October 2018) at 22942 (Elizabeth May); Second Reading Senate 27 January 2016, *supra* note 113 at 156 (Hon Wilfred Moore) ("[a]t its heart, this bill is about preventing cruelty to sensitive beings that share our planet" (*ibid*)); Third Reading Senate 29 May 2018, *supra* note 123 at 5625 (Hon Murray Sinclair) ("[Bill S-203] [calls] for an end to the cruelty inherent in cetacean captivity for profit and entertainment purposes" (*ibid*)).

[326] While some experts testified at the House Standing Committee on Fisheries and Oceans, this committee was a mere formality as most of the evidence was collected during the seventeen committee meetings at the Senate.

[327] "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 3rd reading, *Senate Debates,* 42-1, No 218 (11 June 2018) at 5994 (Hon Daniel Christmas) [Third Reading Senate 11 June 2018].

necessities of life.[328] Or (b) captivity in itself constitutes a form of cruelty to cetaceans, as their characteristics, biological and otherwise, make it impossible for them to actually thrive in captivity.[329] Thus, they unduly suffer as a result of their inability to carry out certain activities.[330] The latter position mainly guided the decision-making process relating to the *Whales Act.*

Drawing on highly specialized knowledge, most of the proponents judged captivity by comparing the lives of captive cetaceans against those of their wild counterparts, who have opportunities to lead thriving or flourishing lives by exercising their capabilities.[331] For example, wild cetaceans enjoy "bodily integrity", as they have the opportunity to move freely around in the ocean. Viewed in light of Nussbaum's CA, a marine environment gives cetaceans an opportunity to move freely around in a space "that is such as to please their

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[328] This position was espoused by leading experts, such as David Rosen, Research Associate at the University of British Columbia, or Andrew Trites, Professor at the University of British Columbia. Further discussion of this topic is found in the section "Addressing the Opponents' Views: Captivity is Justifiable", *below.*

[329] See "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 2nd reading, *Senate Debates,* 42-1, No 75 (23 November 2016) at 1792 (Hon Wilfred Moore) (citing a letter from experts) [Second Reading Senate 23 November 2016]; "Scientists' Statement Regarding Captive Cetaceans", online (pdf): *Marine Connection* <marineconnection.org/wpcontent/uploads/2016/07/Scientists_statement_on_captive_cetaceans_08Feb16.pdf>). See also Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 12 (30 March 2017) at 12:51 (Hal Whitehead) [Senate Committee 30 March 2017] (noting that captivity is a form of deprivation for cetaceans); Senate Committee 30 March 2017, *ibid* at 12:45 (Lori Marino) ("[y]ou cannot make a concrete tank deep enough or big enough, in any reasonable sense, to meet their needs. You cannot provide the kinds of social interactions that they would normally have in the wild to meet their needs" (*ibid*)).

[330] This position was espoused by leading experts, such as Hal Whitehead, Professor at Dalhousie University, Lori Marino, President of the Whale Sanctuary Project, Ingrid Visser, scientist and founder of the Orca Research Trust, or Naomi Rose, scientist at the Animal Welfare Institute. Further discussion of this topic is found in the following pages, *below.*

[331] See e.g. Second Reading Senate 27 January 2016, *supra* note 113 at 154 (Hon Wilfred Moore); "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 2nd reading, *House of Commons Debates,* 42-1, No 361 (29 November 2018) at 24241 (Fin Donnelly) [Second Reading House 29 November 2018] ("[s]cience has proven that they suffer in captivity. Let us have a look at what the Animal Welfare Institute reports about their natural behaviour compared to when they are in captivity" (*ibid*)); House Committee 18 March 2019, *supra* note 309 at 6 (Hon Murray Sinclair) ("[t]he reality is that these are animals that are thriving in the wild. They're living fulfilled lives in the wild, and we're taking them from their fulfilled existence and placing them into a contained environment" (*ibid*)). See also Senate Committee 30 March 2017, *supra* note 329 at 12:41, 12:49 (Lori Marino).

senses".[332] Also, in the wild, they are able to form attachments with others − in other words, "affiliation" − and have control over their environment, as they are not directly controlled by human interests.

Indeed, throughout the proceedings, most parliamentarians who supported the *Whales Act* carefully outlined that captive cetaceans are not able to perform many activities they would normally do in the wild, such as the ability to swim long distances,[333] dive deep,[334] move around freely,[335] forage for food,[336] use their sophisticated communication

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[332] Nussbaum, *Frontiers of Justice, supra* note 49 at 396 [footnotes omitted].

[333] See Second Reading House 29 November 2018, *supra* note 331 at 24241 (Fin Donnelly); Second Reading House 29 November 2018, *ibid* at 24243 (Julie Dabrusin); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Third Reading House 10 May 2019, *supra* note 151 at 27649 (Elizabeth May) ("[t]hey are creatures that travel enormous distances" (*ibid*)); Third Reading House 10 May 2019, *ibid* at 27652 (Pierre-Luc Dusseault) ("[t]hey cannot swim as they would in their natural habitat. They cannot swim in a straight line, swim long distances or swim in deep water" (*ibid*)); Third Reading House 10 June 2019, *supra* note 20 at 28780 (Rachel Blaney) ("[i]n captivity they are in small enclosures and unable to swim in a straight line for any distance" (*ibid*)); Third Reading House 10 June 2019, *ibid* at 28782 (Gord Johns); Second Reading Senate 27 January 2016, *supra* note 113 at 154 (Hon Wilfred Moore); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson); Third Reading Senate 29 May 2018, *supra* note 123 at 5626 (Hon Murray Sinclair). See also Senate Committee 30 March 2017, *supra* note 329 at 12:49 (Lori Marino) ("[w]hat matters to them is the ability to travel long distances; they can't do that" (*ibid*)); Senate Committee 4 April 2017, *supra* note 30 at 13:22 (Naomi Rose) (explaining that cetaceans are wide-ranging animals, covering many miles per day).

[334] See Second Reading House 29 November 2018, *supra* note 331 at 24238 (Sheila Malcolmson); Second Reading House 29 November 2018, *ibid* at 24241 (Fin Donnelly); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Third Reading House 10 June 2019, *supra* note 20 at 28779–28780 (Rachel Blaney); Third Reading House 10 June 2019, *ibid* at 28782 (Gord Johns); Second Reading Senate 27 January 2016, *supra* note 113 at 154 (Hon Wilfred Moore); Third Reading Senate 29 May 2018, *supra* note 123 at 5626 (Hon Murray Sinclair). See also Senate Committee 30 March 2017, *supra* note 329 at 12:49 (Lori Marino) ("[w]hat matters to them is the ability to dive deep; they can't do that" (*ibid*)); Senate Committee 4 April 2017, *supra* note 30 at 13:10 (Naomi Rose).

[335] See Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May); Second Reading House 29 November 2018, *ibid* at 24243 (Julie Dabrusin); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Third Reading House 10 May 2019, *supra* note 151 at 27652 (Pierre-Luc Dusseault) ("[t]hey need a lot of space to live … [r]egardless of the size of the facility, there is no way it can be big enough to meet all of the social and biological needs of cetaceans" (*ibid*)); Third Reading House 10 June 2019, *supra* note 20 at 28780 (Rachel Blaney); Third Reading House 10 June 2019, *ibid* at 28782 (Gord Johns); Third Reading Senate 29 May 2018, *supra* note 123 at 5626 (Hon Murray Sinclair). See also Senate Committee 4 April 2017, *supra* note 30 at 13:22 (Naomi Rose) (noting that cetaceans "need space").

[336] See Third Reading House 10 May 2019, *supra* note 151 at 27652 (Pierre-Luc Dusseault). See also Senate Committee 11 April 2017, *supra* note 77 at 14:18 (Barbara Cartwright); Senate Committee 4 April 2017, *supra* note 30 at 13:22 (Naomi Rose).

abilities,[337] interact with members of their own kin, as they are "social creatures",[338] express emotion such as grieving a loss,[339] or interact with a "vast and stimulating" natural marine environment.[340] In short, captivity prevents cetaceans from exercising their capabilities.

In Nussbaum's language, by undertaking an analysis based on cetacean capabilities, parliamentarians began to "see what is wrong"[341] with captivity, acknowledging, for example, that "[c]etaceans in captivity are not able to engage in the social networks they create in the wild".[342] The *Whales Act*, by criminalizing certain human acts pertaining to cetaceans, implicitly "h[e]ld human beings accountable"[343] for not protecting these core cetacean capabilities.

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[337] See Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May); Second Reading House 29 November 2018, *ibid* at 24238 (Sheila Malcolmson); Second Reading House 29 November 2018, *ibid* at 24242 (Fin Donnelly); Third Reading House 10 May 2019, *supra* note 151 at 27649 (Elizabeth May) ("[t]hey communicate as communities. They use language. The communication requires space and range" (*ibid*)); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson); Third Reading Senate 29 May 2018, *supra* note 123 at 5626 (Hon Murray Sinclair).

[338] See Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May); Second Reading House 29 November 2018, *ibid* at 24241–24242 (Fin Donnelly); Second Reading House 29 November 2018, *ibid* at 24244 (Julie Dabrusin); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Second Reading House 1 February 2019, *ibid* at 25171 (William Amos); Third Reading House 10 June 2019, *supra* note 20 at 28780 (Rachel Blaney) ("dolphins, whales and porpoises travel up to 100 miles daily feeding and socializing with other members of their pods. The pods can contain hundreds of individuals with complex social bonds and hierarchies … [i]n captivity … [s]ometimes they are housed alone or housed with other animals they are not naturally used to being with" (*ibid*)); Third Reading House 10 June 2019, *ibid* at 28782 (Gord Johns); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson); Third Reading Senate 29 May 2018, *supra* note 123 at 5626 (Hon Murray Sinclair). See also Senate Committee 4 April 2017, *supra* note 30 at 13:11 (Naomi Rose).

[339] See Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May).

[340] See *ibid* at 24242 (Fin Donnelly); Third Reading House 10 May 2019, *supra* note 151 at 27652 (Pierre-Luc Dusseault) ("[t]hey also suffer from the absence of sounds that they would normally hear in their natural environment. These sounds do not exist in captivity" (*ibid*)); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson) ("[t]heir home, the ocean, is a vast and stimulating environment, and they engage in complex, meaningful communications and interactions. In captivity, whales and dolphins are confined to the relative isolation of swimming pools." (*ibid*)).

[341] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 277.

[342] *Ibid.*

[343] *Ibid* at 278.

Moreover, according to both Nussbaum and Wichert, "good whale scientists"[344] act, implicitly or explicitly, as "capabilities theorists",[345] as they understand the "importance of observing the whole life form, the complex interactions of its different activities".[346] In other words, an approach based on capabilities is the "way scientists think about the complexity of animal lives".[347] This implicit focus on capabilities, by most parliamentarians, was indeed guided by scientists who testified on the *Whales Act*, and who arguably employ a similar capability paradigm in their analyses.

It should be noted that some of these abilities, such as swimming vast distances, do not merely vanish in captivity, as cetaceans have evolved and are adapted to do these things for them to "have successful and satisfying lives".[348] In captivity, they lose the ability to perform "normal activities"[349] and are denied the opportunity to choose the course of their own lives, as they are governed by human interests.[350] Biologically and socially, it is not in their "best interests" to live in a captive environment.[351] In the words of MP Elizabeth

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[344] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 366.
[345] *Ibid*.
[346] *Ibid*.
[347] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 276.
[348] White, *supra* note 286 at 6; Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 17 (1 June 2017) at 17:34 (Ingrid Visser) [Senate Committee 1 June 2017]. See also Lori Marino, "The Marine Mammal Captivity Issue: Time for a Paradigm Shift", online (pdf): *The Whale Sanctuary Project* <whalesanctuaryproject.org/content/uploads/Marine-Mammal-Captivity-Time-for-a-Paradigm-Shift.pdf> at 20 [Marino, "Marine Mammal Captivity"].
[349] Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May). See also Third Reading House 10 May 2019, *supra* note 151 at 27650 (Arif Virani) ("[w]e must also think about the difficult living conditions for cetaceans that live in a confined space, such as an aquarium, without the social contact and *normal activities* most cetaceans in the wild would enjoy" (*ibid*) [emphasis added]).
[350] See Second Reading House 29 November 2018, *supra* note 331 at 24241 (Fin Donnelly) (noting that in the wild, cetaceans "have the *freedom* to make their *own choices*" (*ibid*) [emphasis added]).
[351] See Third Reading House 10 May 2019, *supra* note 151 at 27653 (Nick Whalen).

May, captivity "den[ies] them their ability to be what they are: magnificent creatures, leviathans".[352]

With this in mind, these parliamentarians highlighted that cetacean captivity, especially for entertainment, is undeniably cruel. Parliamentarians mostly relied on their own intuitions, moral or otherwise, and on scientific knowledge to ground this decision.[353]

While parliamentarians did refer to empirical evidence showing that cetaceans do suffer injuries and pain in captivity, such as their high mortality rates and other physical and psychological health-related issues,[354] their analyses still encompassed a whole range of cetacean activities. In reality, preventing the exercise of their capabilities was implicitly

[352] Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May). By outlining their magnificence, including comparing them to a mythical creature, one could argue that May has biases toward cetaceans. Further discussion of this topic is found in the section "Biases Toward Cetaceans", *below*.

[353] See Second Reading House 29 November 2018, *ibid* (Elizabeth May) ("[t]his bill is about ending animal cruelty … [t]hat is very clear from scientists around the world" (*ibid*)); *ibid* at 24241 (Fin Donnelly). See also Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Third Reading House 10 May 2019, *supra* note 151 at 27649 (Elizabeth May) ("[t]he science increasingly tells us that it constitutes cruelty to animals to take these cetaceans and keep them in confined spaces" (*ibid*)); Third Reading House 10 May 2019, *ibid* at 27650 (Arif Virani) ("where we may have seen whales, dolphins and other cetaceans in an aquarium as a form of entertainment in bygone years, in many cases we now realize that it actually amounts to animal cruelty" (*ibid*)); Third Reading House 10 May 2019, *ibid* at 27652 (Pierre-Luc Dusseault); Third Reading House 10 June 2019, *supra* note 20 at 28780 (Rachel Blaney); Third Reading House 10 June 2019, *ibid* at 28782 (Gord Johns) ("[w]e know that keeping cetaceans is cruel, given the scientific evidence about their nature and behaviour" (*ibid*)). See also Senate Committee 30 March 2017, *supra* note 329 at 12:51 (Lori Marino) ("[t]he scientific evidence tells us that it is cruelty" (*ibid*)); Senate Committee 1 June 2017, *supra* note 348 at 17:47 (Ingrid Visser).

[354] See e.g. Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May) (noting high mortality rates, short life spans and health issues); Second Reading House 29 November 2018, *ibid* at 24244 (Julie Dabrusin) (noting injuries); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Third Reading House 10 May 2019, *supra* note 151 at 27650 (Arif Virani) ("[t]hose that live in captivity suffer from a higher rate of physical health issues and a lower life expectancy" (*ibid*)); Third Reading House 10 May 2019, *ibid* at 27652 (Pierre-Luc Dusseault) ("cetaceans have a reduced lifespan when they live in captivity. The infant mortality rate is higher, and the facilities that keep them in captivity cannot meet their social and biological needs" (*ibid*)); Third Reading House 10 June 2019, *supra* note 20 at 28779 (Rachel Blaney). See also Senate Committee 30 March 2017, *supra* note 329 at 12:33 (Lori Marino) (noting that captive cetaceans demonstrate "abnormal behaviour … levels of chronic stress … unhealthy dispositions and … short lives" (*ibid*)); Senate Committee 4 April 2017, *supra* note 30 at 13:19 (Naomi Rose) (noting that captive cetaceans exhibit "higher stress levels, swim less and log more" (*ibid*); Senate Committee 1 June 2017, *supra* note 348 at 17:27 (Ingrid Visser).

considered as a contributing factor to their immense suffering in captivity; a correlation was ostensibly established between these two things.

On the question of health problems, Dr. Lori Marino stated that "what that says is the very nature of this animal is not compatible with living in a concrete tank";[355] hence, cetaceans ought to live in a more "natural environment".[356] Some parliamentarians affirmed that the *Whales Act* recognizes that cetaceans ought to be in the wild where they belong.[357] Even in the case of captive-born cetaceans, Nussbaum's approach tells us this is not a sufficient ground to deprive an animal from exercising certain capabilities.[358] In short, it was understood that cetaceans should have the ability to lead a life "characteristic"[359] of their own form of life, namely in a wild habitat.[360] They ought to have the ability to flourish and thrive in this type of natural environment.

Borrowing White's terminology, parliamentarians essentially established that the "primary markers for whether or not captivity harms cetaceans should not be life span and the absence of injury and illness. Rather, it should be whether captivity allows [cetaceans]

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[355] Senate Committee 30 March 2017, *supra* note 329 at 12:42 (Lori Marino). See also Senate Committee 11 April 2017, *supra* note 77 at 14:13 (Barbara Cartwright); Marino, "Marine Mammal Captivity", *supra* note 348 at 18.

[356] Senate Committee 30 March 2017, *supra* note 329 at 12:50 (Lori Marino).

[357] See Second Reading House 1 February 2019, *supra* note 134 at 25169 (Peter Schiefke) ("we are debating a piece of legislation that will help ensure that whales stay where they belong: in the wild" (*ibid*)); Second Reading House 1 February 2019, *ibid* at 25171 (William Amos) ("[w]e need to make sure that Canadian legislation respects that these are incredibly sophisticated beings with complex social relations, and they deserve to be in the wild" (*ibid*)); Third Reading House 10 May 2019, *supra* note 151 at 27653 (Nick Whalen) ("we need to send a clear message through legislation that whales do not belong in captivity. Today we are debating the importance of keeping whales in the wild" (*ibid*)); Second Reading Senate 27 January 2016, *supra* note 113 at 156 (Hon Wilfred Moore). Note that some opponents, while disagreeing with the intent of the *Whales Act*, still agreed that a wild habitat is "the best place for them" (Senate Committee 28 March 2017, *supra* note 108 at 12:16 (Susan Shafer)).

[358] See preceding section "Cruelty and Cetacean Captivity", *above*.

[359] See Nussbaum, "Moral Status of Animals", *supra* note 224 at 5.

[360] See Second Reading Senate 27 January 2016, *supra* note 113 at 156–157 (Hon Wilfred Moore) (noting that captive cetaceans are not "who and what they are" at 157).

to *flourish*",[361] meaning to reach a suitable development of abilities to have a meaningful opportunity to lead a satisfying life.[362] Indeed, the discourse related to the *Whales Act* shows that cetacean captivity is considered a harmful practice, insofar as it particularly hinders a cetacean's overall attempt to flourish.[363] To corroborate this view, concepts such as "thriving"[364] and "flourishing"[365] were used throughout the proceedings to assess the lives of cetaceans and to determine the justifiability of captivity.

Life as experienced in the wild was ultimately used as a guide in determining whether cetaceans are flourishing in captivity.[366] In other words, the "species-specific norm of flourishing"[367] was based on cetaceans' ways of life in the wild.

Flourishing, according to Dr. Marino, is rooted in the "*characteristic nature of each species*",[368] derived from "evolution and adaptation".[369] Moreover, Dr. Marino stated that "[t]o flourish is to thrive and not simply exist or even live or reproduce".[370] In order to flourish, cetaceans need to have the opportunity to do things that a concrete tank cannot

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[361] White, *supra* note 286 at 5 [emphasis in original].
[362] *Ibid.*
[363] Recall that this notion of flourishing is a vital component in Nussbaum's CA. See generally chapter 3, *above*.
[364] See e.g. Second Reading House 29 November 2018, *supra* note 331 at 24242–24243 (Fin Donnelly) (citing a letter from Dr. Jane Goodall); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach) ("[t]hey need to move freely and to dive deeply to thrive" (*ibid*)); Third Reading House 10 June 2019, *supra* note 20 at 28782 (Gord Johns) ("[g]iven the evidence, captive facilities cannot provide for their social or biological needs. They need to roam widely and dive deep in order to thrive" (*ibid*)); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson) ("[w]e know that they are highly intelligent, emotional and social beings that require great space to thrive" (*ibid*)). See also Senate Committee 30 March 2017, *supra* note 329 at 12:41 (Lori Marino); Senate Committee 4 April 2017, *supra* note 30 at 13:7 (Naomi Rose).
[365] See e.g. Third Reading House 10 June 2019, *supra* note 20 at 28780 (Ken McDonald).
[366] On this point, see White, *supra* note 286 at 17 ("in order to identify what it takes for cetaceans to flourish, the model case is their life in a natural habitat" (*ibid*)).
[367] Nussbaum, *Frontiers of Justice, supra* note 49 at 365.
[368] Marino, "Marine Mammal Captivity", *supra* note 348 at 2 [emphasis in original].
[369] *Ibid.* Note that Dr. Marino draws on Nussbaum's ideas in formulating her positions in this article.
[370] *Ibid* at 1.

provide, such as moving, traveling and interacting with others.[371] Most parliamentarians who supported the *Whales Act* ultimately determined that a cetacean merely living in captivity – a form of "comfortable immobility" to borrow Nussbaum's terms[372] – was not enough to justify continuing the practice.[373] Flourishing, notwithstanding the ambiguity of the notion, can be a way to measure the wellbeing of cetaceans,[374] which parliamentarians demonstrated throughout the proceedings. In fact, some of them went further in describing a cetacean's way of life.

Many parliamentarians who supported the *Whales Act* compelled their colleagues and, to a certain extent, the public, to cultivate their own senses of imagination and empathy – to imagine themselves in the same type of situation as cetaceans. MP Ken McDonald, for instance, said the following:

> *Let us imagine whales and dolphins,* which are used to having the ocean as their playground or feeding ground, being put in a cage not much bigger than a large outdoor swimming pool. *Let us imagine the effect* this would have on their ability to survive and flourish if they ever were released again. *Let us imagine ourselves* being put in a room which is 10 feet by 10 feet and being told that is where we have to live out the rest of our days. It certainly would have drastic effects on anyone, or on any animal, for that matter.[375]

Other parliamentarians echoed his views, such as MP Rachel Blaney when she said the following:

> When we look at their freedom in the wild, to swim freely, to dive deeply, when we think about their confinement, it is so much less. We have heard it is less than 1% of the range that they are used to. *Can members imagine that? None of us in this place can imagine being in our environment, doing*

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[371] *Ibid* at 11.
[372] See Nussbaum, "Moral Status of Animals", *supra* note 224 at 3.
[373] Note that some parliamentarians characterized the plight of captive cetaceans as a form of imprisonment. See e.g. Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach).
[374] See White, *supra* note 286 at 5–7.
[375] Third Reading House 10 June 2019, *supra* note 20 at 28780 (Ken McDonald) [emphasis added].

> *the things that we do, and suddenly being put into a small box and told that we have to be successful and perform for other people*. We cannot ask these beings to do that.[376]

While MP Blaney used the words "small box" to basically describe concrete tanks, other parliamentarians used evocative words, such as "bathtub", to define this small barren space. For instance, MP Julie Dabrusin said the following:

> To picture that, an orca would have to swim the circumference of the main pool in SeaWorld more than 1,400 times to get that kind of distance. *It is dizzying. I could not imagine having to go through that.* Senator Sinclair perhaps said it best when he was speaking to senators in the other place about this bill. He said, "So think about this, senators: How would you feel if you had to live the rest of your life in a bathtub?" *I put that same question to the members here. How would they feel spending the rest of their lives in a bathtub?*[377]

With this in mind, many parliamentarians told "stories of striving"[378] to appreciate cetaceans as complex forms of life. For example, some of them told the story of a whale who traveled for 17 consecutive days, holding her dead calf, demonstrably showing signs of grief and morning.[379] Arguably, one could say that parliamentarians exhibited an acute sense of "wonder"[380] for cetaceans' ways of life in the wild. Recall that this capacity to imagine the lives of animals is a core component in Nussbaum's CA, as it makes them potential "subjects of justice".[381]

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[376] *Ibid* (Rachel Blaney) [emphasis added].
[377] Second Reading House 29 November 2018, *supra* note 331 at 24243 (Julie Dabrusin). On this question of imagination, see also Third Reading House 10 May 2019, *supra* note 151 at 27649 (Elizabeth May); Third Reading Senate 29 May 2018, *supra* note 123 at 5626 (Hon Murray Sinclair); Senate Committee 4 April 2017, *supra* note 30 at 13:25 (Hon Charlie Watt).
[378] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 276.
[379] See Second Reading House 29 November 2018, *supra* note 331 at 24237 (Elizabeth May); Second Reading House 29 November 2018, *ibid* at 24242 (Fin Donnelly).
[380] See e.g. "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)", 3rd reading, *Senate Debates,* 42-1, No 219 (12 June 2018) at 6034 (Hon Patricia Bovey) ("nothing is more magnificent than seeing whales in the wild, either orcas, greys or dolphins, off the coast of my former home on Vancouver Island, or my native Manitoba's beluga whales swimming in Hudson Bay off Churchill" (*ibid*)). Recall that this notion of wonder is a vital element in Nussbaum's CA. See Nussbaum, *Frontiers of Justice, supra* note 49 at 347 [footnotes omitted].
[381] Nussbaum, *Frontiers of Justice, supra* note 49 at 355.

Overall, most parliamentarians who supported the *Whales Act* implicitly recognized the value of Nussbaum's approach as a valuable one in guiding our thoughts and actions, political or otherwise, toward animals. As a matter of justice, the *Whales Act* legally promoted, and ultimately protected, the capabilities of future generations of cetaceans by "protect[ing] them from suffering the harms of captivity".[382] Deciding to phase-out the captivity of cetaceans, notably for entertainment, was also framed as a matter of morality and influenced by an Indigenous perspective that sees life on earth as wholly intertwined and interconnected. That perspective is commonly known as "all my relations" ("*nii-konasiitook"*).

4.2.2 Phasing-out Cetacean Captivity: "Morality" and "All My Relations"

In considering the capabilities of cetaceans, some parliamentarians also explicitly stated that the *Whales Act* addresses a moral issue, largely guided by scientific inquiry.[383] It should come as no surprise that these parliamentarians framed the amendments to the *Criminal Code* as a moral issue, as the criminal law is essentially about "declar[ing] which actions are morally against our social values".[384]

Former Senator Moore reaffirmed that idea when he said that "Canada's criminal laws prohibit cruelty to animals … [Bill S-203] *is a moral condemnation of a cruel practice*

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[382] Second Reading Senate 23 November 2016, *supra* note 329 at 1791 (Hon Wilfred Moore).

[383] See Second Reading House 29 November 2018, *supra* note 331 at 24241 (Fin Donnelly); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Second Reading House 1 February 2019, *ibid* at 25170 (William Amos); Third Reading House 10 June 2019, *supra* note 20 at 28780 (Rachel Blaney); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson) ("[i]t is a moral issue, where our conscience agrees with science" (*ibid*)); Third Reading Senate 29 May 2018, *supra* note 123 at 5625 (Hon Murray Sinclair); Third Reading Senate 11 June 2018, *supra* note 327 at 5994 (Hon Daniel Christmas).

[384] House Committee 18 March 2019, *supra* note 309 at 11 (Joanne Klineberg). See also Senate Committee 2 March 2017, *supra* note 30 at 10:44 (Joanne Klineberg) ("[i]f the purpose is to condemn a practice as morally blameworthy and to seek to denounce that practice and punish offenders who engage in that conduct, that's the nature of criminal law" (*ibid*)).

with an appropriate sanction".[385] Thus, the criminal law, and here, the *Criminal Code*, is a "moral code for all society".[386] Cetacean captivity, particularly for entertainment, is publicly and progressively perceived as an archaic human value in Canadian society.[387] Indeed, many members of the Canadian population have never partaken in this type of practice, particularly based on their values and worldviews.[388] Specifically, cetacean captivity is not the kind of thing typically practiced by Indigenous peoples.[389]

"All my relations" is an Indigenous expression used to convey the notion that all life forms are inherently "interdependent" and "interconnected".[390] More precisely, former Senator Sinclair said that:

> [W]e are all related, not just you and I, but you and I and all life forms of Creation. As living things, we are connected to each other. We depend upon one another. Everything we do has an effect on other life forms and on our world. That is why we use the term "*nii-konasiitook*", all of my relations, when addressing each other.[391]

Some scholars also described this expression, as follows:

> Connection with others is foundational to Indigenous ways of knowing … First Nations oral knowledge portray animals as thinking, talking, and living much as humans do. This view of animals is not anthropomorphism … rather, personhood is understood as an experience common to all forms of life … Indigenous people in Canada and the United States have sometimes expressed this kinship in the phrase "all my relations," used to

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[385] Second Reading Senate 23 November 2016, *supra* note 329 at 1793 (Hon Wilfred Moore) [emphasis added].
[386] Senate Committee 8 June 2017, *supra* note 24 at 18:10 (Joanne Klineberg).
[387] Discussion of this topic is found in chapter 2, *above*.
[388] See Third Reading Senate 29 May 2018, *supra* note 123 at 5627 (Hon Murray Sinclair) ("I'm not aware of any Indigenous tradition of displaying live whales for public entertainment, nor am I aware of Indigenous people capturing cetaceans or breeding them for captivity or research purposes" (*ibid*)).
[389] *Ibid.*
[390] Honourable Senator Murray Sinclair, "Foreword" (2019) 5:1 Can J Comparative & Contemporary L i at i–ii. Note that this Indigenous expression is invoked in the Preamble of the proposed *Jane Goodall Act*, *supra* note 46: "whereas the phrase "All My Relations" expresses an Indigenous understanding that all life forms of Creation are interconnected and interdependent".
[391] Sinclair, *supra* note 390 at i–ii.

> refer to the network of all beings, sometimes including those not considered alive by Settlers, such as rivers and mountains.[392]

In this sense, viewing and treating animals as mere entertainers or as personal property are considered an affront to that Indigenous perspective.[393]

While enacting the *Whales Act*, certain principles associated with this worldview were acutely rooted in the opinions of parliamentarians, notably those of Senator Daniel Christmas, former Senator Sinclair and Senator Mary Jane McCallum.[394]

Senator Christmas sees "cetaceans as equals", or as "brothers and sisters".[395] Cetaceans are "living beings" who experience the world much like us.[396] More specifically, according to Christmas, keeping these individual beings in captive settings for our uses, be it research or something else, "doesn't seem to balance with the overall dignity and respect for the animal and its freedom".[397] This is a recognition that cetaceans are not merely entertainers or research tools; they have their own individual lives. By underlining and respecting their dignity and freedom, Senator Christmas implicitly echoed Nussbaum's core ideas: animals ought to have many opportunities to exercise their capabilities to be able to lead flourishing lives, worthy of their form of dignity.[398] Recall that these notions of dignity, freedom and choice are core pillars of Nussbaum's CA.

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[392] Melissa Marie Legge & Margaret Robinson, "Animals in Indigenous Spiritualities: Implications for Critical Social Work" (2017) 6:1 J Indigenous Social Development 1 at 3.
[393] See Sinclair, *supra* note 390 at ii.
[394] See e.g. Senate Committee 6 April 2017, *supra* note 108 at 13:65 (Hon Daniel Christmas); Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 15 (4 May 2017) at 15:51 (Hon Daniel Christmas) [Senate Committee 4 May 2017] ("*[m]y traditional eye tells me that cetaceans are equal to human species,* that they should be afforded dignity, freedom and the right to have a good life" (*ibid*) [emphasis added]); Third Reading Senate 23 October 2018, *supra* note 152 at 6567 (Hon Mary Jane McCallum).
[395] Third Reading Senate 11 June 2018, *supra* note 327 at 5994 (Hon Daniel Christmas).
[396] *Ibid.*
[397] *Ibid.*
[398] See Nussbaum, *Frontiers of Justice, supra* note 49 at 392.

Arguably, the Indigenous notion of "all my relations" is not foreign to Nussbaum's CA, as the categories of her list of central capabilities have been extended to animals. In fact, the approach recognizes that animals and humans share many types of deep-seated abilities, needs and wants.[399] Moreover, animals, like humans, ought to have opportunities to form meaningful attachments and relationships with other species and nature − that is, capability no. 8. In other words, Nussbaum's CA accounts for the ability to establish an "interconnected" and "interdependent" world.

According to Nussbaum, animal and human lives are "complexly intertwined".[400] Indeed, her approach advocates for a "truly global justice".[401] Likewise, the final report of the Truth and Reconciliation Commission of Canada posits that:

> *Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world.* If human beings resolve problems between themselves but continue to destroy the natural world, then reconciliation remains incomplete. This is a perspective that we as Commissioners have repeatedly heard: that *reconciliation will never occur unless we are also reconciled with the earth. Mi'kmaq and other Indigenous laws stress that humans must journey through life in conversation and negotiation with all creation.* Reciprocity and mutual respect help sustain our survival.[402]

Promoting capability no. 8 − that is, the ability to form relationships with other species and the world of nature − would arguably respect these foundational principles.

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[399] See Ilea, "Theory and Public Policy", *supra* note 286 at 559 ("[t]he list of basic capabilities that should be protected serves a number of purposes, including drawing attention to the fact that human and nonhuman animals need similar things to flourish" (*ibid*)).
[400] Nussbaum, *Frontiers of Justice, supra* note 49 at 406.
[401] *Ibid* at 405–407.
[402] Third Reading Senate 11 June 2018, *supra* note 327 at 5994 (Hon Daniel Christmas) [emphasis added], citing Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 17–18.

Depriving captive cetaceans from exercising their core capabilities and hindering their opportunity to flourish or thrive in their own ways, constitutes an affront to their overarching dignity and freedom. It is a lack of "stewardship and respect"[403] to cetaceans, our "brothers and sisters",[404] to deny them the ability to lead their lives in a natural marine environment.

Placing and keeping these complex beings in captive settings for entertainment purposes reinforces a relationship of "superiority and ownership rather than interdependence and interconnectedness".[405] In this sense, captivity does not encourage respectful relationships with other species or, generally, the world of nature. Accordingly, by framing the issues in light of the above-noted Indigenous worldview and Nussbaum's CA,[406] one realizes that holding cetaceans in concrete tanks is an injustice.[407]

Although it protects future generations of cetaceans, the *Whales Act* did not completely sever this rapport of "superiority and ownership", particularly if we consider the situation of current captive cetaceans who are still languishing in concrete tanks in Canadian facilities.[408] In the next section, I suggest that this situation is a form of "tragedy", as described by Nussbaum.

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[403] Third Reading Senate 29 May 2018, *supra* note 123 at 5627 (Hon Murray Sinclair).
[404] Third Reading Senate 11 June 2018, *supra* note 327 at 5994 (Hon Daniel Christmas).
[405] Sinclair, *supra* note 390 at ii.
[406] See Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 276–277.
[407] For a critical perspective on some Indigenous practices in relation to whales living in the wild, see Rachel Nussbaum Wichert & Martha C. Nussbaum, "The Legal Status of Whales: capabilities, entitlements and culture" (2016) 37:72 Seqüência Estudos Jurídicos e Políticos 19 [Nussbaum & Wichert, "Legal Status of Whales"].
[408] See generally "Bill S-203 passed. Now what?" (12 September 2019), online: *World Animal Protection* <worldanimalprotection.ca/news/bill-s-203-passed-now-what?>.

4.2.3 Phasing-out Cetacean Captivity: A "Tragedy"?

It could be argued that phasing-out cetacean captivity, as opposed to prohibiting it outright, was a bad decision. By allowing current cetaceans to remain in the custody and possession of ML or the VA, the *Whales Act* implicitly endorsed the continued inability of these beings to exercise their capabilities. Notwithstanding the general prohibition on performing for entertainment purposes, current captive cetaceans still do not have many opportunities to exercise their core capabilities. Indeed, drawing on Nussbaum's ideas, it could be argued that it is a "waste and a tragedy"[409] that many of the cetaceans at ML or the VA will likely never have the opportunity to exercise certain life activities.[410] With the enactment of the grandfather clause,[411] this state of affairs may persist for several decades.

In fact, many parliamentarians reassured the captivity industry that their businesses may continue to operate through the enactment of the grandfather clause, while also giving them a chance to shift to another business model.[412] In other words, at least for the short-term,[413] ML and the VA can still keep and use their commodities, by displaying them, for example, in "educational shows",[414] until their eventual deaths,[415] continuing to deprive them of the ability to exercise their capabilities.

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[409] Nussbaum, "Moral Status of Animals", *supra* note 224 at 3–4.
[410] *Ibid*.
[411] See *Whales Act*, *supra* note 21, s 2; *Criminal Code, supra* note 22, s 445.2(3)(a).
[412] See Third Reading House 10 June 2019, *supra* note 20 at 28780 (Rachel Blaney); Third Reading House 10 June 2019, *ibid* at 28783 (Gord Johns); Second Reading House 29 November 2018, *supra* note 331 at 24242 (Fin Donnelly) ("Marineland, for example, could keep its current whales and dolphins, many of which should live for decades, and in that time it could evolve to a more sustainable model" (*ibid*)); Second Reading House 29 November 2018, *ibid* at 24239 (Sean Casey) ("[c]etaceans currently in captivity at Marineland and the Vancouver Aquarium would also fall under the exception clauses; that is, these facilities would not be closed down" (*ibid*)); Second Reading House 1 February 2019, *supra* note 134 at 25168 (Anne Minh-Thu Quach); Second Reading Senate 22 March 2016, *supra* note 138 at 385 (Hon Janis Johnson). See also Senate Committee 4 April 2017, *supra* note 30 at 13:20 (Naomi Rose).
[413] See generally Senate Committee 4 April 2017, *supra* note 30 at 13:31 (Rob Laidlaw).
[414] See Marineland, "Educational Presentation", *supra* note 15.
[415] But see Sullivan, *supra* note 16 (noting the recent transfer of 5 beluga whales to an aquarium in the U.S.).

How are we to reconcile the fact that most of the proponents of the *Whales Act* characterized cetacean captivity as a cruel practice with the fact that a provision of this new law explicitly permits facilities such as ML (which is, above all, an entertainment facility) to continue owning and using cetaceans, offending their dignity and freedom? Drawing on Nussbaum's work, the enactment of this provision should be viewed as a form of tragic choice.

At the outset, any decisions seeking to improve the conditions of captive cetaceans would have arguably prevented current ones from exercising their capabilities, necessarily leading to suffering. Given the following circumstances, the grandfather clause was, in a sense, a least-worst policy choice.

First, releasing the current captive cetaceans into the wild would not be feasible, as they are not equipped to live in the wild.[416] At the moment, they are solely dependent on humans for their basic necessities of life and successfully rehabilitating them to be able to live out the rest of their days in a wild habitat could take incredible efforts from humans, with no guarantee of success.[417] Taking into account the preceding arguments on capabilities, it seems inconsistent to suggest that current captive cetaceans may not be able to lead satisfying lives in the wild. However, captive cetaceans, particularly those who have never known the wild, may not be able to survive entirely on their own in this habitat.[418]

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[416] See Senate Committee 30 March 2017, *supra* note 329 at 12:44 (Lori Marino); Senate Committee 4 April 2017, *supra* note 30 at 13:25 (Naomi Rose) ("[t]hey are intelligent animals who learn by cultural transmission. If their culture is in captivity, they wouldn't know how to survive in the wild … *they cannot and should not, from a humane perspective, be released*." (*ibid*) [emphasis added]).

[417] See e.g. Sandi Doughton, "The $20M Lessons of "freeing" Keiko the Whale", *The Seattle Times* (13 May 2009), online: <www.seattletimes.com/seattle-news/the-20m-lessons-of-freeing-keiko-the-whale/> (noting that Keiko, the captive orca from the popular movie "Free Willy", *supra* note 18, was not entirely freed when he was released into the ocean, as he was still largely dependent on humans).

[418] See generally Senate Committee 4 April 2017, *supra* note 30 at 13:25 (Naomi Rose).

Second, other than ML and the VA, current captive cetaceans had no other place to go to that would have improved their condition in June, 2019. At that time, there were no established seaside sanctuaries in Canada where a captive cetacean could be released. I return to this point below.

Third, merely adopting welfare measures, such as standards and guidelines for care, are meaningless, since humans cannot "provide for their care and welfare in captivity".[419] As noted above, some experts believe that cetaceans will never be capable of living a flourishing life in captivity,[420] so developing and implementing standards for them is effectively a pointless enterprise.[421] Thus, the only remaining viable policy solution was to phase-out the practice altogether, but to allow current facilities to keep their cetaceans.

Drawing on Nussbaum's ideas, this is still a tragedy, as all available policy choices, including phasing-out the practice, involved a "violation of some sort".[422] In essence, there was no "right answer",[423] as "all the possible answers … including the best one, are bad, involving serious moral wrongdoing".[424] Amongst the available options, one could argue

[419] Senate Committee 11 April 2017, *supra* note 77 at 14:24 (Barbara Cartwright) ("[s]etting standards still doesn't give us any better welfare" (*ibid*)).
[420] See e.g. Marino, "Marine Mammal Captivity", *supra* note 348 at 18 ("[t]he abundance of scientific evidence reviewed above shows, unequivocally, that cetaceans cannot thrive in captivity … [w]ith all good intentions, it is still impossible to provide what is needed for cetaceans to flourish in captivity" (*ibid*)). See also Senate Committee 30 March 2017, *supra* note 329 at 12:42 (Lori Marino).
[421] See Senate Committee 11 April 2017, *supra* note 77 at 14:13 (Barbara Cartwright) ("no captive environment can satisfy the complex physical, behavioural and social requirements of cetaceans … it is not possible to develop standards that would provide any meaningful measurement of animal welfare in a captive environment for any cetaceans" (*ibid*)).
[422] Nussbaum, *Creating Capabilities*, *supra* note 155 at 37.
[423] Martha C. Nussbaum, "The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis" (2000) 29 J Leg Stud 1005 at 1007.
[424] *Ibid*.

that phasing-out the practice was a least-worst decision, as there was "no choice available that [was] fully right in the largest ethical sense";[425] in other words, a tragedy.

While the grandfather clause could be seen as positives (for the captivity industry and, more importantly, for future cetaceans[426]) outweighing negatives, sacrificing current captive cetaceans for the betterment of future generations should still be viewed, above all, as a tragedy. The *Whales Act* and its grandfather clause seemed like a reasonable alternative to progressively end a practice deemed cruel, while recognizing that captive facilities cannot necessarily provide cetaceans with an opportunity to lead thriving lives.[427]

And yet, at this moment, the Whale Sanctuary Project [WSP] is developing a seaside sanctuary in the community of Port Hilford, Nova Scotia, intended for retired captive cetaceans from entertainment facilities, such as ML.[428] The project will cost an estimated $15 million and the first whales should arrive at the completed sanctuary in 2022.[429] The WSP and their proposed seaside sanctuary, while still in its infancy, has the potential to alleviate the effects of the above-noted tragedy.

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[425] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 13.
[426] See Third Reading Senate 29 May 2018, *supra* note 123 at 5628 (Hon Murray Sinclair).
[427] On this point, recall how Nussbaum framed the issue of animals used in research. See Nussbaum, *Frontiers of Justice, supra* note 49 at 404–405. See also chapter 3, *above.*
[428] See "About the Whale Sanctuary Project", online: *The Whale Sanctuary Project* <whalesanctuaryproject.org/our-work>. As mentioned above, Dr. Lori Marino is the current President of the WSP.
[429] See Alec Bruce, "Whale Sanctuary Details Multi-Million-Dollar Costs", *Toronto Star* (16 June 2021), online: <thestar.com/news/canada/2021/06/16/whale-sanctuary-details-multi-million-dollar-costs.html>. As I am currently writing this thesis, note that a Sanctuary Operations Center will open soon in the community of Sherbrook, Nova Scotia. See Michael Mountain, "Sanctuary Operations Center to Open in June" (2 June 2021), online: *The Whale Sanctuary Project* <whalesanctuaryproject.org/sanctuary-operations-center-to-open-in-june/>.

4.2.3.1 Promoting Cetacean Capabilities in a Seaside Sanctuary

Once it becomes fully operational, the sanctuary will be situated in an enclosed 110 acres of netted ocean area on the eastern shore of Nova Scotia.[430] The sanctuary is primarily designed to foster a sense of "wellbeing" and "autonomy" for all its residents,[431] which will be six to eight cetaceans.[432]

More precisely, the "goal is to offer captive orcas and beluga whales a *natural environment that maximizes their opportunities for autonomy, exploration, play, rest, and socializing*".[433] In short, these whales should have an opportunity to exercise certain core capabilities, such as play, affiliation and bodily integrity, albeit in an enclosed area. While it is still a form of tragedy, to the extent that they will still be in a captive setting and not able to fully perform certain life activities, such as traveling long distances,[434] the sanctuary would still resolve the above-noted problem, that current captive cetaceans had no other reasonable place to go to that would promote their capabilities and improve their condition, in an environment closely resembling the wild.

This sanctuary would be an "authentic" one, meaning there will be no cetacean performances of any kind, no breeding, the wellbeing of individuals would be prioritized and, above all, it would be a place for the residents to thrive, and not merely to live.[435] The

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[430] See Charles Vinick, "A Major Update on the Creation of the Whale Sanctuary" (18 March 2021), online: *The Whale Sanctuary Project* <whalesanctuaryproject.org/a-major-update-on-the-creation-of-the-whale-sanctuary/>. The site was selected for many reasons, such as the depth of its waters. See Frances Willick, "Reality check needed as N.S. whale sanctuary project coasts ahead", *CBC News* (27 March 2021), online: <cbc.ca/news/canada/nova-scotia/whale-sanctuary-project-update-concerns>.
[431] See "About the Whale Sanctuary Project", *supra* note 428.
[432] See Bruce, *supra* note 429.
[433] "About the Whale Sanctuary Project", *supra* note 428 [emphasis added].
[434] Note that humans will still provide them food and care at this facility. See Bruce, *supra* note 429.
[435] See Whale Sanctuary Project, "What Is an Authentic Sanctuary?" (11 June 2021) at 00h:12m:52s-00h:14m:32s, online (video): *YouTube* <www.youtube.com>; Senate Committee 4 April 2017, *supra* note 30 at 13:27 (Naomi Rose) ("no breeding, no imports, no captures" (*ibid*)); Lori Marino, "What is an Authentic

facility would remedy what many experts, as well as parliamentarians, repeatedly stated throughout the parliamentary process: cetaceans belong in a more natural environment, as captivity deprives them of the ability to effectively thrive. A seaside sanctuary, while it cannot place the captive cetaceans in the same exact position as their wild counterparts, "gives them back"[436] at least certain things they are missing in concrete tanks, such as the ability to move around freely and to interact with nature.

Dr. Marino, addressing the concept of a sanctuary, said that "[a] wildlife sanctuary is a place where the wellbeing of the residents is the top priority *and where they're afforded an opportunity to flourish in a natural environment that encourages species-specific natural behaviour*".[437] These comments, implicitly referring to Nussbaum's ideas,[438] suggest that a sanctuary is an institutional practice that protects an animal's "spheres of choice and life-activity".[439] The sanctuary would treat them as "dignified" beings by providing them, in some measure, an opportunity to "live their lives according to their own nature".[440]

Sanctuary?" (10 February 2021), online: *The Whale Sanctuary Project* <whalesanctuaryproject.org/what-is-anauthenticsanctuary/?fbclid=IwAR22xhW94T_2FJairIyGsL7IsaKnhn92k6ry86uiCZNUKsBViOSbCUKjW4> (to be an authentic sanctuary, Dr. Marino affirms that the following questions need to be answered in the negative: "does it engage in performances, demonstrations or displays? Are visitors allowed access to the animals for commercial purposes like rides, petting pools and up-close photos with the animals? Does it allow breeding? And overall, does it have any priorities other than the wellbeing of the animals?" (*ibid*)).

[436] Senate Committee 30 March 2017, *supra* note 329 at 12:44 (Lori Marino).

[437] Lori Marino, "They are prisoners" (2 February 2021), online: *AEON* <aeon.co/essays/concrete-tanks-are-torture-for-social-intelligent-killer-whales> [emphasis added]. See also Senate Committee 30 March 2017, *ibid* at 12:43–12:50 (Lori Marino); Marino, "Marine Mammal Captivity", *supra* note 348 at 20 ("the only ethical and scientifically-valid [response] is to provide cetaceans with an environment in which they can flourish. This environment can only be the natural environment" (*ibid*)).

[438] As noted above, Dr. Marino already relied on Nussbaum's ideas in formulating some of her positions. See e.g. Marino, "Marine Mammal Captivity", *supra* note 348 at 1–2.

[439] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.

[440] "About the Whale Sanctuary Project", *supra* note 428.

With this in mind, the overarching spirit and intent of the *Whales Act* would be respected with the establishment of this facility in the not-too-distant future − a facility that would try to ease the ostensible suffering experienced by captive cetaceans.[441] However, not all experts agree that cetacean captivity is particularly cruel or an affront to a cetacean's own form of dignity.[442]

4.2.4 Addressing the Opponents' Views: Captivity Is Justifiable

The views of opponents to the *Whales Act* may be divided in two separate categories: (a) the valuable utility of cetacean captivity, or the idea we need cetaceans in captive settings for justifiable purposes; and, (b) cetacean captivity is not inherently harmful or cruel. The following paragraphs suggest that this kind of reasoning reflects one guiding principle: that humans feel entitled to prevent cetaceans from choosing the course of their own lives.

4.2.4.1 Utility of Cetacean Captivity

During the parliamentary proceedings related to the *Whales Act*, opponents mainly argued that this piece of legislation would "undermine",[443] "impede",[444] "limit",[445] or simply "criminalize"[446] three core pillars of zoos and aquaria: conservation efforts,[447]

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[441] Note that this sanctuary is not unanimously favored within the expert community. See Willick, *supra* note 430.
[442] See e.g. Senate Committee 4 May 2017, *supra* note 394 at 15:55 (Laurenne Schiller) ("I don't fundamentally equate captivity with cruelty" (*ibid*)).
[443] Senate Committee 6 April 2017, *supra* note 108 at 13:38 (Andrew Trites).
[444] Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 16 (16 May 2017) at 16:11 (Andrew Burns) [Senate Committee 16 May 2017].
[445] Senate Committee 4 May 2017, *supra* note 394 at 15:20 (John Nightingale).
[446] Senate Committee 28 March 2017, *supra* note 108 at 12:6 (Susan Shafer). See also "An Open Letter to Members of the Senate Committee on Fisheries and Oceans" (25 October 2017), online: *CAZA* <caza.ca/news-room/open-letter-members-senate-committee-fisheries-oceans/>.
[447] Captivity is considered reasonable if viewed through the lens of a conservationist. See Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 14 (13 April 2017) at 14:40 (Basile van Havre) [Senate Committee 13 April 2017].

scientific research and public education, including the transformative effects on humans when seeing captive animals.[448] Although some experts attempted to rebut these opinions at Committee,[449] these three categories of activities still remained significant issues throughout the proceedings and influenced certain amendments to the *Whales Act* before it received Royal Assent.[450]

According to the opponents, valuable benefits are supposedly gained by maintaining captive cetaceans, insofar as the practice contributes to conservation efforts of the species in the wild, to the education of the Canadian public, or to scientific research.[451] The utility of cetaceans in captivity is considered a justifiable means to legitimate ends. As long as we provide them with basic necessities, and implementing standards of care, captive cetaceans are valuable research tools: they are "serving the best purpose they can from a scientific point of view".[452] Thus, without resorting to mere emotions,[453] opponents of the *Whales Act* argued that they relied on science to justify cetacean captivity.[454]

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[448] See generally Senate Committee 4 May 2017, *supra* note 394 (Laurenne Schiller).
[449] See e.g. Senate Committee 30 March 2017, *supra* note 329 at 12:26–12:27 (Lori Marino) (noting that the VA and ML have not produced meaningful scientific research on captive cetaceans which had a direct impact on conserving wild species); Senate Committee 30 March 2017, *ibid* at 12:28 (Hal Whitehead); Senate Committee 4 April 2017, *supra* note 30 at 13:10 (Naomi Rose) (mentioning that zoos and aquariums harm education); Senate Committee 1 June 2017, *supra* note 348 at 17:26 (Kathryn Sussman); Senate Committee 1 June 2017, *ibid* at 17:38 (Ingrid Visser).
[450] Adopting the *Whales Act* was, in a sense, the product of compromises. For instance, this law was amended by inserting an exception for scientific research or by adding a non-derogation clause for protecting the rights of Indigenous peoples. On these amendments, see Senate of Canada, Standing Senate Committee on Fisheries and Oceans, "Seventh Report of Fisheries and Oceans Committee", *Senate Debates,* 42-1, No 162 (28 November 2017) at 4249 (Hon Fabian Manning) [Senate Committee "Seventh Report"].
[451] See e.g. Senate Committee 28 March 2017, *supra* note 108 at 12:15 (Susan Shafer); Senate Committee 30 March 2017, *supra* note 329 at 12:34 (Hon Tobias Enverga); Senate Committee 6 April 2017, *supra* note 108 at 13:36–13:37 (Andrew Trites) (noting that captive research is essential for conserving and managing wild populations).
[452] Senate Committee 6 April 2017, *supra* note 108 at 13:61 (David Rosen).
[453] *Ibid* at 13:39 (David Rosen).
[454] See Senate Committee 28 March 2017, *supra* note 108 at 12:24 (Susan Shafer).

Some argued, as noted above, that cetacean captivity is vital for saving and conserving wild populations of cetaceans.[455] In other words, it is reasonable to sacrifice the core freedoms of some captive cetaceans for the betterment of the wild species. In short, it is the wellbeing of the species as a whole that counts for these opponents, as opposed to the welfare or wellbeing of individual captive cetaceans.

Recall that as a matter of justice, ensuring the viability or survival of wild populations, or the species, is not the goal of Nussbaum's CA.[456] The focus of her approach is on the wellbeing of existing individuals and not the species. In fact, the *Whales Act* was mainly designed to protect the individual welfare of cetaceans and not the conservation of a species.[457] While a focus on conservationist goals may justify the captivity of cetaceans, a focus on individual welfare simply does not. In fact, a focus on individual welfare may be in tension with an emphasis on conservation efforts. Basile van Havre, on behalf of the Canadian Wildlife Service, testified at Committee that:

> The *issue of well-being or survival of an individual becomes a concern when its population drops to a very, very low level*. With species like cetaceans, which are plentiful in the wild, the survival and well-being of an individual in captivity is a societal or moral issue, which is different from the conservation issue[458]

In other words, a conservationist may be concerned with the wellbeing of individual animals if their overall population is dropping significantly in the wild.

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[455] See also Senate Committee 8 June 2017, *supra* note 24 at 18:14 (Hon Nancy Raine) (concerned that the *Whales Act* may jeopardize efforts in ensuring the survival of wild species).
[456] See Nussbaum, *Frontiers of Justice, supra* note 49 at 358; Nussbaum, "Moral Status of Animals", *supra* note 224 at 4.
[457] See Senate Committee 13 April 2017, *supra* note 447 at 14:41 (Basile van Havre) ("[m]y understanding of the objective of Bill S-203 is to address some animal welfare issues … that is separate from the conservation" (*ibid*)). See also *Whales Act*, *supra* note 21, s 2; *Criminal Code, supra* note 22, s 445.2(3)(c). Conservation is not currently a factor to be considered in authorizing a person to keep a cetacean in captivity in the "best interests of the cetacean's welfare".
[458] Senate Committee 13 April 2017, *supra* note 447 at 14:36 (Basile van Havre) [emphasis added].

On the whole, to argue in terms of cetaceans' utility is to consider them essentially as objects or tools for our use, regardless of their potential legitimacy for the species, thereby reaffirming their property status under current Canadian law and erasing the complexity of their individual lives. Unlike its opponents, the proponents of the *Whales Act* did not view cetaceans primarily in terms of their overarching utility; these individual beings have their own form of life and ought to be able to exercise certain activities in an environment that gives them the opportunity to do so.

4.2.4.2 Cetaceans Are "Thriving" in Captivity

During the parliamentary proceedings related to the *Whales Act*, some experts took the position that captivity is not "inherently stressful" or "harmful" for cetaceans.[459] In other words, cetaceans do not suffer in concrete tanks and the fact they are unable to perform activities they would normally do in the wild is not necessarily indicative of poor animal welfare.[460]

To substantiate this point, consider this exchange between Senator Christmas and Dr. Martin Haulena at Committee: "*Senator Christmas:* … [i]n your view do captive whales and dolphins suffer lives of isolation, confinement and deprivation relative to whales and dolphins in the wild? *Dr. Haulena:* Not in a good facility, not at all."[461] In other words, according to Dr. Lanny Cornell, cetaceans "thrive" in captivity.[462]

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[459] See Senate Committee 4 May 2017, *supra* note 394 at 15:34 (Martin Haulena).
[460] *Ibid.* See also Senate Committee 6 April 2017, *supra* note 108 at 13:45 (David Rosen); Senate of Canada, Standing Senate Committee on Fisheries and Oceans, *Evidence,* 42-1, No 15 (9 May 2017) at 15:61 (Michael Noonan) [Senate Committee 9 May 2017] (noting that the beluga whales at ML do not display any significant signs of stress and they play a lot. According to Noonan, play is an indicator of animal welfare).
[461] Senate Committee 4 May 2017, *supra* note 394 at 15:43 (Hon Daniel Christmas, Martin Haulena) [emphasis in original].
[462] See Senate Committee 30 May 2017, *supra* note 113 at 17:8 (Lanny Cornell).

The fact that captivity prevents cetaceans from performing certain activities adapted to them, such as swimming vast distances, "something that they have evolved to do over millions of years",[463] was of no concern for most opponents of the *Whales Act*. In fact, some experts expressed the idea that captive cetaceans do not need to perform such activities, if they are provided with the basic necessities of life by humans.[464] According to them, many activities they typically carry out in the wild, such as diving deeply or swimming vast distances, should only be considered as means to the end of cetacean survival, which is not a requirement in captivity.[465]

In this respect, opponents of the *Whales Act* seemed to imply that a "comfortable immobility"[466] is appropriate; as long as cetaceans are provided with the necessities of life[467] and are able to express their normal behaviors, albeit in limited ways,[468] captivity is not necessarily an unpleasant thing for these beings. In other words, their captive environments, extinguishing their choices to do certain things they would normally do in the wild,[469] is not necessarily viewed as a harm. Captive cetaceans in places like ML are "happy, healthy animals", according to Dr. Cornell.[470]

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[463] Senate Committee 1 June 2017, *supra* note 348 at 17:34 (Ingrid Visser).
[464] See Senate Committee 6 April 2017, *supra* note 108 at 13:46 (Andrew Trites); Senate Committee 30 May 2017, *supra* note 113 at 17:21 (Lanny Cornell).
[465] *Ibid.*
[466] Nussbaum, "Moral Status of Animals", *supra* note 224 at 3.
[467] See Senate Committee 30 May 2017, *supra* note 113 at 17:09–17:11 (Lanny Cornell) (noting, for instance, that cetaceans are well fed in captivity and are not subject to parasites commonly seen in the wild, as a result of medication).
[468] See Senate Committee 9 May 2017, *supra* note 460 at 15:61 (Michael Noonan).
[469] See Senate Committee 1 June 2017, *supra* note 348 at 17:28 (Ingrid Visser) (noting that in concrete tanks, "everything involving choice is completely removed, and choice is fundamental when it comes to good animal welfare" (*ibid*)).
[470] Senate Committee 30 May 2017, *supra* note 113 at 17:15 (Lanny Cornell).

However, if we frame the issue otherwise, as Dr. Marino and others did throughout the proceedings, the answer becomes clearer: even if animals are provided with the necessities of life, cetaceans still ought to have opportunities to exercise their capabilities to be able to lead a flourishing life. Maintaining cetaceans in a state where they are unable to flourish, particularly if empirical evidence demonstrates that they suffer as a result of being deprived of these opportunities, constitutes a form of harm. This way of thinking about animal lives, a central feature in Nussbaum's CA,[471] was embedded in testimonies from leading experts who supported the *Whales Act*, including the political discourse of many parliamentarians. This is not to say, however, that opponents of this legislation did not implicitly acknowledge that cetaceans have central capabilities, as per Nussbaum's list.

Certain cetacean capabilities, such as "health" or "play",[472] were ostensibly promoted by some opponents. However, unlike those who supported the *Whales Act*, opponents seemingly ignored other major capabilities, such as "affiliation", "bodily integrity", "control over one's environment", "senses, imagination, and thought", or "other species".[473] In other words, they narrowly focused their analyses on certain activities, while proponents of the *Whales Act* considered most, if not all, the capabilities of cetaceans.

Given that proponents of the *Whales Act* placed a greater emphasis on the missing life choices of captive cetaceans, certain characteristics, such as intelligence (that make them similar to humans), played a pivotal role in enacting this legislation. This raises the

[471] See generally chapter 3, *above*, for more on this topic.
[472] See preceding arguments from Dr. Cornell and Noonan in this section.
[473] Discussion of this topic is found in section "A Consideration of 'Cetacean Capabilities'" in chapter 4, *above.*

question of whether we attribute any kind of substantive weight on their "human-like" qualities in creating law and public policy.

4.2.5 Biases Toward Cetaceans?

The *Whales Act*, by phasing-out cetacean captivity primarily for entertainment purposes, might also be construed as a way to protect "charismatic megafauna",[474] meaning a type of animal species that is highly valued, culturally or otherwise, based upon certain attributes, such as intelligence or social behaviour.[475] Indeed, the political discourse seems to reveal biases in favour of cetaceans.

For example, some parliamentarians who supported the *Whales Act* highlighted the complex "intelligence"[476] and the "extraordinary human-like behaviour"[477] of cetaceans. In fact, MP Elizabeth May affirmed that cetaceans are "*obviously* not akin to livestock"[478] and noted that "school children … were moved because they see movies and nature films and they understand that whales, dolphins and porpoises *are of a different character than other animals*".[479] By firmly distinguishing cetaceans from other kinds of animals, despite the fact that certain animals viewed as livestock, such as pigs, may demonstrate complex abilities,[480] lawmakers ostensibly demonstrated a bias towards cetaceans.

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[474] See Nussbaum & Wichert, "Legal Status of Whales", *supra* note 407 at 37.
[475] *Ibid*. See also Deckha, "Initiating a non-anthropocentric jurisprudence", *supra* note 40 at 805–806.
[476] See e.g. Second Reading House 29 November 2018, *supra* note 331 at 24236 (Elizabeth May); Second Reading House 29 November 2018, *ibid* at 24242 (Fin Donnelly); Third Reading House 10 May 2019, *supra* note 151 at 27650 (Arif Virani); Third Reading House 10 May 2019, *ibid* at 27652 (Pierre-Luc Dusseault); Third Reading Senate 29 May 2018, *supra* note 123 at 5625–5626 (Hon Murray Sinclair).
[477] Second Reading House 29 November 2018, *supra* note 331 at 24242 (Fin Donnelly).
[478] Third Reading House 10 June 2019, *supra* note 20 at 28785 (Elizabeth May) [emphasis added].
[479] *Ibid* [emphasis added].
[480] See generally Marc Bekoff, "Pigs are Intelligent, Emotional, and Cognitively Complex" (12 June 2015), online: *Psychology Today* <psychologytoday.com/ca/blog/animal-emotions/201506/pigs-are-intelligent-emotional-and-cognitively-complex>.

Indeed, the discourse seems to suggest that the *Whales Act* may have been designed to protect an animal species closely resembling humans, based upon revered human traits such as cognitive abilities, thus undercutting the very notion that parliamentarians who supported this piece of legislation engaged in an analysis based on cetacean capabilities. In that sense, the *Whales Act* perhaps encompassed a "so like us" approach, as posited by Nussbaum.[481] However, we should not be too quick to draw such a conclusion.

Identifying or recognizing characteristics in cetaceans that resemble humans is not, in and of itself, an admission that the *Whales Act* follows a "so like us" approach. Even if some parliamentarians had explicit biases in favour of cetaceans, most of them still considered a wide range of activities to attest the harms of captivity, other than mere intellectual and social abilities. For instance, when parliamentarians considered their ability to dive deeply or their roaming ways, they did not place any kind of emphasis on abilities resembling humans. This ability to move freely around is arguably not the same in the human case, as most of us do not need to travel long distances or dive deep to be able to lead thriving lives.

Overall, considering cetacean capabilities that may encompass some abilities that closely resemble those of humans is not necessarily indicative of a "so like us" approach. The legislative provisions of the *Whales Act* were grounded by an assessment of many components, including, but not limited to, cetaceans' intellectual or social abilities. Contrary to Wise, who grounds his legal personhood argument based on characteristics

[481] See section "Animal Capabilities" in chapter 3, *above,* for more on this topic. See also Stephen Hui, "Seals and penguins deserve to be liberated from Vancouver Aquarium, prof says", *Georgia Straight* (23 April 2014), online: <www.straight.com/news/632186/seals-and-penguins-deserve-be-liberated-vancouver-aquarium-prof says> (mentioning Francione's position on ending cetacean captivity, which he essentially attributes to a so "like us" approach).

closely resembling us, such as "self-awareness", the *Whales Act* was justified by a multifaceted approach: drawing on expert testimony, parliamentarians highlighted various relevant facets – biological, social, and other – of this complex being, as a whole. In the same spirit as Nussbaum's CA, many parliamentarians who supported the *Whales Act* recognized that cetaceans ought to have many opportunities to exercise many things in life, regardless if a particular thing is human-like or not. Cetaceans have their own form of life with their own particular needs and wants. Parliamentarians, although exhibiting biases, recognized that cetaceans need protections not necessarily because they resemble us, but because captivity in settings like ML or the VA cannot adequately satisfy their unique characteristics, some of them distinct from ours.

At least implicitly, the *Whales Act* is a recognition that certain core capabilities, such as bodily integrity and affiliation, ought to be promoted and protected as "entitlements grounded in justice",[482] to borrow Nussbaum's words. It is also an implicit recognition that reasoning about animals in this way can shape the course of law and politics, as I shall demonstrate in this final chapter of this paper.

[482] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 275.

Chapter 5: Moving Forward Beyond the *Whales Act*

5.1 An Ocean of Possibilities to Better Protect Other Animals

A decision-making process grounded in the idea of capabilities has the ability, as demonstrated in chapter 4 of this thesis, to positively impact the lives of animals. Moving forward, Nussbaum's CA may be the way that other institutional actors, such as judges, lawyers, and lawmakers, ought to think about animal-related issues.

Indeed, at least one scholar has suggested that Nussbaum's list of capabilities could be used by varied institutional actors, such as lawmakers, as a form of "checklist"[483] as part of their decision-making processes, which may include the enactment and implementation of laws and policies related to animals.[484]

Drawing on Nussbaum's CA, Ilea explains that "[b]y referring to this checklist, policy makers, inspectors, lawyers, and others would be reminded of different factors that play a role in an animal's well-being".[485] Thus, an institutional actor could take meaningful notice that animals have a "variety of needs and capabilities".[486] For example, this checklist could be used as a means to "[assess] the way animals are raised in different facilities or by different industries. The list of the ten basic capabilities can also be used to compare the animal welfare standards of different zoos or circuses".[487] As noted above, an approach that focuses on capabilities could incite institutional actors to frame animal-related issues

[483] See Ilea, "Rights and Capabilities", *supra* note 251 at 208–209.
[484] *Ibid.*
[485] *Ibid.*
[486] Ilea, "Theory and Public Policy", *supra* note 286 at 559.
[487] *Ibid* at 559–560.

in compelling ways, which could influence their decision-making processes and eventual outcomes.[488]

As shown above, the *Whales Act* and the discourse around its adoption implicitly shows that thinking about animal lives in terms of their capabilities, such as their "spheres of choice and life-activity",[489] does have an influence on law and public policy. It is a testament that Nussbaum's approach has the "potential to make a difference, especially in the legal arena".[490]

On this basis, it is not unreasonable to suggest that an official document, such as an Animal Charter of Rights and Freedoms, as already proposed by Animal Justice,[491] could be implemented in the Canadian political and legal landscape in the not-too-distant future by outlining that animals have a form of dignity of their own and that we, as humans, ought to promote and secure their central capabilities.[492] The *Whales Act*, notwithstanding its inherent limitations,[493] still laid the necessary framework or foundation to think about these kinds of issues in a particularly innovative way. Overall, this new law should be seen as a precursor to new developments, or as a likely springboard for granting substantive legal

[488] See Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 276. See also section "Thinking About Capabilities: Implications for Law and Public Policy", *above*, for more on this topic.
[489] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.
[490] Ilea, "Theory and Public Policy", *supra* note 286 at 559.
[491] See "Animal Charter of Rights and Freedoms", online: *Animal Justice* <animaljustice.ca/charter>. See also "Animal charter of rights drafted with policymakers in mind", *CBC News* (24 November 2014), online: <cbc.ca/news/canada/ottawa/animal-charter-of-rights-drafted-with-policymakers-in-mind-1.2846779>.
[492] Recall that Nussbaum said the following in *Frontiers of Justice, supra* note 49 at 400–401: "each nation should include in its constitution or other founding statement of principle an inclusion of animals as subjects of political justice, and a commitment that animals will be treated as beings entitled to a dignified existence. The constitution might also spell out some of the very general principles suggested by this capabilities list."
[493] For example, the "tragic" grandfather clause. See section "Phasing-out Cetacean Captivity: A "Tragedy"?" in chapter 4, *above.*

and political protections for other animals in Canada. However, not all agree that this is a good thing.

For example, MP Robert Sopuck said that:

> *The slippery slope is alive and well when it comes to this type of legislation. Who knows where it will lead, to rodeos or medical research?* Who knows where this will lead once a bill like this is passed?
>
> …
>
> The animal rights movement is clever in how it pushes forward legislation or policy change. The process is to start with something that seems innocent and then keep going and going, and pretty soon who knows what will be banned? For example, *once we ban cetaceans from captivity, what is next?*[494]

In other words, the *Whales Act* may lead to other similar legislative initiatives, that threaten the ethos of our human propensities to use animals.

MP Blaine Calkins echoed Sopuck's views by saying that: [f]or the very first time, it would make it illegal and criminalize the breeding of animals. This is something that is a *very dangerous precedent* for anybody involved in animal husbandry or any of these industries."[495] According to Calkins, the legislative provisions of the *Whales Act* ostensibly depart from other anti-cruelty measures, such as the prohibition on animal fighting.[496]

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[494] Second Reading House 29 November 2018, *supra* note 331 at 24240, 24241 (Robert Sopuck) [emphasis added]. On this question of "slippery slope", see also Senate Committee 9 May 2017, *supra* note 460 at 15:58 (Michael Noonan) ("[w]ould the Senate next be in the business of working its way through the various holdings at the Toronto Zoo, deciding at this level of government which particular species are or are not acceptable to hold in captivity?" (*ibid*)); Senate Committee 16 May 2017, *supra* note 444 at 16:9 (Andrew Burns) ("[t]his bill is about advancing an agenda: the granting of the rights of a person to whales … and then to other species" (*ibid*)).

[495] Third Reading House 10 June 2019, *supra* note 20 at 28784 (Blaine Calkins).

[496] See House Committee 18 March 2019, *supra* note 309 at 5 (Blaine Calkins) ("[i]t's not like other elements of animal welfare in the Criminal Code, like cock-fighting, dog-fighting and actual human abuse of animals" (*ibid*)). On this point, see also *Criminal Code, supra* note 22, ss 445.1(1)(b)(i)–(ii).

The *Whales Act* was also viewed as "incoherent",[497] as it proscribed the captivity of members of a particular animal species while not addressing or questioning the captivity of other similar species, such as polar bears.[498] Some of these concerns are not completely unreasonable.

5.1.1 The *Whales Act*: An Impetus for Introducing the *Jane Goodall Act*

The enactment of the *Whales Act* created a legislative precedent in Canada, evidenced by the subsequent introduction of the proposed *Jane Goodall Act,* which would create the same kinds of prohibitions and limitations but for great apes, elephants and for other designated animals. Its provisions, similarly to the *Whales Act*, question our human dominion and control over certain types of animal species.

The fact that the *Jane Goodall Act* was introduced in 2020, on the heels of the *Whales Act*, is noteworthy. However, of particular interest for our purposes is the fact that the proposed legislation seems to follow the same capability paradigm as the *Whales Act*. In short, certain provisions of the newly introduced *Jane Goodall Act*, including the brief political discourse around its introduction, arguably recognize the value of a "capability-based analysis"[499] in advancing certain protections for animals, as was the case with the *Whales Act*. Indeed, the following section suggests that the *Jane Goodall Act*, similar to the *Whales Act,* implicitly recognizes the value of Nussbaum's CA in shaping the course of law and public policy.

[497] Senate Committee 9 May 2017, *supra* note 460 at 15:64 (Michael Noonan).
[498] See Second Reading Senate 27 January 2016, *supra* note 113 at 156 (Hon Donald Plett).
[499] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.

5.2 The General Scope of the *Jane Goodall Act*

The legislative provisions of the *Whales Act* provided a template or "framework"[500] for drafting the proposed *Jane Goodall Act*.[501] Thus, the cetacean ownership, breeding, reproductive materials, and entertainment offences in the *Criminal Code* would also apply to great apes, elephants or other "designated" animals, subject to added adjustments.[502] For greater clarity, a designated animal refers to a captive non-domesticated animal species similar to a cetacean, great ape or elephant,[503] that has been designated as such by the Governor in Council.[504] Below, I further explain this designation process so as to clarify how this clause follows an analysis based on capabilities.

In a related vein, and in keeping with one of the main principles of the *Jane Goodall Act* which is that certain animals "ought not to be kept in captivity, except for justifiable purposes",[505] no person would be authorized to import or export a great ape, elephant or a designated animal,[506] unless permitted to do so, such as for non-harmful scientific research or where captivity is in an animal's best interests.[507]

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[500] See Third Reading House 10 June 2019, *supra* note 20 at 28784 (Blaine Calkins) (noting that this piece of legislation "creates a *framework* and structure whereby anybody can add onto that by *simply adding a comma into the legislation*" (*ibid*) [emphasis added]).
[501] For the purposes of this thesis, I will not address the import and export bans relating to elephant ivory and hunting trophies, as my focus is exclusively on the issue of animal captivity. For more information on these bans, see *Jane Goodall Act*, *supra* note 46, cl 8.
[502] See *Jane Goodall Act, ibid*, cl 2. Note that this entertainment offence would prohibit elephant rides. See "Bill S-218, An Act to amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (great apes, elephants and certain other animals)", 2nd reading, *Senate Debates,* 43-2, No 13 (19 November 2020) at 435 (Hon Murray Sinclair) [Second Reading Senate 19 November 2020].
[503] Such as a tiger. See Second Reading Senate 19 November 2020, *supra* note 502 at 439–440 (Hon Murray Sinclair).
[504] *Jane Goodall Act*, *supra* note 46, cl 3. See also *ibid*, cl 11. Further discussion of this topic is found in the section "The 'Noah' Clause", *below*.
[505] *Jane Goodall Act, ibid,* Preamble.
[506] *Ibid,* cl 8. Note that this clause would amend *Wappriita, supra* note 28.
[507] *Ibid,* cl 9.

Indeed, most of the exceptions contained in the *Whales Act* would extend to animals covered by the *Jane Goodall Act*. For instance, keeping animals in captivity in their best overall interests, the "tragic" grandfather clause in the *Whales Act*, and the exceptions relating to assistance, care or rehabilitation efforts and scientific research, would also apply to great apes, elephants or designated animals.[508]

The provisions of the proposed *Jane Goodall Act* are relatively similar to those contained in the *Whales Act*, but also differ in some ways, for example by adding "non-harmful" to the exceptions relating to scientific research and by adding "conservation" as one of the factors to be considered when determining whether keeping an animal in captivity is in their best interests.[509] Upon further review of these provisions, one could argue that the *Jane Goodall Act* revisits or questions some of the issues discussed during the adoption of the *Whales Act*. I will return to this topic below, but for now, I turn my focus to one of the provisions of the bill that may receive – and arguably, has already received – attention from members of the legal profession,[510] namely the legal standing clause.

The *Jane Goodall Act* provides that if a person is convicted of an offence relating to prohibited captivity, breeding, reproductive materials or entertainment activities, a court, during its sentencing hearing, could order an offender to carry out certain actions to

[508] *Ibid,* cl 2. See also *ibid,* cl 10.
[509] *Ibid,* cls 9, 10, 2.
[510] See e.g. Shroff, "Jane Goodall Act", *supra* note 145.

safeguard the best interests of the animal(s) in question.[511] An animal advocate could also be appointed to assist the court in determining the animal's best interests.[512]

For instance, a court could order that a cetacean be relocated to a seaside sanctuary,[513] such as the above-noted sanctuary being developed by the WSP, that would ultimately promote and secure the best interests of its residents.[514]

Former Senator Sinclair framed this clause as providing "limited" legal standing, as an animal's best interests would only be heard at the sentencing stage.[515] However, the bill's preamble explicitly states that provinces may grant an expanded legal standing to animals in other contexts, such as civil or regulatory proceedings, should they wish to do so.[516]

Broadly speaking, the "law of standing answers the question of who is entitled to bring a case to court for a decision".[517] In 2021, animals do not have any "standing" in Canadian courts,[518] but the tide may be shifting in their favour.

For example, Chief Justice Fraser, in her dissenting reasons in *Reece*, stated that "[n]o animal … can start an action on its own",[519] but that "it arguably remains an open question whether the common law has now evolved to the point where, depending on the

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[511] See *Jane Goodall Act*, *supra* note 46, cl 4.
[512] *Ibid.*
[513] *Ibid.*
[514] See Second Reading Senate 19 November 2020, *supra* note 502 at 435 (Hon Murray Sinclair).
[515] *Ibid* (Hon Murray Sinclair).
[516] *Ibid* (Hon Murray Sinclair). See also *Jane Goodall Act*, *supra* note 46, Preamble.
[517] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 1.
[518] See Shroff, "Jane Goodall Act", *supra* note 145. See also "New Senate Bill Would Protect Great Apes, Elephants, & Give Some Animals Standing in Court" (17 November 2020), online (blog): *Animal Justice* <animaljustice.ca/blog/new-senate-bill-would-protect-great-apes-elephants-give-some-animals-standing-in-court> [Animal Justice, "New Senate Bill"].
[519] *Reece*, *supra* note 302 at para 179.

circumstances, an animal might be able to sue through its litigation representatives to protect itself".[520] Accordingly, "a top judge in a top Canadian court has acknowledged that animals may achieve legal standing through the common law – and not in the distant future, but *now.*"[521]

Recently, in 2019, Justice Brian O'Ferrall in his dissenting reasons in *Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry)*,[522] affirmed that "[i]f animals are to be protected in any meaningful way, *they*, or their advocates, *must be accorded some form of legal standing.*"[523] In other words, to ensure they receive proper protections under current Canadian laws, animals should be given a form of standing. In this respect, the limited form of standing provided by the *Jane Goodall Act* may be considered as a step towards achieving that goal, as it signals that some animals should have their interests duly represented in court, albeit in a limited fashion. The standing clause in the *Jane Goodall Act*, together with the preamble, sends a powerful message that protecting animals in any meaningful way is only possible if their interests are given due consideration, notably with the involvement of animal advocates.

On this notion of standing, it should be noted that "[s]cholar Marguerite Hogan has argued that "[d]ecisions denying standing in cases involv[ing] nonhuman animals ignore the principle that standing doctrine exists to ensure that litigants are those entities *most*

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[520] *Ibid*, n 143. This footnote has come to my attention thanks to the following sources: Tyler Totten, "Should Elephants Have Standing" (2015) 6:1 Western J Leg Studies 1 at 11; Anna Pippus, "Animal Rights: Personhood Does Not Have to be the Opposite of Property" (14 April 2015), online (blog): *Animal Justice* <animaljustice.ca/blog/animal-rights-personhood-not-opposite-property>. For more information on Chief Justice Fraser's dissent in *Reece,* including the standing issue, see Totten, *ibid* at 1, n 5.
[521] Pippus, *supra* note 520 [emphasis in original].
[522] 2019 ABCA 208.
[523] *Ibid* at para 54. See also *Reece*, *supra* note 302 at para 70.

directly affected by the issue".[524] That said, if the *Jane Goodall Act* is adopted into law, it would be a recognition that it is the animals, and not humans, who directly suffer the harms of a criminal offence and, if needed, that they should receive an adequate remedy that promotes their best interests.

Notwithstanding the above-mentioned comments, the notion of standing pertaining to animals is still an unsettled subject matter within academic circles. For example, Steven Wise, commenting on the *Reece* decision, said the following:

> The Edmonton suit by PETA and Zoocheck is an example of one attempt to obtain personhood, not standing, for an elephant being kept in a zoo in abominable conditions. As I have written elsewhere, *there is no serious problem of nonhuman animal "standing," for no "thing" ever has standing, while an injured nonhuman animal "person" automatically has it.*[525]

In other words, it is meaningless to talk about standing when animals are still considered property and not legal persons. In truth, according to Wise, obtaining "legal personhood" for animals[526] is a necessary precondition before obtaining legal standing.[527]

Be that as it may, the *Jane Goodall Act,* if enacted, may incite new developments in the field of animal law. Since its introduction in the Senate, the bill has already been

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[524] Totten, *supra* note 520 at 13 [footnotes omitted] [emphasis in original].
[525] Leah Edgerton, "What is the Most Effective Way to Advocate Legally for Nonhuman Animals?" (29 August 2016), online: *Animal Charity Evaluators* <animalcharityevaluators.org/blog/what-is-the-most-effective-way-to-advocate-legally-for-nonhuman-animals/> [emphasis added]. This source has come to my attention thanks to: Angela Fernandez, "Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise" (2018) 41:1 Dal LJ 197 at 210, n 54.
[526] See Steven M. Wise, "Legal Personhood and the Nonhuman Rights Project" (2010) 17:1 Animal L 1 at 1 ("[l]egal personhood is the capacity to possess at least one legal right; accordingly, one who possesses at least one legal right is a legal person" (*ibid*) [footnotes omitted]).
[527] *Ibid* at 1–4.

hailed in the public sphere as a "ground-breaking"[528] piece of legislation for animals,[529] and will undoubtedly continue to receive much attention and scrutiny in the following months or years, whether in relation to its inherent limitations or potential benefits for animals.[530] With this in mind, I will examine one likely pitfall and one potential benefit of the *Jane Goodall Act* in the next sections of this thesis.

5.2.1 Conservation or Individual Welfare?

Drawing on my analysis of the *Whales Act*, I undertake this analysis for the following reasons: (a) if the *Jane Goodall Act* receives Royal Assent, it will affect the condition of cetaceans and perhaps call into question central aspects of the *Whales Act*; and (b) the *Jane Goodall Act* and the brief discourse around its introduction reaffirm the idea that undertaking an analysis based on core capabilities is a vehicle for positive changes for animals. Specifically, I will discuss the following two points: (a) the emphasis on conservation for certain exceptions; and (b) the "Noah" clause.

Currently, a person may be authorized to keep a cetacean in captivity in the "best interests of the cetacean's welfare"[531] and an import or export permit may be granted to a person on the basis of the "best interests of the cetacean's welfare".[532] As demonstrated,

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[528] Victoria Shroff, "Proposed Jane Goodall Act game-changing animal law breakthrough", *The Lawyer's Daily* (25 November 2020), online: <thelawyersdaily.ca>.
[529] See generally Animal Justice, "New Senate Bill", *supra* note 518; "2020 Year in Review" (31 December 2020) at 10, online (pdf): *Humane Canada* <humanecanada.ca/wp-content/uploads/2020/12/Humane-Canada-2020-Milestones-1.pdf>.
[530] See e.g. Rob Miskosky, "The Jane Goodall Act" (2020), online: *Alberta Outdoorsmen* <albertaoutdoorsmen.ca>; "Canada Threatens African Wildlife Conservation With "Jane Goodall Act"" (4 December 2020), online: *SCI* <safariclub.org>; Jordan Reichert, "Jane Goodall Act continues the slow march of animal rights legislation in Canada" (28 November 2020), online: *Animal Protection Party of Canada* <animalprotectionparty.ca>.
[531] *Criminal Code, supra* note 22, s 445.2(3)(c); *Fisheries Act, supra* note 28, s 23.4(2). See also *Whales Act*, *supra* note 21, s 2.
[532] *Fisheries Act, supra* note 28, s 23.2(2)(b).

conservation is not explicitly mentioned in these provisions. However, this situation would change with the passage of the *Jane Goodall Act,* particularly in regards to the *Criminal Code.*

As described above, the cetacean ownership, breeding and reproductive materials offences in the *Criminal Code* would also apply to great apes, elephants or other designated animals.[533] The *Jane Goodall Act* provides that these offences would:

> [N]ot apply to a person who, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by any authority in the province that may be specified by the Lieutenant Governor in Council, is conducting non-harmful scientific research *or who is authorized to keep a cetacean,* great ape, elephant or designated animal *in captivity in the best interests of the animal,* with regard to individual welfare *and conservation of the species*.[534]

This provision would ostensibly allow a person to keep a cetacean in captivity for conservation purposes[535] and would allow that person to breed the animal for this purpose, as the breeding prohibition would not apply. Accordingly, this provision could be interpreted as a departure from the primary intent of the *Whales Act*, which was to protect the welfare of individual cetaceans and not the species, as a whole.[536] As acknowledged by former Senator Sinclair, the spirit and overarching intent of that legislation is not to protect any endangered species,[537] but rather, to protect individual captive cetaceans from a life of cruelty and suffering.[538]

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[533] See *Jane Goodall Act, supra* note 46, cl 2.
[534] *Ibid* [emphasis added] [emphasis in original omitted].
[535] Note that the *Jane Goodall Act*, as per its preamble, frames conservation as a "justifiable purpose". See *ibid,* Preamble.
[536] See section "Addressing the Opponents' Views: Captivity is Justifiable", *above*, for more on this topic.
[537] See House Committee 18 March 2019, *supra* note 309 at 5–6 (Hon Murray Sinclair).
[538] *Ibid* at 2 (Hon Murray Sinclair).

The issue of conservation has been considered by both parliamentarians and experts in the context of adopting the *Whales Act*.[539] For instance, at Committee, an exchange between Senator Nancy Raine and Dr. Ingrid Visser ensued as to the overarching value in captive cetacean breeding for saving the species in the wild. Dr. Visser categorically said that:

> [N]o breeding program of cetaceans anywhere in the world is releasing them back out into [the] wild. They're either trading them to another facility or keeping them themselves like Marineland is doing, so that's not contributing to conservation.
>
> …
>
> There are no facilities that have released captive-born cetaceans into the wild.[540]

Upon completing its exhaustive study of the *Whales Act*, the Committee did not provide any exceptions relating to conservation, as they did for scientific research.[541]

The *Jane Goodall Act,* by providing a conservation exception, seems to undo the vast amount of work undertaken during the enactment of the *Whales Act*. But, more fundamentally, this kind of provision reaffirms the notion that individual captive cetaceans are justifiable means or tools for purportedly legitimate ends, such as species survival.

As per the *Whales Act*, the subject of concern is not the species itself. However, pursuant to the above-noted conservation exception in the *Jane Goodall Act,* sacrificing capabilities of individual captive cetaceans, such as bodily integrity, would be considered justifiable in ensuring the survival of the species. Arguably, it would further entrench the notion that cetaceans are mere property, devoid of the possibility or opportunity to lead

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[539] See e.g. House Committee 18 March 2019, *ibid* at 20 (Clinton Wright) (proposing an amendment for conservation purposes).
[540] Senate Committee 1 June 2017, *supra* note 348 at 17:49 (Ingrid Visser).
[541] See generally Senate Committee "Seventh Report", *supra* note 450 at 4249 (Hon Fabian Manning).

flourishing existences outside the governing control of humans, regardless of whether or not we have good intentions for them or their species, as a whole.

At this point, I should be clear: this argument should not be construed as being overtly against all kinds of zoos and their conservation efforts, including their breeding programs. In fact, Nussbaum herself, discussing the case of Asian elephants,[542] suggested that zoos could be vital to ensuring the survival of this particular species that is highly threatened in the wild.[543] However, to prevent contradicting myself, two things need to be said.

First, most zoos would need to significantly change to meet the necessary needs of animals like elephants[544] to continue their conservation efforts, as Nussbaum's CA "*insists that the usual way elephants are kept in zoos is horrendous:* one or two females in a tiny enclosure, in which they have more or less no room for movement or foraging, and no opportunity for the group life characteristic of their kind."[545] Thus, as indicated by former Senator Sinclair, perhaps it is "time to phase out elephant captivity in Canada",[546] especially as zoos are not able to provide these sorts of things to elephants.[547]

Second, from a scientific standpoint, cetacean captivity is considered a nefarious enterprise for the welfare of individual cetaceans, particularly when it comes to

[542] In 2020, the African Lion Safari situated in Ontario held 16 Asian elephants. See Second Reading Senate 19 November 2020, *supra* note 502 at 438 (Hon Murray Sinclair).
[543] Nussbaum, "Animal Entitlements", *supra* note 219 at 246–247.
[544] See e.g. *ibid* at 247 ("at minimum an elephant herd in a zoo ought to include four females with their young, and that such elephants should have a hundred acres of land around them" (*ibid*)).
[545] *Ibid* at 246–247 [emphasis added].
[546] Second Reading Senate 19 November 2020, *supra* note 502 at 439 (Hon Murray Sinclair)
[547] *Ibid* (Hon Murray Sinclair) ("at three of Canada's four facilities, elephants are living alone or in small groups … [t]hey must spend winters indoors despite being huge, far-ranging animals." (*ibid*)).

entertainment.[548] As a result of this mounting evidence, the main purpose of the *Whales Act* is to prevent perpetuating this practice by including stringent breeding prohibitions. Conservation, as a factor to be considered for the "best interests of the cetacean's welfare", was implicitly ruled out as a ground to amend the *Whales Act*, as described above.

Although the *Whales Act* allows an exception for scientific research,[549] which, in a way, still treats cetaceans as tools, the *Jane Goodall Act* would further undermine the notion that captivity constitutes a form of harm for individual cetaceans. Drawing on my previous arguments, if the *Jane Goodall Act* is adopted as is, it may begin to chip away at certain aspects of the *Whales Act*, which was mainly designed to protect the welfare of individual cetaceans.

Does the *Jane Goodall Act* primarily seek to protect the welfare of individual cetaceans and other animals or the conservation of their respective species? At first glance, the intention seems ambiguous. Protecting both these things at the same time could result in an impasse or an irreconcilable tension in values and objectives, as noted above.[550]

Former Senator Sinclair also framed the *Jane Goodall Act* as a potential vehicle to improve the conditions of captive facilities holding certain animal species, such as great apes. Addressing the welfare of orangutans at the Toronto Zoo, former Senator Sinclair said the following:

> I do have a welfare concern about all orangutans, including those in Toronto. They currently do not enjoy adequate outdoor access. For years, Toronto Zoo has planned to renovate to include outdoor space, and the current information is that a new enclosure will be ready next year … This

[548] See generally chapter 2, 4, *above.*
[549] See *Whales Act*, *supra* note 21, s 2; *Criminal Code, supra* note 22, s 445.2(3.1). See also Senate Committee "Seventh Report", *supra* note 450 at 4249 (Hon Fabian Manning).
[550] See Senate Committee 13 April 2017, *supra* note 447 at 14:36 (Basile van Havre) and accompanying text.

> improvement can't come soon enough, as in the case of Puppe. She has been inside for 47 years. Senators, *the bottom line is that we need to get our friends, the orangutans, some fresh air and sunshine. This bill will help*.[551]

That said, what is the precise intention or goal of this bill? Does it challenge the notion of captivity of certain animals or does it endorse, and perpetuate, the practice? The whole issue, as revealed by the discourse, is not entirely clear.

Contrast these comments with what former Senator Sinclair said in relation to the *Whales Act*:

> Scientists were clear at committee, when the question was put to them directly, that *keeping cetaceans in concrete tanks is cruel.* So, it is appropriate to create a practice-specific animal cruelty offence in this instance. That way, *if Bill S-203 is adopted, it will prevent the births of any additional cetaceans in captivity, saving them from the cruel fate of living their entire lives in a relatively minuscule concrete tank.*[552]

Not once did he explicitly mention, during his second reading speech related to the *Jane Goodall Act,* that captivity itself was a cruel practice for great apes and others, other than generally stating that animals face "cruelty at human hands"[553] and that the bill would amend the animal cruelty laws.[554]

All in all, the bill's current intention, particularly with its added emphasis on conservation, is slightly ambiguous. Nevertheless, for the purposes of this thesis, the *Jane Goodall Act* still contains innovative provisions to better protect animals' interests, one of which is commonly referred to as the "Noah" clause.

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[551] Second Reading Senate 19 November 2020, *supra* note 502 at 438 (Hon Murray Sinclair) [emphasis added].
[552] Third Reading Senate 29 May 2018, *supra* note 123 at 5628 (Hon Murray Sinclair) [emphasis added].
[553] Second Reading Senate 19 November 2020, *supra* note 502 at 434 (Hon Murray Sinclair).
[554] *Ibid* at 435 (Hon Murray Sinclair).

5.2.2 The "Noah" Clause

One of the key provisions of the *Jane Goodall Act* provides that all the prohibitions and exceptions applicable to great apes and elephants would also apply to "designated animals", meaning a non-domesticated captive animal species similar to a cetacean, a great ape or an elephant.[555] This provision is called the "Noah" clause, since it operates like an ark;[556] other similar animals could eventually "board the legal ark"[557] to receive the same kinds of protections as cetaceans, great apes and elephants. In respect of the *Criminal Code* offences, the designation process is set out in the following terms:

> The Governor in Council may, after consulting with professionals in animal science, veterinary medicine or animal care and with representatives of groups whose objects include the promotion of animal welfare, *on the capability of a species to live in captivity and whether the conditions of captivity adequately accommodate the biological and ecological needs for individual animals of that species to live a good life,* make regulations designating a species of non-domesticated captive animal similar to a cetacean, great ape or elephant as a designated animal for the purposes of section 445.2.[558]

As shown in the preceding chapters of this thesis, expert evidence establishes that cetaceans are not able to lead thriving lives in captivity, as this type of environment cannot "accommodate" all of their needs.[559] Thus, this provision provides that if another captive non-domesticated animal species is not capable of living in captivity and if the conditions of such an environment cannot accommodate the many needs of its individuals, this species deserves the same types of protections as cetaceans, as well as great apes and elephants. It

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[555] See generally *Jane Goodall Act*, *supra* note 46, cls 2, 3, 8, 9, 10, 11.
[556] See Second Reading Senate 19 November 2020, *supra* note 502 at 440 (Hon Murray Sinclair). This term is arguably in reference to Noah's Ark, a widely known Bible story.
[557] *Ibid.*
[558] *Jane Goodall Act*, *supra* note 46, cl 3 [emphasis added]. An identical designation process is also provided in the case of the import/export ban of great apes, elephants or designated animals. See *ibid,* cls 8, 11.
[559] See e.g. Second Reading Senate 23 November 2016, *supra* note 329 at 1792 (Hon Wilfred Moore) (citing a letter from experts).

is on the basis of highly specialized knowledge from relevant experts that the government would be in a position to extend the protections already offered to cetaceans, great apes, and elephants to another species, thereby acknowledging the important role of science in shaping animal protection legislation.[560]

Former Senator Sinclair provided further clarifications on this designation process, as follows:

> For a valid designation, it would be enough for a species to share some similarities with either great apes, elephants or whales that are relevant to their welfare in captivity. *Factors for a designation may, for example, include intelligence, emotions, social requirements, physical size, wide-ranging lifestyles, use in performances, ability to engage in natural behaviour in captivity, public safety risks and evidence of harms such as abnormal, repetitive behaviour, short lifespan and high infant mortality rates.*[561]

In other words, the designation process, together with this explanation, thoroughly recognizes the complexity of animal lives. It is an acknowledgment that extending the protections to other animal species is predicated on a whole range of characteristics, including, but not limited to, intelligence or social abilities.[562] As described in the preceding pages of this thesis, these kinds of factors, enunciated by former Senator Sinclair, were considered in the context of enacting the *Whales Act*.

Above all, the designation process and its explanation are an extension of the same kind of analysis undertaken during the parliamentary decision-making process relating to

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[560] See *Jane Goodall Act*, *supra* note 46, Preamble.
[561] Second Reading Senate 19 November 2020, *supra* note 502 at 439 (Hon Murray Sinclair) [emphasis added].
[562] Here, a caveat is warranted. In the case of great apes, most notably chimpanzees, former Senator Sinclair mainly highlighted their human-like abilities and their intelligence to justify the bill. See e.g. Second Reading Senate 19 November 2020, *ibid* at 435–436 (Hon Murray Sinclair). His assessment of elephants was, however, different, as he emphasized their unique characteristics, such as their sense of smell, hearing, and their roaming ways in the wild. See *ibid* at 438 (Hon Murray Sinclair).

the *Whales Act*. In a sense, they are implicitly premised on the foundational principles of Nussbaum's CA, whereby an emphasis should be placed on the central capabilities of these animals, such as "life", "health", "bodily integrity", "senses, imagination, and thought", "emotions", or "affiliation".[563] As shown in chapter 4 of this thesis, these capabilities are inextricably tied to the above-noted factors enunciated by former Senator Sinclair, such as "wide-ranging lifestyles", "social requirements", and so on.

Accordingly, the designation process recognizes that certain animals need to pursue a whole range of activities to be able to lead flourishing existences. It implicitly concedes that by denying them of the opportunity to exercise certain capabilities, captivity may cause undue suffering. Overall, it is an acknowledgement that we ought to promote and secure these capabilities, as "entitlements grounded in justice",[564] to borrow Nussbaum's words.

With this in mind, it is not surprising that former Senator Sinclair claimed tigers, or "big cats", could be a first likely candidate to receive such a designation, as they are "wide-ranging, often exploited, unable to engage in natural behaviours in captivity, prone to abnormal behaviours in captivity like pacing, and pose a safety threat".[565] Sinclair also recognized that other candidates could eventually follow suit, such as walruses.[566]

All in all, this "Noah" clause is arguably the most promising for other captive non-domesticated animals if the *Jane Goodall Act* receives Royal Assent. More importantly, it implicitly recognizes the value of an approach that places great emphasis on the complexity of animal lives, on their "*spheres of choice* and *life-activity*",[567] to invariably shape the

[563] See generally chapter 3, 4, *above.*
[564] Nussbaum & Wichert, "From Bentham to the Capabilities Approach", *supra* note 247 at 275.
[565] Second Reading Senate 19 November 2020, *supra* note 502 at 439 (Hon Murray Sinclair).
[566] *Ibid* at 440 (Hon Murray Sinclair).
[567] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365 [emphasis added].

course of law and public policy – an approach that may be the key to overcoming the many challenges to protecting animals, legally and politically.

Chapter 6: Conclusion

This thesis has sought to better understand the normative impact of the *Whales Act* in the current political and legal landscape, by framing the issues related to this piece of legislation with two theoretical frameworks, namely Nussbaum's CA and Kingdon's policy streams model. In doing so, I conceptualized the *Whales Act* as a complex social, legal, and political phenomenon. In truth, unlocking the normative aspects of this piece of legislation meant that I had to dissect extrinsic components beyond the legislative text itself. Indeed, all the queries related to this thesis reflected this multifaceted approach.

To ascertain the context and nature of the issues around the *Whales Act*, I used Kingdon's approach. Although not the crux of the thesis, this particular exercise was useful, insofar as doing so provided a suitable foundation upon which to assess this piece of legislation and its impact in the political and legal landscape.

Further, this context provided an opportunity to grasp some of the conditions that are required for enacting any kind of political and legal changes for animals by Parliament. These circumstances include: (a) a perceived public problem that requires the actions of key governmental and political actors; (b) a readily available solution, perhaps already implemented at the local, national or international level, and (c) an environment that is particularly ripe to enact the desired change.[568]

Thus, the preceding pages of this thesis illustrate that the *Whales Act* emerged onto the public sphere with the union of Kingdon's three streams − that is, "politics", "policies"

[568] See Cairney & Zahariadis, *supra* note 65 at 91–92; Atupem, *supra* note 60 at 7–9.

and "problems".[569] This context helped to appreciate the problems associated with cetacean captivity that were ostensibly present before this piece of legislation was first introduced in the Senate. It also revealed that most of the provisions of the *Whales Act* were not necessarily unique, as other jurisdictions have enacted similar policies. Finally, the context provided an understanding of the fact that certain institutional actors played vital roles in the emergence of the *Whales Act*. This context was essential, as it paved the way for an evaluation of the discourse pertaining to this piece of legislation, notably by drawing on Nussbaum's key ideas relating to her CA.

Despite competing opinions in the literature concerning her version of the CA, this thesis suggested that Nussbaum still provides an innovative way to frame animal-related issues, which can influence law and policy. In fact, Nussbaum's CA, and the corresponding list of capabilities, guided my reflections as to the overarching issues surrounding the *Whales Act*. By examining the discourse in relation to some of her key ideas, such as her concepts of "capabilities", "flourishing", "dignity" or "tragedy", I suggested that an analysis based on capabilities did in fact shape the course of law and politics in Canada. To be clear, some parliamentarians implicitly recognized the value of thinking about animal lives in terms of their capabilities during the enactment of the *Whales Act*.

Drawing on Nussbaum's ideas, including those of Thomas I. White, I attempted to demonstrate that most parliamentarians who supported the *Whales Act* immersed themselves in an ethical evaluation of cetacean capabilities, by notably placing an emphasis on the missing choices and life activities[570] of these highly complex individuals in captive

[569] See generally Kingdon, *supra* note 49 at 331–332.
[570] See Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.

settings like ML. Many considered and valued distinctive features of cetaceans, including, but not limited to, intelligence, social abilities, or their roaming ways in the wild.

Accordingly, most parliamentarians who supported the *Whales Act* grounded their policy choices by appreciating the complexity of cetacean lives, notably by drawing on highly specialized knowledge. Indeed, while there are certainly competing views within the expert community concerning the issue of cetacean captivity, a number of marine mammal experts testified at Committee that captive cetaceans simply cannot thrive in concrete tanks.[571] As shown in this thesis, these kinds of assessments guided the parliamentary decision-making process relating to the *Whales Act*.

By thinking about cetaceans in this way, most parliamentarians redefined the notion of animal cruelty. For them, at least implicitly, cruelty does not necessarily mean unnecessary pain, injury or suffering, as it is commonly understood in light of the *Criminal Code*. Rather, cruelty means to prevent the exercise of capabilities, which necessarily leads to suffering, pain or injury. In justifying the amendments to the *Criminal Code,* the focus was not exclusively on cetacean pain and suffering. Instead, the discourse illustrated that a whole range of factors, including, but not limited to, cetacean suffering, were measured.

In truth, most parliamentarians who supported the *Whales Act* placed greater emphasis on the missing freedoms of captive cetaceans in assessing their welfare, notably by comparing their lives to those of their wild counterparts. Despite competing views on the matter, the parliamentary proceedings demonstrate that the *Whales Act* profoundly

[571] See e.g. Senate Committee 30 March 2017, *supra* note 329 at 12:41 (Lori Marino); Senate Committee 4 April 2017, *supra* note 30 at 13:7 (Naomi Rose).

questioned the captivity of certain animals and created a precedent, leading to the introduction of the *Jane Goodall Act* in 2020.

Parliamentarians' ways of thinking about cetacean lives during the enactment of the *Whales Act*, implicitly echoing Nussbaum's ideas, played a role in drafting the proposed *Jane Goodall Act*, and particularly the "Noah" clause. This clause basically rests on the idea of promoting and securing the "spheres of choice and life-activity"[572] of other captive wild animals closely resembling cetaceans. While this provision, including the bill in general, could be regarded as creating a potential "hierarchy"[573] among animals, it still represents an innovative way to protect some animals by recognizing the complexity of their lives. More importantly, it implicitly recognizes the value in Nussbaum's approach.

Based on Ilea's writings, I also explained in the preceding chapter that Nussbaum's CA and her list of capabilities could be used as a valuable checklist to evaluate animal use practices and industries. When implemented in this fashion, thinking about capabilities can be used as a way to challenge many popularized views and treatments of animals, perhaps as an impetus to seek changes to certain policies that involve both non-domesticated and domesticated animals.[574] Domesticated animals have lives of their own, arguably with their own unique choices and life activities. In other words, thinking about animals in terms of their capabilities, whether domesticated or not, can be a potential springboard for enacting positive changes for animals, politically or legally. This theoretical study of the *Whales Act*

[572] Nussbaum & Wichert, "Scientific Whaling", *supra* note 248 at 365.
[573] See Shroff, "Jane Goodall Act", *supra* note 145.
[574] See Ilea, "Theory and Public Policy", *supra* note 286 at 560.

has, however, shown there are limits in trying to promote animal capabilities and flourishing in circumstances where it seems practically impossible to do so.

For example, future generations of cetaceans are largely protected by the *Whales Act*, unlike current captive cetaceans at either ML or the VA. Unlike the whales seen onboard the MV Georgie Porgie, these cetaceans will most likely never have the opportunity to be with their own kin in the wild, to forage for food, to dive deeply, to swim long distances or to interact with nature. Most of these captive cetaceans are destined to perish at ML, the VA or another captive facility, such as an aquarium, barred from thriving or flourishing in their own ways. Drawing on Nussbaum's ideas, I suggested that this situation should be viewed as a tragedy, as it was the only conceivable option in 2019. However, I also outlined a silver lining to this tragic story.

A seaside sanctuary is currently being developed in Nova Scotia. In 2022, the WSP would eventually offer opportunities for retired captive cetaceans to exercise some of their central capabilities, such as affiliation. As described above, this type of facility seeks to promote their autonomy and dignity.

Animal activists are suggesting that Kiska, the lone orca at ML, could be a suitable candidate for this kind of facility.[575] As she languishes in her tank, efforts are mounting to ensure she receives proper care at ML.[576] Unfortunately, as described above, any attempts to ensure Kiska's welfare in a concrete tank is practically a futile mission, as she will never

[575] See Bobby Hristova, "Marineland faces legal complaint about Kiska, 'the world's loneliest orca'", *CBC News* (28 July 2021), online: <cbc.ca/news/canada/hamilton/marineland-orca-1.6120865>. See also "Animal Justice Files Cruelty Complaint Over Lonely, Listless Marineland Orca" (28 July 2021), online (blog): *Animal Justice* <animaljustice.ca/blog/animal-justice-files-cruelty-complaint-over-lonely-listless-marineland-orca> (noting that government should fund this kind of facility).
[576] *Ibid.*

be able to lead a thriving life at ML. The *Whales Act*, despite permitting ML to continue owning 50+ cetaceans, signaled that keeping these beings in captivity, especially for entertainment, threatens their wellbeing.[577]

In 2019, the *Whales Act* thrust the issue of cetacean captivity directly in the forefront of public discourse and, in 2021, Canadians are still paying close attention to this matter, as demonstrated by Kiska's situation. In the midst of this public sentiment, let us hope that Kiska may be (one day) relocated to the seaside sanctuary being developed by the WSP in Nova Scotia. Using Nussbaum's language, let us hope that Kiska finds a place, like that sanctuary, that could provide her a "*shot* at flourishing in [her] own way".[578]

[577] An analysis of the symbolic role of legislation is beyond the scope of this thesis. But, for more information on this topic, see e.g. Richard H. McAdams, "An Attitudinal Theory of Expressive Law" (2000) 79:2 Or L Rev 339.
[578] Nussbaum, "Getting the Theoretical Framework Right", *supra* note 155 at 11 [emphasis added].

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