December 4, 2023

Standing Senate Committee on Agriculture and Forestry
The Senate of Canada
Ottawa, Ontario K1A 0A4
agfo@sen.parl.gc.ca

By email

Dear Committee Members,

Re: The Constitutional Validity of Bill S-241, The Jane Goodall Act

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We the undersigned law professors write to express our support for Bill S-241, the *Jane Goodall Act* ("**Bill S-241**").[1] Our comments will focus on why the Bill is a valid exercise of Parliament's powers to pass criminal laws pursuant to section 91(27) of the *Constitution Act, 1867*[2] and to pass laws concerning international and interprovincial trade under s. 91(2) of the Constitution. Our views apply as well to the related government Bill S-15, containing very similar measures to Bill S-241 with respect to elephants and great apes.[3]

Overview of Bill S-241 Amendments to the *Criminal Code* and WAPPRIITA

Bill S-241 aims to provide legal protection for over 800 species of captive wild animals. Its objectives encompass the phasing out of elephant captivity in Canada, prohibition of new captivity of big cats at roadside zoos and as pets, and addressing wildlife trafficking, notably restricting the trade in live wild animals of affected species and inviting an amendment to curb the elephant ivory and rhino horn trades.

Bill S-241 proposes to amend the *Criminal Code*[4] to prohibit new unlicenced ownership, including breeding of wild species including lions, tigers, bears, wolves, many primates, sea lions, and dangerous reptiles, such as crocodiles, anacondas, and venomous snakes. The changes would also prohibit elephant rides and the use of designated species in performances

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[1] S-241, *Jane Goodall Act*, 1st Sess, 44th Parl, 2022, online: <https://perma.cc/WZ8E-57Y6> [Bill S-241]; Currently under consideration with the Standing Senate Committee on Legal and Constitutional Affairs.
[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [Constitution].
[3] S-15, *An Act to Amend the Criminal Code and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, 1st Sess, 44th Parl, 2023, online: <https://perma.cc/4G3R-BLXG> [Bill S-15]; Introduced by Senator Marc Gold, Representative of the Government in the Senate (21 November 2023). See Canada, Parliament, *Debates of the Senate (Hansard)*, 44th Parl, 1st Sess, Vol 153, Iss 168, (23 November 2023), online: <https://perma.cc/7YW6-A4RV> (speech by Senator Marty Klyne explaining the relationship between the two bills, which both amend the same two statutes as "related but distinct"; Bill S-15 "is essentially a piece of Bill S-241").
[4] *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*].

for entertainment. In addition, Bill S-241 would establish new sentencing measures for illegal capture, breeding, or performance, providing for judicial discretion to relocate wild animals involved in these offences. These measures are analogous in structure and purpose to existing measures in the *Criminal Code*, such as section 490.1(1), and section 19 of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* ("**WAPPRIITA**"), providing for the seizure and disposition of property involved in offences (see below at notes 23 & 24 for the text of these provisions).[5]

Bill S-241 would also amend WAPPRIITA to prohibit the unlicenced import, export, or interprovincial transport of affected species. Changes to WAPPRIITA include a framework for individual licensing of new captivity for the purposes of wild animals' best interests – regarding individual welfare and species conservation – or non-harmful scientific research. Bill S-241 would also establish the federally administered "animal care organization" licensing framework for zoos, aquariums, and sanctuaries meeting the criteria to be administered by Environment and Climate Change Canada.

We contend that this bill is a valid constitutional exercise of the federal criminal law power with respect to animal cruelty (as applied to wild animals in captivity) and public safety (raised in the risk of their escape, mishandling, or dangerous practices while in captivity, such as direct contact with elephants during performances for entertainment or rides), and the federal trade and commerce power over international and interprovincial trade (relating to wildlife trafficking, specifically elephant ivory and rhino horn).

Bill S-241 Falls Within Federal Jurisdiction

To determine whether a law falls within the authority of Parliament or a provincial legislature, one must first characterize the law or identify the matter (or "pith and substance") of the law and then, based on that characterization, assign the matter to one of the "classes of subjects" or heads of legislative power listed under sections 91 and 92 of the Constitution.[6] We submit that the "pith and substance" of this Act is containing the moral and safety hazards associated with the keeping of captive wildlife by prohibiting dangerous and harmful practices.

(A) Step 1: Pith and Substance

To properly characterize the matter of a piece of legislation, one must identify its "pith and substance."[7] This requires an examination of both the purpose and the effects of a law in the

[5] *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52 [WAPPRIITA].
[6] Peter W. Hogg, *Constitutional Law of Canada* 5th ed. (Toronto: Thomson Reuter, 2017; updated by Wade Wright July 2023) at § 15:4.
[7] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 28 and 166 [Genetic Non-Discrimination Reference]; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 51 [GGPPA References]; The Supreme Court of Canada has articulated the concept of "pith and substance" in a number of ways, including by describing it as the law's "dominant purpose", "leading feature or true character", "dominant or most important

quest to determine the precise "matter" to which the law in question relates.[8]

Purpose

In order to determine a law's purpose, it is necessary to consider both intrinsic and extrinsic evidence.[9]

(1) Intrinsic Evidence

Intrinsic evidence pertains to elements within a specific law, such as its text, preamble, purpose clause, title, and overall structure.[10] In this instance, the short title of Bill S-241 — the *Jane Goodall Act* — suggests that a key purpose is animal protection. The bill was named in honour of renowned anthropologist and primatologist Dr. Jane Goodall to acknowledge her significant contributions to animal protection and conservation efforts.[11]

Dr. Goodall and the Jane Goodall Institute of Canada worked closely with Senator Murray Sinclair and Senator Marty Klyne's offices throughout the development of Bill S-241 to create balanced legislation that would protect animals under human care and curb wildlife trafficking.[12] In speaking of the bill's name, Dr. Jane Goodall said:

> Today is an important day for animals. So many of them are in desperate need of our help and the *Jane Goodall Act* establishes protection and support for animals under human care. It is a monumental step forward for animals, people, and the environment. I am honoured to lend my name to this world-leading legislation that is supported by a wonderful coalition of government, conservationists, animal welfare groups and accredited zoos. Together we can and will provide a voice for those who cannot speak for themselves and put an end to the misery that is wildlife trafficking.[13]

The preamble of Bill S-241 also contains several nods to its purpose:

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characteristic" and the "essence of what the law does and how it does it" (See: *Reference re Impact Assessment Act*, 2023 SCC 23 at para 62 [IAA Reference], citing *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 20, 23, 184, 284, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 29 [RJR-MacDonald]; *R v Morgentaler*, [1993] 3 SCR 463 at p 481; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at p 62.

[8] *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 16 [Firearms Reference]; Genetic Non-Discrimination Reference, *ibid.* at para 30.

[9] Firearms Reference, *ibid.* at para 17; Genetic Non-Discrimination Reference, *supra* note 7 at para 34; GGPPA References, *supra* note 7 at para 51; IAA Reference, *supra* note 7 at para 62.

[10] IAA Reference, *supra* note 7 at para 62.

[11] During second reading debates for the previous iteration of Bill S-241 (Bill S-218), Senator Murray Sinclair spoke about the decision to name the Bill in honour of Dr. Jane Goodall. See Canada, Parliament, *Debates of the Senate (Hansard)*, 43rd Parl, 2nd Sess, Vol 152, Iss 13, (19 November 2020) at 1730, online: <https://perma.cc/XX6J-YZUQ>.

[12] The Jane Goodall Institute Canada, "The Jane Goodall Act" (2023), online: <https://perma.cc/G5KC-UN7P>.

[13] *Ibid*.

- Whereas science, empathy and justice require everyone to r**espect the biological and ecological characteristics and needs of animals**;
- Whereas cetaceans, great apes, elephants and certain other non-domesticated animals ought not to be kept in captivity, except for justifiable purposes such as their **best interests — including individual welfare and conservation** — and non-harmful scientific research;
- Whereas non-domesticated animals that may **benefit from protection**, in circumstances of captivity, through designation under the provisions enacted by this Act include big cats, bears, wolves, pinnipeds, non-human primates, dangerous reptiles and other species;
- Whereas animal care organizations that meet the **highest standards of animal care may serve the interests of animals** across many species with regard to animal welfare, conservation, non-harmful scientific research and public education;
- Whereas a ban in Canada on trade in elephant ivory and rhinoceros horn and on the collection of elephant and rhinoceros hunting trophies will help to **conserve elephant and rhinoceros populations** and encourage bans in other countries.

In addition, section 3 of Bill S-241 allows the Governor in Council to add or remove a species of animals from the list of species of designated animals if certain factors are met – including:

- whether **the biological and ecological needs for individual animals of that species to live a good life can be met in captivity**, including in particular
    - the ability of animals of the species to engage in natural behaviour while in captivity,
    - the intelligence, emotions, social requirements, physical size, lifestyle and potential use in performances of animals of the species,
    - the **public safety risks posed by animals of the species**, and
    - the **evidence of harm to animals** of the species in captivity, including stereotypies, health problems in captivity, shorter lifespans and increased infant mortality rates.

These factors speak directly to the bill's purposes of containing the moral and safety hazards associated with the keeping of captive wildlife.

In sum, the intrinsic evidence reveals that the purpose of Bill S-241 relates to animal protection and public safety through stringent animal care standards, consideration for animal well-being, and species conservation.

(2) Extrinsic Evidence

Extrinsic evidence refers to evidence that speaks to the context of the law in question, such as Hansard debates, the events leading up to and including the creation of the bill, the minutes of

parliamentary committees and relevant government publications.[14] In the case of Bill S-241, the extrinsic evidence overwhelmingly supports its core objectives as being animal protection and public safety.

The predecessor to Bill S-241 (Bill S-218) was first introduced in 2020 by Senator Murray Sinclair. During second reading debates, Senator Sinclair spoke to the purpose of Bill S-218 and the events leading up to its creation, particularly the rise in important animal protection legislation at the federal level:

> Honourable senators, Jane Goodall is a hero who inspires us to do better by all creatures of creation with whom we share this earth. **Today, animals face mass extinction and cruelty at human hands. We must respond with empathy and justice.** We must change course, both for their sake and for our own well-being.
>
> In many Indigenous cultures, we use the phrase, "all my relations" to express the interdependency and interconnectedness of all life forms and our relationship of mutual reliance and shared destiny. When we treat animals well, we act with both self-respect and mutual respect.
>
> Today I ask this chamber to **protect our animal relations with Bill S-218**, named for my hero and yours, and a hero to your children and your grandchildren, as the "Jane Goodall Act."
>
> Let me tell you a bit about what the act is about.
>
> **This legislation continues the Senate's work to protect animals. That work includes Senator Boyer's leadership to prevent animal abuse, Senator MacDonald's ban on shark fin imports and Senator Stewart Olsen's bill to end animal testing for cosmetics[15], which I hope becomes law this Parliament.**
>
> **Specifically, this bill builds on laws established by former Senator Willie Moore on whale and dolphin captivity** and by then Government Representative Senator Harder's amendments to fisheries Bill C-68. Those amendments achieved a vote for Senator Moore's bill. Thank you to Senator Harder and the government, particularly Minister Wilkinson, for their actions to do right by the whales.
>
> Now with the Jane Goodall act, my aim is to protect Canada's captive great apes, elephants and certain other animals under our federal laws and to ban the import of elephant ivory and hunting trophies.[16]

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[14] IAA Reference, *supra* note 7 at para 62; see also *R v Morgentaler*, *supra* note 7.

[15] On June 22, 2023, Canada officially banned cosmetics animal testing and trade with the passing of measures through Bill C-47, the *Budget Implementation Act*.

[16] *Supra* note 11 [emphasis added]; re-iterated by Senator Martin Klyne during second reading debates for Bill S-241 on March 24, 2022, when he said: "As former Senator Sinclair noted, the Jane Goodall act builds on the Senate's great work in recent years to protect animals. Achievements include former senator Willie Moore's whale and dolphin laws; Senator MacDonald's shark fin ban; Senator Harder's extraordinary efforts to enact both those policies; former senator Carolyn Stewart Olsen's bill to ban cosmetic testing on animals, now the subject of

As the House of Commons sponsor for Bill S-241, Member of Parliament Nathaniel Erskine-Smith, stated:

> The *Jane Goodall Act* **strengthens Canada's animal protection laws and fulfills the Government's mandate to protect animals in captivity**. Canadians across the political spectrum care about animal welfare, and I hope to see this bill supported by MPs from every party.[17]

Senate sponsor, Senator Marty Klyne, similarly stated during Second Reading debate in the Senate:

> […] **this bill's priority is animal protection at the highest standards**.
>
> […]
>
> The coalition behind this bill has led efforts to establish new legal protections for over 800 species … In determining these priority species, **based on welfare and safety concerns**, zoo and NGO input has been valuable, along with the advice of Dr. Lori Marino.[18]

With regard to public safety specifically, Senator Marty Klyne also said:

> Finally, with new designations, the *Jane Goodall Act* prohibits many dangerous reptiles. This includes all members of the crocodile and alligator family; twelve species of anacondas, pythons and boa constrictors; and all venomous reptiles, including over 600 species of snakes and lizards. These designations are understandably **prioritized on public safety grounds**. Senators recall the tragic attack by a nearly four-metre python in New Brunswick in 2013, taking the lives of two young boys.[19]

In an article in *SenCA+ Magazine,* Senator Marty Klyne further explained that there is "a strong scientific, legal and public safety case for the bill":

> Based in science and Indigenous values of respect for nature, the bill would phase out elephant captivity in Canada, with our harsh winters, and ban elephant rides and performances for entertainment **to protect elephants' dignity**.

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government and opposition election commitments; Senator Boyer's sponsorship of Bill C-84 to address animal abuse; and Senator Bovey and Senator Christmas' sponsorship of government bills to protect aquatic habitat." See Canada, Parliament, *Debates of the Senate (Hansard)*, 44th Parl, 1st Sess, Vol 153, Iss 28, (24 May 2022) at 1530, online: <https://perma.cc/2DYQ-GFD9>.

[17] Canada, Parliament, *Debates of the Senate (Hansard)*, 44th Parl, 1st Sess, Vol 153, Iss 28, (24 March 2022) at 1530, online: <https://perma.cc/2DYQ-GFD9>.

[18] *Ibid* at 1540.

[19] *Ibid* at 1550.

> More than 20 captive elephants live in Canada at four locations, with most located at African Lion Safari near Hamilton, Ontario. Leading elephant scientists and other experts have endorsed the bill's elephant policies, and both Zoo de Granby [in Quebec] and Edmonton Valley Zoo have committed to phase out elephants.
>
> The legislation would also **protect animal welfare and public safety** by banning new captivity of more than 800 wild species at roadside zoos and as pets, including big cats, bears, wolves, many primates, sea lions and dangerous reptiles, such as giant pythons, crocodiles and venomous snakes.
>
> **Every passing day presents risks to animal welfare and public safety**. Private owners are estimated to hold more than 7,000 lions, tigers and other big cats in Canada, with a record of attacks, escapes, abnormal behaviour and lack of space.[20]

Taken together, the extrinsic evidence unequivocally establishes that Bill S-241 is fundamentally centered on the objectives of containing the moral and safety hazards associated with the keeping of captive wildlife.

There is no evidence intrinsic to the Act that it aims at local industry or property regulation for purposes other than curbing unethical or dangerous behaviour.[21] The Act contains no provisions relating to marketing, pricing, or any industrial or commercial dimensions of any enterprise beyond those relevant to curbing the moral and safety risks that define the Act's clear purpose.

Effects

In analyzing the effects of the challenged law, it is necessary to consider both legal effects (effects that flow directly from the provisions of the statute itself) and practical effects (effects that flow from the application of the statute).[22]

Legal Effects

Section 2 of Bill-S241 would amend section 445.2(1) to (4) of the *Criminal Code* to prohibit new unlicenced ownership, including breeding, of wild species including lions, tigers, bears, wolves, many primates, sea lions, and dangerous reptiles, such as crocodiles, anacondas, and venomous snakes. This section would also prohibit the captivity of certain animals for performances for entertainment purposes or for their use as a conveyance (e.g. elephant rides).

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[20] Senator Marty Klyne, *SenCA+ Magazine*, "Jane Goodall Act would protect captive wildlife and public safety: Senator Klyne" (2023), online: <https://perma.cc/3HSP-ZLDR>.
[21] *Reference re Validity of Section 5(a) of the Dairy Industry Act, Canadian Federation of Agriculture v Attorney-General of Quebec et al. Margarine Case*, 1950 UK JCPC 4 DLR 689.
[22] IAA Reference, *supra* note 7 at para 63, referencing *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 54; GGPPA References, *supra* note 7 at para 51.

Section 4 imposes new sentencing measures for contravening these prohibitions, providing for judicial discretion to relocate wild animals involved in the offences. In making a determination under these sections, the court must consider the individual animal's welfare and conservation of the species. These measures are legally analogous to existing measures in the *Criminal Code*, such as section 490.1(1),[23] and section 19 of the WAPPRIITA,[24] providing for the seizure and disposition of property involved in offences.

Section 4 also amends the *Criminal Code* by granting the Governor in Council the authority to designate "animal advocates," allowing them to seek court orders to safeguard the best interests of an animal during the sentencing of an individual convicted of an offense. This is similar to section 448.01(4) of the *Criminal Code*, enabling a judge handling an application for a warrant or order related to a journalist's communications to call upon a special advocate for insights concerning freedom of the press.[25] This power reflects a broader understanding that a judge in criminal proceedings may require special expertise to determine the nuances of a sentence or order. Bill S-241's amendments specifically require the animal advocate to possess expertise in animal welfare, providing that the advocate must be: (a) nominated by the

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[23] Section 490.1 of the *Criminal Code*, *supra* note 4, provides the following:

> **Order of forfeiture of property on conviction**
>
> **490.1(1)** Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall
>
> > **(a)** if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and
> >
> > **(b)** in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

[24] Section 19 of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52 provides the following:

> **19 (1)** Where a person is convicted of an offence under this Act, the convicting court may, in addition to any punishment imposed, order that any thing detained or seized, or any proceeds realized from its disposition, be forfeited to Her Majesty.

[25] Section 448.01(4) of the *Criminal Code*, *supra* note 4, states:

> **(4)** The judge to whom the application for the warrant, authorization or order is made may, in his or her discretion, request that a special advocate present observations in the interests of freedom of the press concerning the conditions set out in subsection (3).

provincial animal welfare authority; (b) a representative of an organization dedicated to animal welfare; or (c) a professional in animal science, veterinary medicine or animal care. In all three cases, the goal is to ensure the legal system prioritizes the well-being of the animals involved in a captivity offence, as well as animals of closely related species in the offender's possession (e.g. lions and tigers), when making a sentencing decision or order.

Sections 8 through 17 of Bill S-241 would amend WAPPRIITA to prohibit the unlicenced import, export, or interprovincial transport of affected species. Changes to the WAPPRIITA include a framework for individual licensing of new captivity for the purposes of wild animals' best interests – regarding individual welfare and species conservation – or non-harmful scientific research. These sections would also establish the federally administered "animal care organization" licensing framework for zoos, aquariums, and sanctuaries objects of which include:

- promoting the welfare of non-domesticated animals;
- supporting the conservation of non-domesticated animal species;
- providing rehabilitation to non-domesticated animals in distress;
- offering sanctuary to non-domesticated animals;
- conducting non-harmful scientific research on non-domesticated animals; or
- engaging in public education related to non-domesticated animals.

Practical Effects

While concerns have been raised that Bill S-241 aims to phase out the zoo industry entirely, this is not its practical effect. Instead, the bill establishes a framework for recognizing designated "animal care organizations," ensuring that credible entities can continue operations and targeting only those facilities that do not meet the highest standards of animal care. For those failing to meet new standards, potential closures or forced relocation of animals are possible. As Senator Peter Harder said during a speech on May 5th, 2022:

> […] The practical effect of the bill could, for example, see the forced relocation — with costs — of all of a roadside zoo's big cats if it were found that any of the zoo cats were to have been illegally bred. Similarly, if a proprietor were to stage an illegal whale show, the same could apply for the relocation of whales.[26]

Bill S-241 outlines criteria for "animal care organizations" to be exempt from the bill's prohibitions. These criteria include adhering to the highest professionally recognized standards of animal care, providing whistle-blower protection to employees reporting animal welfare issues, refraining from activities that misrepresent or degrade captive wild animals, acquiring

[26] Canada, Parliament, *Debates of the Senate (Hansard)*, 44th Parl, 1st Sess, Vol 153, Iss 40, (5 May 2022) at 1620, online: <https://perma.cc/3BX7-KGML>.

wild animals in a manner that positively impacts species populations, and maintaining other standards set by the minister based on the best available scientific information.

By conferring legal status upon credible "animal care organizations," Bill S-241 ensures that its prohibitions and penalties are selectively applied. These measures underscore a deep concern for animal protection and ethical treatment, allowing animals involved in offences to be placed in suitable environments. As with many laws prohibiting unethical or dangerous conduct, the fact that this law has an incidental effect on property rights does not affect its true character and essence as criminal legislation.[27] Nothing in the extrinsic evidence suggests that the impacts on industry and owners rise above the level of incidental effects.

In conclusion, the main thrust of the bill is to prohibit the import/export, interprovincial transportation, ownership, custody of, captive breeding and use for entertainment of great apes, elephants and other designated animals (except in accordance with a federal permit, or in some instances a provincial permit) and establish criteria for the issuance of federal permits. It does so under pain of the risk of summary conviction and a fine of up to $200,000. The law's overriding legal and practical effects align with its purpose: to curb the moral and safety hazards associated with the keeping of captive wildlife.

(B) Step 2: Classification

Once the pith and substance has been identified, the second step in the analysis is to assign the "matter" of the challenged legislation to a head of power under either ss. 91 or 92 of the Constitution.

Sections 2 to 7 of Bill S-241 Fall Under Parliament's Jurisdiction to use the Criminal Power in Relation to Animal Protection and Public Safety

We submit that sections 2 to 7 of Bill S-241 fall under section 91(27) of the Constitution, which grants the Parliament of Canada the authority to legislate on:

> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

The Supreme Court has repeatedly emphasized that the criminal law power is the most expansive and flexible of Parliament's legislative powers.[28] In this case, no expansive definition of criminal law is required to support the validity of this law. The Act's matter – prohibiting and penalizing unethical and dangerous conduct – falls squarely within the traditional scope of the federal criminal law power.

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[27] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para 18 (CJ McLachlin writing: "Merely incidental effects will not generally affect the pith and substance analysis").

[28] See e.g. RJR-MacDonald, *supra* note 7 at para 28 (where Justice La Forest wrote that the criminal law power "is plenary in nature and this Court has always defined its scope broadly... this Court has been careful not to freeze the definition in time or confine it to a fixed domain of activity").

As a general rule, legislation may be classified as criminal law if it possesses three prerequisites: (i) a valid criminal law purpose; (ii) backed by a prohibition; and (iii) a penalty.[29]

Sections 2 through 7 of the Act meet all three of these requirements. As explained above, these sections amend the Criminal Code to prohibit specific conduct (e.g. new ownership, custody of, captive breeding and use for entertainment or conveyance of great apes, elephants and other designated animals (except in accordance with federal or provincial permits)) and impose penalties for violating those prohibitions (e.g. summary conviction and a fine up to $200,000).

We submit that these sections of the bill are supported by a valid criminal law purpose. According to the courts, a law is backed by a criminal law purpose if the law, in pith and substance, represents Parliament's response to a threat of harm to a public interest traditionally protected by the criminal law, such as peace, order, security, health and morality, or to another similar interest.[30] We conclude that the prohibitions established by Bill S-241 have a criminal law purpose, protecting several public interests traditionally safeguarded by the criminal law.

The protection of the environment, protection of public safety, and prevention of cruelty to animals are potentially public purposes that could sustain laws enacted under the criminal law power.[31] The *Criminal Code* includes several offences related to harming or killing animals, including the offence of causing unnecessary suffering to animals, set out in section 445.1(1)(a). The offence is committed if a person "wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird."[32]

Section 445.2 of the *Criminal Code*, adopted by Parliament in 2019, addresses captivity-related offenses concerning whales, dolphins, or porpoises, protecting their physical health, psychological well-being, and dignity from cruel or degrading treatment. Bill S-241 builds upon these provisions, extending similar protections to a broader range of wild species, and ensuring public safety by regulating the treatment of dangerous animals.

Double Aspect Doctrine

Even if the provinces have legislation affecting captive wild animals (such as protection from distress under provincial animal welfare statutes or regulations regarding zoo permitting or licensing) falling within the jurisdiction of provincial legislatures regarding "property or civil rights" under section 91(13) of the Constitution, that does not invalidate a valid exercise of the

[29] Firearms Reference, *supra* note 8 at para 27; Genetic Non-Discrimination Reference, *supra* note 7 at para 67. See also Hogg, *supra* note 6 at §18:2 "Definition of Criminal Law Power."
[30] Genetic Non-Discrimination Reference, *supra* note 7 at para 68.
[31] Hogg, *supra* note 6 at §18:2, citing to *Ward v Canada*, 2002 SCC 17 at para 53 (the federal criminal law powers could extend to prohibitions on the killing and manner of killing of animals like seals as a matter of public peace, order, security, health or morality).
[32] *Criminal Code*, *supra* note 4 at s 445.1(1)(a).

criminal law power. This is because the courts have held that subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91.[7] This principle is known as the "double aspect doctrine."[33] The "history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers"[34] in order to "favour, where possible, the ordinary operation of statutes enacted by both levels of government."[35]

Both federal and provincial governments have legislated on animal-related matters, spanning diverse areas within these sections. Federal jurisdiction significantly influences various aspects of animal welfare, including criminal law as a matter of morality, interprovincial and international trade (of note, WAPPRIITA is both a criminal and trade statute), slaughter standards, fisheries, and food and health safety.[36] Indeed, section 64(1) of the federal *Health of Animals Act*, also a criminal statute, authorizes federal regulation for the humane treatment of animals in their manner of transport, which would apply to animals living in zoos when they are moved within and into or out of the country.[37] The preamble of Bill S-241 recognizes this principle of shared jurisdiction.[38]

Incidental effects on "property and civil rights" do not invalidate properly constituted criminal laws. The province retains its authority to regulate in relation to property dimensions of animal ownership. The double aspect doctrine plainly allows that a subject of provincial jurisdiction over property may also be a subject of the federal criminal law power.

Indeed, virtually every criminal law affects the use of property, e.g. firearms are property, cars driven while intoxicated are property, houses destroyed by arson are property, proceeds of crime are property. What matters is the dominant characteristic or pith and substance of the law (e.g. law in relation to public morals or safety), rather than that which the law may incidentally affect. The fact that Bill S-241 would affect property cannot invalidate otherwise constitutionally valid criminal law.

As recently deceased and pre-eminent constitutional law scholar Peter Hogg has written: "A large part of criminal law is devoted to the protection of private property."[39] Protection can and certainly often does work in favour of the property owner. However, protection can also work against an owner when there are issues with how the ownership is being exercised.

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[33] Hogg, *supra* note 6 at §15:7 n. 2 (dating the "double aspect" doctrine to *Hodge v The Queen* (1883) 9 App Cas 117, 130); See also Bill S-241, *supra* note 1 at preamble, quoted at *supra* note 25 (naming the "double aspect" of shared federal and provincial jurisdiction for non-domesticated captive animals).
[34] *Ontario (Attorney General) v* OPSEU, [1987] 2 SCR 2 at 18.
[35] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 22. See also Firearms Reference, *supra* note 8.
[36] See Appendix A.
[37] See e.g. *Health of Animals Act*, SC 1990, c 21, s. 64(1)(i)(ii) (relating to the power to make regulations "for the humane treatment of animals and generally […] governing the manner in which animals are transported within, into or out of Canada").
[38] Bill S-241, *supra* note 1 at preamble: "[W]hereas the subject matter of non-domesticated captive animals has a double aspect of shared federal and provincial jurisdiction."
[39] Hogg, *supra* note 6 at §18:2.

Property in the province also intersects with federal jurisdiction in the area of animal protection and species conservation under the federal *Species at Risk Act*.[40] A recent Federal Court of Appeal case considered whether the power to issue an emergency order related to a frog on private land in Quebec under subsection 80(4) of the *Species at Risk Act* fell within Parliament's criminal law power.[41] The lower court in that case concluded that there was "no doubt" in relation to whether section 80(4)(c)(ii) had a "legitimate public purpose in criminal law... associated with the suppression of evil."[42] On appeal, the Federal Court of Appeal determined that the criminal law power invoked to support the order was akin to the concept of "evil" as outlined in the *R v Hydro-Quebec* case, where the Supreme Court of Canada established the criteria for federal criminal law power.[43] Specifically, the Court stated:

> In the light of the foregoing, I am, therefore, of the view that the Federal Court did not err in concluding that subparagraph 80(4)(c)(ii) seeks to suppress an "evil" as interpreted in the jurisprudence of the Supreme Court, and that there is no distinction to be made between the "evil" referred to in *Hydro-Québec* and the "evil" demonstrated in this case. **The duty to prevent the extinction of wildlife species is a moral obligation as is the protection of the environment. The criminal law power must allow Parliament to intervene in these matters**, particularly when the perceived harm is imminent.[44]

The court's conclusion was that the utilization of the emergency order, including its application to provincial land, did not offend the division of powers.[45]

Many provisions of the *Criminal Code* or other federal laws enacted pursuant to section 91(27) have an impact on property and civil rights in the provinces. For example, Bill S-241's measures for relocating wild animals involved in illegal captures, breeding, or performances are legally analogous to already existing measures in the WAPPRIITA and the *Criminal Code* for the seizure and disposition of property involved in offences.[46]

Animal protection then is a subject with a double aspect — it can be validly addressed by the provinces pursuant to section 92(13) *and* it can be validly addressed by Parliament from a criminal law point of view pursuant to section 91(27), which is exactly what Bill S-241 does. In other words, provincial and federal legislation dealing with different aspects of the same

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[40] *Species at Risk Act*, SC 2002, c 29.
[41] *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2020 FCA 88 [Groupe Maison, FCA].
[42] *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643 at para 102 [Groupe Maison, FC].
[43] Groupe Maison, FCA, *supra* note 41 at para 55; See also: Rebecca Kauffman, "Threatened Jurisdiction: Species at Risk and the Constitution" (2023) online: <https://canlii.ca/t/7n1qv> at 20-21.
[44] Groupe Maison, FCA, *supra* note 41 at para 55; See also: Kauffman, *ibid*.
[45] Groupe Maison, FCA, *ibid* at para 65; See also: Kauffman, *ibid*.
[46] *Supra* notes 23 & 24.

subject can easily/harmoniously co-exist and federal legislation will be paramount only if and when it effectively conflicts with provincial legislation.[47]

Zoo Animals are not Ordinary Property in a Province

Provincial laws recognize that animals are a unique form of property, providing protection for them from distress.[48] Notably, the Civil Code of Quebec's book on property contains the following provision: "Animals are not things. They are sentient beings and have biological needs."[49] While property rules still apply to them, it is clear that the legislature decided in 2015 to afford them a special status.[50] Wild animals, whether they are living in accredited or non-accredited facilities, have only a 'quasi' property status.[51] Interest in their care, because they are sentient, have biological needs, and can be in distress, makes them more than mere property and so different than ordinary property in a province. Indeed, the existence of criminal and quasi-criminal anti-cruelty laws in every Canadian jurisdiction illustrate that animal interests differentiate them from other forms of legal property.

Zoo animals are especially noteworthy in this respect, as AZA accredited zoos in North America operate under a collective management system in which animals are moved from one zoo to another, being "borrowed" or "exchanged," for breeding and other purposes.[52] In the words of one zoo expert: "governing zoo animals is becoming increasingly cooperative, collective, and global."[53] There is now a global animal management database, the Zoological Information Management System (ZIMS), which seeks to provide each animal with a "global passport," thereby facilitating collaboration and lending between zoos worldwide.[54] Zoo animals are not therefore ordinary property in a province. An animal living in one facility, sometimes for

[47] *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161.
[48] See eg *Provincial Animal Welfare Services Act, 2019*, SO 2019, c 13 at s 15(1) ("No person shall cause an animal to be in distress"); *Prevention of Cruelty to Animals Act*, RSBC 1996, c 372 at s 9.1(2) ("A person responsible for an animal must not cause or permit the animal to be, or to continue to be, in distress"); *Animal Protection Act*, RSA 2000, c A-41 at s 2(1.1) ("No person shall cause an animal to be in distress").
[49] *Civil Code of Quebec*, Book 4, Property, General Provisions, 2015 c 35, s 1, art 898.1.
[50] *Ibid,* article 898.1 continues: "In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals."
[51] Angela Fernandez, "Wild Animals as Quasi-Property" in *Elgar Concise Encyclopedia of Animal Law* (forthcoming); See also Angela Fernandez, "Animals as Property, Quasi-Property or Quasi-Person" in *Brooks U Animal Law Fundamentals*, online: <https://perma.cc/79GA-6XDK>; Angela Fernandez, "Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals" (2019) 5 *CJCCL* 155.
[52] See Irus Braverman, *Zooland: The Institution of Captivity* (Stanford, CA: Stanford University Press, 2013) at 11 [*Zooland*]. See also Irus Braverman, *Wildlife: The Institution of Captivity* (Stanford CA: Stanford University Press, 2015) and Irus Braverman, *Zoo Veterinarians: Governing Care on a Diseased Planet* (New York: Routledge, 2021).
[53] Braverman, *Zooland*, *ibid* at 5.
[54] *Ibid* at 107. ZIMS has operated under Life360 since 2016. See ibid Introduction outlining the transfer of Timmy the gorilla from the Cleveland Zoo to the Bronx Zoo to the Louisville Zoo. An unsuccessful action to prevent Timmy's transfer from the Cleveland Zoo "'set a precedent that zoos can send animals from institution to institution,' thereby affirming and legitimizing the collective work of North American zoos for years to come." *Ibid* at 12.

decades, might well be owned by another in a different jurisdiction.[55] Large zoos have a lot of animals coming in and out.[56] So even if they are "almost always owned by zoos," these animals are "not necessarily [owned] by the zoos in which they are kept."[57] The loaning zoo still formally owns the animal;[58] however, some in the industry believe that "ownership is just a word" in a world where AZA collective management has "eroded the meaning of the institutional ownership of zoo animals."[59]

These shared ownership or shared care arrangements become relevant when a safety issue arises, as it did recently when a tiger born at the Toronto Zoo died while under anesthesia during dental surgery at the Cheyenne Mountain Zoo in Colorado, resulting in collaboration between the two zoos to understand and prevent similar accidents in the future.[60] Like the Toronto Zoo, the Cheyenne Mountain Zoo is AZA-accredited.[61]

It is this world of AZA-accredited zoos which Bill S-241 seeks to regulate and restrict conduct, where the special concerns raised by the ethical and safe keeping of captive wildlife have long impacted the mode in which any "property" interests in animals have been regulated and self-regulated, as well as being restricted by Canada's criminal and trade laws.

Sections 8 to 19 of Bill S-241 Fall Under Parliament's Jurisdiction Related to Criminal Law and Federal International/Interprovincial Trade Restrictions

Under section 91(2) of the Constitution, Parliament holds exclusive authority over the "regulation of trade and commerce." This authority encompasses two key areas: Parliament's ability to legislate on matters related to interprovincial and international trade and its broad power to address commercial issues that affect the entire country.[62]

The proposed amendments in sections 8 through 19 of Bill S-241 focus on the WAPPRIITA. The principal legal effect of these sections of the bill is to prohibit the import/export and interprovincial transportation of great apes, elephants and other designated animals (except in

[55] While Timmy remained owned by the Cleveland Zoo (he was purchased from the Memphis Zoo in 1966), he lived in other AZA-accredited zoos for over two decades. *Ibid* at 138.
[56] See *ibid* at 120 (quoting a registrar of the Bronx Zoo: "We have a lot of animals coming in and out … we do a lot of exchanges with other institutions").
[57] *Ibid* at 138.
[58] *Ibid* at 121.
[59] *Ibid* at 138.
[60] "Tiger Born at Toronto Zoo Dies in Incident Involving Anesthesia," Brooks Animal Law Digest: Canada Edition (30 August 2023).
[61] Association of Zoos and Aquariums, AZA-Accredited Members. S. 19 of Bill S-241, *supra* note 1, includes the Board and Management of the Toronto Zoo as one of the seven zoos and aquariums designated as eligible Animal Care Organizations, which would have a deemed permit. The others are the Assiniboine Park Zoo, the Calgary Zoological Society, the Zoo de Granby, the Montréal Biodôme, Ripley's Aquarium of Canada, and the Vancouver Aquarium.
[62] Guy Régimbald et al, "Constitutional Law: Division of Powers," *Halsbury's Laws of Canada*, 2019 Reissue, pp 489 - 494.

accordance with a federal permit). Laws that do this come within Parliament's exclusive jurisdiction to regulate international and interprovincial trade and commerce.[63] The preamble of Bill S-241 explicitly recognizes this jurisdiction, stating that "Parliament may enact criminal laws and **laws to regulate international trade and commerce in relation to animals**."[64]

Parliament has previously exercised its exclusive jurisdiction over international and interprovincial trade and commerce in the context of animal protection. In 2019, for example, Parliament passed Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, which included Senate amendments to restrict the international trade in live whales and dolphins, as well as shark fins.[65] For example, this bill prohibited the importation into and exportation from Canada of shark fins or parts of shark fins not attached to a carcass. The rationale behind Bill C-68 closely resembled that of Bill S-241, with respect to unsustainable trades in wildlife, with the government emphasizing the urgent need to combat the destructive practice of shark finning due to its severe impact on global shark populations.[66]

The Government also recently introduced regulations to the *Wild Animal and Plant Trade Regulations* that will prohibit the import and export of raw elephant ivory and raw rhinoceros horn unless the specimens are destined for a museum or zoo; use in scientific research; or use in support of law enforcement activities.[67] One of the stated objectives of these changes was to "contribute to the conservation of elephants and rhinoceros by limiting Canada's participation in the international commercial trade of elephant ivory and rhinoceros horn."[68]

In amending the WAPPRIITA, Bill S-241 similarly aims to address the pressing issues of both wildlife welfare and conservation, by limiting the trade of certain wild species such as elephants, where captures and imports to Canada may imperil welfare and harm wild populations. It also invites a ban, via amendment, on the trade of elephant ivory and rhinoceros horn within Canada, as well as the collection of elephant and rhinoceros hunting trophies.[69] These measures are designed to conserve elephant and rhinoceros populations and encourage similar bans in other countries.[70] Additionally, Bill S-241 recognizes the harmful effects of the global wildlife trade on biodiversity, mass extinction, and the risk of zoonotic diseases.[71]

These proposed amendments align with Parliament's exclusive jurisdiction related to federal international and interprovincial trade restrictions and reflect Parliament's commitment to addressing pressing wildlife welfare and conservation concerns.

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[63] *Murphy v CPR*, [1958] SCR 626.
[64] Bill S-241, *supra* note 1 at preamble [emphasis added].
[65] *An Act to amend the Fisheries Act and other Acts in consequence*, SC 2019, c 14.
[66] Fisheries and Oceans Canada, News Release, "Government of Canada bans shark finning" (20 June 2019), online: <https://perma.cc/ET4G-DXKA>.
[67] *Regulations Amending the Wild Animal and Plant Trade Regulations*, SOR/2023-241.
[68] Canada Gazette, Part II, Vol 157, No 24, online: <https://perma.cc/SQ7W-NYA7>.
[69] Bill S-241, *supra* note 1, preamble [emphasis added].
[70] *Ibid.*
[71] *Ibid.*

Conclusion:

In conclusion, Bill S-241, the *Jane Goodall Act*, is firmly grounded in Canada's constitutional framework. The same is true of the related government Bill S-15. These bills address critical issues related to animal protection and public safety, utilizing both the federal criminal law power related to animal cruelty and public safety and the federal trade and commerce power concerning international and interprovincial trade. These bills align with the constitutional principles governing the exercise of federal powers, making them valid and constitutionally sound legislative measures.

Thank you for your attention to this important matter.

Sincerely,

Irus Braverman
Professor of Law & Animal Studies
State University of New York at Buffalo
Faculty of Law & Department of Geography

Jessica Eisen
Associate Professor of Law
University of Alberta
Faculty of Law

Angela Fernandez
Full Professor
University of Toronto
Faculty of Law & Department of History

Daphne Gilbert
Full Professor Law
University of Ottawa
Faculty of Law

Jodi Lazare
Full Professor
Dalhousie University
Schulich School of Law

Anna Su
Associate Professor
University of Toronto
Faculty of Law & Department of History

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Appendix A:

1. *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)*, S.C. 2019, c. 11
2. *An Act to Amend the Criminal Code (bestiality and animal fighting)*, S.C. 2019, c. 17
3. *An Act to amend the Fisheries Act and other Acts in consequence*, S.C. 2019, c. 14
4. *The Health of Animals Act*, S.C. 1990, c. 21
5. *Health of Animals Regulations*, C.R.C., c. 296, with regulations amending the regulations in 2019
6. *Safe Food for Canadians Regulations, SOR/2018-108*, with regulations amending the regulations in 2022
7. *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40
8. *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187
9. *Species at Risk Act*, S.C. 2002, c. 29
10. *Fisheries Act*, R.S.C., 1985, c. F-14
11. *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52