

ANIMALS AND THE LAW

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CLOSING THOUGHTS

Today's problems cannot be solved by thinking the way we thought when we created them.

— Albert Einstein

What strikes one most about the profound violence to which so many animals are subjected in modern Canadian society is how utterly ordinary it is. That is why anti-cruelty laws have proved unable to diminish that violence in any meaningful way. The word “cruelty,” both as the title of criminal offences against animals, and as the general manner in which unacceptable treatment of animals is commonly described, protects the routine practices that are common in a given activity by drawing out for condemnation only singular acts of *extraordinary* behaviour. If many people find it convenient, enjoyable, or profitable to do things that hurt animals, those things are not legally cruel. So long as causing animals to suffer is not the only object of the act, the fact that they suffer as a result becomes almost entirely irrelevant.

Cruelty connotes a malevolent intention that creates too high and constrained a standard. Many criminal offences could be said to involve cruelty as it is generally understood—breaking in to a person's home, theft of a person's treasured belongings, kidnapping, assault, murder, and so on. Yet there is no additional legal element of “cruelty” to cast an interpretive shadow over those or any other crimes. The term is a legal anachronism that dates from the time the relationship between humans and animals was first codified, a time when animals were seen

to be largely irrelevant things which were categorically different from humans.

Similarly, laws that prohibit “unnecessary suffering” or require “humane treatment” fail to protect the interests animals have in living their own lives and in not being made to suffer for human purposes. The former term conveys an objective necessity and corresponding entitlement to hurt animals in accordance with human convenience or preference. The latter term is problematic in two ways: when used as a standard for the treatment of animals, it is bereft of any substance; when used to describe and excuse generally accepted practices in which animals are often severely hurt—practices which would be criminal offences if committed against any human being—it transforms into Orwellian doublespeak.

The problems that have been discussed in this book are ubiquitous. In many cases, vested interests perpetuate activities that have, by any modest ethical standard, lost all credible defences. But that perpetuation depends on societal acceptance of those activities, or at least, of societal willingness to look away and defer to those vested interests to decide right and wrong on the collective behalf. As science has, over time, eroded the categorical distinctions between humans and other animals by revealing our biological kinship, the public attitude has changed. These activities no longer enjoy the lack of scrutiny they once did. The trivialization of animal interests that has long prevailed in law and other social institutions is beginning to yield. Slowly, but undeniably, respect for animals is emerging as a Canadian value.

As it does, the topic of animal law begins its development. This is a sign of considerable progress, indicating that the subject has moved from the stage of ridicule, to debate, and toward adoption, in accordance with the three stages of social movements identified by John Stuart Mill. However, the term “animal law” might not be clear enough. “Human law” would seem to include every possible kind of conflict that two human persons could have, and this would comprise every legal subject under the sun. The term “animal law” is equally vague, potentially including every problem in which animals appear at the centre. A term like “animal rights law” might better identify a body of law in which the *status quo* approach to animals as property is in dispute.

In a democracy, law is expected to change in accordance with changing values. The legal lexicon by which the human-animal relationship is regulated will have to evolve to accommodate modern knowledge and ideas about animals. Law must look back to understand the assumptions that have traditionally impoverished interpretations of statutory language as noted above; otherwise, that language will con-

tinue to camouflage the very harms it purports to restrain. However, not only the language which implements these assumptions requires review; where the beliefs on which legal assumptions rest no longer have a factual base, the validity of the assumptions themselves must be re-evaluated, such as the assumption that animals are things with no morally significant interests of their own.

As the law begins to more meaningfully recognize animals as sentient beings, it will have to consider what the morally relevant differences are that justify the negative treatment of some sentient beings, while knowing that treatment would be unacceptable for human beings. It will have to confront the absurdity that while inanimate constructs such as churches, partnerships, trusts, estates, unions, municipalities, and other corporations can advance their interests in law,¹ sentient beings with fundamental interests that are comparable to the very interests the law seeks to protect for humans, are prevented from doing so. It will have to begin to recast some kinds of legal conflicts and consider new ways of resolving others.

Ultimately, in a legal system that seeks to be logically and morally coherent, legal personhood for animals seems an inevitable result. To say that a being is a person is merely to say that the being has morally significant interests, that the principle of equal consideration applies to that being, and that the being is not a thing.² However, because of the long-standing nature of the proprietary relationship humans have preferred, the legal shift will take some time. As Professor Stone observed many years ago in his academic inquiry into whether trees should have standing:

[t]he fact is, that each time there is a movement to confer rights onto some new 'entity,' the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of 'us,' those who are holding rights at the time.³

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- 1 Under international law, states are also recognized as having legal personality. See the discussion in Laurence H Tribe, "Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise" (2001) 7 *Animal L* 1.
 - 2 Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia: Temple University Press, 2000) at 100–1. For further discussion, see Chapter 2.
 - 3 Christopher D Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 *S Cal L Rev* 450 at 453–56.

Personhood might be established by way of direct legal efforts, or it might be the result of an accumulation of indirect initiatives in which the property status of animals is gradually eroded and replaced.⁴ For example, American legal scholars have prepared an academic legal brief based on the theoretical case of an individual named Evelyn Hart.⁵ Hart is a chimpanzee whose human guardian contested an order dispatching her to a government-funded biomedical research laboratory. The story of Evelyn Hart is a composite; she is intended to personify all great apes who are sold into human commerce. The brief articulates a persuasive argument for great ape personhood based on constitutional and other legal principles.

In a more concrete example, an Austrian shelter housing two chimpanzees filed for bankruptcy in 2007. The animals had been captured as babies in Sierra Leone and smuggled to Austria for use in pharmaceutical experiments. Customs officers intercepted the shipment and turned the animals over to the shelter. Donors were prepared to continue their financial support after the shelter closed, but under Austrian law, only a legal person could receive personal gifts. Advocates commenced a legal proceeding to establish the legal personhood of one of the chimps, named Matthew Hiasl Pan, so that a guardian could be appointed to protect his interests, receive support on his behalf, and ensure that he could not be sold to someone outside of Austria where weaker legal standards applied. The claim was rejected, as novel legal arguments often initially are; in fact, the problem had less novel solutions, such as establishing a foundation to collect the needed financial support. However, the initiative received extensive international attention and debate.⁶

In 2005, an application for a writ of *habeas corpus* was brought on behalf of a lone chimpanzee named Suica, living in a zoo in Brazil.⁷ *Hab-*

4 See a controversial example, Jessica Berg, "Of Elephants and Embryos: A Proposed Framework for Legal Personhood" (2007) 59 *Hastings LJ* 369.

5 Lee Hall & Anthony Jon Waters, "From Property to Person: The Case of Evelyn Hart" (2000) 11 *Seton Hall Const LJ* 1.

6 See William J Cole, "Activists in Austria Want Chimp Declared a 'Person'" *Associated Press* (5 May 2007), online: www.chron.com/news/nation-world/article/Activists-in-Austria-want-chimp-declared-a-1613850.php; "Austrian Judge: Chimps Aren't People" *Associated Press* (27 September 2007), online: www.usa-today.com/news/offbeat/2007-09-27-chimpanzee_N.htm.

7 In 9th Salvador Criminal Court, Salvador, Bahia, Official Diary for 4 October 2005, Docket Number 833085-3/2005. The decision is available online: www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm. An English translation of the brief filed is available online: www.animallaw.info/nonus/pleadings/pb_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf.

eas corpus is a legal procedure by which a person can seek relief from unlawful detention. Rather than dismiss the initial application, the Brazilian court found it to be a highly complex issue deserving of discussion and requiring in-depth examination. It sought further information from Suica's advocates, which was to be produced within seventy-two hours; however, in that interim period, Suica was found dead in her cage. The court therefore dismissed the application, but in doing so, it observed that criminal law is not static, that new decisions have to adapt to new times, and that the topic would not die with the writ.⁸

In Canada, no such direct claim for animal personhood has yet been made, but courts have begun to reflect the changing paradigm and have laid the groundwork for a new approach. The cases are few in number to date, but they can be found across the legal spectrum. For example:

- In a variety of cases in the realm of torts, family law, and provincial offences, courts import consideration of an animal's "best interests" and "custody," thereby recognizing the law's interest in protecting a sentient animal for his own sake and not just in his capacity as somebody's property.⁹
- Similarly, in *R v Power*,¹⁰ the Court of Appeal for Ontario confirmed that in criminal offences against animals, the offence is to the animal herself, regardless of whether or not a person has any interest in her.
- In *R v Munroe*,¹¹ the ten-fold increase in the overall maximum penalty that was implemented in 2008 for crimes against animals was found to be virtually unheard of in criminal law. It reflected Parliament's recognition of widespread concerns that animal cruelty provisions had fallen drastically out of step with current social values and it represented both a fundamental shift in Parliament's approach and a dramatic change to the legislative landscape for these crimes.¹²

8 For further discussion, see Deborah Rook, "Should Great Apes Have 'Human Rights?'" [2009] 1 Web JCLI.

9 See discussion in Chapter 5. In a similar spirit, some municipalities have begun to change their terminology and refer to the humans as being "guardians" of animals, rather than "owners": see a By-law for the Licensing and Registration of Dogs and for the Control of Dogs Generally within the City of Windsor, By-law 245/2004, online: www.citywindsor.ca/000024.asp.

10 (2003), 176 CCC (3d) 209.

11 2010 ONCJ 226.

12 *Ibid* at paras 1–3 and 27.

- In *R v Houdek*,¹³ the Saskatchewan Court of Queen's Bench contemplated the consequences of dangerous dog proceedings for the dog in issue and expressed that in making the determination of whether or not a dog is dangerous, "the quality of mercy should not be strained."¹⁴
- In *Ferguson v Birchmount Boarding Kennels Ltd*,¹⁵ Ontario's Divisional Court rejected the categorization of a companion animal as just another consumer product as "incorrect in law."¹⁶
- In the "oncomouse case,"¹⁷ the Supreme Court recognized the animal rights perspective as a relevant one in Canadian legal discourse.
- In *Reece v Edmonton (City)*,¹⁸ the chief justice of the Alberta Court of Appeal drew upon the growing body of legal scholarship on this topic,¹⁹ and acknowledged both the pressing need for legal progress and the theoretical basis for granting meaningful animal rights. And

13 2008 SKQB 434.

14 *Ibid* at para 24.

15 (2006), 79 OR (3d) 681 (SCJ).

16 *Ibid* at paras 20 and 25.

17 *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76.

18 2011 ABCA 238.

19 *Ibid* at footnote 24. Fraser CJA relied on what she described as the considerable scholarship in this area that has been generated over the past two decades in both Canada and the United States, including: David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1 *Detroit College of Law Review* 1; Gary Francione, "Animals, Property and Legal Welfare: Unnecessary Suffering and the Humane Treatment of Animals" (1994) 46:2 *Rutgers L Rev* 721; Gary Francione, "Animal Rights Theory and Utilitarianism: Relative Normative Guidance" (1997) 3 *Animal L* 75; Gary Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996); Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, MA: Perseus, 2000); Elaine L Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 *Animal L* 23; FC DeCoste, "Animals and Political Community: Preliminary Reflections Prompted by Bill C-10" (2003) 40:4 *Alta L Rev* 1057; Lyne Letourneau, "Toward Animal Liberation—The New Anti-Cruelty Provisions in Canada and Their Impact on the Status of Animals" (2003) 40:4 *Alta L Rev* 1041; Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004); Arlene Kwasniak, *Wildlife Stewardship* (Calgary: Canadian Institute of Resources Law, 2006); Elaine Hughes, *Animal Welfare Law in a Canadian Context*, 3d ed (Edmonton: University of Alberta Faculty of Law, 2006); Cass R Sunstein & Jeff Leslie, "Animal Rights Without Controversy" (2007) 70 *Law & Contemp Probs* 117; David Favre, "Living Property: A New Status for Animals Within the Legal System" (2010) 93 *Marq L Rev* 1021; Joan E Schaffner, *An Introduction to Animals and the Law* (Hampshire, UK: Palgrave Macmillan, 2011); and Peter Sankoff & Steven White, eds, *Animal Law in Australasia: A New Dialogue* (Annandale, NSW: The New Federation Press, 2009).

while such progress is being implemented, her reasons provide interim support for a significantly broader interpretation of existing legislation that has animal protection as its aim.

This book has been largely occupied with suffering and exploitation, because those are the characteristics which define the relationships most animals have with humans in Canada. In *Reece*, Fraser CJA found that the evidence revealed a disturbing image of the magnitude, gravity, and persistence of health problems and the severity of the suffering endured by an elephant named Lucy, an animal held captive at Edmonton's Valley Zoo for the benefit of human visitors. The evidence, she found, held up a mirror for all to see—so long as one is prepared to look in it. If one holds up “Fraser's Mirror” high enough, the urgent need for legal change for animals across Canada is patently clear, and the task of Canadian lawyers and lawmakers is to apply the attention, determination, and creativity needed to usher it in.