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Bending the Rules? Including Animals in a Substantive Account of the Rule of Law

Maneesha Deckha and Alexa Powell*

ABSTRACT

This article explores the relationship between the rule of law and the situation of nonhuman animals. A commonplace view prevails that the rule of law in anthropocentric legal systems is unrelated to how we treat animals. In those rare instances when jurists have framed the legal treatment of animals as a rule of law problem, the connection has been a limited one (i.e., the rule of law is said to be violated when governments fail to enforce existing laws for animals' benefit). This article presses the connection between the rule of law and animal justice beyond the issue of poor enforcement of anticruelty laws to build upon nascent scholarship theorizing legal systemic animal use as presenting a constitutional problem implicating the rule of law. The article asks whether Canadian jurisprudence contains precedent for a "thicker" vision of the rule of law that can incorporate animal interests in its purview to generate a higher standard of animal protection than the very little that currently exists. The article concludes that it does. Although the "thinner" version is the one

* Maneesha Deckha is Professor and Lansdowne Chair in Law at the University of Victoria. Alexa Powell lives on lək̓ʷəŋən and W̱SÁNEĆ Unceded Territories (Victoria, British Columbia) where she works as a lawyer at Woodward and Company Lawyers LLP. The authors wish to thank the editors of the *McGill Law Journal* and the anonymous reviewers for their excellent recommendations and assistance. The authors are also grateful to the Social Sciences and Humanities Research Council for core funding support. Alexa Powell would also like to thank her parents, Maureen and Greg Powell.

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that has been more frequently articulated by the Supreme Court of Canada, the analysis charts the significant precedent for a substantive vision, arguing that such a vision could theoretically extend to animals and that this doctrinal opening should not be summarily closed by ongoing anthropocentric reasons. The article further highlights existing legal commitments outside of conventional rule of law doctrine, namely reconciliation with Indigenous legal orders and adherence to customary international environmental law and developments in transnational environmental litigation, as additional doctrinal grounds as to why Canadian legal conversations and reasoning about what the rule of law means and protects should consider an animal-inclusive vision.

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RÉSUMÉ

Cet article explore la relation entre la primauté du droit et la situation des animaux non humains. Il est communément admis que la primauté du droit dans les systèmes juridiques anthropocentriques n'a aucun lien avec la façon dont nous traitons les animaux. Dans les rares cas où les juristes ont présenté le traitement juridique des animaux comme un problème de primauté du droit, le lien a été limité : la primauté du droit est considérée comme violée lorsque les gouvernements n'appliquent pas les lois existantes au bénéfice des animaux. Cet article approfondit le lien entre la primauté du droit et la justice animale au-delà de la question de la mauvaise application des lois anti-cruauté, pour s'appuyer sur les travaux de recherche naissants qui théorisent l'utilisation systémique des animaux comme un problème constitutionnel impliquant la primauté du droit. L'article se demande si la jurisprudence canadienne contient des précédents en faveur d'une vision plus « épaisse » de la primauté du droit, capable d'intégrer les intérêts des animaux dans son champ d'application afin de générer un niveau de protection animale plus élevé que le très faible niveau actuel. L'article conclut par l'affirmative. Bien que la version la plus « légère » soit celle qui a été le plus souvent formulée par la Cour suprême du Canada, l'analyse retrace le précédent significatif en faveur d'une vision substantielle, soutenant qu'une telle vision pourrait théoriquement s'étendre aux animaux et que cette ouverture doctrinale ne devrait pas être sommairement fermée par des raisons anthropocentriques persistantes. L'article met également en évidence les engagements

juridiques existants en dehors de la doctrine conventionnelle de la primauté du droit, à savoir la réconciliation avec les ordres juridiques autochtones et le respect du droit international coutumier de l'environnement, ainsi que l'évolution des litiges environnementaux transnationaux, comme fondements doctrinaux supplémentaires expliquant pourquoi les discussions et le raisonnement juridiques canadiens sur ce que signifie et protège la primauté du droit devraient envisager une vision inclusive des animaux.

INTRODUCTION

THE contemporary era is increasingly marked by a normalcy of crises related to how humans treat each other, the environment, and the multitude of nonhuman beings who comprise this planet.[1] Scholars across disciplines have thus stressed the need for a radical recalibration in how humanity goes forward in our relationship with nonhumans.[2] Anthropocentric legal orders such as Canadian law compound the current crises when they designate nonhumans as property and deny them even simple legal subjectivity.[3] In this article, we take up the question of generating transformative legal change in Canadian law in relation to one cohort of nonhumans: nonhuman animals (hereafter "animals"). What legal arguments can be deployed within the existing Canadian common

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1 The first set of crises marked as human rights issues may seem unrelated to the second and third set regarding the environment and nonhumans. However, a growing chorus of environmental, posthumanist, and animal studies scholars have connected these crises perceived to be disparate (showing the links between systemic racism, misogyny, and poverty on the one hand, and environmental vulnerability, zoonotic pandemics, industrial agriculture, and animal suffering on the other). Petra Tschakert et al, "Multispecies Justice: Climate-Just Futures With, for and Beyond Humans" (2021) 12:2 WIREs Climate Change 1 at 2–5, 7; Marie Carmen Shingne, "The More-than-Human Right to the City: A Multispecies Reevaluation" (2022) 44:2 J Urban Affairs 137 at 137–38; María Elena García, "Death of a Guinea Pig: Grief and the Limits of Multispecies Ethnography in Peru" (2019) 11:2 Envtl Humanities 351 at 352–53, 356–59, 361–62.

2 Ursula K Heise, *Imagining Extinction: The Cultural Meanings of Endangered Species* (Chicago: University of Chicago Press, 2016) at Introduction, chs 5–6; Kate Rigby, *Dancing with Disaster: Environmental Histories, Narratives, and Ethics for Perilous Times* (Charlottesville, Va: University of Virginia Press, 2015); TJ Demos, Emily Eliza Scott & Subhankar Banerjee, *The Routledge Companion to Contemporary Art, Visual Culture, and Climate Change*, 1st ed (New York: Routledge, 2021) at 295–383; Helen Kopnina, "Beyond Multispecies Ethnography: Engaging with Violence and Animal Rights in Anthropology" (2017) 37:3 Critique of Anthropology 333 at 335–36, 339–42, 347–52; Leesa Fawcett & Morgan Johnson, "Coexisting Entities in Multispecies Worlds: Arts-Based Methodologies for Decolonial Pedagogies" in T Lloro-Bidart & VS Banschbach, eds, *Animals in Environmental Education: Interdisciplinary Approaches to Curriculum and Pedagogy* (Cham, Switzerland: Palgrave Macmillan, 2019) 175 at 176, 182–89; Sue Donaldson, Janneke Vink & Jean-Paul Gagnon, "Realizing Interspecies Democracy: The Preconditions for an Egalitarian, *Multispecies*, World" (2021) 8:1 Democratic Theory 71.

3 Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021) at 39–117 [Deckha, *Animals as Legal Beings*].

law legal system to kickstart a legal cultural and juridical conversation (and eventual shift) in substantially *raising* protections for animals (particularly farmed animals)? This article suggests that the rule of law can provide a noteworthy answer.

Our argument presumes that the question of what *proactive steps* governments must take to actualize nonhuman justice, for animals or otherwise, is a question that *can* theoretically engage rule of law concerns at the domestic and international level. As we discuss below, the rule of law can place pressure on lawmakers to institute change given its foundational and constitutional stature in many national jurisdictions and in international law. However, a commonplace view prevails that the rule of law in anthropocentric legal systems is unrelated to how we treat animals.[4] In those rare instances when jurists have framed the legal treatment of animals as a rule of law problem, the connection has been a limited one—the rule of law is said to be violated when governments fail to enforce *existing* laws for animals' benefit. This constricted vision of the rule of law is how Chief Justice Fraser (as she then was) of the Alberta Court of Appeal invoked the concept in favour of Lucy, an elephant in distress at the Edmonton Valley Zoo (who still resides there today), in her remarkable 2011 dissent in *Reece v. Edmonton* (*Reece*).[5] The Chief Justice stated that Alberta's lack of enforcement of its animal protection law when Lucy was clearly in distress was a matter of pressing concern as it engaged the rule of law.[6] From an animal protection perspective, this connection (of Lucy and her human advocates' interests in having the government enforce its animal welfare law) to the rule of law was a primary reason for the dissent's groundbreaking nature.[7] Chief Justice

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4 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 785 [Deckha, "Non-Anthropocentric Jurisprudence"].

5 2011 ABCA 238 [*Reece*], leave to appeal to SCC refused, 34453 (26 April 2012). The case was groundbreaking in terms of envisioning animals as vulnerable and suffering beings deserving something more from government than pure property treatment. For a detailed exposition, see Deckha, "Non-Anthropocentric Jurisprudence", *supra* note 4 at 797–813.

6 *Reece, supra* note 5 at paras 158–60.

7 The chief justice was aware that some readers and jurists would mock this suggestion, but held firm:

> Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy's case raises serious

Fraser uniquely highlighted the vulnerability of animals and their suffering through this connection, even though her opinion invoked only a minimal expectation about the rule of law when applied to animals (i.e., that existing laws be enforced particularly vis-à-vis government).[8]

In the present analysis, we seek to press the connection between the rule of law and animal justice beyond the poor enforcement of anticruelty laws (a problem afflicting many jurisdictions with animal welfare provisions),[9] as well as build upon nascent scholarship theorizing legal systemic animal use as at least presenting a constitutional problem implicating the rule of law.[10] Notably, we agree with John Adenitire's compelling

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> issues not only about how society treats sentient animals—those capable of feeling pain and thereby suffering at human hands—but also about the right of the people in a democracy to ensure that the government itself is not above the law (see *ibid* at para 39) [footnotes omitted].

8 The dissent asks whether the government is immunized from judicial scrutiny of unlawful acts in a case where advocacy groups sought public interest standing seeking a declaratory judgement that the government failed to comply with animal welfare laws (see *ibid* at para 47). For other expressions of this central issue, see *ibid* at paras 39, 53. That government abide by existing legislation may be said to be the bare minimum of what the rule of law means even while the concept is heavily contested (see Brian Z Tamanaha, "The Rule of Law and Legal Pluralism in Development" (2011) 3:1 Hague J on Rule L 1 at 4–5).

9 MB Rodriguez Ferrere, "Animal Welfare Underenforcement as a Rule of Law Problem" (2022) 12:11 Animals 1411 at 1412. As Ferrere notes, a further problem is the fact that anticruelty prosecutions are not undertaken by state officials but delegated "in most instances, [to] humane societies" to pursue (see *ibid*). A constitutional variant of this assignment-of-enforcement problem (in favour of human defendants) was recognized in a lower court judgment, but eventually overruled in *Ontario (AG) v Bogaerts*, 2019 ONCA 876 at paras 63–71. The litigation, however, caused the delegate humane society in Ontario to cease enforcement altogether, prompting the Ontario legislature to pass the *Provincial Animal Welfare Services Act*, 2019, SO 2019, c 13, setting out a state-run enforcement model.

10 John Adenitire argues that, if at its core, the rule of law is meant to protect subjects from "arbitrary power," then classic formal, procedural, and substantive theories of the rule of law should shift to encompass animals as subjects that benefit from the rule of law—since animals suffer from "arbitrary power" (see John Adenitire, "The Rule of Law for All Sentient Animals" (2022) 35:1 Can JL & Jur 1 at 1–4). Katie Sykes and Sam Skinner argue that the fact that ag-gag laws make existing poor enforcement of animal welfare laws more difficult and perpetuate the myth of proper legal regulation of farmed animals violates the rule of law (see Katie Sykes & Sam Skinner, "Fake Laws: How Ag-Gag Undermines the Rule of Law in Canada" (2022) 28:2 Animal L 229, s 1).

argument that the legal rendering of nonhuman animals as inferior in anthropocentric legal systems, and the power dynamics that thereby result through normalized human and corporate use, generate the type of arbitrariness against which the rule of law is meant to protect.[11] We imagine though that many others might disagree, preferring instead to view the rule of law as unaffected by such arbitrariness either because they see the concept as indelibly produced through anthropocentric logic as a matter of first principles, or at least implicitly suffused by it through judicial treatment. Under this view, the rule of law is not offended by human and corporate domination of animals and the latter's arbitrary exclusion as fundamental rightsholders is because legal precedent indicates that the rule of law is defined through human exceptionalism.

With our analysis we seek to provide a reply to the view that legal precedent bars a reading of the rule of law that transcends its normal containment to human justice matters and corresponding subordination of animals. We do so by asking whether Canadian jurisprudence contains precedent for a "thicker" vision of the rule of law that can incorporate animal interests in its purview to *generate* a higher standard of animal protection than the very little that currently exists.[12] We conclude that it does and further argue that this opening should not be summarily closed by ongoing anthropocentric reasons. Rather, we highlight existing legal commitments that suggest why, given that Canadian precedent on the rule of law does not presently bar a substantive vision that would include them (the first part of our argument), legal conversations should consider that vision further (the second part of our argument).[13]

The rule of law is neither a faultless nor ideal purveyor of justice. The rule of law has a complex and checkered history in relation to creating better and just legal orders.[14] Further, even if one believes that Canadian

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11 Adenitire, *supra* note 10 at 2.

12 The analysis thus focuses on judicial understandings of the rule of law and the enforcement of the rule of law that judges undertake. With this focus we do not wish to (further) obscure the dynamic by which the rule of law can also operate to check judicial power and the judicial role (see Robert Leckey, "Complexifying *Roncarelli*'s Rule of Law" (2010) 55:3 McGill LJ 721 at 737).

13 Our focus is on Canadian precedent, but such an analysis could also be carried out with respect to other jurisdictions.

14 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003) at ch 2.

law houses a relatively benign version of the concept today, persuading anthropocentric jurists that the concept can apply to animals would also likely be difficult. Certainly, entrenched anthropocentrism in the legal system makes our ultimate goal of having the rule of law protectively extend to animals an ambitious one. Exploring whether existing rule of law doctrine and other legal commitments in Canada can support an extension to protect animals, however, is still important. Given that Western anthropocentric legal systems have helped to engender the planetary fragility now affecting all living beings, rethinking these systems, even where the capacity of these systems to profoundly reorient seems doubtful, is necessary.[15] The rule of law has been critical to such legal systems, enabling—particularly through its protection of private property rights—the global modernization that exploits animals and other natural entities who are regarded as resources for human economic growth. The rule of law has thus enabled the anthropogenic forces creating the crisis-ridden era now referred to as the Anthropocene.[16] It thus seems necessary to try and redirect the rule of law in aspiring toward non-anthropocentric legal systems.[17] Entrenched legal norms *can* change to reflect values about interspecies justice and fundamental animal rights.[18] Moreover, the Supreme Court of Canada has revisited existing precedent, including its own, to remain responsive to society's needs.[19] We thus investigate

15 James Tully, "Sustainable Democratic Constitutionalism and Climate Crisis" (2020) 65:3 McGill LJ 545 (describing our present-day modernist legal and other systems as "vicious" and in need of transformation to "virtuous" ones at 548–49).

16 *Ibid* at 547, 550; Katalin Sulyok, "Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations" (2024) 13:3 Transnational Envtl L 1 at 6–8.

17 Maneesha Deckha, "Supplanting Anthropocentric Legalities: Can the Rule of Law Tolerate Intensive Animal Agriculture?" in Matilda Arvidsson and Emily Jones, eds, *International Law and Posthuman Theory* (London, UK: Taylor & Francis, 2024) 258 at 260–62 [Deckha, "*Supplanting*"]; Deckha, "Non-Anthropocentric Jurisprudence", *supra* note 4 at 797–99.

18 Catherine Hall, "Diffusing the Legal Conceptions of the Global South and Decolonizing International Law: Crystallizing Animal Rights through Inter-Judicial Dialogue" (2023) 4 Frontiers in Animal Science at 11. Switzerland, where constitutional recognition of animals' dignity endures, is an example of a jurisdiction where such change is underway (see Margot Michel, "Moving Away from Thinghood in Law: Animals as a New Legal Category?" (2023) J Animal L, Ethics & One Health 29 at 40–41).

19 Bradford W Morse & Kimia Jalilvand, "The Supreme Court of Canada: The Road to Authority, Legitimacy and Independence" in Monika Florczak-Wątor, ed,

whether the loftiest legal norm there is—the rule of law—can be redirected toward interspecies justice in Canada using existing legal precedent and other legal commitments.

To scaffold this exploration (which starts from the premise that while a thin vision of the rule of law would be a considerable boon for animals, a thicker vision would result in even stronger protections against use),[20] Part I gives a general snapshot of why animals fare so poorly under Canadian law presently, such that a bold legal intervention is required to initiate meaningful change. Part II follows with a review of the rule of law jurisprudence in Canada to demonstrate the existence of Canadian legal precedent for a thicker version of the rule of law that is not explicitly confined to benefitting only human subjects. Although the thinner version is the one that has been more frequently articulated by the Supreme Court of Canada, this part charts the significant precedent for a substantive vision. We argue that this body of precedent has accreted through multiple cases and at least once through a robust discussion of the rule of law at the Supreme Court of Canada,[21] and could theoretically extend to animals. Part III then turns to other legal commitments in the Canadian legal system, primarily reconciliation with Indigenous laws but also adherence to customary international law in the context of environmental law. We identify these commitments as further existing doctrinal reasons within the Canadian legal system to adopt a multispecies orientation toward the rule of law and to consider the present arbitrary legal treatment of animals as a rule of law violation.[22] Part IV provides some practical examples of the types of current arbitrary legal treatment the rule of

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Constitutional Law and Precedent: International Perspectives on Case-Based Reasoning, 1st ed (London, UK: Routledge, 2022) 32 at 48–50, 54.

20 Adenitire, *supra* note 10 at 3, 27–29.

21 This occurred in the 2002 prisoner voting rights case of *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*].

22 Although we believe our argument can apply to nonhumans at large, or for specific trees, other plants, bodies of water, land, and mountains, our primary focus is on the interests of animals. For scholarship that connects the rule of law to environmental rights issues, a connection we return to in Part III, see e.g. Heather Colby et al, "Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change" (2020) 7:3 Oslo L Rev 168; Jina J Kim, "Leave No One Behind: Realizing Environmental Justice through Climate Litigation Remedies" (2021) 48:2 Ecology LQ 409.

law would disallow and then outlines the shape such arguments against this objectionable treatment could take.

I. HOW THE PRESENT LEGAL SYSTEM ENABLES ANIMAL EXPLOITATION

The multiple adverse ways humans and corporations are legally allowed to treat animals are intimately connected to the rise of climate change, environmental devastation, zoonotic pandemics,[23] and food insecurity.[24] As a leading example, Canadian law gives animal food and other industries a wide berth in how they use animals. As another, anticruelty laws, antibestiality laws, and endangered species legislation are the core of legislation ostensibly protecting animals in Canadian law, but are beset by anthropocentric purposes and parameters.[25] Notably, consider that most pieces of anticruelty legislation contain blanket exceptions for common agricultural practices.[26] Industry actors decide how to treat the animals they commodify through self-regulation.[27] This means that dominant legal systems in Canada permit animal agriculture with a near-

23 Jodi Lazare, "Animal Rights Activism and the Constitution: Are Ag-Gag Laws Justifiable Limits?" (2022) 59:3 Osgoode Hall LJ 667 at 672–73 [Lazare, "Animal Rights Activism and the Constitution"]; Walter Willett et al, "Food in the Anthropocene: The EAT–Lancet Commission on Healthy Diets from Sustainable Food Systems" (2019) 393:10170 Lancet 447 at 447; David O Wiebers & Valery L Feigin, "What the COVID-19 Crisis Is Telling Humanity" (2020) 54:4 Neuroepidemiology 283 at 284–285.

24 Willett et al, *supra* note 23 at 477; Ivar Vågsholm, Naser Shah Arzoomand & Sofia Boqvist, "Food Security, Safety, and Sustainability—Getting the Trade-Offs Right" (2020) 4 Frontiers in Sustainable Food Systems at 2–3.

25 Deckha, "Non-Anthropocentric Jurisprudence", *supra* note 4 at 789; Maneesha Deckha, "Learning from the Animal Trials in the Anthropocene" (5 June 2025), online: <equality.jotwell.com> [perma.cc/YU3P-C4W7].

26 *Ibid*.

27 Maneesha Deckha, "The 'Pig Trial' Decision: The Save Movement, Legal Mischief, and the Legal Invisibilization of Farmed Animal Suffering" (2018) 50:1 Ottawa L Rev 65 at 82–84; Jessica Eisen, "Feminist Jurisprudence for Farmed Animals" (2019) 5 Can J Comp & Contemporary L 111 at 142–43; Peter Sankoff, "Canada's Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?" (2019) 5:1 Can J Comp & Contemporary L 299 at 302.

free rein as to how they breed, raise, and treat animals before slaughter.[28] Canadian law is virtually silent regarding other industry regulation of animal treatment, creating a state of regulatory lapse in relation to establishing standards for animal treatment in animal-use industries in marked contrast to the hyperregulatory nature of society otherwise.[29]

While Canadian law abandons animals, the law is actively facilitating animal-use industries' success and their presumed "private" and "good" nature. This occurs through routine entrenchment of animals' property status, as well as through specific laws such as ag-gag legislation supportive of property rights in animals,[30] vigilant against trespass or whistleblowing, or even public protest,[31] and laws supplying favourable quotas, taxation, and subsidies.[32] Moreover, the jurisprudence generally takes an instrumentalist, animal-silencing approach where animal advocates have challenged the actions of those with legal control over animals.[33] To expect a reversal of existing anthropocentrically-oriented laws and policies

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28 Canadian animal (and other) agriculture benefits from heightened immunity from legislators that qualifies as a type of "agricultural exceptionalism" (see Jessica Eisen, "Down on the Farm: Status, Exploitation, and Agricultural Exceptionalism" in Charlotte Blattner, Kendra Coulter & Will Kymlicka, eds, *Animal Labour: A New Frontier of Interspecies Justice?* (New York: Oxford University Press, 2019) 139 at 143); Lazare, "Animal Rights Activism and the Constitution", *supra* note 23 at 706.

29 Maneesha Deckha, "Fifty Years of Taking Exception to Human Exceptionalism: The Feminist-Inspired Theoretical Diversification of Animal Law Amidst Enduring Themes" (2023) 46:1 Dal LJ 339 at 344–47 [Deckha, "Fifty Years"]. For a discussion of similar self-regulation in biomedical research of animals, see Laura Janara, "Human-Animal Governance and University Practice in Canada: A Problematizing Redescription" (2015) 48:3 Can J Political Science 647 at 654–55. For a discussion of the expansive nature of the regulatory state in Canada, see Colleen M Flood & Lorne Sossin, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2022) at 3–4.

30 Jessica Eisen, "Milked: Nature, Necessity, and American Law" (2019) 34 Berkeley J Gender L & Just 71 at 111–12 [Eisen, "Milked"].

31 Jodi Lazare, "Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?" (2020) 58:1 Alta L Rev 83 at 88–92, 98–102.

32 Maneesha Deckha, "Something to Celebrate?: Demoting Dairy in Canada's National Food Guide" (2020) 16:1 J Food L & Pol'y 11 at 29–34 [Deckha, "Demoting Dairy"].

33 See the majority decision in *Reece*, *supra* note 5; *Cassells v University of Victoria*, 2010 BCSC 1213; *Greenpeace Foundation of British Columbia v British Columbia (Minister of the Environment)*, 1981 CanLII 265 at paras 5, 13–15, 17 (BCSC); *Teja's Animal Refuge v Quebec (AG)*, 2009 QCCA 2310.

at Canadian federal, provincial, and municipal levels in the short- or medium-term is unrealistic. Yet, theorizing innovative legal pathways that may have some eventual traction against what can only be described as a deep regulatory capture that the animal-based food lobbies enjoy is valuable.[34] Scholarly consideration of how to recalibrate the legal status of animals in law when the traditional channels of legal change—legislation or judge-made law—are slow-moving and a human exceptionalist mindset stands firm may eventually help bring this recalibration to fruition.[35] Animal law scholars have proposed multiple ways forward,[36] with some encouraging innovative application of existing legal norms given the extensive challenges in convincing human jurists that the anthropocentrism of the law is legally objectionable.[37] However, few have thus far focussed on how the rule of law could serve as a platform for animal law reform and the doctrinal viability of rule of law-based arguments in favour of animals. The remainder of this article focuses on this theorization and analysis in the Canadian context.

II. THE PRECEDENT IN CANADIAN RULE OF LAW DOCTRINE FOR A NON-ANTHROPOCENTRIC REDIRECTION

This Part reviews Canadian jurisprudence on the rule of law, relying on and updating Mary Liston's recent summary, and concludes that while the thin version predominates, rule of law precedent also supports a more

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34 On the value of scholarly theoretical analysis to influence eventual legal change with respect to animal rights, see Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Cham, Switzerland: Springer, 2023) at 5. On regulatory capture, see Deckha, "Demoting Dairy", *supra* note 32 at 29–34; Conner Peta, "Canada's Supply Management System and the Dairy Industry in the Era of Trade Liberalization: A Cultural Commodity?" (2019) 49:4 American Rev Can Studies 547 at 559; Oliver Lazarus, Sonali McDermid & Jennifer Jacquet, "The Climate Responsibilities of Industrial Meat and Dairy Producers" (2021) 165:30 Climatic Change 30 at 4.

35 Gilbert P Carrasco, "Effecting Social Change Through Legal Scholarship" (1991) 10:1 St Louis U Pub L Rev 161 at 166; Scott L Cummings, "Empirical Studies of Law and Social Change: What is the Field? What are the Questions?" (2013) 2013:1 Wis L Rev 171 at 176.

36 Deckha, "Fifty Years", *supra* note 29 at 357–68; Jessica Eisen, "Of Linchpins and Bedrock: Hope, Despair, and Pragmatism in Animal Law" (2022) 72:4 UTLJ 468 at 470–71.

37 Eisen, "Of Linchpins and Bedrock", *supra* 36 at 471–72; Stucki, *supra* note 34 at 11.

substantive rule of law vision that would allow a future embrace of animal interests.

A. A Thin Vision Predominates

Canada has inherited the "institutional foundations" of the formal rule of law from Britain. As Mary Liston observes in her incisive textbook overview, these include the typical features of the Westminster system: the separation of powers, respect for legal doctrine as a source of epistemic claim-making, respect for the common law, and independent professionalized legal institutions.[38] As Liston further comments, these foundations and the basic features of the procedural vision defined above have shaped the dominant understanding of the rule of law by the Supreme Court of Canada.[39] In the 1998 *Quebec Secession Reference*, the Court noted that "at its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct its affairs."[40] Although the statement indicates a minimal standard with no maximum endpoint, broadly speaking, the Court has generally endorsed a thin, formal conception of the rule of law.[41] Liston itemizes the rule of law descriptions the Court has used:

> (1) it is supreme over private individuals as well as over government officials, who must exercise their authority non-arbitrarily and according to law, (2) it requires the creation and

38 Mary Liston, "Administering the Canadian Rule of Law" in Flood & Sossin, *supra* note 29 at 74. Dicey said that in England, the rule of law was so deeply embedded in society, it "can hardly be destroyed without a thorough revolution in the institutions and manners of the nation" (AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London, UK: Macmillan and Co, 1885) at 214).

39 Liston, *supra* note 38 at 75. Liston lists the following cases and pinpoints from the Court corresponding to each description: *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 1959 CanLII 50 (SCC) [*Roncarelli*]; *Re Manitoba Language Rights,* [1985] 1 SCR 721 at paras 55–66, 1985 CanLII 33 (SCC) *[Manitoba Language Rights Reference]*; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 58 [*Imperial Tobacco*]; *Reference re Renumeration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 123, 1997 CanLII 317 (SCC); *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 38–39; see Liston, *supra* note 38 at n 10.

40 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 1998 CanLII 793 (SCC) [*Quebec Secession Reference*].

41 Liston, *supra* note 38 at 85.

> maintenance of a positive order of laws; (3) it requires the relationship between the state and the individual to be regulated by law; and (4) it is linked to the principles of judicial independence and access to justice.[42]

We see that these descriptions lean toward the procedural-formalist thin vision. In other cases captured in Liston's description list, as well as in others that are not,[43] the Court considerably narrowed the scope and effect of the principle in Canadian constitutional law. These (thinner) parameters of the rule of law are said to be embedded in our written constitution and unwritten constitutionalism even while other thinner elements are absent.[44]

Perhaps most strongly, as Liston notes, in *Imperial Tobacco* the Court stated that under the rule of law, legislation—except legislation pertaining to criminal law—need not be prospective, arguably diluting the thinner version even more. Further, the rule of law is not against special privileges being conferred on the government. It does not mandate procedural even-handedness in a civil trial and it cannot invalidate legislation.[45] The Court argued that protection from unfair or unjust legislation lies not in the rule of law and the courts, but through other constitutional provisions, forms of government redress, or at the ballot box.[46] More recently, the 2019 majority decision from the Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (*Vavilov*), a case revisiting administrative law doctrine about the standard of review to be applied to administrative decision-making in various contexts, reinforced a formalistic rule of law approach, inviting criticism from the dissent that favoured a non-Diceyan vision.[47] Some have classified this recent majority decision

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42 *Ibid* at 75. (Liston lists the corresponding cases affirming these guarantees in n 10.)

43 See e.g. *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 134.

44 Liston, *supra* note 38 at 75, 82. See Preamble to the *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5; Preamble to the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

45 For discussion on *Imperial Tobacco* at para 65, see Liston, *supra* note 38 at n 45.

46 *Imperial Tobacco, supra* note 39 at paras 65–66; as discussed by Liston, *supra* note 38 at 84.

47 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 17, 64, 240–44 [*Vavilov*]. *Vavilov* is the most recent case wherein the Supreme Court

as Diceyan for its faith in courts to deliver the right and consistent answer when certain important questions are involved in decision-making. In the past few years, the Supreme Court has repeated this concern regarding certainty and predictability in no less than 45 percent of cases in which the Court mentions the concept "rule of law."[48]

B. Accretive Precedent for Open-Endedness of the Rule of Law

Though repeatedly espousing faith in a procedural rule of law that emphasized classic features of a "thin" version, Canadian jurisprudence has departed from a strict Diceyan vision by valuing administrative regulation. The Diceyan vision of the rule of law left little space for administrative discretion, but the Canadian iteration has allowed for it in recent decades. Discretion is seen to be an increasingly valued element of modern administrative decision-making, particularly in matters traditionally seen as judicial functions.[49]

More importantly for present purposes is the reality that departure from the Diceyan vision has also emerged from endorsement of a substantive approach to defining the rule of law. A substantive rule of law vision is detectable in early as well as more recent cases of the Supreme Court of Canada. Famously, in the 1959 case of *Roncarelli v. Duplessis,* Justice Rand's concurring judgement noted that an administrative decision, though it met the four corners of the applicable legal framework, contradicted the substantive content of the rule of law.[50] Justice Rand

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of Canada set out to revise the standard of review doctrine. It involved a decision by the Registrar of Citizenship revoking a renewal of a passport. For more on the somewhat sensational facts of the case and the decision's importance to standard of review doctrine, see Paul Daly, "The Vavilov Framework and the Future of Canadian Administrative Law" (2020) 33:2 Can J Admin L & Prac 111 at 112–13, 116. On the dissent's different approach to the rule of law, see *Vavilov*, *supra* note 47 at para 130.

48 A search on CanLII for cases mentioning "rule of law," filtered for Supreme Court of Canada cases from January 1, 2020 and onward, generated the following results: 42 total cases mentioned the concept "rule of law," with 19 cases (45.2%) linking the concept with certainty/predictability/consistency, 5 cases (11.9%) linking the concept with access to justice, 6 cases (14.3%) linking the concept with being synonymous to codified law, 6 cases (14.3%) linking the concept with public confidence, and 6 cases (14.3%) linking the concept with other principles.

49 See Liston, *supra* note 38 at 90–91.

50 *Roncarelli*, *supra* note 39 at 142.

included in that content not just good faith decision-making and fair procedures, but the fundamental rights of freedom of religion and freedom of expression as well, without any explicit supporting constitutional provisions.[51] This was controversial at a time when persecution of religious minorities was not widely perceived as discriminatory, and demonstrates the susceptibility of the rule of law to competing interpretations; it also shows the ways in which unwritten legal principles and widely accepted public morality might bind the use of public authority.[52]

Two other leading cases, *Reference Re Secession of Quebec* (*Quebec Secession Reference*) and *Reference Re Manitoba Language Rights*, that provide extensive discussions of the rule of law by the Supreme Court of Canada also implicitly house a substantive vision for the concept.[53] Both link the principle of legality and the rule of law with certain values, namely democratic notions and parliamentary sovereignty. In *Quebec Secession Reference*, for example, the rule of law and democracy are the key basis of state legitimacy and legality. "The consent of the governed" is emphasized, with the Court stating that "democracy in any real sense of the word cannot exist without the rule of law."[54] Ultimately, the Court describes the rule of law and democracy as two separate principles: "[L]egitimacy ... requires an interaction between the rule of law and the democratic principle."[55] Yet, the Court also finds that legitimacy rests on "an appeal to moral values, many of which are imbedded in our constitutional structure."[56]

In several other cases dealing with judicial independence, the rule of law is used in a way that suggests it may, on its own, strike down legislation or require specific government action, another departure from the

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51 This case occurred before the introduction of the *Canadian Charter of Rights and Freedoms,* s 2, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

52 Liston, *supra* note 38 at 88–89.

53 *Quebec Secession Reference, supra* note 40; *Manitoba Language Rights Reference, supra* note 39.

54 *Quebec Secession Reference, supra* note 40 at para 67.

55 *Ibid.*

56 *Ibid.*

procedural thin vision and a nod to a thicker vision.[57] We can further note that the Court referred to the competing interpretations within the scholarly debate about the contours of the concept,[58] and affirmed that the rule of law is an "amorphous ... principle."[59] Indeed, the amorphous quality of it was on display in very recent discussions of the concept at the Court. In the leading standard of judicial review decision in *Vavilov* in 2019,[60] in response to the majority judgment's view of the rule of law as mandating placing courts as the final decision-maker with respect to certain categories of questions that administrative decision-makers make, the dissenting judgment pointedly stated that the "rule of law is not the rule of courts."[61] Even more recently at the Court, the majority differed from its dissenters as to what the scope of access to justice to the courts is,[62] whether precedent should be followed regarding the meaning of section 15 *Canadian Charter of Rights and Freedoms* (*Charter*) equality rights,[63] and whether the rule of law can tolerate legislation that gives

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57 Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 UTLJ 715 at 727–29 (discussing *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13*); Rice v New Brunswick*, 2002 SCC 13 at para 69; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 at para 10 (SCC), and *BCGEU v British Columbia (Attorney General),* 1988 CanLII 3 at 230 (SCC).

58 *Imperial Tobacco, supra* note 39 at para 61, citing Hogg and Zwibel, *supra* note 57 at 717–18.

59 *Ibid* at para 66.

60 This view is also reflected in the standard of review doctrine preceding the recent *Vavilov* decision. What precisely is the appropriate relationship between administrative, executive, legislative, and judicial powers under the rule of law—and, indeed, which body is seen to make law—is a lively debate with favourable reception for the Diceyan vision of the rule of law in Canada oscillating over decades. See *Vavilov*, *supra* note 47 at para 1; Daly, *supra* note 47 at 116.

61 *Vavilov*, *supra* note 47 at para 241, per Abella and Karaksatanis JJ. This critique was renewed by Justice Karaksatanis in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association,* 2022 SCC 30 at paras 128–29.

62 *Trial Lawyers*, *supra* note 39 at paras 38–39, 81.

63 *Fraser v Canada* (*Attorney General)*, 2020 SCC 28 at paras 133–36, 220. The dissenting judgment of Justices Brown and Rowe that would have narrowed the remit of the meaning of "substantive equality" in section 15 *Charter* jurisprudence drew from Lord Bingham's (substantive) account of the rule of law, albeit emphasizing its procedural dimensions.

the executive branch power to amend legislation.[64] Contrasting—even conflictual visions of the rule of law within a single judgment—are also found in more "classic" Canadian rule of law decisions.[65]

From this review it seems fair to conclude that several competing conceptions of the rule of law have been articulated by the Supreme Court of Canada over past decades, with several apex cases ascribing the concept with "normative force," leaving it open to any one interpreter to choose one interpretation and justify that choice in law.[66] In the domestic jurisprudence of other Western jurisdictions, the meaning of the rule of law has also shifted across time.[67] As Liston suggests, the concept

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64 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 88, 273–74. According to the majority:

> In the case at bar, Parliament, far from abdicating its legislative role, has in the *GGPPA* instituted a policy for combatting climate change by establishing minimum national standards of GHG price stringency. Sections 166(2), 166(4), 168(4) and 192 of the *GGPPA* simply delegate to the executive a power to implement this policy. This delegation of power is within constitutionally acceptable limits and the general rules of administrative law apply to constrain the Governor in Council's discretion under all these provisions (para 88).

Justice Côté's partial dissent, in contrast, noted:

> There are two additional rule of law concerns with the delegation of legislative power to the executive. The first, as Professor Elmer A. Driedger noted, the "delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be found in the statute book" ... This gives rise to confusion and uncertainty, which are inimical to the rule of law ... The second additional concern is that Henry VIII clauses endow the executive with authority to act arbitrarily. They do so by permitting the executive to act contrary to the empowering statute, creating an authority without meaningfully enforceable limits and thus an absolute discretion (paras 273–74).

65 Liston, *supra* note 38 at 86–89. Although differing from Liston's reading, but similarly supporting our argument here, Robert Leckey shows how the rule of law influenced the majority and dissenting judgments in *Roncarelli*, contrary to typical scholarly assessment that only Justice Rand's judgment espouses a rule of law vision (see Leckey, *supra* note 11 at 724).

66 Liston, *supra* note 38 at 83.

67 The Australian and UK jurisprudence invoking the rule of law suggests a largely procedural vision of the rule of law. Though, like in Canada, different judgments have invoked shifting and contradictory visions of the rule of law. Their case law regarding prisoner disenfranchisement refers to arbitrariness and proportionality, but it doesn't

"remains normally subterranean in most legal cases," likening it to an "underground stream that occasionally burbles up into full sight."[68] This open-endedness leaves room for the rule of law to remain flexible and expand even as we abide by the Court's direction that "[t]he rule of law is not at invitation to trivialize or supplant the Constitution's written terms" or challenge legislation that may be offensive to a particular cohort, but is nonetheless constitutional.[69]

C. *Major Precedent for a Substantive Vision That Can Apply to Animals:* Sauvé

Together, the sources above form a basis from which to argue for a substantive approach to the rule of law in Canadian law that can extend to animals. The majority ruling in *Sauvé v. Canada (Chief Electoral Officer)* (*Sauvé*), addressing the political disenfranchisement of prisoners, considerably amplifies this argument.[70] A closer look at the decision is thus illuminating.

At issue was whether a provision of the *Canada Elections Act* that disenfranchised prisoners serving a sentence of two-years or more violated the right to equality and was thereby unconstitutional. A five-to-four majority of the Court held that the provision did violate the right to

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invoke the rule of law in the same capacity as the Supreme Court. See *R (on the application of Chester) v Secretary of State for Justice*, [2023] EWHC 1407 at paras 20, 83, 108, 128, 134*; McGeoch (AP) v The Lord President of the Council and another (Scotland),* [2013] UKSC 63; *Roach v Electoral Commissioner,* [2007] HCA 43 at paras 1–21, 141, 145.

68 Liston, *supra* note 38 at 84; Hogg & Zwibel, *supra* note 57 at 732.

69 *Imperial Tobacco*, *supra* note 39 at para 67.

70 Richard Sauvé first appeared before the Supreme Court of Canada in 1993. In that earlier case, the Court quickly concluded that a provision of the *Canada Elections Act* (CEA) that disenfranchised all prisoners unreasonably contravened the *Charter* as the provision is "drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component." The Court held that section 51(e) of the *Canada Elections Act,* RSC 1985, c E-2 as it appeared in 1985 contravened section 3 of the *Charter* and was not saved under section 1 of the *Charter* (see *Sauvé v Canada (Attorney General)*, 1993 CanLII 92 (SCC)). Parliament then amended the CEA to only disqualify prisoners serving sentences of two years or more (Bill C-114, *An Act to amend the Canada Elections Act,* 3rd Sess, 34 Parl, 1993, cl 51(e) (Assented 6 May 1993), SC 1993 (3rd Sess), c 19). Sauvé challenged the amended legislation before the Court once again in 2002.

equality protected by section 15 of the *Charter* and was also not justified under section 1 of the *Charter*.[71] Chief Justice McLachlin (as she then was) wrote the majority decision, applying the section 1 justification test from *R v. Oakes*,[72] requiring the government show "that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justifiable."[73] Chief Justice McLachlin opened her decision with the statement that "(t)he right of every citizen to vote ... lies at the heart of Canadian democracy," an importance she repeated multiple times in the judgment.[74] The government argued that prisoner disenfranchisement was "a matter of social and political philosophy, requiring deference" from the Court in considering whether the government's actions met the requisite tests justifying the limit placed on the right to vote.[75] Chief Justice McLachlin rejected a deferential posture on multiple grounds, first stating that deference "is not appropriate ... on a decision to limit fundamental rights."[76] She characterized *Charter* rights as a "function of membership in the Canadian polity," rather than a matter of merit or privilege.[77] As the chief justice saw it, "it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter*" that the courts must be vigilant in their constitutional duty to "protect the integrity of the system."[78] Chief Justice McLachlin further rejected the government's suggestion that deference was warranted because the legislation was animated by "philosophical" and "symbolic" objectives.[79] Finally, she rejected the argument that the Court "should defer to Parliament as part of a 'dialogue.'"[80]

The phrase "rule of law" appears 46 times throughout the majority and dissenting judgements that reveal conceptual contestation by both

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71 *Sauvé*, *supra* note 21 at para 64.

72 *R v Oakes,* 1986 CanLII 46 at para 49 (SCC).

73 *Sauvé, supra* note 21 at para 7.

74 *Ibid* at paras 1, 9, 14, 27, 31.

75 *Ibid* at para 12.

76 *Ibid* at paras 12–13.

77 *Ibid* at para 14.

78 *Ibid* at para 15.

79 *Ibid* at para 16.

80 *Ibid* at para 17.

of central yet abstract values, as well as disagreement about the utility of "abstract and symbolic" values themselves in the 208-paragraph case.[81]

Indeed, normative theorizing is the vehicle through which the majority decision in *Sauvé* advances a capacious conceptualization of the rule of law, firmly connecting it to substantive democratic rights, and clearly rejecting an analysis in which respect for the law is required from those not able to register input in the system that governs them.[82] The majority advances the view that "[a]ny strategy … to encourage respect for law *as a democratic institution* (should) emphasize the fact that those subject to the law by and large contribute to its creation."[83] A substantively-oriented rule of law vision is the vision the majority marshalled to state that Canada enjoys "universal suffrage" and this universality of the franchise gives Canadian law its legitimacy. For the majority, the exclusion of children does nothing to diminish the ostensible universality of the franchise.[84] The dissent, preferring a different normative outlook, criticizes this aspect of the judgement, framing the question as not whether prisoners are citizens but whether they are members of a political community.[85] With this normative departure point, the dissent does not perceive the measure as offending the rule of law because the rule of law does not stretch that far.

D. Extending to Animals: Rule of Law Doctrine Can Support a Non-Anthropocentric Redirection

The conceptual jockeying in *Sauvé* is solid precedent in Canadian law for an expansive vision of the rule of law—one that can encompass animals. To accept this reading of the case, one need not apprehend a close link between voting rights and the protection of animals.[86] Rather,

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81 *Ibid* at paras 8, 100, 102.

82 Michael Plaxton & Heather Lardy, "Prisoner Disenfranchisement: Four Judicial Approaches" (2010) 28:1 BJIL 101 at 108.

83 *Ibid* at 108*; supra* note 13 at para 116 (emphasis added).

84 *Sauvé*, *supra* note 21 at para 37.

85 *Ibid* at para 119.

86 As observed at the outset, the law is encapsulated in a severe anthropocentric framework, and Chief Justice McLachlin very likely did *not* have a multispecies orientation in mind when she spoke about the rule of law as supportive of progressive enfranchisement or as generally capable of change. However, one can establish a close link, even though

the connection can crystallize through *Sauvé*'s higher-level argumentation about the rule of law. The majority decision liberally invoked political and social theories in taking up the equality claim and relies on such theories rather than empirical proof as a core driver of the debate that splits the court five-to-four, as the dissenting judgment also highlights.[87] Both judgments arrived at their conclusions about the content of the rule of law through open-ended, values-based inquiries, differing in their historical readings and contemporary valuations of what further necessary yet "abstract and symbolic" concepts of democracy, rights, and animating values of the *Charter* mean.[88] *Sauvé* reveals that the rule of law is a doctrinally contested concept amenable to different readings, and also highlights the type of bold normative outcome—absolute prohibition on disenfranchisement—that can flow from its application. The majority decision also connected its generous reading of the rule of law to social justice measures of inclusiveness and equity.[89] These are all also grounds that

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our argument in the present analysis does not rely on this link. But we set it out here in any case given its rising prominence in the field of animal ethics: The rule of law vision deployed by the majority in *Sauvé* suggests the involvement of subjects of the law in making the law is where law acquires its legitimacy. Animal political scholars have highlighted the illegitimacy of law for this very reason—that is, denying animals democratic participation even though the law greatly affects their lives (overwhelmingly, for the worse). Such scholarship contends that a just legal order and democracy must include animals as subjects within the polis and find meaningful ways to actualize their choices and participation. For a helpful overview of this literature, see Robert Garner, "The Case for an Interspecies Theory of Democracy" (2022) 12:1 J Animal Ethics 96 at 100; Donaldson, Vink & Gagnon, *supra* note 2. One need not give the formal right to vote under this expanded vision of the polis, but instead provide enfranchisement through other methods of facilitating animal participation in addition to humans representing their interests (see Garner, *supra* note 86 at 100).

87 *Ibid* at para 99. For example, the dissent discusses social contract theory (see *ibid* at para 115). Chief Justice McLachlin does not cite the Supreme Court's previous rulings on the rule of law or attempt to offer any kind of concrete definition in her reasons apart from its relationship to democratic rights. While Justice Gonthier does note the political and philosophic concepts that are being engaged, he does not provide any concrete definitions of the rule of law either. Instead, he suggests deference to the government's conception of it (see *ibid* at para 105).

88 See e.g. *ibid* at para 110.

89 The majority characterizes "the history of democracy" as being "the history of progressive enfranchisement" and a shift from an era when a "few meritorious people" voted, "expressed in terms like class, property and gender," to the modern system of universal suffrage; the majority says this culminated in 1982 with the constitutional enshrinement of section 3 in the *Charter* (see *ibid* at para 33). The connection to human rights and

support *inclusion* of animals, rather than exclusion, through future innovating when defining abstract legal concepts.

With respect to the last point about promoting inclusiveness and equity, we can observe that animals are also a vulnerable and marginalized population and socially and legally excluded.[90] Some precedent in Canada explicitly recognizes this. Recall that Chief Justice Fraser in *Reece* underscored animals' vulnerability due to their legal subordination as property as part of her contribution in that case that "institute[d] an opening for non-anthropocentric jurisprudence in Canada."[91] Also consider that Canadian law is familiar with the term 'vulnerability' in general and has recognized animals as vulnerable in multiple instances since Chief Justice Fraser's opinion in *Reece*.[92] Although such cases overwhelmingly concern anticruelty cases involving companion animals, we note at least one instance of a lower court recognizing farmed animals as "vulnerable."[93] At the very least, an emergent line of case law recognizing animal vulnerability vis-à-vis domesticated animals is discernible. Further, wildlife statutes already commonly apply the concept of vulnerability to wild animal species,[94] and the framing of animal species as a whole as

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equality is also explicitly noted. Chief Justice McLachlin quotes a South African prison voting rights case in which the right to vote is "a badge of dignity and of personhood. Quite literally, it says that everybody counts" (see *ibid* at para 35, citing *August v Electoral Commission*, [1999] (3) ZACC 3 (SAFLII) at para 17).

90 We are aware that some may perceive the situation of humans in prison as incongruous with animals in confinement. For more on this comparison, see generally Lori Gruen and Justin Marceau, *Carceral Logics: Human Incarceration and Animal Captivity* (Cambridge, UK: Cambridge University Press, 2022) at 2; Kathryn Gillespie, "Placing Angola: Racialisation, Anthropocentrism, and Settler Colonialism at the Louisiana State Penitentiary's Angola Rodeo" (2018) 50:5 Antipode 1267 at 1270.

91 Deckha, "Non-Anthropocentric Jurisprudence", *supra* note 4 at 801–04, 814.

92 A search on CanLII for "vulnerable animals" retrieved 24 cases where courts had used this phrase, including the Supreme Court of Canada's bestiality case *R v DLW*, 2016 SCC 22 at para 69 [*DLW*]. For more discussion of this point, see also Maneesha Deckha, "Vulnerability, Equality, and Animals" (2015) 27:1 CJWL 47 at 68 [Deckha, "Vulnerability, Equality, and Animals"].

93 The British Columbia Supreme Court recognized that "[l]ivestock are vulnerable animals" albeit in the context of susceptibility to attacks by neighbouring dogs, as opposed to being harmed through normalized farming and slaughter (*R v Robinson*, 2014 BCSC 1463 at para 124).

94 See e.g. *Wildlife Act*, RSBC 1996, c 488, s 6 (2).

vulnerable animates endangered species legislation.[95] This established precedent viewing animals as "vulnerable" helps ground the argument (drawing from the connection that the majority drew in *Sauvé* between the rule of law, vulnerable groups, and inclusiveness) that to continue to exclude vulnerable animals is a matter that implicates the rule of law.

In sum, we can conclude that *Sauvé* amplifies the rule of law precedent already available (as explained in section 4.2) for an open-ended reading of the rule of law in favour of animals. Precedent thereby exists for a thicker, substantive rule of law vision that recognizes animal vulnerability and seeks to bring about laws that reduce vulnerability. It would be conceding too much to presume that such rule of law precedent cannot travel across the legal species divide to apply to actual animal beings who are also deeply vulnerable,[96] something Canadian appellate courts, including the Supreme Court of Canada, have recognized.[97] The case law contains no explicit statement that the rule of law cannot relate to ideas about rights or other legal entitlements for nonhuman members of our society. To the contrary, to the extent that sentient animals may already be considered partial rightsholders, depending on how we read the limited protections contained in anticruelty legislation and understand the term "rights,"[98] it may be incumbent on a rule of law-abiding legal system to include animals in its anti-arbitrary purview.[99]

III. INDIGENOUS LAWS AND ENVIRONMENTAL LAW AS FURTHER SUPPORT FOR A NON-ANTHROPOCENTRIC REDIRECTION

The strikingly animal-friendly dissent in *Reece*, highlighted at the outset of this analysis, provides legal support that *underenforcement* of animal welfare laws implicates the rule of law. The above analysis demonstrates that legal support—indeed, precedent—also exists in general in Canadian rule of law jurisprudence for normative visions to direct the

95 See e.g. *Species at Risk Act*, SC 2002, c 29 at s 6.

96 Deckha, *Animals as Legal Beings, supra* note 3 at 122.

97 *Reece*, *supra* note 5 at para 162, Fraser CJ, dissenting; *R v Chen*, 2021 ABCA 382 at para 39; *DLW*, *supra* note 92 at para 69.

98 Yaffa Epstein & Eva Bernet Kempers, "Animals and Nature as Rights Holders in the European Union" (2023) 86:6 Mod L Rev 1336 at 1349.

99 Adenitire, *supra* note 10 at 14–18.

meaning of the rule of law. To recap the analysis thus far, although the conceptualization of the rule of law appears to fall short of a truly substantive vision in Canadian jurisprudence overall, *Sauvé* is strong legal precedent that normative visions about rights and who holds them are closely connected to our understandings of what the rule of law requires in Canada. Overall, the case serves as legal precedent for an evolving substantive vision of the rule of law—one that could address animals' interests. Moreover, nothing explicit in the Canadian rule of law jurisprudence rejects animals as recipients of rule of law protection. Indeed, the classification of animals as "vulnerable" by Chief Justice Fraser in *Reece*, and affirmed since then, is one that calls for more legal protection, suggesting that legal normative visions directed by the rule of law can apply to animals.

In this Part, we turn to legal developments in areas *outside* of Canadian rule of law doctrine that provide, as we argue below, further legal support for a non-anthropocentric redirection of the rule of law in Canada. Most notably, the reconciliation-forward responsibility to incorporate Indigenous legal orders into analysis of Canadian law is, as discussed below, supportive of a non-anthropocentric redirection.[100] We also flag recent developments in international and Canadian environmental law as further support. We do not discount the normative connections between expanding the scope of the rule of law to extend to animals and larger anticolonial and environmental efforts. Specifically, an expansion would challenge the settler-colonial legal view that humans are superior to all other beings and should approach nonhumans through an extractive rather than sustainable model.[101] However, our purpose is to highlight the legal connections.

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100 Space does not permit full argumentation about the precise precedential value of Indigenous laws for Canadian doctrine, but the discussion is suggestive of how developments in affirming and respecting Indigenous legal orders in Canada provides support to redirect the rule of law toward animal interests.

101 Hall, *supra* note 18; Tully, *supra* note 15 at 556.

A. Revitalizing the Rule of Law Through Indigenous Legal Principles

The majority decision in *Sauvé* reminds us that progressive normative philosophical visions can drive legal argument.[102] In other words, we need not be wed to law's anthropocentric (and colonial) trappings, especially if we wish to intervene in present-day crises. The rule of law, if redirected, could theoretically support a philosophical vision that objects to nonhuman exploitation, instrumentalization, and commodification. This is especially so if we recognize the ethical obligations of Canadian law to incorporate Indigenous legal principles and the possibility of reading existing Canadian doctrinal principles in such a vein,[103] even when those principles are subtle and encode a deep foundational bias against animals.[104] Elevating the legal status of animals in Canadian law is one way that Canadian law can integrate Indigenous legal teachings about the worth of animals and follow Indigenous legal orders that ascribe legal subjectivity to animals.[105]

The "braiding" of legal orders in this way to dislodge the anthropocentric orientation of Canadian law would be an integration that

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102 Constitutional scholars have also reminded us of this possibility for the rule of law to "thicken" not simply due to existing judicial precedent, but also understanding "law" as a capacious concept. Arguing that equality-oriented advisory guidelines to improve women's outcomes in spousal support generated through processes that model the very best of public decision-making are a legitimate source of "law" even though formulated by non-state actors, see e.g. Jodi Lazare, "The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law" (2019) 31:2 CJWL 317 at 342.

103 John Borrows, "Introduction" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Center for International Governance Innovation, 2019) 1 at 3–7 [Borrows et al, *Braiding Legal Orders*]; John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 4.

104 Jessica Eisen, "Constitutional Animal Protection: Written Commitments and Unwritten Principles" in Anne Peters, Kristen Stilt & Saskia Stucki, eds, *The Oxford Handbook of Global Animal Law* (Oxford, UK: Oxford University Press) [forthcoming in 2026].

105 Maneesha Deckha, "Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood" (2020) 41:1 J Intercultural Studies 77 at 78 [Deckha, "Unsettling Anthropocentric Legal Systems"]; Meaghan S Weatherdon, "Religion, Animals, and Indigenous Traditions" (2022) 13:7 Religions 654 at 662; Ruth Koleszar-Green & Atsuko Matsuoka, "Indigenous Worldviews and Critical Animal Studies: Decolonization and Revealing Truncated Narratives of Dominance" in Atsuko Matsuoka & John Sorenson, eds, *Critical Animal Studies: Towards Tran-species Social Justice* (London, UK: Rowman & Littlefield International, 2018) 333 at 334–35.

advances the normative goal of decolonizing Canadian law.[106] However, such braiding is also arguably a *legal* requirement within Canadian law. Consider the legal requirement to integrate Indigenous laws in giving contemporary legal meaning to common law concepts implicated in the resolving of the section 35 constitutional analysis.[107] Consider also that the federal government domesticated the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*)[108] in 2021 when it enacted the *United Nations Declaration on Indigenous Peoples Act* (*UNDRIP Act*)[109] and that an array of other federal statutes also mention *UNDRIP*.[110] Among other steps, the *UNDRIP Act* requires the Canadian government to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[111] The latter is an expansive international convention that seeks to uphold Indigenous cultural traditions as well as legal systems.[112] The precise effect of *UNDRIP* and the *UNDRIP Act* on domestic law has not yet been articulated.[113] However, the Supreme Court of Canada has recently indicated, albeit in obiter dicta, that "the Declaration has been incorporated into the country's positive law."[114] This statement's meaning may need further precision. (For example, does it include just federal government or also provincial ones; does *UNDRIP Act* bind the Crown?)[115] Notwithstanding this

106 John Borrows et al, *Braiding Legal Orders*, *supra* note 103 at 2; Deckha, "Unsettling Anthropocentric Legal Systems", *supra* note 105 at 91.

107 *R v Van der Peet*, 1996 CanLII 216 at paras 49–50 (SCC).

108 UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295 [*UNDRIP*].

109 SC 2021, c 14 [*UNDRIP Act*].

110 Nigel Bankes & Robert Hamilton, "What Did the Court Mean When It Said That UNDRIP 'Has Been Incorporated Into the Country's Positive Law'? Appellate Guidance or Rhetorical Flourish?", *ABlawg* (28 February 2024) at 3, online (pdf): <ablawg.ca> [perma.cc/NS9V-NLPA].

111 *UNDRIP Act*, *supra* note 109, s 5. The *UNDRIP Act* includes UNDRIP as a Schedule.

112 *UNDRIP*, *supra* note 108.

113 Bankes & Hamilton, *supra* note 110 at 1.

114 *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 at para 4 [*First Nations Reference*].

115 Bankes & Hamilton, *supra* note 110 at 7. At the provincial level, we can read provincial legislation in British Columbia and Northwest Territories that has domesticated UNDRIP as further indicators that laws in these provinces must Indigenize (see *ibid* at 4–6, discussing *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 and *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*,

ambiguity, for present purposes we can observe that the Court's comments lend considerable support to continue rethinking Canadian legal doctrines, including constitutional ones, in light of different legal conceptualizations in Indigenous laws.[116]

At the very least, the dicta from the Court that *UNDRIP* is part of the country's positive law reflects legal recognition at the highest Canadian level of the principle of reconciliation reflected in the Truth and Reconciliation Commission's Calls to Action, which included Call 46 to establish a Covenant for Reconciliation that would, inter alia, include

> repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and terra nullius, and the reformation of laws, governance structures, and policies … that continue to rely on such concepts.[117]

We can classify the rule of law as one of these objectionable concepts, the anthropocentrism of which helped advance the common law and settler-colonialism in Canada.[118]

SNWT 2023, c 36). It would be reasonable to expect that future judicial interpretation of these provincial statutes would be mindful of the unanimous comments of the Court that *UNDRIP* has the effect of positive law when considering the impact of positive law at the provincial level to shift case law—which, thus far, has shied away from this conclusion (see Bankes & Hamilton, *supra* note 110 at 7).

116 Bankes and Hamilton further observe that a recent Quebec Superior Court decision held that "UNDRIP requires courts to reconsider the test for s 35 Aboriginal rights … to reflect Indigenous law" (see Bankes & Hamilton, *supra* note 110 at 10, citing *R v Mountour*, 2023 QCCS 4154).

117 Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015). The gist of this part of Call 46 is also repeated in Call 47.

118 Billy Ray Belcourt, "Animal Bodies, Colonial Subjects: (Re)Locating Animality in Decolonial Thought" (2015) 5:1 Societies 1 at 4; Eisen, "Milked", *supra* note 30 at 75–79. Moreover, the federal government has committed to advancing progress on these Calls. Crown-Indigenous Relations and Northern Affairs Canada, *Delivering on Truth and Reconciliation Commission Calls to Action* (Gatineau: CIRNAC, 2024), online: <rcaanc-cirnac.gc.ca> [perma.cc/UK8X-E4DW]. Thus, the prospect of elevating the legal status of animals to a more equal status as part of braiding Indigenous orders and doing away with concepts justifying European sovereignty need not seem so legally remote.

Of course, not all Indigenous laws may manifest this more egalitarian status between humans and nonhumans, but many do.[119] We can identify such non-anthropocentric regard for animals in the form of multispecies relationality as a common Indigenous legal value even as we recall: First, that Indigenous material practices and understandings, like all cultural products, are "constantly unfolding and evolving"[120] and properly contestable as such;[121] and second, animals are typically not guaranteed a right to life under such laws which tolerate killing animals as part of conceptualizing reciprocity between humans and nonhumans.[122] Our claim here is not that Indigenous laws are uniformly benign toward animals or that Indigenous laws and animal rights seamlessly overlap.[123] Rather, we advance the comparative assessment that if Canadian law were to adopt the multispecies relational ontologies that comprise the laws of many Indigenous nations in Canada, and require us to advert to animals' needs, view them as treaty partners and kin, learn from them, and generally enter responsible relationships with them,[124] it would become much less anthropocentric.[125] Such an adoption would also place all practices associated with the routine industrial killing and use of animals (agriculture,

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119 Deckha, "Unsettling Anthropocentric Legal Systems", *supra* note 105 at 85–88.

120 Amanda C Thomas, "Indigenous More-than-humanisms: Relational Ethics with the Hurunui River in Aotearoa New Zealand" (2015) 16:8 Soc & Cultural Geography 974 at 978, 981.

121 That Indigenous laws and governance should not be romanticized even as we recognize the hope they hold out in providing an alternative to modernity's ills is a point emphasized by Indigenous and non-Indigenous feminists. See e.g. Gina Starblanket & Heidi Kiiwetinepinesiik Stark, "Towards a Relational Paradigm – Four Points for Consideration: Knowledge, Gender, Land, and Modernity" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 175 at 183–89.

122 Deckha, "Unsettling Anthropocentric Legal Systems", *supra* note 105 at 86.

123 *Ibid*. It remains important, however, not to presume wide disparities between the goals of human decolonization and anti-anthropocentrism. As Maneesha Deckha observes, a conflict between Indigenous and animal rights is often presumed, itself fuelled by colonial and selective framing (see Maneesha Deckha, "Veganism, Dairy, and Decolonization" (2020) 11:2 J Human Rights & Envt 244 at 246).

124 Brian Noble, "Treaty Ecologies: With Persons, Peoples, Animals, and the Land" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 315 at 315–18.

125 Deckha, "Unsettling Anthropocentric Legal Systems", *supra* note 105 at 89–90.

aquaculture, research, zoos, etc.) under much more dubious legal status.[126] As Canadian jurists may now have an *UNDRIP* and *UNDRIP Act*-instigated legal responsibility to integrate Indigenous legal orders into the future development of Canadian law, Indigenous worldviews about achieving respectful relations with animals are another legal ground that supports the position that the rule of law should be redirected to protect animals.

As but just one example of thinking about what the rule of law could denote if we contemplate it outside the confines of liberal humanism and the colonial legal order, Indigenous legal scholar John Borrows has pointed out that the principle of "inherent limits" (i.e., understanding that there are limits to rights and other entitlements) familiar to Canadian law could be adopted in relation to how we conceptualize our relationships with our environment. Critically, the onus to do so is to be understood as a "basic principle of the rule of law."[127] Borrows notes that law is traditionally said to be important because it provides "fundamental organizing principles" to curb government abuses.[128] He then pointedly asks: "Could anything be more fundamental than the environment around which the country is built"?[129] Borrows has further observed that if Canadian law cannot help us to "reconcile [our]selves with the earth," the legal certainty the rule of law promotes is in jeopardy.[130] With these insights, Borrows alerts us to another way to envision the rule of law

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126 *Ibid*.

127 John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 49 at 64–65 [Borrows, "Earth-Bound"]. Others have pointed out that reconciliation requires the explicit application of Indigenous legal traditions in the common law and to the rule of law. See Kathleen Mahoney, "The Rule of Law in Canada 150 Years After Confederation: Re-Imagining the Rule of Law and Recognizing Indigenous Peoples as Founders of Canada" (29 March 2017), online (pdf): <ablawg.ca> [perma.cc/KG4D-MPYR]. For a different view about rehabilitating the rule of law for reconciliation projects, see Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 135 at 159.

128 Borrows, "Earth-Bound", *supra* note 127 at 64.

129 *Ibid*.

130 *Ibid* at 65. See also Sulyok, *supra* note 16 at 7.

within Canadian doctrine, one that recognizes the interdependence of nonhumans with whom we cohabit and the need to stop exploiting them and attend to their needs.[131]

To be sure, whether the rule of law can be rehabilitated from its colonial significations and effects even when redirected to include animals is a complex question given the built-in nature of liberal systems to exclude through rule of law discourse that justifies violence against certain (racialized and animalized) populations.[132] However, the inference from Borrow's observation above and the nascent scholarship addressing this question directly suggests that the rule of law can be so redirected; including nonhumans and specifically animals within the rule of law's remit may be a significant anticolonial intervention.[133] This anticolonial and ultimately transformative impact seems a sufficient basis to consider the concept further in relation to animal advocacy. International environmental law literature calling for the rule of law to combat climate change and other environmental issues would also appear to endorse an anti-anthropocentric and anticolonial redirection. We now turn to this argumentation in favour of an environmentally protective rule of law.

B. Recent Developments in Environmental Law as Support for a Non-Anthropocentric Rule of Law

Indigenous teachings, laws, and activism undergird many of the current developments in the area of international and domestic environmental law that call on the judiciary to innovate legal norms that can reverse extractive industry and anthropogenic-induced planetary crises.[134] These

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131 *Ibid* at 61. Recent critically-oriented and Indigenous legal theory have pressed for a multispecies reorientation/transformation in Western laws through integration of Indigenous legal principles, as a matter of responsibility given the dire planetary situation. See e.g. Betsan Martin, Linda Te Aho & Maria Humphries-Kil, eds, *ResponsAbility: Law and Governance for Living Well with the Earth* (London, UK: Routledge, 2019).

132 Hussain, *supra* note 14.

133 Maneesha Deckha, "Animals, Colonialism, and the Rule of Law" (2025) 29:3 Rev Const Stud 523 [forthcoming in 2025].

134 Internationally, this is clearly seen, for example, in the growing Rights of Nature movement that has influenced legislatures and courts worldwide to accord various (discrete) nonhumans legal personhood (see Hall, *supra* note 18). Domestically, consider as just but three recent examples (see *Mathur v Ontario*, 2023 ONSC 2316, *La Rose v Canada*, 2023 FCA 241, and *References re Greenhouse Gas Pollution Pricing Act*, *supra* note

developments include a proliferation of Rights of Nature,[135] climate change,[136] biodiversity,[137] and future generations litigation.[138] Considerable scholarly analysis normatively argues for the success of this environmental protection-focused litigation to help curb the multiple anthropogenic forces imperilling the planet and multispecies life on it.[139] This literature discusses how the thin and anthropocentric vision of the rule of law can expand and transform to provide a legal ground for advancing innovative environmental arguments in these lawsuits and better represent the interests of those future humans and nonhumans that the law presently discounts or ignores. We present a snapshot of this literature to suggest that such a judicial expansion in transnational environmental law protection is based on legal principles that should also be persuasive in the Canadian context to distance rule of law doctrine from its anthropocentric presumptions to benefit animals.

64, all discussed in Stepan Wood, "*Mathur v Ontario*: Grounds for Optimism About the Recognition of a Constitutional Right to a Stable Climate System in Canada?" (2024) 69:1 McGill LJ 3 at 17–18).

135 Animal law scholars have generally regarded the Rights of Nature movement as favourable for animals in multiple respects, while recognizing the limits of the paradigm that relate to the long-standing rupture between more species-based environmental law paradigms and individually-based animal ethics paradigms (see Kristen Stilt, "Rights of Nature, Rights of Animals" (2021) 134:5 *Harvard L Rev Forum* 276 at 276–77). While the progressive legal recognition in international environmental law of the vulnerability of nonhumans either through rights of nature discourse or otherwise may bode well for animals, our point here in this section does not depend on alignment per se between animal and environmental law.

136 Wood, *supra* note 141 at 8; César Rodriguez-Garavito & David R Boyd, "A Rights Turn in Biodiversity Litigation" (2023) 12:3 Transnational Envtl L 498 at 500.

137 Rodriguez-Garavito & Boyd, *supra* note 136 at 501.

138 Trevor Daya-Winterbottom, "Defining Our Legacy to All Future Generations" (2024) 54:4 J Royal Society N-Z 547 at 553–54.

139 See e.g. Daina Bray & Thomas Poston, "The Methane Majors: Climate Change and Animal Agriculture in U.S. Courts" (2024) 49:S Colum J Envtl L 145 at 147–48; Jasmina Nedevska, "Climate Change and Institutions for Future Generations: The Litigation Option" in Gianfranco Pellegrino & Marcello Di Paola, eds, *Handbook of the Philosophy of Climate Change* (Cham, Switzerland: Springer, 2023) at 1234–36; Rodriguez-Garavito & Boyd, *supra* note 136 at 499–500; Narayan Toolan et al, "Legal Implications of the Climate-Health Crisis: A Case Study Analysis of the Role of Public Health in Climate Litigation" (2022) 17:6 PLOS ONE 1 at 12–16. See also Wood, *supra* note 141 at 46–47.

Katalin Sulyok has recently chronicled the way the rule of law is implicated in environmentally-related future generations litigation, which seeks to remedy climate change and other environmental harms to future generations due to the failures of states to stop anthropogenic activities causing environmental devastation.[140] She argues that an "intergenerational reinterpretation of the rule of law" is identifiable in judicial decisions resulting from this litigation across multiple jurisdictions.[141] This implicit invocation and embrace of the rule of law is discernible, Sulyok argues, when courts agree with plaintiffs that the presentist nature of the legal system—meaning one that is focused on short-term economic gains of humans rather than the long-term interests of future human generations and the environment—is arbitrary and thus unjustifiable.[142] Sulyok also notes that a court has explicitly invoked the rule of law in affirming the justiciability of such litigation against broad government policy goals.[143]

Sulyok is hopeful that this judicial connection of rule of law principles to government lack of action or inadequate action regarding environmental issues will augment and eventually result in a "future-focused understanding of the rule of law."[144] She is mindful of the view that any legal innovation should "be incremental rather than radical" to avoid pushback,[145] but states that such a transformation in the meaning of the rule of law "may not be as revolutionary an idea as it may sound at first."[146] She notes that other scholars and jurists have also come together to emphasize that the failure of governments to sufficiently respond to the climate crisis must be perceived as a rule of law problem by courts worldwide.[147] What is more, Sulyok offers the rule of law as a

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140 Sulyok, *supra* note 16.

141 *Ibid* at 7.

142 *Ibid* at 3, 6, 8, 11.

143 *Ibid* at 21, citing Hoge Raad der Nederlanden [Supreme Court of the Netherlands], The Hague, 20 December 2019, *The State of the Netherlands v Stichting Urgenda*, No 19/00135, ECLI:NL:HR:2019:2007 (the Netherlands).

144 *Ibid* at 27.

145 *Ibid* at 10.

146 *Ibid* at 26.

147 *Ibid* at 21, citing British Institute of International and Comparative Law "Declaration on Climate Change, Rule of Law and the Courts" (last visited 1 February 2025), online: <biicl.org> [perma.cc/LQB2-ZF58].

foundational norm that can help *stabilize* new judicial treatment that extends existing legal doctrine regarding human rights, justiciability, access to justice, and the like.[148]

Consider that Sulyok highlights that the judicial decisions that require governments to act to protect the environment invariably cite to climate science as well as customary international law.[149] These are factors which ought to also influence Canadian courts (and legislators) when asked to make Canadian environmental law more responsive to the threats posed by present anthropogenic forces. Deciding according to overwhelming scientific consensus is part of judicious reasoning, and, indeed, Canadian courts are now affirming this consensus in environmental lawsuits.[150] Further, unless it has specifically been overridden by statute, international law is part of the domestic Canadian legal system.[151] Hence, these developments in international and transnational environmental law are ones that courts could take notice of regarding how to conceptualize the domestic meaning of the rule of law in Canadian cases. Specifically, Canada's commitments to evidence from science and customary international law should encourage it to view, as Sulyok traces, a rule of law component to questions relating to nonhuman justice. As such, we can infer that the developments in transnational and international environmental law *also* support the redirection of the rule of law that we have argued is possible in relation to non-anthropocentric interests more generally—i.e., for animals.

C. Summary

Our main concern in this analysis was to show the precedent that exists in Canadian law traditionally understood within rule of law jurisprudence to support a non-anthropocentric account of the rule of law. This section has pointed to further legal grounds outside of Canadian rule of law doctrine that also supports a non-anthropocentric interpretation even if such grounds do not qualify as precedent. When one factors in the legal subjectivity of animals in many Indigenous laws in what is

148 *Ibid* at 10.

149 *Ibid* at 16–17, 23, 26.

150 *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 64 at para 2.

151 *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 85–87.

now known as Canada and the embedded principles to be responsive to animals as equal peoples, nations, kin, and/or comembers of an interrelational web, we see further legal ground for such an argument that can be presented to reconciliation-minded Canadian courts. If we look to international legal developments regarding the rule of law in relation to addressing climate change and other environmental crises, we are similarly directed. In short, beyond normative alignment with decolonizing and environmental goals that Canada espouses, these areas provide additional legal reasons to redirect the rule of law to protect animals.

IV. PRACTICAL IMPLEMENTATION AND OBJECTIONS

The domestication of *UNDRIP*, customary international environmental norms, rule of law-related reasoning in transnational and international environmental law, and Canadian rule of law doctrine itself are available legal grounds to question the anthropocentric containment of the rule of law as a concept. Building upon Chief Justice Fraser's original connection between animal protection and the rule of law, then, a substantive rule of law in favour of animals is a doctrinally plausible goal (if still a politically remote possibility). These are all grounds that animal advocates can invoke to argue for a broad, interspecies justice conception of the rule of law that would call into serious question the arbitrary violence to which animals are systemically exposed through their ubiquitous commodification. In this part, we provide some examples of practices that could be affected, briefly outline the shape arguments could take to reach these outcomes, and address main objections to the argument.

A. Impact and Shape of Substantive Rule of Law Arguments for Animals

If legislative intent materializes in Canada to transition society away from the commercial instrumentalization of animals, a substantive vision of the rule of law could be the basis of top-down legislative enactments. Given the staggering scale of the number of animals involved in commercial agriculture, aquaculture, and fishing, the most dramatic impact for animals would occur if legislation phased out these industries.[152] We have seen this type of governmentally-instituted transitional ban occur with respect to mink farms in British Columbia due to public health reasons

152 Deckha, "Supplanting", *supra* note 17 at 258.

arising from zoonotic risk.[153] The federal government has also indicated that open-net pen salmon farms currently allowed in British Columbia will be banned due to risks to wild salmon.[154] Both bans involve transition periods of several years.[155] The federal government has also promised to phase out toxicity testing on animals by 2035.[156] These initiatives show it is possible and legitimate to phase out an industry for political reasons, assuming jurisdictional authority, without any further legal basis.[157] It would certainly be possible then to phase out industries for *legal* reasons—i.e., based on substantive visions of the rule of law.

Such change, though, would likely have to come from the judiciary, who will be more inclined to respond to rule of law than legislatures even as judges, too, are affected by anthropocentric and other psychological blocks when fundamental legal change for animals is at stake.[158] Transitional legislative measures in relation to other types of food (farmed animals on land) are nowhere on the legislative horizon in Canada. As noted earlier, industries advance their interests with government through extensive lobbying and enjoy a dynamic of regulatory capture. They also invest in creative public relations and communications to obfuscate the role of animal-based diets and intensive farming in creating environmental crises to maintain the socially benign perception of animal

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153 "B.C. to Permanently Close All Mink Farms over COVID-19 Transmission Risk", *CBC News* (5 November 2021), online: <cbc.ca> [perma.cc/T9J4-WZKS].

154 Eric Plummer, "Fish Farms Get Five More Years, as Feds Commit to Transition Industry from Net Pens", *Ha-Shilth-Sa* (20 June 2024), online: <hashilthsa.com> [perma.cc/A6E7-J8RQ].

155 The British Columbia government announced this decision in relation to mink farms in 2019, providing the industry with six years to transition. The federal government announced its decision in 2024 in relation to open-net salmon farms, providing the industry with five years to transition. It indicated a ban would be in place by June 30, 2029 (*ibid*).

156 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 68.1(1), 68.1(2).

157 The mink farmers brought five separate lawsuits again the British Columbia government decision, all of which have failed (see e.g. *C&A Mink Ranch Ltd v British Columbia*, 2024 BCSC 770 at paras 32, 35, 37–39, 52–53).

158 Maneesha Deckha, "Animalization and Dehumanization Concerns: Another Psychological Barrier to Animal Law Reform" (2023) 2 Psychology Human-Animal Intergroup Relations at 3 [Deckha, "Animalization and Dehumanization"].

agriculture.[159] The obfuscation is helped along by the majority of think tanks (even those who advocate against climate change) who fail to make animal agriculture's greenhouse emissions visible,[160] and human psychology and masculinity codes that make permanently shifting adult dietary choices extremely challenging.[161] As a result, the general public continues to support these industries as consumers and is projected to do so in the future.[162] The phasing out of animal food industries will thus likely need a kickstart from the judiciary to motivate legislation. This is where substantive rule of law-based arguments could play a role to catalyze dramatic change not only for farmed animals but also all animals enduring vulnerable lives of captivity.

What legal pathways are, then, potentially available in the judicial realm? In analyzing favourable judicial decisions in environmental litigation, Sulyok notes how courts have expanded the *range of rights holders* at stake (to include future human generations) and broadened conception of what is *justiciable* (even highly political matters and mandating governments to take action to protect the environment).[163] Lawsuits seeking judicial orders that can address environmental crises regularly face barriers related to standing, justiciability, causation, foreseeability, and remedies.[164] Similar outcomes could also follow for animals from a non-anthropocentric treatment of the rule of law despite the multiple barriers. That is, courts could be compelled by rule of law principles to recognize animals as rights holders just as future humans have been recognized. While animals likely will not be able to avail of the human rights-focused nature of environmental lawsuits to have their own rights recognized (such as the right to a healthy environment to argue for biodiversity protection), the impulse in these cases to welcome "the formulation of

159 Viveca Morris & Jennifer Jacquet, "The Animal Agriculture Industry, US Universities, and the Obstruction of Climate Understanding and Policy" (2024) 177:41 Climatic Change 2 at 8, 24, 26–27.

160 Núria Almiron, Miquel Rodrigo-Alsina & Jose A Moreno, "Manufacturing Ignorance: Think Tanks, Climate Change and the Animal-Based Diet" (2022) 31:4 Envtl Politics 576 at 586–91.

161 *Ibid* at 591–93.

162 *Ibid* at 593.

163 Sulyok, *supra* note 16 at 25.

164 Wood, *supra* note 141 at 20–27.

new legal doctrines or the creative reinterpretation of existing ones"[165] is an impulse that can extend directly to lawsuits that advocate for animal rights recognition rather than only human ones. Similarly, the growing inclination of courts around the world to get involved in government policy choices that Sulyok chronicles and expand the scope of justiciability is also suggestive of the impact the rule of law can have for animal claims—i.e., to convince courts to be seized of the matter.[166]

Sulyok's discussion tracing the rule of law platform on which international and transnational environmental litigation is built also helps in visualizing what specific shape rule of law arguments could assume. She shows how futures litigation has challenged presentism (legislating for short-term rather than long-term interests) as *arbitrary*.[167] In a similar vein, animal advocates can challenge anthropocentric preference as arbitrary.[168] Sulyok also identifies access to justice as a rule of law component, due to the importance of civic engagement and inclusive public input into decision-making.[169] In the same vein, the *participatory exclusion* of animals as part of the democratic polis can be challenged as a rule of law problem. Leading political theorist James Tully also identifies the exclusion of nonhumans from the democratic dialogue needed to reorient social and legal systems as implicating the rule of law. He recalls the "democratic principle that 'all affected' should have an effective say" as based on the "equiprimordiality of democracy and rule of law."[170]

As Tully further explains, what this would practically mean, as but one measure, is that any "proposed law is tested on its ability to sustain both the ecosystems and the social systems it affects

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165 Rodriguez-Garavito & Boyd, *supra* note 143 at 520.

166 Sulyok, *supra* note 16 at 14–19.

167 *Ibid* at 11–20 (specifically, Sulyok notes that claimants have also successfully challenged the discounting of the interests of minors as *discriminatory* at 19–20). This legal claim is tethered more to the notion of equality and human rights-based charters and codes and so may have comparatively little chance of success when compared to a claim based on arbitrariness (Deckha, "Vulnerability, Equality, and Animals", *supra* note 92 at 68).

168 Adenitire, *supra* note 10, s 2.

169 Sulyok, *supra* note 16 at 20–23.

170 Tully, *supra* note 15 at 562–63, 568. Recall also that the rule of law vision deployed by the majority in *Sauvé* suggests the involvement of subjects of the law in making the law is where law acquires its legitimacy.

intergenerationally."[171] Tully includes animals in his definition of who is a member of these systems and can be adversely affected. He proposes that such testing occur through "dialogues with the humans who live there, and as much as possible, with their fellow citizens of plants, animals, micro-organisms, and ecosystems."[172] Indeed, animal political scholars have highlighted the illegitimacy of law for this very reason—that is, denying animals democratic participation even though the law greatly affects their lives (overwhelmingly, for the worse). Such scholarship contends that a just legal order and democracy must include animals as subjects within the polis and find meaningful ways to actualize their choices and participation.[173] Recent scholarship in this area recommends harnessing our capacity for observation, research, empathy, imagination, and consultation with experts to figure out what animals want in particular situations and legal disputes involving their lives.[174]

Through highlighting arbitrariness and access of justice as already-recognized components of the rule of law, animal advocates can use the rule of law to ground their claims that judges must order governments to enact protective transitional legislation discussed above to phase out industries. Such arguments can also cast a negative light on governmental subsidies that flow to these harmful industries,[175] and call for legislation taxing (fish, meat, dairy, and egg) industries to recoup the costs they externalize to animals, the environment, and humans.[176]

B. Addressing Practical Objections

Expanding the reach of the rule of law to one that would actively protect animals may be objected to as yet another instrumentalist deployment of the concept that will ultimately weaken its normative pull as a

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171 *Ibid* at 563.

172 Learning from Indigenous peoples as to "how to live in good, sustainable ways with Mother Earth" is a second important measure (*ibid* at 564).

173 See Garner, *supra* note 86 at 98; Donaldson, Vink & Gagnon, *supra* note 2 at 84.

174 Challie Facemire et al, "Animals in the Courtroom" (2024) 32 JL & Pol'y 1 at 15–18.

175 Oliver Lazarus, Sonali McDermid & Jennifer Jacquet, "The Climate Responsibilities of Industrial Meat and Dairy Producers" (2021) 165:30 Climatic Change 1 at 17–18; Deckha, "Demoting Dairy", *supra* note 32 at 29–33.

176 Franziska Funke et al, "Toward Optimal Meat Pricing: Is It Time to Tax Meat Consumption?" (2022) 16:2 Rev Envtl Econs & Pol'y 219 at 219–21.

basic and vital legal safeguard because judges will decide by personal values rather than the law.[177] We acknowledge this possibility that judicial embrace of instrumentalist expansion to advance social agendas (here an anti-anthropocentric one) might dilute the integrity of legal concepts. But as we have argued for here, legal precedent is available in Canadian law to connect the rule of law to animals and doing so does not seem a purely instrumentalist act if one is of the view that the rule of law should guard against tyranny and that an apt characterization of the conditions animals live under is a tyrannical one.[178] Also instructive to note is that despite the orthodox ideal that courts should be neutral, they "have always been political, and they are only gaining more power in this regard."[179] The Supreme Court of Canada is particularly well-known to influence "major political conflicts in the country," taking a prominent "policymaking" role ever since the advent of the *Charter*.[180] A better response than trying to obtain a neutral positioning in the face of inevitable "power asymmetries" that structure the constitutional (and other) disputes courts are asked to adjudicate, may be to permit courts to realistically attend to diverse perspectives, ensuring marginalized actors are able to participate.[181]

This would be a dramatic refashioning of society, upturning property rights that are foundational to the present economy. But converting our present-day destructive "vicious" legal and "ecosocial systems" into "virtuous" ones would appear to require such a transformative

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177 Brian Tamanaha, "How an Instrumental View of Law Corrodes the Rule of Law" (2007) 56:2 De Paul L Rev 469 at 492–94.

178 Adenitire, *supra* note 10 at 14–18.

179 Minh Do & Robert Schertzer, "How Should Courts Respond to Political Questions? Exploring the Dialogical Turn in the Supreme Court of Canada's Federalism and Indigenous Case Law" (2024) 49:1 Law & Soc Inquiry 478 at 484.

180 *Ibid* at 488.

181 *Ibid* at 502. Do and Schertzer discuss the example of the Supreme Court of Canada adjudicating political governance issues in relation to section 35 of the Canadian Constitution, but their argument regarding a more active role for the court to attend to power disparities does not appear to be specific to only Indigenous rights; instead, it applies to the claims of vulnerable groups in general in the face of "power asymmetries, colonial legacies, and complications of representation" (*ibid*). These would also be features of rights claims involving animals who are in a tremendously legally subordinate position as property (Deckha, "Supplanting", *supra* note 17 at 262).

intervention.[182] Tully refers to the need for modern legal systems to stop supporting predatory and extractive economic modalities that have resulted in present-day anthropogenic crises and instead transform into what he calls "Gaia law" in order to support a sustainable future for all life on the planet.[183] In contrast to "vicious" legal systems (such as the property foundations of present-day Canadian law) that dispossess Indigenous peoples and subordinate their legal systems, compartmentalize law as an autonomous realm separate from society, and instrumentalize animals and plants as resources,[184] a legal system following the principles of Gaia law would reverse these patterns and move from "crises-ridden systems toward a self-sustaining future."[185] Reciprocity with the nonhuman world, and not exploitation, becomes a critical value for Canadian law to adopt if it were to reflect the Gaia law vision.[186]

A substantive rule of law for animals might encounter one further main objection: that including animals at an equal level in our legal system—i.e., by extending them fundamental rights equivalent to those humans have—will have a detrimental effect on marginalized humans. The concern here traces back to Aristocratic notions of equality that caution us not to base human rights on any capacity, since invariably, some humans will not possess that capacity (for example, a threshold level of cognition, language, or even sentience) and thereby will be regarded as inferior. The ostensible solution to this risk is to base human rights simply on one's humanity. But this "solution" is seen to require the exclusion of nonhumans from the legal entitlements humans have in order to safeguard equal legal status for all humans; excluding animals is believed to best avoid the dehumanization of marginalized humans (such as those without paradigmatic cognitive capacity) who might then be animalized if they had to prove their worth beyond their humanity.[187]

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182 Tully, *supra* note 15 at 548–49.

183 *Ibid* at 562.

184 *Ibid* at 547.

185 *Ibid* at 560.

186 *Ibid* at 564. Tully does not focus on the rule of law but identifies "six common law tools of transformation" that could help cultivate Gaia law in Canada (*ibid* at 565–70).

187 For more details on this theory, see Raffael N Fasel, *More Equal Than Others: Humans and the Rights of Other Animals*, 1st ed (Oxford, UK: Oxford University Press, 2024) at 2, 4.

In counterproposal, we would highlight the scholarship that instead argues that animal rights and human rights are interdependent in that human rights for marginalized groups will never be secure and stable until stigma against being an animal is removed. There is not space to delve fully into the argument here, but the gist of the reply shows how intra-human hierarchies and ideologies rely on the human-animal binary and seeing animals as inferior.[188] We can thus not hope to overcome ableism or other hierarchies until we do away with anthropocentric thinking and a legal system built on assuming humans as special. Moreover, we cannot hope to respond to present-day anthropogenic realities by continuing to discount the interests of animals and other nonhumans.[189]

CONCLUSION

At present, Canadian law disavows the needs of most animals and ascribes none with an empowering legal subjectivity. Our normative departure point in this contribution is that this status quo must change to respond to present global crises that are multispecies in nature and that law has a role to play in this regard. In a world where redefining our relationships with nonhuman animals seems more critical than ever, this article pointedly asks how Canadian law can move from enabling the status quo to providing a critical pathway for transformative social change. Connecting the need for society to respond to our multispecies and multi-being reality to a founding Canadian legal principle like the rule of law would have dramatic effects. Jurists would need to seriously consider that the present endemic nature of animal and other nonhuman vulnerability in the law by way of their combined cultural and legal status violates the rule of law.

This article has shown the available precedent in Canadian jurisprudence itself to ground such consideration. The dominant "thin" view of the rule of law that obtains in Canadian jurisprudence does not foreclose the development and augmentation of a more forward-looking and much needed iteration with potential multispecies impact. When obligations for Canadian law to reconcile with its colonial past and haunted present

188 Deckha, "Animalization and Dehumanization", *supra* note 158 at 10–12; Stucki, *supra* note 34 at 65–76 and sources discussed therein.

189 Deckha, "Animalization and Dehumanization", *supra* note 158 at 12; Stucki, *supra* note 34 at 79–81.

by integrating Indigenous laws into its ethos are factored in, the legal case to consider that the rule of law relates to questions of animal and interspecies justice is amplified. The same holds if we expect domestic judicial reasoning to attend to international law, notably recent developments regarding rule of law-based arguments in relation to climate change and other environmental litigation. The nascent scholarly literature discussing these developments help envision how challenging the anthropocentrism of the rule of law in Canada could pragmatically take effect in relation to animals in legal arguments; namely, the arbitrariness of laws that bolster human exceptionalism could be called out and the interests of new rightsholders—here, animals—recognized. Judges could respond favourably to submissions that ask them to order governments to enact protective legislation.

We present all of this knowing it will not be simple to argue for animals as rightsholders in Canada. And the expanded understanding of justiciability may also face an uphill battle in Canadian courts given that—if environmental-based *Charter* litigation proves influential—judges may look for policy first to be expressed as legislation before adjudicating on the (in)adequacies of government action vis-à-vis industry regulation.[190] Again, our purpose here has been to simply show that rule of law-informed claims are legally possible, if still highly unlikely to succeed in the present-day in Canada. But we would nonetheless observe that at some point these doctrines will have to expand. As César Rodriguez-Garavito and David Boyd have summarized in also calling for dramatic legal change:

> In the 21st century, the world is facing a series of planetary crises, which include not only biodiversity collapse, but also climate breakdown, water scarcity, desertification, and pervasive pollution, in addition to a surge in emerging infectious diseases of zoonotic origin.[191]

The intensive farming of animals causes all these crises. And while animal agricultural industries have enjoyed great success in obscuring just how

190 Wood, *supra* note 141 at 21–22.

191 Rodriguez-Garavito & Boyd, *supra* note 143 at 499.

much of these harms are caused by their practices,[192] animal advocates are active in bringing forth the type of stories that can positively influence Canadian judges and members of the public to bring these connections to light and result in legal action.[193]

The rule of law is marked by a complicated and hierarchy-laden history, and may be particularly ill-suited, even when compared with other liberal legal concepts, to help animals in the end. Broadening the rule of law to embrace animals may be a tremendous ambition given the implicit anthropocentrism of Canadian law. This analysis does not suggest that the rule of law is a benign concept nor that its extension to animals would be the best or quickest legal remedy to the anthropocentrism of Canadian laws. But the concept should not be ruled out for these reasons. It could be productive for animals in the ways this analysis has suggested. Rule of law-based arguments thus merit serious attention and inclusion in the growing repertoire of diverse legal arguments that scholars and advocates are fashioning to advance animals' legal status and generally halt the anthropocentric logic, norms, and practices that have resulted in the multiple global crises at our doorstep.

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192 Núria Almiron & Milena Zoppeddu, "Eating Meat and Climate Change: The Media Blind Spot–A Study of Spanish and Italian Press Coverage" (2015) 9:3 Envtl Communication 307 at 320–22; Vasile Stanescu, "'Cowgate': Meat Eating and Climate Change Denial" in Núria Almiron & Jordi Xifra, eds, *Climate Change Denial and Public Relations*, 1st ed (New York: Routledge, 2020) 178 at 178–79.

193 Candice Allmark-Kent, *Literature, Science, and Animal Advocacy in Canada: Practical Zoocriticism*, 1st ed (Cham, Switzerland: Springer International Publishing AG, 2023) at 4–7.