WHERE THE WILD THINGS ARE (AND HAVE BEEN): AN ARCHEOLOGY OF LEGAL DISCOURSES ON ANIMALS IN QUEBEC

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Are animals mere things in the eyes of the law? Public discourse suggests so. However, the history of legal discourses about animals reveals another story. For better or for worse, animals have not been considered as mere things in law. It was long recognized that animals possess certain characteristics that are observable in beings, such as agency, sentience, and sociability. Together, agency, sentience, and sociability constitute a cluster of being-like characteristics sketching, through time, a portrait of the animal that is distanced from the image of a mere object of property. To support this conclusion, we ask where the "wild things" are and have been in our legal history. We relocate animals in the history of legal discourses surrounding them in the territory of Quebec, beginning slightly before codification. As many individuals worldwide would like to see their own jurisdiction explicitly recognize that animals are not things but beings, Quebec provides a fruitful case study for international readers on the impact that such a change may have on legal norms and discourses.

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I. INTRODUCTION

Our journey starts on a day in September. While the leaves are turning gamboge yellow, crimson red, and carnelian orange on the mountains of Quebec's Eastern Townships, a new

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cohort of law students enters a university humming between these forestry hills. Mandatory for first-years is the property law course. There, these students are about to learn the law's infamous *summa divisio* between persons and things, and where nonhuman animals fall within it. If the law is composed of a series of myths we tell each other, then teaching is the greatest storytelling exercise.

On that day, students are told about the myth that animals are mere objects of property in the eyes of the law. This classification suggests that an owner can do whatever they want with their animal. Some students are shocked: "How can the law allow me to kill my dog whenever I want?" For other students, this classification simply confirms their moral belief in human superiority. Others, maybe most, will simply never remember that class. At the end of the day, however, the myth settles in those students' minds as a piece of truth. But should it have?

We have been in this class, as teachers, trying to deconstruct this enduring myth that animals are mere objects of property.[1] Naturally, the continuity of this conception comes as no surprise. Indeed, throughout history, animals have been utilized for various purposes, including in agriculture, transportation, entertainment, and research. It is deeply ingrained in our culture that it is possible to use, consume, and exploit animals for human purposes. The historical association of animals with utility and economic value — akin to any other object of property — contributes to the perpetuation of this myth. Likewise, legal systems in the Western world have historically protected the interests of those who exploit animals for these various purposes. In this regard, it is not surprising that law students adhere to the idea that, in law, animals are treated as objects of property like any other.

The idea that animals are mere things arouses among antispecists either cynicism or scandal and calls for change so as to better respect animals. Although we do not want to discourage efforts towards improving the legal status of animals, we want to question the observation that animals are and have always been mere things in the eyes of the law, akin to any other things, and devoid of any distinctive characteristics. To do so, we relocate animals in the history of legal discourses surrounding them. We ask where the "wild things" are and have been in our legal history.

The claim that animals are mere things in law must be reconsidered for three reasons. First, adopting the view that animals are mere things in law, even if this is done with the intention to fight animal exploitation, inadvertently aligns with the interests of those who wish to exploit animals. Accepting that animals are mere things in law implies accepting that owners can legally do whatever they want to them until the law undergoes change. Second, this viewpoint disregards existing legal resources to challenge instances of animal exploitation, pushing the debate primarily into the realm of politics. Third, it is not necessary to paint a grim portrait of the law in order to advocate for its reform. Even if — as we will argue — the law recognizes animals' agency, sentience, and sociability, there remains compelling reasons to seek improvement in animals' legal status. Consequently, our common understanding of animals' legal history must be revisited.

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[1] Marie-Andrée Plante taught that class in Fall 2019 at the University of Sherbrooke and Michaël Lessard gave a presentation on how the attributes of civil law ownership apply to animals.

To conduct our inquiry into the legal status of animals and, in particular, the discourses surrounding them, we have chosen Quebec law as our case study. This jurisdiction serves as an interesting site of inquiry because its legislature explicitly changed animals' legal status in 2015 by declaring that animals are not things but sentient beings with biological needs.[2] Consequently, analyzing the discourses emanating from statutes, case law, and doctrine from before and after this explicit reform enables us to understand this change from a historical discourse analysis perspective. As many individuals around the world would like to see their own jurisdiction explicitly recognize that animals are not mere objects of property, Quebec provides a fruitful case study for international readers who wish to see the impact of such a change on legal discourses.

Our article thus represents an archaeological[3] exploration of the legal discourses surrounding animals, shedding light on the historical conception of animals in Quebec's legal culture. By "legal discourses," we are referring to the language that circulates within the legal field. This encompasses, but is not limited, to legal scholarship, statutes, regulations, judicial opinions, legal rules, theories, principles, arguments, or interpretations, all of which collectively shape our intricate legal imagination. Our discourse analysis method aims to investigate how legal language has contributed to the formation of a distinct conception of animals, imbued with specific characteristics. This approach allows us to direct our attention towards the legal discourses themselves and their effects, rather than delving into the intentions and personal beliefs of the individuals who articulated them. It is important to clarify that our method does not involve an inquiry into the personal perceptions of jurists regarding animals; instead, our focus lies in understanding how these jurists discussed animals and how such discourses shaped a particular legal imagination.

In this article, we argue that animals were already considered as more than mere things in legal discourses when Quebec's animal law reform came into force in 2015. Our inquiry into the issue's legal history reveals that legal discourses have been more receptive to particular traits of animals than what is usually assumed. More precisely, we observe that legal discourses have historically implicitly acknowledged, to some degree, animal agency, sentience, and sociability. These characteristics were not initially identified in our research project, but instead consistently surfaced within our corpus as we analyzed the historical legal discourses in Quebec. Together, these characteristics sketch a picture of the animal that Quebec's reform further refined by formally declaring that animals are not things but sentient beings.

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2 Art 898.1 CCQ. We wish to recognize the work of Quebec legal scholars who argued in favour of a legal reform. See among others Alain Roy, "Papa, maman, bébé et… Fido! L'animal de compagnie en droit civil ou l'émergence d'un nouveau sujet de droit" (2003) 82 R du B can 791 [Roy 2003]; Alain Roy, "Je lègue l'universalité de mes biens meubles et immeubles à mon compagnon bien-aimé… Fido" (2004) 38 RJT 613; Martine Lachance, "La reconnaissance juridique de la nature sensible de l'animal: du gradualisme français à l'inertie québécoise" (2013) 72 R du B 579.

3 While this article is not a direct application of Michel Foucault's archaeological approach, it does embody a Foucauldian sensibility. In this sense, its discourse analysis approach aims to describe the things that have been said in a certain culture and to pay attention to see how they have been said, how they have functioned and endured, and how they may eventually have transformed. See Michel Foucault, *The Archaeology of Knowledge (and The Discourse on Language)*, translated by AM Sheridan Smith (New York: Pantheon Books, 1972).

To be sure, our inquiry deals with animals' legal status and representations in legal discourses — not with how they were treated or seen in the social sphere more generally. Furthermore, our findings do not suggest that animals were not legal things nor objects of property, or that they have ever (legally or socially) been respected to the full extent they deserve — far from it. Nor do we imply that Quebec's animal law reform had no normative consequences and simply codified already existing law. Our point, rather, is twofold: historical and political.

On the historical side, we challenge the idea that the 2015 reform represents a complete departure from the way animals have been conceived under Quebec law.[4] When we trace an archeology of legal discourses on animals in Quebec, the picture is not so clear-cut. Indeed, it seems that many of the ideas that were thought to emerge from the reform (sentience, agency, and sociability) already existed in the legal discourses. For instance, the expectation that formally recognizing the sentience of animals would dramatically change their legal status is based on the false premise that the law treated animals as mere things, just like any other things. Legal discourses already bore witness to the fact that animals were regarded as more than objects of property. We thus wish to demonstrate that Quebec's animal law reform is situated in an ongoing process that acknowledges animals' particularities; consequently, the reform is not a disruption, but a maturation. We want to counter the post-reform discourse of a complete paradigm shift, insofar as it ignores important aspects of pre-existing legal norms and discourses.

On the political side, we want to point to legal resources that antispecists may use to limit the dominion of humans over animals. In Quebec, there are two main views on the animal law reform: either that the reform had no normative impact because it explicitly provides that the law of property still applies to animals (the non-normative view), or that the reform requires the law to articulate a new respect for animal sentience (the normative view). However, both views miss the point: animals were not being considered as mere things even before the reform. Consequently, proponents of the non-normative view must acknowledge that there were already existing restrictions in property law concerning animals. Conversely, proponents of the normative view — which we are[5] — must realize that they may draw on pre-reform precedents to interpret the reform, elaborate on legal claims, and develop political demands. For readers in an unreformed jurisdiction, our historical inquiry suggests that their own jurisdiction might hold legal resources that may be used to help animals.

This article will be of interest to Quebecers who wish to gain a better understanding of the treatment of animals. It will also appeal to readers from outside Quebec, as their own

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4 This discourse frequently surfaces in the public sphere, highlighting the shift from considering animals as mere movable property under Quebec law to recognizing them as sentient beings. Here and there, we can read that "[i]t may seem obvious to many, but until [4 December 2015], an animal in Quebec had the same rights as a piece of furniture" or that "[s]ince 2015, the animal is no longer considered movable property in Quebec, in the same way as a toaster or a lawnmower," see respectively: La Presse Canadienne, "Québec adopte une loi pour le bien-être et la protection des animaux," *La Presse* (4 December 2015), online: [perma.cc/TYJ2-EMNJ] [translated by authors]; Jeanne Corriveau, "Cohabiter avec les animaux en ville," *Le Devoir* (5 December 2022), online: [perma.cc/XML8-B9KX] [translated by authors]. Our point is that animals, while certainly considered property, were already not treated in the same way as a toaster or a lawnmower.

5 We detailed our view in Michaël Lessard & Marie-Andrée Plante, "L'animal de la famille: un sujet sensible" (2023) 52:3 RDUS 729.

jurisdiction's legal history may resemble Quebec's with regards to animals. This international appeal is not limited to jurisdictions that, like Quebec, legally recognize animals as sentient beings, nor is it restricted to civil law jurisdictions; it is broader.[6] Indeed, we examine legal mechanisms — such as property acquisition through control, civil liability by act of an animal, anti-cruelty rules, and damage claims for killed or injured animals — that also exist in a variety of other jurisdictions, including most, if not all, Western jurisdictions.[7] Hence, the lessons we draw from the Quebec case study may be applicable to their own jurisdiction.

Our article has five parts. First, we briefly introduce the parameters of our historical inquiry into Quebec's legal discourses. Then, we move to analyzing our findings, demonstrating that jurists have already acknowledged to some extent that animals have agency, sentience, and sociability, each of these characteristics constituting its own section. We conclude with a transversal analysis of where animals can be located throughout Quebec's legal history, in which we will see that our examination of Quebec's legal discourses highlights both an ongoing process of dereification of animals and a shift in the conception of animals, from being viewed as a "collectivity" to being considered "individuals" in the eyes of the law.

II. HISTORICAL PROLEGOMENON

Our investigation into the evolution of Quebec's legal discourses reveals that the Province did not assimilate animals to other legal things but rather implicitly acknowledged that animals have peculiar characteristics that elevate them into something more than mere things, that is, beings. More precisely, the Province recognized that animals were capable of agency, sentience, and sociability, infusing this recognition with normative force.

Before delving into our historical material, a few historical facts must be laid out for non-Quebec readers. The territory on which the Province of Quebec is currently established was claimed by France in 1534, despite the fact that it was already inhabited. Individuals from France gradually settled on the territory they called New France, most notably while developing fur trade. Since French law was not unified into a single regime at the time, there is some debate as to which legal regime applied in New France. With the reconfiguration of New France into a proper royal colony, the *Custom of Paris* became, in 1664, the legal regime in force, with minor local adjustments.[8] French law remained in force until, following the British Conquest of New France, France ceded this territory to Great Britain in 1763.[9] Most French-originating private law was officially reinstated in 1774 by the *Quebec Act*,

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6 Consider also the arguments in Michaël Lessard, "Can Sentience Recognition Protect Animals? Lessons From Québec's Animal Law Reform" (2021) 27 Animal L Rev 57.

7 Note the work of Angela Fernandez with regards to common law, see e.g. Angela Fernandez, "Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals" (2019) 5:1 Can J of Comparative & Contemporary L 155.

8 *Déclarations du Roi sur la Compagnie des Indes occidentales*, 1664, s 33.

9 *Royal Proclamation*, 1763, reprinted in RSC 1985, App II, No 1. Following the Royal Proclamation, there was uncertainty as to whether the locally-adapted Custom of Paris still applied to the Province of Québec, see National Assembly of Quebec, "Proclamation royale (1763)," online: [perma.cc/ZBS8-ZVXQ]; Rodolphe Lemieux, *Les origines du droit franco-canadien* (Montreal: Théorêt, 1901) at 354–72; Jacques L'Heureux, L'organisation judiciaire au Québec de 1764 à 1774 (1970) 1:2 RGD 266.

while English-originating law would rule public law and judicial procedures in all matters.[10] This is still the case today.

The locally adapted *Custom of Paris* mostly stayed in force up until the codification of Quebec law into the *Civil Code of Lower Canada* in 1866. In contrast to the so-called *Napoleonic Code*, the *Civil Code of Lower Canada* did not represent a legal paradigm shift, but largely codified existing law at the time.[11] Note that because of British dominion over the province, the *Civil Code of Lower Canada* was written in both French and English, as is the rest of Quebec law. We will be quoting the law in both of its official languages.[12] In 1994, the *Civil Code of Quebec* replaced the *Civil Code of Lower Canada* and is still in force today. To sum up, three main periods thus cover the *jus commune* of Quebec: the rule of the *Custom of Paris* (1664–1866), that of the *Civil Code of Lower Canada* (1866–1993), and that of the *Civil Code of Quebec* (1994–now).

With regards to criminal law, this domain is considered a public law matter in the British world, so English-originating law has applied in Quebec since the British Conquest. That being said, Quebec retained jurisdiction over criminal law up until the unification of Lower Canada (as Quebec was known) and Upper Canada (as Ontario was known) in 1841.[13] From that time, the United Province of Canada held jurisdiction over the matter until the Confederation of Canada in 1867.[14] Since Confederation, the federal Parliament has held jurisdiction over criminal law.[15]

As a final note on Canada's legal system, we must underline that, with Confederation, jurisdiction over fishing in navigable waters and at sea was given to the federal Parliament.[16] The latter uses that jurisdiction to ensure conservation of marine animals in sufficient stock for perennial human consumption. Moreover, the federal Parliament has jurisdiction over trade and commerce outside of provinces,[17] a jurisdiction it uses to regulate standards of food production, including the slaughter process of so-called food animals.

Our investigation covers these three periods of Quebec private law — insofar as historical data is available — as well as public law, mostly with regard to criminal law.[18] Our

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10 *An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America*, (1774), 14 George III, c 83.

11 Pierre-Basile Mignault, *Le droit civil canadien basé sur les « Répétitions écrites sur le Code civil » de Frédéric Mourlon avec revue de la jurisprudence de nos tribunaux*, t 1 (Montreal: Théorêt, 1895) at 52ff; Pierre-Basile Mignault, *Le droit civil canadien basé sur les « Répétitions écrites sur le Code civil » de Frédéric Mourlon avec revue de la jurisprudence de nos tribunaux*, t 5 (Montreal: Théorêt, 1901) at 683.

12 In Quebec, laws and regulations are bilingual and the English and French versions have equal legal value. However, as of 2022, in the event of a discrepancy between the French and English versions that cannot be properly resolved using the ordinary rules of interpretation, the French text prevails, see *Charter of the French Language*, CQLR c C-11, s 7.1.

13 Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989) at 46, 56–57, 60.

14 *Ibid* at 60.

15 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

16 *Ibid*, s 91(12).

17 *Ibid*, s 91(2).

18 Note that, with the exception of criminal law, our inquiry does not deal with federal law regulating certain animal-related issues; for example, the *Health of Animals Act*, SC 1990, c 21, or the *Safe Food for Canadians Act*, SC 2012, c 24. Indeed, the starting point of our inquiry was the discourse of Quebec jurists on animals in legal doctrine, and they expressed very little opinion on federal legislation on the subject. For this reason, the various federal statutes and regulations outside criminal law were excluded from our analysis.

methodology for identifying the legal discourses concerning animals is simple: we analyzed every piece of doctrine we could find on the matter, as well as related case law and statutory law. The earliest doctrinal source from the Quebec territory we found is Henry des Rivières Beaubien's *Traité sur les Lois civiles du Bas-Canada* from 1832, and the latest is Sylvio Normand's *Introduction au droit des biens* from 2020, as we finished compiling our corpus in August 2020.[19] When doctrinal sources directed us towards other legal sources, we pursued these paths into the realms of statutory law and case law. Consequently, certain sections of this article delve more deeply into statutory law (as seen in the section on sentience) or case law (as observed in the section on sociability) compared to others. This distinction arises from the fact that doctrinal sources place greater emphasis on these alternative sources when discussing the specific characteristic, and these sources more effectively illustrate the legal discourses pertaining to that characteristic. Hence, our research results in an overview of legal perspectives on animals, as evidenced and reinforced by influential doctrinal authors, and supplemented by authoritative case law and relevant statutory law.

This historical journey into the discourses of legal actors invites us to look beyond mere rules and instead pay attention to the ways in which animals are conceived and articulated within the law. Such an inquiry is important because of the performative effect of such discursive productions.[20] Indeed, legal discourses shape the law itself, but also impact society in general given the law's authoritative and symbolic role. Legal discourses actively construct a reality. As we will uncover through this journey, legislators, judges, and doctrinal authors have, for decades or even centuries, implied or asserted explicitly that animals are agents with a will of their own, are endowed with sentience, and develop meaningful relationships with humans. This discovery is not trivial. Affirming that animals are not mere things, that they are something more — perhaps beings in their own right — and bringing this discourse to reverberate within society through the law has capital importance. Such discourse is likely to shape our perceptions of what is legally and socially conceivable. To speak of animals as more than simple things is to make animals become so. Over time, this contributes to transforming this discourse into a legal and social reality recognized by all, driving changes in attitudes and behaviours.[21]

In this regard, the 2015 animal law reform illustrates how norms and discourses are intertwined. On one hand, the recognition of animal sentience had important normative effects: since its inclusion in the *Civil Code of Quebec*, every legal right and power must be

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19 This research was completed on 1 August 2020. This research was completed on 1 August 2020. See the Appendix for our bibliography of historical doctrinal sources. To know more about the historical evolution of doctrine in Quebec, see Sylvio Normand, "Une analyse quantitative de la doctrine en droit civil québécois" (1982) 23:4 C de D 1009.

20 See e.g. Eileen Crist, *Images of Animals: Anthropomorphism and the Animal Mind* (Philadelphia: Temple University Press, 1999), where the author analyzes the language used to portray animal behaviour in the behavioural science literature and emphasizes how this language shapes the way we think and how we approach the subject of animal minds.

21 Numerous authors have emphasized the role of legal discourses in shaping social reality, including scholars associated with legal realism, critical legal studies, feminist legal theory, critical race theory, among others. We are not necessarily aligning with a specific author or movement here; rather, we simply aim to underscore the idea that legal discourses are not neutral but actively contribute to the construction and perpetuation of social reality.

exercised with respect for animals' sentience.[22] On the other hand, the formal acknowledgment of animal sentience also unequivocally shapes the idea of animals: they are not things, they are sentient beings, carrying the symbolic weight associated with such a designation. While this reform does not represent a discursive rupture in our view, it nonetheless marks a pivotal moment, significantly influencing the evolving perception of animals in Quebec.

A study of the history of legal discourses surrounding animals is also important for other reasons: it unveils normative resources within our law that may serve to advocate for the interests of animals today. The reform of 2015 is one such resource, but it is not the sole one, as our historical investigation demonstrates.

From our findings, we conclude that legal discourses on animals have long recognized that animals are not mere things. Animals have been understood as particular objects of property possessing certain characteristics observable in beings, such as agency, sentience, and sociability. Jurists have long acknowledged the existence of these characteristics and invested them with normative force. Animals are agents, which the law acknowledges when enabling some animals to escape from legal ownership and when regulating injuries caused by animals. Animals suffer from pain and the lack of minimal care, which the law acknowledges by prohibiting some forms of animal abuse and imposing welfare-related obligations. Animals form close and intimate relationships with humans, which the law acknowledges by compensating the emotional injury a human endures when losing their animal. Together, agency, sentience, and sociability constitute a cluster of being-like characteristics sketching, through time, a portrait of the animal that is distanced from the image of a mere object of property. Let us examine each characteristic in turn.

III. AGENCY

The recognition of animals' agency in Quebec's legal discourses, as we will see, is a first indication that, well before the 2015 reform, Quebec jurists did not talk of animals as mere things. By "agency," we refer to animals' ability to make choices, to have preferences, and to initiate actions to satisfy those preferences. In other words, "agency," for the purpose of this research does not mean that choices are or must be consistent with an individual's values, beliefs, or goals, nor does it imply any other reference to that type of autonomy.[23] It does not mean that choices are or must be understood by an individual to be her own. Our focus is on "agency" as the idea that an individual has the ability to make a choice that leads her to act deliberately with a purpose. In other words, we refer to choice-making capacity, the range of which may depend on the animals' species and individual characteristics. Hence, when we discuss the recognition of animals' agency, we are referring to the fact that Quebec jurists, as evidenced by their writings, viewed animals as beings endowed with a degree of choice-making capacity that mediates their interactions with their environment. In other

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22 *Road to Home Rescue Support c Ville de Montréal*, 2019 QCCA 2187 at 57 [*Road to Home*].

23 Martha Nussbaum notes that "autonomy" typically means "the ability to criticize one's desires in the light of some higher-order principles": Martha C Nussbaum, *Justice for Animals: Our Collective Responsibility* (New York: Simon & Schuster, 2023) at 29.

words, they did not perceive animals as mere automatons acting solely mechanistically, but rather as beings that, to a certain extent, have the ability to initiate their own actions.[24]

Legal discourses reflect a recognition of animals' agency in two domains: property acquisition and civil liability. In these subjects, this recognition is both discursive and normative. Authors and judges talk of animals being animated by a "natural freedom." This natural freedom has justified the law freeing some animals and ascribing responsibility to humans to the detriment of animal owners, possessors, and custodians. The regimes of property acquisition and civil liability penalize humans who do not exercise effective control over their animals.

To be sure, the point here is not that property and civil liability regimes were or are in a desirable state from the point of view of animals' interests. On the contrary, as we will see, rules of property acquisition facilitate the stabilization of animal ownership. The recognition of animals' natural freedom ultimately does not help animals regain their freedom (although it might do so in the short term). Instead, it allows humans to rather easily take possession of an animal they find. Rules of civil liability for injuries inflicted by animals do not consider animals to be members of a moral community that could be held accountable for their actions. Instead, this regime of civil liability applies to animals as objects of property, behind which there is an owner or a custodian holding a patrimony, who can pay damages and is personally responsible.

The point is rather that there is and has been a discourse according to which animals are, to a certain degree, agents, and that the law has embraced this discourse as a factual truth and built a legal framework around animals accordingly. The result is that animals are "things" that can legally escape and "things" that can bring civil liability on their owners and custodians, despite humans not having committed any fault or reprehensible omission. Animals are the only "things" that can act of their own volition.

Let us consider in turn these two legal regimes in which the law recognized the existence of animals' agency and injected it with normative consequences, starting with property acquisition and then moving to civil liability for injuries inflicted by animals.

A. PROPERTY ACQUISITION: CONTROL, ESCAPE, AND PURSUIT

In justifying the parameters of animal ownership, doctrinal authors recognized the ability of certain animals to acquire their freedom and take control of their own lives. The possibility

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[24] While it is not the purpose of this article to delve into the debates emanating from philosophy and other areas of research on the nature of animal agency, cognition, and rationality, it should be noted that a rich literature on the subject has emerged in recent years that calls into question the strict division between human and animal minds. See e.g. Marc Bekoff, Colin Allen & Gordon M Burdhardt, eds, *The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* (Cambridge, Mass: MIT Press, 2002); Susan Hurley & Matthew Nudds, eds, *Rational Animals?* (Oxford: Oxford University Press, 2006); Sarah E McFarland & Ryan Hediger, eds, *Animals and Agency: An Interdisciplinary Exploration* (Leiden: Brill, 2009); Robert W Lurz, ed, *The Philosophy of Animal Minds* (Cambridge, UK: Cambridge University Press, 2009); Tom Beauchamp & RG Frey, eds, *The Oxford Handbook of Animal Ethics* (Oxford: Oxford University Press, 2012); Kristin Andrews, *The Animal Mind: An Introduction to the Philosophy of Animal Cognition*, 2nd ed (New York: Routledge, 2020).

of regaining this freedom is denied to animals that are considered to be domesticated animals. Indeed, the law of property distinguishes between two types of animals — so-called wild animals and domestic animals — but there used to be an additional third category — in-between animals that were semi-wild and semi-domestic.[25] A different regime applies to each class of animals.

Animals, no matter their categorization, are either born free or under custody. Animals that are born free are considered *res nullii*, that is, things without an owner.[26] They can be acquired by force. Animals that are born from an owned mother belong to the owner[27] of their mother.[28] The acquisition of free animals, as well as the persistence of ownership in both free- and custody-born animals depend on humans' exercise of control over them. As such, the law enables animals to escape from their master in some circumstances.

Wild free-ranging animals[29] with no owner can become a retainable object of property by a human's occupation,[30] that is, the taking of possession with the intention of becoming the

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25 Andrée Montpetit & Gaston Taillefer, *Traité de droit civil du Québec* (Montreal: Wilson & Lafleur, 1945) at 185; Louis Baudouin, *Le droit civil de la province de Québec* (Montreal: Wilson & Lafleur, 1953) at 376–77 [Baudouin, *Le droit civil*]; Léon Faribault, *Traité de droit civil du Québec*, t 4 (Montreal: Wilson & Lafleur, 1954) at 41; Gérald Goldstein, "L'immobilisation des animaux par destination agricole en droit civil québécois" (1987) 47 R du B 595 at 606.

26 Before codification, see Henry des Rivières Beaubien, *Traité sur les Lois civiles du Bas-Canada*, t 1 (Montreal: Imprimerie de la Minerve, 1832) at 101; under the *Civil Code of Lower Canada* see Louis-Amable Jetté, "De l'acquisition et de l'exercice des droits de propriété" (1933) 12 R du D 212 at 216; Montpetit & Taillefer, *ibid* at 185; André Nadeau, *Traité de droit civil du Québec* (Montreal: Wilson & Lafleur, 1949) at 420; Baudouin, *ibid* at 376–77, 468–69; Faribault, *ibid* at 31, 43, 58, 74; André Nadeau & Richard Nadeau, *Traité pratique de la responsabilité civile délictuelle* (Montreal: Wilson & Lafleur, 1971) at 456–57, para 480; under the *Civil Code of Quebec*, see Pierre-Claude Lafond, *Précis de droit des biens*, 1st ed (Montreal: Thémis, 1999) at 1002 [Lafond, 1st ed]; Sylvio Normand, *Introduction au droit des biens*, 1st ed (Montreal: Wilson & Lafleur, 2000) at 64, para 3.2.1.1 [Normand, 1st ed]; Denys-Claude Lamontagne, *Biens et propriété*, 4th ed (Cowansville: Yvon Blais, 2002) at 6, para 13 [Lamontagne, 4th ed]; Pierre-Claude Lafond, *Précis de droit des biens*, 2d ed (Montreal: Thémis, 2007) at 1020–21, para 2350 [Lafond, 2nd ed]; Denys-Claude Lamontagne, *Biens et propriété*, 7th ed (Cowansville: Yvon Blais, 2013) at para 13 [Lamontagne, 7th ed]; Sylvio Normand, *Introduction au droit des biens*, 2d ed (Montreal: Wilson & Lafleur, 2014) at ch 10, introduction, and para 2.1 [Normand, 2nd ed]; Denys-Claude Lamontagne, *Biens et propriété*, 8th ed (Montreal: Yvon Blais, 2018) at para 13 [Lamontagne, 8th ed]; Sylvio Normand, *Introduction au droit des biens*, 3d ed (Montreal: Wilson & Lafleur, 2020) at ch 10, para 2.1 [Normand, 3rd ed].

27 Or anyone, like the usufructuary or the user, holding a right of use or enjoyment of the mother.

28 Charles Chamilly de Lorimier, *La bibliothèque du Code civil de la Province de Québec*, vol 3 (Montreal: Cadieux & Dérome, 1871) at 380–81 (citing Pothier); Faribault, *supra* note 25 at 41; arts 409, 447, 448, 478 CCLC; arts 910, 949, 1126, 1161 CCQ.

29 While the law of property does not seem to provide an exhaustive definition of "wild animals," we can look to the *Act Respecting the Conservation and Development of Wildlife* for inspiration. Adopted in 1983, it provides a definition focusing on the indigenousness of its species, which remained almost unchanged under the *Civil Code of Lower Canada*, with the advent of the *Civil Code of Quebec* and the animal law reform, see *Act Respecting the Conservation and Development of Wildlife*, CQLR c C-61.1, s 1 (to see its evolution, see online: *Publications Québec* [perma.cc/6DUK-PULD]). Note that this Act distinguishes between animals and fish (*ibid*, s 1), although others do not, see e.g. *Animal Health Protection Act*, CQLR c P-42 s 2; *Act Respecting the Marketing of Marine Products*, CQLR c C-32.1, s 4; *The Marine Products Processing Act*, CQLR c T-11.01, s 1. This statute's distinction between fish and other wild animals may be explained by the fact that it sets distinctive regimes for fishing and hunting other animals. For our purposes, distinguishing fish from other animals may only be useful insofar as fish have been considered sometimes to be part of the in-between category of animals by the law of property.

30 Pierre-Basile Mignault, *Le droit civil canadien basé sur les « Répétitions écrites sur le Code civil » de Frédéric Mourlon avec revue de la jurisprudence de nos tribunaux*, t 3 (Montreal: Théorêt, 1897) at 233 [Mignault, t 3]; Jetté, *supra* note 26 at 214; Nadeau, *supra* note 26 at 420; Faribault, *supra* note 25 at 43, 58, 74; Lamontagne, 4th ed, *supra* note 26 at 6, para 13; Lamontagne, 7th ed, *supra* note 26 at para 13; Lamontagne, 8th ed, *supra* note 26 at para 13.

owner. Two common modes of occupation are hunting and fishing.[31] A hunted animal is generally occupied when killed,[32] struck,[33] or trapped[34] in such a manner that they[35] cannot escape.[36] An aquatic animal is generally occupied by being captured.[37] These wild animals thus do not belong to the owner of the land or water where they live. This landowner is limited to claiming damages from a hunter or fisher who acquires animals on the landowner's property but cannot claim the animals themselves. This has been the case since before the codification of 1866 and still is today.[38] Wild animals have no owner; they are free. Moreover, wild animals regain their legal freedom as soon as they regain their physical freedom, with no intention of returning to their master and without their master pursuing them.[39]

Semi-wild and semi-domestic free animals — a category that no longer exists — were also able to gain some legal freedom but lived in a more complex legal situation. When they settled on a property, these in-between animals became the landowner's property and were classified as immovables.[40] The landowner did not own individual animals per se, but owned them as part of their land.[41] This was explained by the principle of accession, that is, the mode of acquisition of ownership over what is produced or united to a property.[42] However, in-between animals could also be individually acquired by occupation, just like wild

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31 des Rivières Beaubien, *supra* note 26 at 101–103; Mignault, t 3, *ibid* at 237–40; Jetté, *ibid* at 214, 218; Baudouin, *supra* note 25 at 468–69; Faribault, *ibid* at 43, 58; Lafond, 1st ed, *supra* note 26 at 1002; Lamontagne, 4th ed, *ibid* at 6, para 13; Lafond, 2nd ed, *supra* note 26 at 1020–21, para 2350; Lamontagne, 7th ed, *ibid* at para 13; Lamontagne, 8th ed, *ibid* at para 13.

32 Jetté, *ibid* at 216; Faribault, *ibid* at 45; Normand, 1st ed, *supra* note 26 at 66, para 3.2.1.1; Normand, 2nd ed, *supra* note 26 at 72, para 3.2.1.1; Normand, 3rd ed, *supra* note 26 at 80, para 3.2.1.1.

33 Faribault, *ibid* at 45; Normand, 1st ed, *ibid* at 66, para 3.2.1.1; Lamontagne, 4th ed, *supra* note 26 at 6, para 13; Lamontagne, 7th ed, *supra* note 26 at para 13; Normand, 2nd ed, *ibid* at 72, para 3.2.1.1; Lamontagne, 8th ed, *supra* note 26 at para 13; Normand, 3rd ed, *ibid* at 80, para 3.2.1.1.

34 Faribault, *ibid* at 45; Lamontagne, 4th ed, *ibid* at 6, para 13; Lamontagne, 7th ed, *ibid* at para 13; Lamontagne, 8th ed, *ibid* at para 13.

35 Recognizing animals as beings commands departing from the "it" pronoun, which in the collective imagination primarily refers to objects (although we acknowledge that "it" may occasionally refer to humans). Because we already use the singular "they" for human beings, we have decided to do the same for nonhuman beings.

36 Note that in the past, the simple pursuit of an animal was considered enough to trigger valid occupation, see Jean Bouffard, *Traité du domaine* (Quebec: Le Soleil, 1921) at 172 (citing *Charlebois v Raymond* (1867), 17 RJR 241 [*Charlebois*]); Faribault, *supra* note 25 at 45 (citing *Charlebois*, *ibid*). *Contra* Jetté, *supra* note 26 at 217.

37 Faribault, *ibid* at 58; Lamontagne, 4th ed, *supra* note 26 at 6, para 13; Lamontagne, 7th ed, *supra* note 26 at para 13; Lamontagne, 8th ed, *supra* note 26 at para 13.

38 des Rivières Beaubien, *supra* note 26 at 101–03; Mignault, t 3, *supra* note 30 at 233; François Langelier, *Cours de droit civil de la Province de Québec*, t 3 (Montreal: Wilson & Lafleur, 1907) at 483 [Langelier, t 3]; Baudouin, *supra* note 25 at 468–69; Faribault, *ibid* at 44, 58; Pierre Martineau, *Les biens*, 1st ed (Montreal: Thémis, 1973) at 73; Pierre Martineau, *Les biens*, 5th ed (Montreal: Thémis, 1979) at 63; Lafond, 1st ed, *supra* note 26 at 1002–1003; Lafond, 2nd ed, *supra* note 26 at 1020–1021, para 2350.

39 des Rivières Beaubien, *supra* note 26 at 117; Jetté, *supra* note 26 at 217; Nadeau, *supra* note 26 at 420; Faribault, *ibid* at 45; Nadeau & Nadeau, *supra* note 26 at 456–457, para 480 (citing *Dubeau c Rule*, [1943] RL 275 (not addressing that, according to Faribault, *ibid* at 46, this case has been overruled in appeal by the Court of King's Bench in an unreported decision number 2,468)); Normand, 1st ed, *supra* note 26 at 65, para 3.2.1.1; Normand, 2nd ed, *supra* note 26 at ch 3, para 3.2.1.1.

40 That is, in the legal category of things which are, or are deemed to be, not susceptible of displacement. See Paul-André Crépeau Centre for Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons - Property* (Cowansville: Yvon Blais, 2012). Note that other animals could also become immovables but by destination, such as farm animals, see Goldstein, *supra* note 25 at 614–22.

41 des Rivières Beaubien, *supra* note 26 at 106–107; Benjamin-Antoine Testard de Montigny, *Histoire du droit canadien* (Montreal: Eusèbe Senécal, 1869) at 679; François Langelier, *Cours de droit civil de la Province de Québec*, t 2 (Montreal: Wilson & Lafleur, 1906) at 167 [Langelier, t 2]; Montpetit & Taillefer, *supra* note 25 at 185; Faribault, *supra* note 25 at 42.

42 Montpetit & Taillefer, *ibid* at 185–87; Goldstein, *supra* note 25 at 606.

animals.[43] Before codification, Henry des Rivières Beaubien explained that pigeons and fish enter this category of semi-wild and semi-domestic animals.[44] Under the *Civil Code of Lower Canada*, article 428 has been understood to include pigeons, rabbits, and fish in this category, which became the property of the owner of the premises where they resided. Note that bees also belonged to this semi-wild and semi-domestic category but could never become immovables.[45] These pigeons, rabbits, and fish thus oscillated between being immovable property and being non-classified free animals as they journeyed between their elected residences. Despite being subject to becoming immovable property, these animals still retained their natural freedom in the eyes of the law. The consequence was that they could leave their current residence and the owner of that residence could not claim them from the owner of their new residence.[46] In-between animals could come and go as they so desire. With the advent of the *Civil Code of Quebec*, this in-between category disappeared, leaving only a distinction between wild animals and domestic animals.[47]

Legal discourses surrounding these rules on ownership of movable and immovable animals present two features of interest regarding the recognition of animals' agency.[48]

First, doctrinal authors have explained ownership rules by explicitly referring to animals' "natural freedom." Wild and semi-wild animals have been free to elect their residence wherever they wish, and their legal status simply follows from their own choice. In the first

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43 Mignault, t 3, *supra* note 30 at 233; Langelier, t 2, *supra* note 41 at 167. Note that pigeons in an aviary or a birdcage instead of a dove-cote, rabbits in a hutch instead of a warren, and fish in a fishpond instead of a pond were considered to already be property by occupation, as the owner of the aviary, birdcage, hutch, or fishpond exercised physical control over them, see Mignault, t 3 *supra* note 30 at 233; Langelier, t 2, *supra* note 41 at 167; Montpetit & Taillefer, *ibid* at 186.

44 des Rivières Beaubien, *supra* note 26 at 106–107.

45 Bees also belonged to this semi-wild and semi-domestic category but could never become immovables. Before the codification of Quebec law, bees were under the regime of wild animals, see *ibid* at 104. In 1865, they were subjected to a new regime by the *Act to Define the Right of Property in Swarms of Bees, and to Exempt Them From Seizure in Certain Cases*, see *Acte pour fixer la propriété des essaims d'abeilles et les rendre insaisissables en certains cas*, 1885, 28 Vict, c 8; Pierre-Basile Mignault, *Le droit civil canadien basé sur les « Répétitions écrites sur le Code civil » de Frédéric Mourlon avec revue de la jurisprudence de nos tribunaux*, t 2 (Montreal: Théorêt, 1896) at 516 [Mignault, t 2]. This new regime was incorporated in the *Civil Code of Lower Canada* in 1888 under article 428, see also Mignault, t 2, *ibid* at 516–17; Langelier, t 2, *supra* note 41 at 168; Montpetit & Taillefer, *supra* note 25 at 186–87; Baudouin, *supra* note 25 at 376–77. Previously unowned bees belonged to the person who discovered them, which constituted an exception to the principle of accession. The owner of a swarm of bees that left a hive could follow them and claim them, unless the bees moved to another hive, see Langelier, t 2, *ibid* at 168; Montpetit & Taillefer, *supra* note 25 at 186–87; Faribault, *supra* note 25 at 42–43. If the owner declined to pursue them, the swarm belonged to the owner of the land on which it settled. However, if another person undertook pursuit of the hive, that person was substituted in the previous owner's rights.

46 Montpetit & Taillefer, *ibid* at 185; Faribault, *supra* note 25 at 42. The previous owner of an in-between animal had legal recourse only when these animals were attracted elsewhere by fraud or artifice. However, when pigeons, rabbits, and fish were attracted by fraud or artifice, their previous owner could not retrieve them from their new residence, and was permitted only to claim damages from the new owner who used fraud or artifice, see des Rivières Beaubien, *supra* note 26 at 106–107; Mignault, t 2, *ibid* at 514–16; Langelier, t 2, *ibid* at 167; Montpetit & Taillefer, *ibid* at 185–86; Faribault, *ibid* at 42. As long as these animals were not individually occupied, they retained their "natural freedom," see Montpetit & Taillefer, *ibid* at 186.

47 Jean Pineau & Monique Ouellette, *Théorie de la responsabilité civile* (Montreal: Thémis, 1980) at 187 (not seeming to consider the in-between category despite writing in 1980 when this category existed, although their comment does not concern rules of ownership acquisition); Normand, 1st ed, *supra* note 26 at 64, para 3.2.1.1; Normand, 2nd ed, *supra* note 26 at ch 3, para 3.2.1.1; Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile délictuelle*, 8th ed (Cowansville: Yvon Blais, 2014) at paras 1–1021; Normand, 3rd ed, *supra* note 26 at chapter 3, para 3.2.1.1.

48 Peripheral to property law, this discourse was also present in and around criminal offences to property. See e.g. *Criminal Code*, SC 1892, c 29, s 304 (" Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen").

treaty on Lower Canadian law, Beaubien explicitly mentioned animals' "natural freedom" in 1832,[49] then Pierre-Basile Mignault referred to their initial "state of liberty" in 1897.[50] François Langelier picked up the idea of a "natural freedom" in 1906,[51] as did Louis-Amable Jetté in 1933,[52] André Nadeau in 1949,[53] and André and Richard Nadeau in 1971.[54] Throughout these texts, authors discussed animals as *recovering* their natural freedom; hence, being perceived as free beings in their primary state.

Second, authors have considered animals regaining their natural freedom to be acceptable because they perceived animals to be the property of humankind. Indeed, this idea appears in some authors' work when discussing the status of unowned animals as if to reassure readers that an animal is never lost to property interests in general. Authors have recognized in animals a volition that does not exist for other objects of property, but immediately reclaimed them by registering them in a discourse of common domain. Beaubien discussed animals as members of "the old state of negative community in relation to the right that everyone has to seize them."[55] Mignault, a renowned doctrinal author, referred to God's gift to human beings of everything on earth to justify ownership of wild animals:

> God …, having made a gift to mankind of the earth and all that it contains, men, by their occupation of parts of the earth and of the animals and things therein, created individual property which is a natural right.[56]

Langelier perpetuated a similar idea by speaking of animals *in natura laxitate* as "not belong[ing] to anyone in particular, and [being] the property of the human race,"[57] Louis Baudouin, in 1967, talked of wild animals as being "in the public domain,"[58] as did the Nadeaus in 1971.[59]

In some recent works, such discourses — presenting animals as a God-given gift or as property of humankind subject to appropriation by individuals — seem to have evolved towards the idea that animals are a *common* resource guaranteed to every human and to future generations. The result is the reinforcement of a discourse condemning excessive human exploitation of animals, and promoting the preservation of animals as a collectivity, as well as the ecosystem they inhabit.[60] Although animals remain in the ambit of property regimes — far from the status of subject — they are less and less thought of by jurists as

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49 des Rivières Beaubien, *supra* note 26 at 81, 117 ("liberté naturelle") [translated by authors].
50 Mignault, t 3 *supra* note 30 at 233 ("état de liberté") [translated by authors].
51 Langelier, t 2, *supra* note 41 at 168 ("liberté naturelle") [translated by authors].
52 Jetté, *supra* note 26 at 217, 219.
53 Nadeau, *supra* note 26 at 420.
54 Nadeau & Nadeau, *supra* note 26 at 456–57, para 480.
55 des Rivières Beaubien, *supra* note 26 at 101 ("l'ancien état de communauté négative par rapport au droit que chacun a de s'en emparer") [translated by authors]; see also des Rivières Beaubien, *ibid* at 117.
56 Mignault, t 3, *supra* note 30 at 232 ("Dieu, … ayant fait donation au genre humain de la terre et de tout ce qu'elle renferme, les hommes, par leur occupation de parties de la terre et des animaux et choses qui s'y trouvent, créèrent la propriété individuelle qui est de droit naturel) [translated by authors].
57 Langelier, t 2, *supra* note 41 at 167 ("ils n'appartiennent à personne en particulier, et sont la propriété du genre humain") [translated by authors]; see also Langelier, t 2, *ibid* at 168.
58 Louis Baudouin, *Les aspects généraux du droit privé dans la Province de Québec* (Paris: Dalloz, 1967) at 861–62, n 107 ("[e]n règle générale le gibier [à moins d'être élevé et nourri sur la propriété] appartient au domaine public") [translated by authors] [Baudouin, *Les aspects généraux*].
59 Nadeau & Nadeau, *supra* note 26 at 456–57, para 480.
60 Normand, 1st ed, *supra* note 26 at 46, 65, para 3.2.1.1; Normand, 2nd ed, *supra* note 26 at ch 3, para 3.2.1.1; Normand, 3rd ed, *supra* note 26 at 80.

solely subject to private interests, and more to collective ones, which ends up mitigating the exercise of individual property rights over them.

In contrast, domestic animals[61] do not benefit from a legal discourse that grants them a natural freedom. Domestic animals are born under ownership. As such, they are often acquired by accession.[62] However, effective control still matters for their ownership, as domestic animals can flee or be brought out of captivity.

Under the *Civil Code of Lower Canada*, straying animals were considered "things without a known owner," pursuant to article 594 of the *Civil Code of Lower Canada*.[63] As such, article 594 of the *Civil Code of Lower Canada* allowed a person who found an animal to preserve them, subject to special laws requiring public notice to be given. The owner who had not voluntarily abandoned the animal could claim them. If the animal was not claimed or was abandoned, the finder could keep the animal as owner by right of occupation.

More than a century later, the *Civil Code of Quebec* provides for similar rules. Pursuant to article 939 of the *Civil Code of Quebec*, animals that have been lost or forgotten still belong to their owner. They cannot be acquired by occupation, but by prescription by the person who detains them. The finder must try to find their owner.[64] When animals are abandoned, they can be acquired by occupation pursuant to article 935 of the *Civil Code of Quebec*.[65] Hence, when a domestic animal breaks free, the law considers them either lost or abandoned, and thus subject to acquisition. When lost, the animal is still legally attached to their owner. When abandoned, the animal is (temporarily) without a master and therefore both free of and at the mercy of humans.[66]

Throughout the explanation of these rules, the doctrinal authors omit any reference to domestic animals regaining their freedom. This is not to imply that domestic animals are inherently less capable than wild animals when it comes to taking control of their lives; rather, there appears to be a noticeable absence of discourse in this regard. Nevertheless, domestic animals undeniably occupy a central role in discussions surrounding civil liability

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61 The law of property does not define domestic animals. In a 1954 civil law treaty, Léon Faribault defined domestic animals as "animals which, according to their nature, serve the ordinary needs of man and live in his immediate surroundings," see Faribault, *supra* note 25 at 41 ("[a]nimaux domestiques. On appelle ainsi les animaux qui, d'après leur nature, servent aux besoins ordinaires de l'homme et vivent dans son entourage immédiat") [translated by authors]. The *Animal Welfare and Safety Act*, an important segment of the 2015 animal law reform, proposed, for the purpose of the act, a statutory definition focusing not on animals' alleged essence like Faribault, but on the intervention of humankind in the evolution of an animal species, stating that a domestic animal is "an animal of a species, a subspecies or a breed that has been chosen by man to meet certain needs / un animal d'une espèce, d'une sous-espèce ou d'une race qui a été sélectionnée par l'homme de façon à répondre à ses besoins" (*Animal Welfare and Safety Act*, CQLR c B-3.1, s 1). Note that, although Faribault provides a definition of domestic animals that seems to focus on animals' alleged essence (*supra* note 25), he offers a definition of wild animals that seems to recognize the intervention of humankind in the evolution of animal species, defining them as animals "that have never been reduced to domesticity. This category therefore includes all living beings that were not subjected to the service of man" (Faribault , *ibid* at 43). ("[L]es animaux [...] qui n'ont jamais été réduits en domesticité. Cette catégorie comprend donc tous les êtres vivants qui n'étaient pas assujettis au service de l'homme") [translated by authors].

62 Art 409 CCLC; arts 910, 948 CCQ.

63 Mignault, t 3, *supra* note 30 at 240, 247–48.

64 Art 940 CCQ.

65 Normand, 3rd ed, *supra* note 26 at ch 3, para 3.2.1.1.

66 As explicitly stated under art 934 CCQ. Agamben noticed this ambiguity between liberty and vulnerability in the foundations of the notion of ban, see Giorgio Agamben, *Homo Sacer. L'intégrale 1997-2015* (Paris: Seuil, 2016) at 101.

for an animal's act, wherein their agency is explicitly recognized, as we will delve into in the next section of this article.

In sum, legal discourses on these methods of property acquisition contained a recognition of animal agency understood as volition and the ability for animals to initiate their own actions. Of course, this agency was exercised within a framework favouring humans' proprietary interests. This is nevertheless an indication that animals were not merely viewed as things but as possessing certain characteristics, such as a form of agency, which can be observed in beings. Let us now look at what legal discourses related to the regime of civil liability by act of an animal can tell us about conceptions of animal agency.

B. CIVIL LIABILITY BY ACT OF AN ANIMAL

The regime of civil liability by act of an animal, along with the associated legal discourses, openly recognize animals' agency. Assuming that everyone knows animals act of their own volition, the law imposes on their owner or custodian the responsibility of keeping them under control. The law achieves this indirectly by making owners and custodians liable for injuries resulting from the autonomous acts of their animal, even when the animal strays or has escaped and is thus no longer under the owner's control. The implications of this rule do not markedly diverge from those of liability for an independent act and for the ruin of things. Despite the lack of significant difference, doctrinal authors are careful, as we will see, to justify and explain the liability for an animal's actions by relying on the animal's decision-making abilities. This observation is important in our study of legal discourses concerning animals. Legal discourses speak of animals as agents.

Under the *Civil Code of Lower Canada*, article 1055 stated that an owner or a person "who is using / *qui se sert de*" the animal was liable for the harm the animal caused when the animal was under the owner's, their servant's, or a user's care, or had strayed or escaped from it. In doing so, article 1055 of the *Civil Code of Lower Canada* went further than the civil liability rule for inanimate movables — for other "things" — which allowed an owner to cast off his or her responsibility by proving they committed no fault.[67] Hence, article 1055 of the *Civil Code of Lower Canada* was often seen as imposing a presumption of liability,[68] which could only be cast off by proving the animal's act was a fortuitous event, the result of a force majeure, or the victim's own fault.[69] Although one may have been found liable without having committed a fault, "traces of the idea of fault as the foundation of the liability

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67 Art 1055 CCLC; Langelier, t 3, *supra* note 38 at 481–82.

68 Pineau & Ouellette, *supra* note 47 at 125; Maurice Tancelin, *Des Obligations*, 2nd ed (Montreal: Wilson & Lafleur, 1984) at 257, para 496 [Tancelin, 2nd ed]; Maurice Tancelin, *Des Obligations*, 4th ed (Montreal: Wilson & Lafleur, 1988) at 300, para 496 [Tancelin, 4th ed]; Maurice Tancelin, *Des Obligations*, 6th ed (Montreal: Wilson & Lafleur, 1997) at 365, para 715 [Tancelin, 6th ed]; Baudouin, Deslauriers & Moore, *supra* note 47 at paras 1–1021, 1–1039.

69 Jean-Joseph Beauchamp, *Supplément au code civil annoté* (Montreal: Wilson & Lafleur, 1924) at 740–44; George VV Nicholls, *Offences and Quasi-Offences in Quebec* (Toronto: Carswell, 1937) at 123–24; Pierre Beullac, *La responsabilité civile dans le droit de la province de Québec* (Montreal: Wilson & Lafleur, 1948) at 270–71; Baudouin, *supra* note 25 at 808–809; Tancelin, 2nd ed, *ibid* at 257, para 496; Tancelin, 4th ed, *ibid* at 301, para 496; Tancelin, 6th ed, *ibid* at para 715. Note that there has been some hesitation in Quebec's jurisprudence as to whether one could escape one's responsibility by proving one committed no fault, but the case law ultimately settled on the understanding that one could not; see Baudouin, *ibid* at 808–809; Baudouin, Deslauriers & Moore, *ibid* at paras 1–1021, 1–1039.

remain: some authors justify it as an irrebuttable presumption of fault implied in the custody of an animal."[70]

Indeed, the animal was understood as an autonomous being to be controlled by their related human. The acknowledgment of their agency is evident in the writings of doctrinal authors. The Nadeaus explained that "[o]f all things, indeed, animals are probably still the most likely, by reason of the particular life animating them, to be the authors of damage."[71] Moreover, article 1055 of the *Civil Code of Lower Canada* was triggered only when an animal acted of their own volition; otherwise, if the animal acted as an instrument of a human, the general fault-based regime of civil liability applied.[72] André Nadeau wrote that "[t]he animal must be the active agent of the damage" and that:

> it is necessary that the specific act of the animal be at the source of the damage, in other words that the damage be the result of the animal's act independent of the act of man.… Therefore, if the animal … is directed and led by its master … it is consequently an active instrument in the hands of its master … The damage is then considered as the act of man rather than the act of the animal.[73]

Jean Pineau and Monique Ouellette wrote that the "animal must therefore be an active agent in causing the damage," that the "damage must result from an activity of the animal, which it carries out on its own initiative, independent of the hand of man."[74]

The idea of necessary control over an animal thus justified this civil liability regime in the eyes of doctrinal authors. In 1953, Louis Baudouin described this regime as imposing a "general duty of vigilance" that "consists of never letting the animal in question escape from one's material control."[75] In his 1967 treatise published in Paris, he explained that the "animal is in fact a thing that must be the object of supervision and consequently the one who, although not the owner of the animal has the care of it during the damage, can be held liable" so that civil liability is not exclusively connected to ownership.[76] Consequently, there

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70 Martin Boodman, John EC Brierley & Roderick A Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Montgomery, 1993) at para 500. See also Nadeau, *supra* note 26 at 419.

71 Nadeau & Nadeau, *supra* note 26 at 45, para 471 ("[d]e toutes les choses, en effet, les animaux restent probablement les plus susceptibles, grâce à la vie propre dont ils sont animés, d'être des auteurs de dommages") [translated by authors].

72 Nicholls, *supra* note 69 at 77; Baudouin, *Les aspects généraux*, *supra* note 58 at 861–62; Nadeau & Nadeau, *ibid* at 458–59, para 483; Pineau & Ouellette, *supra* note 47 at 126–27.

73 Nadeau, *supra* note 26 at 422 [translated by authors]:
> Il faut que l'animal soit l'agent actif du dommage.… [I]l faut que le fait propre de l'animal soit à la source du préjudice, en d'autres termes que le dommage soit le fruit d'une activité de l'animal indépendante de la conduite de l'homme.… Si donc l'animal … est dirigé et conduit par son maître … il est par conséquent un instrument actif aux mains de son maître.… Le dommage est alors plutôt considéré comme le fait de l'homme que le fait de l'animal.

74 Pineau & Ouellette, *supra* note 47 at 126–27 ("[i]l faut, donc, que l'animal soit un agent actif dans la réalisation du dommage" and "[l]e dommage doit résulter d'une activité de l'animal, qu'il a de sa propre initiative, indépendante de la main de l'homme") [translated by authors].

75 Baudouin, *supra* note 25 at 808–809 ("devoir général de vigilance" and "consiste en somme à ne jamais lais[s]er échapper de son contrôle matériel l'animal en question") [translated by authors].

76 Baudouin, *supra* note 58 at 861–62 ("[l]'animal est en effet une chose qui doit être l'objet d'une garde et par conséquent celui qui, bien que non-propriétaire de l'animal en a la garde lors du dommage, peut être tenu pour responsable") [translated by authors][citations omitted].

was alternative liability between the owner and the user of an animal: the one with control power over the animal was the one held responsible for the injury caused by them.[77]

Indeed, the idea of necessary control also bore normative value in determining who exactly was liable for an animal's act. As apparent in the Nadeaus' treatise, it was understood that an animal's owner or user must exercise additional care in overseeing the animal because of the "particular life" animating them:

> A person who has legal custody of an animal is liable for the damage caused by that animal, because there is a presumption that he has not adequately exercised his duty of care, that he has not sufficiently supervised the animal. Art. 1055 is an extension of art. 1054, al. 1, which governs the case of damage caused by things. It is normal, indeed, that the custodian of an animal, endowed with a particular life, be as responsible, if not more so, than the custodian of an inanimate thing. Does the animal not require greater and more constant surveillance than an inanimate thing?[78]

In that regard, the law made a distinction between the legal custodian (*gardien juridique*) and the material custodian (*gardien matériel*) of an animal.[79] The former had "a right of direction or control, a power of command" over the animal, their "master"; the latter merely had physical custody of the animal, such as the owner's servant or employee.[80] The former could be liable; the latter could not.

The *Civil Code of Quebec* provides for a similar regime in article 1466. There is one important distinction: this time, the owner may be held liable even though the animal was under the custody of a third party rather than the owner's custody. As Nathalie Vézina explains, the new wording states:

> [T]he user [of an animal] is subject to the presumption [of liability] *with* the owner. Thus, the legislature — knowingly or inadvertently — has transformed the alternative application of the presumption into a cumulative one. The result is a very burdensome presumption for the owner, who will find it difficult to avoid

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77 Beullac, *supra* note 69 at 276–77; Nadeau, *supra* note 26 at 423–27; Baudouin, *ibid* at 861–62. Beullac (*supra* note 69 at 812) notes an exception: whereas, when the owner of a pasture receives animals in their care, they are usually liable for their actions, the owner's liability may be triggered if the animals are vicious or if he owner was imprudent in entrusting the animals to the owner of the pasture.

78 Nadeau & Nadeau, *supra* note 26 at 455, para 478 [translated by authors]:

> Une personne qui a la garde juridique d'un animal est responsable du dommage que cause cet animal, parce qu'il y a présomption qu'elle n'a pas exercé de façon adéquate son obligation de garde, qu'elle n'a pas surveillé suffisamment bien l'animal. L'art. 1055 est une extension, un prolongement de l'art. 1054, al. 1, qui règle le cas du dommage causé par les choses. Il est normal, en effet, que le gardien d'un animal, doué d'une vie propre, soit responsable au même titre, sinon davantage, que le gardien d'une chose inanimée. L'animal ne nécessite-t-il pas une surveillance plus grande et plus constante qu'une chose inanimée?

See also *ibid* at 460, para 484; Nadeau, *supra* note 26 at 420, 423.

79 Nadeau, *ibid* at 425; Nadeau & Nadeau, *ibid* at 462, para 488.; *Backer v Beaudet*, [1973] SCR 628; Tancelin, 2nd ed, *supra* note 68 at 258, para 497; Tancelin, 4th ed, *supra* note 68 at 301, para 497; Tancelin, 6th ed, *supra* note 68 at 366, para 716.

80 Nadeau, *ibid* at 425 [translated by authors] ("un droit de direction ou de contrôle, un pouvoir de commandement" and "maître"); Nadeau & Nadeau, *ibid* at 462 [translated by authors] ("un droit de direction ou de contrôle, un pouvoir de commandement" and "maître"). See also Tancelin, 2nd ed, *ibid* at 258, para 497; Tancelin, 4th ed, *ibid* at 301, para 497; Tancelin, 6th ed, *ibid* at 366, para 716.

> liability, even when [they] exercised no effective control over the animal placed in the custody of a third party. It has been suggested that the change was intended to provide better protection for the victim.[81]

Besides this distinction, doctrinal writings on this rule seem to share the same views as before. Jean-Louis Baudouin, Patrice Deslauriers, and Benoît Moore explain that "liability by act of animals having its basis in the concept of ownership or custody, only those whose activity can effectively be subject to human control can engage the liability of the owner or user."[82] An owner or user can be exonerated by proving the victim's or a third party's fault or force majeure.[83] In other words, they must "prove the causal non-imputability of the animal's act."[84]

The doctrine of civil liability by act of an animal offers an opportunity for jurists' recognition of animals' agency. By analyzing its legal discourses, we can conclude that there has been a strong sense among Quebec jurists that animals possess a will of their own. One could argue that these jurists did not truly attribute a will to animals but merely recognized their ability to move independently.[85] However, it appears that the writings of the aforementioned authors go beyond the mere capacity for independent movement. Indeed, they suggest that animals possess a particular life, can be active agents of damage, act independently of humans, and exhibit initiative. It is precisely because of this will that is attributed to them, which can lead to causing damages to others independent of human intervention, that jurists have believed that animals must be subject to vigilant control by humans. Needless to say, this goes beyond the simple notion of being able to move.

While such a regime of civil liability — and the agency that it recognizes in animals — is not inherently beneficial to animals' interests, as it remains solely centered on the necessary reparation due from one human causing an injury to another, it does, however, depict animals in a manner that goes beyond considering them as mere things.

IV. SENTIENCE

For a long time before Quebec's animal law reform, the law acknowledged animals' sentience insofar as it prohibited animal abuse. This does not mean that legal prohibitions

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81 Nathalie Vézina, "The Law of Civil Liability: Part One: Preliminary Notions, Duality of Regimes, and Factual Basis of Liability" in Aline Grenon & Louise Bélanger-Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) 325 at 374, n 113.

82 Baudouin, Deslauriers & Moore, *supra* note 47 at paras 1–1043 ("[l]a responsabilité du fait des animaux ayant son fondement dans la notion de propriété ou de garde, seuls ceux dont l'activité peut effectivement être l'objet d'un contrôle humain peuvent engager la responsabilité du propriétaire ou de l'usager") [translated by authors].

83 *Ibid* at paras 1–1024 to 1–1046. Benoît Moore, "Commentaires sous l'article 1466" in Benoît Moore, ed, *Code civil du Québec: Annotations – Commentaires 2016-2017*, 1st ed (Montreal: Yvon Blais, 2016); Benoît Moore, ed, *Code civil du Québec: Annotations – Commentaires 2017-2018*, 2d ed (Montreal: Yvon Blais, 2017) [Moore, 2017]; Benoît Moore, ed, *Code civil du Québec: Annotations – Commentaires 2018-2019*, 3d ed (Montreal: Yvon Blais, 2018) [Moore, 2018]; Benoît Moore, ed, *Code civil du Québec: Annotations – Commentaires 2019-2020*, 4th ed (Montreal: Yvon Blais, 2019) [Moore, 2019]; Benoît Moore, ed, *Code civil du Québec: Annotations – Commentaires 2020-2021*, 5th ed (Montreal: Yvon Blais, 2020) [Moore, 2020].

84 Baudouin, Deslauriers & Moore, *supra* note 47 at paras 1–1021 ("[i]l faut donc prouver la non-imputabilité causale de l'acte de l'animal") [translated by authors].

85 See art 384 CCLC and art 905 CCQ (as it stood prior to the animal law reform of 2015), which provided that things that can be moved by themselves are classified as movables.

covered a sufficient scope of mistreatments, nor that respect for sentience can be summarized by a prohibition against abuse.[86] Indeed, Quebec's animal law reform demonstrates that animal abuse prohibition misses out on some essential aspects of their biological, emotional, and social needs.[87] The point rather is that animals were already not considered to be mere "things" that a human could treat with violence without consequences.

Exploitation and physical harm have been limited by the law since before codification. In 1838, Lower Canada adopted its first rules — to our knowledge[88] — against animal abuse by enacting the *Ordinance for Establishing an Efficient System of Police in the Cities of Quebec and Montreal*.[89] This ordinance prohibited over-loading, over-driving, and ill-treating horses, dogs, and other animals. Offenders could be sentenced to a month in jail. In 1855, it was extended to every town and village in Lower Canada.[90]

Still before codification, after Lower Canada and Upper Canada were incorporated into the United Province of Canada, the latter enacted the *Act to Prevent the Cruel and Improper Treatment of Cattle and Other Animals* in 1857.[91] This statute prohibited wantonly, cruelly, or unnecessarily beating, binding, ill-treating, abusing, and torturing listed animals. It also considered it an offence to cause, through "negligence or ill-usage in the driving" of an animal, any mischief, damage, or injury. Offenders could be sentenced to up to 14 days in prison or face a fine. Commentators such as historian Darcy Ingram saw in this 1857 Act a recognition that animals could not be treated as any other object of property:

> A key legal statement, the act's importance lay in the fact that it clearly took the issue of cruelty beyond the limits implied by ownership or concerns regarding public order. In according these species some basic considerations in relation to their treatment and well-being, this legislation transformed at least some animals into a distinct form of property, over which owners no longer held absolute rights.[92]

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86 Note that criminal law has almost always been interpreted to exclude agricultural activities causing pain; see Katie Sykes, "Rethinking the Application of Canadian Criminal Law to Factory Farming" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irving Law, 2015) at 49 (calling this "the implicit farming exception," pointing to *R v Pacific Meat Co*, [1957] 119 CCC 237, as "the precedential source of the implicit farming exception" at 42, and noting society's general acceptance that "food production is outside the ambit of criminal law … without necessarily even knowing that the *Pacific Meat* case exists"). To be sure, this exception does not seem to question animals' sentience in itself, but rather the moral value granted to their suffering by the law. In other words, our analysis of criminal law reveals that the law has long recognized animal sentience, but it withdraws or does not grant related protections in agricultural context because this activity is deemed more important than the moral value placed on the prevention of animal suffering.

87 Quebec animal law reform also has important shortcomings on that front, notably in that it provides an exception to agricultural, veterinary, research, and educational activities; see *Animal Welfare and Safety Act*, CQLR c B-3.1, s 5-7.

88 As reported in Virginie Simoneau-Gilbert, *Au nom des animaux: L'histoire de la SPCA de Montréal (1869-2019)* (Montreal: Somme Toute, 2019); Darcy Ingram, "Beastly Measures: Animal Welfare, Civil Society, and State Policy in Victorian Canada" (2013) 47:1 J Can Studies at 221–52

89 2 Vict c 2 (1838), s XI ("convicted … of over loading, over driving, or otherwise ill treating any horse, dog or other animal / *convaincue … d'avoir surchargé, surmené ou maltraité autrement aucun cheval, chien ou autre animal*").

90 *Lower Canada Municipal and Road Act of 1855*, S Prov C 1855 (18 Vict), c 100, s XXV.

91 *An Act to Prevent the Cruel and Improper Treatment of Cattle and Other Animals*, S Prov C 1857 (20 Vict), c 31 [*Act to Prevent Cruel Treatment*]. Although sections II and III of that statute do not apply to Lower Canada (see s XVIII), that jurisdiction seems to have equivalent provisions in the *An Act to Amend the Several Acts to Remedy Abuses Prejudicial to Agriculture*, S Prov C 1857 (20 Vict), c 40, s IX.

92 Ingram, *supra* note 88 at 225.

Philosopher Virginie Simoneau-Gilbert also concluded that "this legislation considers animals not as mere objects (although the issue of damage to property is mentioned in the preamble), but as sentient beings to be protected from abuse."[93] Indeed, this legislation imposed obligations not only to ensure the maintenance of animals as property but with the desire to limit animal suffering. In its preamble, it denounced the fact that "many cruelties are practised by improperly driving and conveying cattle … by severely beating and binding them, as well as by keeping and detaining them without food and nourishment for a considerable time, to the great and needless increase of the sufferings of dumb animals."[94]

After the confederation of Lower Canada into the Dominion of Canada, the federal Parliament adopted *An Act Respecting Cruelty to Animals* which, in 1869, prohibited wantonly, cruelly, or unnecessarily beating, bonding, illtreating, abusing, and torturing any animal of cattle, poultry, dog, domestic animal, or bird.[95] This statute also considered it to be an offence to cause, through "negligence or ill-usage in the driving" of an animal, any mischief, damage, or injury. In 1870, the federal Parliament amended it to add a prohibition on animal fights.[96] A few years later, in 1875, the federal Parliament acknowledged that "the transportation of cattle, by railway or vessels for long distances without rest, food, or water is liable to cause suffering from hunger, thirst and fatigue," which led it to adopt an act to fight cruelty to animals while in transit, ensuring animals of cattle received food and water and were allowed to rest.[97]

In 1892, those statutes were codified in the *Criminal Code* in a part dedicated to cruelty to animals, under the title concerning offences against rights of property.[98] A general anti-cruelty provision prohibited wantonly, cruelly, or unnecessarily beating, binding, illtreating, abusing, overdriving, or torturing any cattle, poultry, dog, domestic animal, or bird.[99] As James Crankshaw noted, however, the mere infliction of pain to animals did not, in itself, constitute an offence: there had to be some ill-usage from which the animal suffered without any necessity.[100] A provision considered it an offence to cause, through "negligence or ill-usage in the driving" of an animal, any mischief, damage, or injury,[101] while another provision prohibited the fighting or baiting of animals.[102] The 1892 *Criminal Code* also prohibited keeping a cockpit,[103] and addressed the treatment of cattle while in transit.[104] In the Part on Mischief, the 1892 *Criminal Code* prohibited attempts to kill, maim, wound, poison, or injure cattle,[105] and actually injuring other animals kept for any lawful purpose.[106] All these provisions reflected a concern for animal suffering, while still allowing suffering

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93 Simoneau-Gilbert, *supra* note 88 at 94 [translated by authors].
94 *Act to Prevent Cruel Treatment*, *supra* note 91 at preamble.
95 *Cruelty to Animals Act*, SC 1869, c 27.
96 *An Act to Amend "An Act Respecting Cruelty to Animals*," SC 1870, c 29.
97 *An Act to Prevent Cruelty to Animals While in Transit by Railway or Other Means of Conveyance within the Dominion of Canada*, SC 1875, c 42.
98 *Criminal Code*, SC 1892, c 29, ss 512–14 [*CC* 1892]. For the development of anti-cruelty laws in the *Criminal Code* after 1892, see Leslie Bisgould, *Animals and the Law* (Toronto: Irving Law, 2011) at 58ff.
99 *CC* 1892, *ibid*, s 512(a).
100 James Crankshaw, *The Criminal Code of Canada* (Montreal: Whiteford & Theoret, 1894) at 452.
101 *CC* 1892, *supra* note 98 at s 512(b).
102 *Ibid*, s 512(c).
103 *Ibid*, s 513.
104 *Ibid*, s 514.
105 *Ibid*, s 500.
106 *Ibid*, s 501.

that serves human interests. These provisions also reflected a desire to preserve society from the harm to human morality that certain activities harming animals can cause.

Between 1892 and the re-enactment of the *Criminal Code* in 1953, there were few modifications to the general anti-cruelty provision. The first occurred in 1895, when its protection was extended to include wild animals and birds in captivity,[107] thus now applying to animals without an owner. This change in the law suggested a recognition of animals as sentient beings rather than mere objects of property, as animals, regardless of ownership, could experience suffering and thus deserved safeguarding from such harm. In 1925, abandoning an animal in distress or failing to supply food, water, and shelter were added to the definition of the offence, as well as causing "unnecessary suffering or injury."[108] Once again, this modification of the general anti-cruelty provision suggested an expansion in the perception of animals as sentient beings by implying that their suffering may not only result from explicit acts of physical violence, but also from forms of abuse, such as neglecting to provide for their basic needs. In 1930, the provision was clarified by adding that the offence consisted in the failure to provide "proper and sufficient food, water, bedding, care and shelter."[109] In 1938, the reference to the supply of food, water, bedding, care, and shelter was removed.[110]

In the overhaul of the *Criminal Code* enacted in 1953,[111] the general anti-cruelty provision was modified to correspond to the form it takes in the present times. The various references to ill-treatment of animals were replaced by the notion of causing "unnecessary pain, suffering or injury." An offence is thus committed when one "wilfully causes, or being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird."[112] The reference to the failure to provide suitable and adequate food, water, shelter, and care also returned to the 1955 *Criminal Code*.[113]

In 1978, the Court of Appeal of Quebec rendered its decision in *R c. Ménard*, which is still today the leading case for interpreting the notion of causing unnecessary pain, suffering, or injury.[114] Writing for the Court, Justice Antonio Lamer underlined that this notion was intended "to be more sensitive to the lot which we reserve alas all to often to our animals while at the same time guarding us against the danger of confusing compassion with sentimentality."[115] While affirming the subordination of animals to "men," who, as "supreme creatures," have the right to put animals at their service to satisfy their needs,[116] the Court nonetheless declared that humans must "impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice

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107 *An Act Further to Amend the Criminal Code*, SC 1895, c 40, s 1.
108 *An Act to Amend the Criminal Code*, SC 1925, c 38, s 12.
109 *An Act to Amend the Criminal Code*, SC 1930, c 11, s 11. Note that section 512(a) was now section 542(a).
110 *An Act to Amend the Criminal Code*, SC 1938, c 44, s 35.
111 *Criminal Code*, SC 1953-1954, c 51 (which came into force in 1955, see *An Act to Amend the Criminal Code*, SC 1955, c 2) [*CC* 1955].
112 *Ibid*, s 387(1)(a).
113 *Ibid*, s 387(1)(c).
114 *R c Ménard* (1978), 43 CCC (2d) 458 [*Ménard*]. Note that section 387(1)(a) had been re-enacted in 1970 as section 402(1)(a), see *Criminal Code*, RSC 1970, c C-34.
115 *Ménard*, *ibid*.
116 *Ibid* at 464–65.

of means employed."[117] Through the lens of human responsibility towards animals that derives from humans' privileged position in nature, the Court affirmed that humans are obligated not to inflict on animals, pain, suffering, or injury which one may reasonably avoid.[118] The amount of pain inflicted, in itself, is not relevant to establish the offence: it is sufficient that the pain is inflicted wilfully and done without necessity.[119] While this, of course has the effect of allowing "necessary suffering," we can see that the Court, in its interpretation of the general anti-cruelty provision, acknowledged the interest of animals to not suffer.

The anti-cruelty provisions have remained substantially similar over the past decades. The most significant modifications involved penalties, which were increased.[120] Some attempts were made to move the anti-cruelty offences out of the property section of the *Criminal Code*,[121] which, despite their lack of success, did reflect, in the words of Lesli Bisgould, "that there are times when it is not appropriate to think of [animals as property] that way, and it is more important to consider that they are sentient beings who feel the harms inflicted on them."[122]

Today, cruelty to animals is addressed in sections 445.1 to 447.1 of the *Criminal Code*. Although it remains in the part of the *Criminal Code* concerning property offences, the cruelty prohibition applies to every animal, no matter whether they are owned.[123] Although criminal law has only been used in exceptional circumstances in practice,[124] and rarely in the context of institutionalized exploitation,[125] we must acknowledge that the law, although imperfect, is based on a certain concern for animals' sentience, and goes further than merely regulating interferences with the rights of owners over their property.

Furthermore, while prohibitions against animal abuse moved from Lower Canada's jurisdiction into the hands of the federal Parliament, they have not been perceived as detached from civil law property. In 1896, Mignault, whose writings we discussed when addressing the recognition of animals' sentience, rationalized the criminal prohibitions against animal abuse as a means of limiting owners from abusing their own right of property:

> This possibility to *abuse* [of one's property] is not, moreover, as dangerous as it appears to be. The owner's own interest serves as a counterweight. The law, moreover, could not, without being tyrannical, direct its attention to all the particular facts which constitute the exercise of the right of property. It anticipated and punished the most salient and dangerous abuses. As for acts less compromising for society, it tolerates them, out of respect for natural liberty, which would eventually succumb if the exercise of property was regulated by law down to its most minute details.

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117 *Ibid* at 465.
118 *Ibid*.
119 *Ibid* at 463.
120 Bisgould, *supra* note 98 at 66.
121 *Ibid* at 88ff.
122 *Ibid* at 90.
123 *Criminal Code*, RSC 1985, c C-46. The general anti-cruelty provision, section 445.1(1)(a), now provides that "every one commits an offence who wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird." Note that there is also a protection of animals "kept for a lawful purpose" at section 445, and of animals used in law enforcement, military operations, or assistance to a person with disability at section 445.01. See also Bisgould, *ibid* at 69.
124 Sykes, *supra* note 86 at 40–41.
125 Bisgould, *supra* note 98 at 71–75.

> Let us therefore not accuse the law! it regulates everything that is seriously, really dangerous. That an abuse is revealed by repeated acts, it is not long before the law reaches it. It is thus that laws pronounce penalties against owners who excessively beat their pets.[126]

Criminal prohibitions were more than a measure of public law according to Mignault. They also made sense in private law by limiting the exercise of a right of property. Otherwise, allowing animal abuse could be understood, from the internal point of view of private civil law, as an abuse of rights.[127]

In parallel to criminal law, the body of law in Quebec relating to animal preservation has also hinted to a recognition of animals' particular sentience and their corollary biological needs. This body of law has been constituted by two regimes adopted at the Provincial level: one now structured by the *Act Respecting the Conservation and Development of Wildlife* covering wild animals, and one by the *Animal Health Protection Act* that generally applies to domestic animals (and sometimes to other animals kept in captivity). To be sure, both regimes have seemed to focus on the preservation of animals as a group and a resource rather than as individuals and beings. However, through time, the regimes built in provisions evidencing a concern for diminishing animals' suffering — at least for certain animals.

On one hand, the wildlife preservation measures[128] were aimed at ensuring the reproduction of wild animals with a view to preserving every person's right to hunt and fish.[129] That being said, as of 1962, the Government of Quebec has imposed obligations on anyone keeping a wild animal in captivity, which seems to acknowledge animal's sentience and biological needs beyond the minimal criminal law protections against animal abuse and

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126 Mignault, t 2, *supra* note 45 at 476–77 [translated by authors].

127 However, a question remains: how could this be enforced, and who would have standing in a situation where an owner would abuse their right of property over their animal?

128 There seems to have been fishing and hunting regulations since the beginning of the colony in Quebec, see e.g. des Rivières Beaubien, *supra* note 26 at 101–103. The oldest statutes solely on these matters applying generally to the territory of Quebec (there have been statutes circumscribed to particular regions) that we found are the *An Act to Prohibit the Hunting and Killing of Deer and Other Game within this Province, at Certain Seasons of the Year*, 7 Vict c 12 (1843), and *The Fishery Act*, 20 Vict c 21 (1857). Those statutes were ultimately replaced by the *Wild-life Conservation Act*, SPQ 1969 c 58, then replaced by the still in force *Act Respecting the Conservation and Development of Wildlife*, CQLR c C-61.1.

129 This reason was often explicitly stated in statutes, see e.g. *An Act to Prevent Certain Wild Fowl and Snipes from Being Destroyed at Improper Seasons of the Year, and to Prevent the Trapping of Grouse and Quail in this Province*, 8 Vict c 46 (1845), preamble:

> [I]t is expedient to enact a Law to prevent that description of Game (which contributes so much to the amusement and luxury of the Inhabitants of that part of the Province,) from being utterly destroyed by such clandestine means / *[I]l est expédient d'établir une loi pour empêcher cette espèce de gibier (qui contribue tant à l'amusement et au luxe des habitants de cette partie de la province) d'être entièrement détruite par ces moyens clandestins*.

Act Respecting the Conservation and Development of Wildlife, CQLR c C-61.1, preliminary provision, in 2002:

> The object of this Act is the conservation of wildlife and its habitat, their development in keeping with the principle of sustainable development, and the recognition of every person's right to hunt, fish and trap in accordance with the law. To that end, this Act establishes various prohibitions that relate to the conservation of wildlife resources and various standards of safety, and sets forth the rights and obligations of hunters, fishers and trappers. / *La présente loi a pour objet la conservation de la faune et de son habitat, leur mise en valeur dans une perspective de développement durable et la reconnaissance à toute personne du droit de chasser, de pêcher et de piéger, conformément à la loi. À cet effet, elle établit diverses interdictions relatives à la conservation des ressources fauniques ainsi que diverses normes en matière de sécurité et elle énonce les droits et obligations des chasseurs, pêcheurs et piégeurs.*

ill-treatment. Indeed, while the Order in Council no 1269 lays out, "for humanitarian or security reasons / *pour des questions humanitaires ou de sécurité*," the regulations for keeping a wild animal in captivity, it guarantees, among other things, access to food and water, a proper shelter and health care, and that animals destined to be killed must be killed in a "suitable manner / *façon convenable*":

6. *All shelters, cages or enclosures must be so designed as to ensure a minimum of welfare for the animal* or animals which will be kept therein, and constructed in such a way as to protect the public against possible attacks on the part of the animal or animals;	**6°** *Tout abri, cage ou enclos doit être conçu de façon à assurer un minimum de bien-être pour le ou les animaux* qui y seront gardés, et construits de façon à protéger le public contre toute attaque possible de la part de ou des animaux;
7. *Clean water and suitable food must be ensured* to the captive animal;	**7°** *Une eau propre et une nourriture convenable doivent être assurées* à l'animal captif;
8. *The care of a veterinary-surgeon must not be spared* any animal which will have need thereof, and such, at the expense of the holder of the license;	**8°** *Les soins d'un vétérinaire doivent être prodigués* à tout animal qui en aurait besoin et ce, aux frais du détenteur de permis;
9. *Any animal destined to be killed must be killed in a suitable manner*;	**9°** *Tout animal destiné à être abattu doit l'être d'une façon convenable*;[130]

A subsequent regulation clarified that the notion of killing an animal in a suitable manner requires minimal pain. See the *Regulation Respecting Animals in Captivity* of 1992:

3. Any person who kills an animal kept in captivity shall do so using a method that causes instant death or that does not cause the animal to suffer unnecessarily.	**3.** Quiconque abat un animal qu'il garde en captivité doit le faire par un procédé qui cause instantanément sa mort ou qui ne lui cause pas de souffrances inutiles.[131]

This section, providing for the instant and painless death of some animals, constitutes a significant milestone in the recognition of animals as sentient beings in the eyes of the law. Not only does it acknowledge animal sentience, but it also expresses a concern about it. Provincial legislators have thus built a legal framework around their desire to diminish animal suffering, at least for wild animals kept in captivity.

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130 OC 1269-62, 11 August 1962, (1962) GOC 4214 [emphasis added]. These norms were perpetuated in OC 3222-70, 26 September 1970, (1970) GOQ II 5436; *Regulation Respecting Animals in Captivity*, OC 3870-78, 13 December 1978, (1978) GOQ II 63; *Regulation Respecting Animals in Captivity*, OC 1029-92, 8 July 1992, GOQ II 3447 (English), 4709 (French), s 2-3; *Regulation Respecting Animals in Captivity*, CQLR c C-61.1, r 5, r 3, r 4. These sections grew up to be much more complex in the current version of this regulation, *Regulation Respecting Animals in Captivity*, CQLR c C-61.1, r 5.1, ss 25–52, 66–70, 127–35.

131 *Regulation Respecting Animals in Captivity*, OC 1029-92, *ibid*, s 3.

On the other hand, the regime of animal health protection[132] was focused on the preservation of animals as objects of human consumption, producers of food, or instruments for human use. Indeed, the first version of *An Act Respecting Animal Health Protection*, enacted in 1935, was explicitly aimed at sanitizing herds and stables,[133] and this purpose endured for half a century.[134] Although a result of this animal health protection regime was to prevent disease from spreading among animals, and thus the death of animals, it seemed to still treat them as assets whose loss should be prevented, as it provided the government with the power to slaughter potentially healthy animals to prevent a disease from spreading to other animals, without consideration for the loss of animals' lives as such.

Note that, while the provincial regime remained with the same conception of animals, new regulations were adopted at the federal level to protect so-called food animals. According to federal regulation, since 1959, animals slaughtered for human consumption must have a rapid or immediate loss of consciousness.[135] This rule suggests a recognition of animal suffering in their slaughter. Any slaughterhouse hoping to trade outside Quebec's borders must abide by this rule because it was enacted under the federal trade and commerce power. Since most slaughterhouses trade outside Quebec — especially the biggest ones — the rule applies to most animals slaughtered in Quebec.[136] The existence of this federal rule may explain why provincial legislators took a long time to develop sentience-related protections at the provincial level.

Only in 1993 did the provincial animal health protection regime add a string to its bow by addressing animal welfare[137] — more than 150 years after Lower Canada enacted its first

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132 *Animal Health Protection Act*, SQ 1935 (25–26 Geo V), c 31, s 2. Note that, before this statute, one could demand that a domestic animal's owner or custodian isolate this animal if they had a contagious disease, *An Act to Amend Chapter Twenty-Six of the Consolidated Statutes of Lower Canada, Entitled: An Act Respecting Abuses Prejudicial to Agriculture*, SC 1866 (5th Sess) (29–30 Vict), c 33; legislation also existed to prevent the importation of diseases, see *An Act to Provide Against the Introduction and Spreading of Disorders Affecting Certain Animals*, SC 1865 (4th Sess) (29 Vict), c 15.

133 *Animal Health Protection Act*, *ibid*.

134 *Animal Health Protection Act*, RSQ 1941, c 135; *Animal Protection Act*, RSQ 1964, c 126; *Animal Health Protection Act*, CQLR 1977, c P-42.

135 *Humane Slaughter Regulations*, SOR/60-3 (1959–1587); *Meat Inspection Regulations, Amended*, SOR/60-4 (1959–1588) (adding a requirement that "animals shall be slaughtered in accordance with the Regulations under the Humane Slaughter of Food Animals Act"); *Meat Inspection Regulations*, SOR/79-579, s 45(2) (referring to the *Humane Slaughter Regulations*); *Meat Inspection Regulations, 1990*, SOR/90-288, s 76–79; *Meat Inspection Regulations, 1990, Amendment*, SOR/93-160, art 9; *Regulations Amending the Meat Inspection Regulations, 1990*, SOR/99-369, s 4; *Safe Food for Canadians Regulations*, SOR/2018-108, ss 141–44. An equivalent standard was not part of provincial legislation until 2015, according to the Minister of Agriculture, Fisheries and Food: see Quebec, Assemblée nationale, *Journal des débats de la Commission de l'agriculture, des pêcheries, de l'énergie et des ressources naturelles*, 41-1, vol 44 No 57 (3 November 2015); "Étude détaillée du projet de loi no 54, Loi visant l'amélioration de la situation juridique de l'animal," online: [perma.cc/H43V-VV5M] ["Étude détaillée"] ("là on bâtit, sur un plan législatif, quelque chose qui n'existait pas … Au Québec, on n'avait rien" noting that more than "plus que 90 % de l'abattage … se fait dans des abattoirs d'inspection fédérale").

136 "Étude détaillée," *ibid*. The Minister of Agriculture, Fisheries and Food note that "plus que 90 % de l'abattage ... se fait dans des abattoirs d'inspection fédérale."

137 Ministère de l'Agriculture, des Pêcheries et de l'Alimentation, *Rapport sur l'application de la Loi sur la protection sanitaire des animaux (RLRQ, c. P-42) concernant la sécurité et le bien-être animal*, (Quebec: Gouvernement du Québec, 2015) at 5–8, online: [perma.cc/7F2S-6UNT], 5-8; Action citoyenne responsable pour les animaux de compagnie au Québec, "Historique de la législation québécoise sur la protection des animaux de compagnie," online: [perma.cc/T3UX-BQMK]. Among provincial legislation, only the *Regulation Respecting the Sale of Livestock by Auction*, CQLR c P-42, r 11, s 19 seems to be hinting to animals' sentience. See also, in the same spirit although after the coming into force of legislative changes discussed in this paragraph, the *Act to Regularize and Provide for the Development of Local Slaughterhouses*, CQLR c R-19.1, ss 4, 43.

criminal protections for animals as sentient beings. In that year, the National Assembly of Quebec adopted the new division of the *Animal Health Protection Act* entitled "Safety and Welfare of Animals."[138] Most notably, section 55.9.2 imposed on animal owners and custodians some minimal obligations regarding their animal's safety and welfare having to do with sufficient access to water and food, being kept in suitable and salubrious conditions, receiving health care, and being free from abuse and ill-treatment:

55.9.2. *The owner or custodian of an animal shall ensure that the safety and welfare of the animal are not jeopardized.* The safety and welfare of an animal is jeopardized where	**55.9.2.** *Le propriétaire ou le gardien d'un animal doit s'assurer que la sécurité et le bien-être de l'animal ne soient pas compromis.* La sécurité et le bien-être d'un animal est compromis lorsqu'il:
(1) the animal does not have *access to drinking water or food* in quantities and of a quality in keeping with the biological requirements of its species;	1° n'a pas *accès à de l'eau potable ou à de la nourriture* en quantité et en qualité compatibles avec les impératifs biologiques de son espèce;
(2) the animal is not *kept in suitable, salubrious living conditions*;	2° n'est pas *gardé dans un habitat convenable et salubre*;
(3) the animal is wounded or sick and does not receive *the health care required* by its state;	3° est blessé ou malade et ne reçoit pas *les soins de santé requis* par son état;
(4) the animal is subject to *abuse or ill-treatment* that may affect its health.	4° est soumis à *des abus ou des mauvais traitements* qui peuvent affecter sa santé;[139]

Unlike the *Regulation Respecting Animals in Captivity*, this division of the *Animal Health Protection Act* did not regulate the killing of domestic animals. The *Animal Health Protection Act* was modified in 2000 to require that an animal be "properly transported in an appropriate vehicle / *convenablement transporté dans un véhicule approprié*."[140]

However, this division of the *Animal Health Protection Act* was not yet in force by the turn of the century, as the Government of Quebec held a discretionary power to decide when it would have force of law. The "Safety and Welfare of Animals" division came into force on 8 December 2004,[141] more than 11 years after its adoption. On the same day, the Government of Quebec adopted the *Regulation Respecting the Animal Species or Categories Designated under Division IV.1.1 of the Animal Health Protection Act*, which lists animals that this new division protects: only dogs and cats.[142]

Only in 2012 did the Government of Quebec apply this division to every animal covered by the *Animal Health Protection Act*, that is, to "all domestic animals, including horses

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138 *Animal Health Protection Act*, CQLR c P-42, ss 55.9.1–55.9.16.

139 *Ibid*, s 55.9.2 [emphasis added].

140 Bill 120, *An Act to Amend the Animal Health Protection Act and Other Legislative Provisions and to Repeal the Bees Act,* 1st Sess, 36th Leg, Quebec, 2000 (assented to 15 November 2000), CQLR c P-42, s 29.

141 *Loi sur la protection sanitaire des animaux (L.R.Q., c. P-42) – Entrée en vigueur de lois*, OC 1150-2004, (2004), GOQ II, 5447.

142 *Ibid* at 5454–55. Although this statute's reach is dramatically limited, concluding that "Quebec is the only jurisdiction in Canada that does not have any animal welfare legislation whatsoever" seems like an overstatement, especially when acknowledging that other Canadian jurisdictions' animal welfare legislations are more limited in scope, Bisgould, *supra* note 98 at 117–18.

(*Equus caballus*), and animals kept in captivity, other than those governed by the *Act respecting the conservation and development of wildlife* / *tous les animaux domestiques, incluant le cheval (Equus caballus), ou ceux gardés en captivité autres que ceux régis par* la Loi sur la conservation et la mise en valeur de la faune."[143] Note, however, that article 55.9.15 of the *Animal Health Protection Act* explicitly stated that agricultural, teaching, or scientific research activities involving animals were still permitted, provided they were practised in accordance with generally recognized rules, as well as ritual practices involving animals prescribed by the laws of a religion.

Still in 2012, the *Regulation Respecting the Safety and Welfare of Cats and Dogs* came into force. Among other things, this regulation oblige some owners or custodians to guarantee that their cats and dogs have access to a quantity of food and water sufficient to meet their biological needs, and are kept in a safe and salubrious location, have lighting compatible with their biological needs, have access to a rest area, are kept in a large enough space, and, for a female animal, have ongoing access to her kittens or puppies until they are weaned. This regulation also picked up an idea applied for a decade to some wild animals, that of making sure euthanization is as painless as possible:

43. *When an animal is euthanized*, its owner or custodian must ensure that *the circumstances and the method used are not cruel and cause the animal a minimum of anxiety and pain*. The euthanasia method chosen must result in rapid and irreversible loss of consciousness, followed quickly by death.	**43.** *Lorsqu'un animal est euthanasié*, son propriétaire ou son gardien doit s'assurer que *les circonstances entourant l'euthanasie ainsi que la méthode employée ne sont pas cruelles et qu'elles occasionnent un minimum d'anxiété et de douleur chez l'animal*. La méthode d'euthanasie doit produire une perte de conscience rapide et irréversible, suivie d'une mort prompte.
The owner or custodian must also ensure that the absence of vital signs is determined immediately following euthanasia.	Le propriétaire ou le gardien doit également s'assurer que l'absence de signes vitaux est constatée immédiatement après l'euthanasie de l'animal.[144]

Just like for the *Regulation Respecting Animals in Captivity*, this provision ensures that cats and dogs are killed in a way that is not cruel and that causes a minimum of anxiety and pain. The provision is both a recognition of animals' sentience, and an indication that, according to the legislator, this sentience must be respected (again, to a certain extent).

These previous rules seem to have constituted the seed of Quebec's animal law reform. Indeed, in 2015, Quebec took an important step forward regarding animal welfare and sentience recognition, as the National Assembly adopted article 898.1 of the *Civil Code of Quebec*, which explicitly declares that animals are not things and defines them as "sentient beings" with biological needs. However, it must be highlighted that this legislative change did not have the effect of removing animals completely from the ambit of property to the great dismay of many. Indeed, article 898.1 of the *Civil Code of Quebec* explicitly states that the law concerning property nonetheless applies to animals. In other words, animals are "not-

143 *Espèces ou catégories d'animaux désignées pour l'application de la section IV.1.1 de la Loi–Modification*, OC 371-2012, (2012) GOQ II, 2209.

144 *Regulation Respecting the Safety and Welfare of Cats and Dogs*, CQLR c P-42, r 10.1, s 43 [emphasis added].

things" subject to property regimes. Article 898.1 of the *Civil Code of Quebec* reads as follows:

898.1. Animals are not things. They are sentient beings and have biological needs.	**898.1.** Les animaux ne sont pas des biens. Ils sont des êtres doués de sensibilité et ils ont des impératifs biologiques.
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.	Outre les dispositions des lois particulières qui les protègent, les dispositions du présent code et de toute autre loi relative aux biens leur sont néanmoins applicables.

Animals' sentience was further advanced in the *Animal Welfare and Safety Act*,[145] which applies to all domestic animals (and foxes, minks, and animals designated by regulation).[146] Sections 5, 6, 7, 8, and 12 of the *Animal Welfare and Safety Act* are especially of interest for our purposes. Section 5 imposes various obligations for owners and custodians regarding the care of animals (such as guaranteeing access to water and food, suitable living conditions, exercise, protection from temperature and weather fluctuations, transportation, health care, and protection from abuse and mistreatment), obligations that are mostly in line with previous regulations. Section 6 is novel, as it prohibits any act or omission that causes an animal to be in distress. However, note that, as per section 7, sections 5 and 6 do not apply in the case of agricultural, veterinary medicine, teaching, or scientific research activities carried on in accordance with generally recognized rules. Section 8 imposes the provision of stimulation, socialization, and environmental enrichment to cats, dogs, and equines. Finally, section 12 specifies that the slaughtering or euthanizing of an animal must be performed in a way that is not cruel and that causes the animal a minimal amount of pain and anxiety.

While sections 5 and 12 are in line with previous norms that have acknowledged animal sentience, by imposing care standards and minimizing pain in death, sections 6 and 8 are particularly illuminating regarding the extent to which the legislator conceives of animal sentience. By prohibiting any act or omission that causes an animal to be in distress, and by imposing obligations of stimulation, socialization, and environmental enrichment, this statute demonstrates more than a symbolic recognition of sentience: it indicates a real concern on the part of the legislator that this sentience ought to be respected in various contexts.[147] Here, animals seem to be beings in their own right.

As Quebec law had already acknowledged animals' sentience, the 2015 reform does not appear to us as a complete rupture from existing law. However, the reform was nonetheless a crucial moment in the expansion of animal welfare protections in Quebec and has had an overarching impact on Quebec law since it was enacted.

Indeed, the Court of Appeal of Quebec has recently confirmed that article 898.1 of the *Civil Code of Quebec* is more than a mere symbolic declaration acknowledging animal

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145 CQLR c B-3.1, ss 5– 8, 12.

146 See *Regulation Respecting the Designation of Other Animals Governed by the Animal Welfare and Safety Act*, CQLR c B-3.1, r 1.

147 For a more detailed analysis of section 6, see Michaël Lessard, "Le droit de vie et de mort sur l'animal: quelle évolution depuis la reconnaissance des animaux comme êtres sensibles?" (2021) 55:1 RJT 137.

sentience.[148] The normative legal impact of this explicit sentience recognition is twofold. First, sentience recognition sets forth a standard of conduct that must be followed by all: every person must be careful not to cause pain to an animal. Second, the Court has suggested that sentience recognition has a direct impact on regulations, prohibiting, for instance, a cruel and painful method of euthanasia. This was made clear in *Road to Home Rescue Support c. Ville de Montréal*:

> There is nothing in this that contravenes Article 898.1 *C.C.Q. By affirming that animals are sentient beings with biological needs, the legislator dictates at the same time the conduct that must be followed by all those who interact with such beings*. This provision, which therefore has the value of a behavioural standard, certainly applies to the way in which cities implement the by-laws they adopt under the *Municipal Powers Act* in order to manage animal nuisances or stray animals or dangerous animals. Thus, *when a regulatory provision* (as is the case here) *provides for the euthanasia of an animal, it must be done in a manner consistent with art. 898.1 C.C.Q., that is to say respectful of the animal sentience recognized by the legislator*. Nor is it impossible that art. 898.1 *C.C.Q.* has a direct effect on the very content of such a regulation, which could not, before a range of possibilities, prescribe the use of the cruellest or most painful means in order to put an animal to death (in this case, the regulations do not prescribe anything like this).[149]

Further clarifications from judges and scholars seem necessary to fully understand the implications of the explicit recognition of animal sentience and the new categorization of animals as sentient beings, out of the category of legal things. We have argued elsewhere that these changes could lead to significant changes in the way animals are treated.[150] That being said, our corpus does not allow us to take the full measure of the 2015 reform on Quebec law, but it does allow us, for the purposes of this article's analysis, to observe that legal discourses considered that animals are sentient both before and after the 2015 reform.

To sum up, long before the 2015 reform, and certainly afterwards, the animal was hardly thought of as a mere thing. The recognition of animal sentience in legal discourses, over the years, confirms this position.[151] As a sentient being, the animal is not to be subjected to abuse or ill-treatment, and obligations are imposed regarding their care to ensure their well-being and safety. Slowly, the animal as a being is moving away from the reified position they were once relegated to, away from their subjection to the absolute rights of an owner.

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148 *Road to Home*, *supra* note 22. See also Alain Roy, "Commentaires sous l'article 898.1" in Moore, 2020, *supra* note 83; Michaël Lessard, "Can Sentience Recognition Protect Animals? Lessons From Quebec's Animal Law Reform" (2021) 27:4 Animal L Rev 57. For a general discussion of animal sentience recognition, see Charlotte E Blattner, "The Recognition of Animal Sentience" (2019) 9:2 J Animal Ethics 121.

149 *Road to Home*, *ibid* at para 57 [translated by authors] [emphasis added, citations omitted].

150 See, for an overview, Michaël Lessard, "A Field Trip into Québec Law: Exploring the Theoretical Ramifications of Sentience Recognition" in Jane Kotzmann & Marcelo Rodriguez Ferrere, eds, *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (London, UK: Bloombury) [forthcoming in 2024]; for a detailed account of our view, see Lessard & Plante, *supra* note 5.

151 In addition to sources cited in this section, see Paul Pomerleau & Pierre Thouin, "Les ventes d'animaux et la garantie des vices cachés" (1997) 57 R du B 663 at 664 ("les animaux sont des êtres vivants organisés doués de sensibilité et de mobilité").

V. SOCIABILITY

Even though animals are objects of property, jurists have recognized the intimate bond humans develop with them.[152] Thus, animals are not considered to be just *any* objects of property.[153] Jurists acknowledge their sociability and recognize that humans can form meaningful relationships with them.[154]

This connection becomes most apparent in discourses surrounding cases where damages are claimed for an animal that is killed or sometimes injured by a third party.[155] Courts may then attribute damages specific to the emotional loss suffered by an owner, in addition to the material value of the animal.[156]

This form of compensation for emotional harm relies upon the doctrine of *solatium doloris*, whose objective is the alleviation of pain (*soulagement de la douleur*).[157] This doctrine constitutes one of the facets of the "general civil law rule [according to which] any prejudice, whether moral or material, even if it is difficult to assess, is compensable if proven."[158] This doctrine is often invoked for the loss of a close relative or friend.[159] Note that some work is still needed to popularize this doctrine into Quebec legal culture since it was suppressed by English law for over a century. As a consequence, some judges may be reluctant to attribute damages as *solatium doloris*, even for uncontroversially emotionally harmful human loss. However, this reluctance appears to constitute an error of law.

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152 Some legal scholars even advocated for the development of new regimes to legally recognize relationships human and non human animals built in reality, see Roy 2003, *supra* note 2.

153 In addition to the discussion that follows, see Jean Turgeon, "La Régie du logement, l'interdiction d'un animal de compagnie et son expulsion sans préjudice sérieux : abus de droit ou droit d'abus ?" (2013) 72 R du B 287 at 376–78.

154 We recognize the potentially unequal ways in which animals can be forced into social relationships with humans. Having said this, we simply aim here to highlight the ways in which the discourses of jurists have shown the *possibility* of an intimate bond between humans and animals, the value of which is recognized by the law.

155 Animals are also described as social beings in other areas of law. In family law, for example, judges and jurists have often recognized the special bond an animal has with human members of a family, see Roy 2003, *supra* note 2. In anti-discrimination law, see also *Commission des droits de la personne et des droits de la jeunesse (D R et autres) c Ducharme*, 2020 QCTDP 16 at paras 13–14. In this part of the article, we focus on damage claims, because this area of law offers some of the best examples of descriptions of animals as social beings. Indeed, having to measure a human's suffering by measuring the extent of a relationship between an animal and a human leads judges to provide details on their conception of such relationships.

156 Harming or killing an animal is a civil liability fault allowing the animal's owner to claim damages. Beullac, *supra* note 69 at 278–79; Nadeau & Nadeau, *supra* note 26 at 478–79, para 510; Sophie Morin, *Le dommage moral et le préjudice extrapatrimonial* (Cowansville: Yvon Blais, 2011), s 3.2.2(ii); Jean-Louis Baudouin & Patrice Deslauriers, 1998, *La responsabilité civile délictuelle*, 5th ed (Cowansville: Yvon Blais, 1998) at 211, n 279; Roy 2003, *supra* note 2 at 802–806; Jean-Louis Baudouin & Patrice Deslauriers, 1998, *La responsabilité civile délictuelle*, 6th ed (Cowansville: Yvon Blais, 2003) at 314, n 365; Jean-Louis Baudouin & Patrice Deslauriers, *La responsabilité civile délictuelle*, 7th ed (Cowansville: Yvon Blais, 2007) at 436 [Baudouin & Deslauriers, 7th ed]; Baudouin, Deslauriers & Moore, *supra* note 47 at paras 1–327, 1–439; Daniel Gardner, *Le préjudice corporel*, 4th ed (Montreal: Yvon Blais, 2016) at para 15. Damages for that emotional loss may be awarded in other situations as well, such as for the loss of an animal caused by a latent defect, see art 1728 CCQ. For a discussion of how the doctrine of latent defect applies to animals, see Pomerleau & Thouin, *supra* note 151.

157 *Régnier c Gosselin*, 1978 CarswellQue 916 [*Régnier*]; *De Belleval c 137888 Canada Inc*, 1999 CanLII 10415 (QC CQ) (acknowledging that this doctrine constitutes the relevant legal framework while arguing that the doctrine s*olatium doloris* does not cover animal loss because an animal is a thing); Roy 2003, *supra* note 2 at 804.

158 *Augustus v Gosset*, [1996] 3 SCR 268 at para 27 [*Augustus*].

159 *Ibid* at paras 26–35.

Indeed, as the Supreme Court of Canada has explained, "[u]nlike the common law, the civil law tradition has never denied that an indirect victim can obtain compensation for the moral prejudice resulting from a person's death."[160] However, in 1887, in *Canadian Pacific Ry. Co. v. Robinson*,[161] the Supreme Court, in its own words, "inspired by a concern to apply the rule of non recovery for *solatium doloris* uniformly in Canada and by the common law's traditional reluctance to compensate for non economic losses, refused to award the wife and children of a deceased person any compensation whatsoever for their bereavement."[162] Because of this judgment, Quebec courts had thereafter generally refused to grant damages for *solatium doloris*.[163]

The Province of Quebec had to wait until 1996 for the Supreme Court, in *Augustus v. Gosset*, to reaffirm the normative existence of the doctrine of *solatium doloris* in the Province. The Supreme Court qualified its past decision as a "historical error," specifying that "French law, not English law, … should have been applied in deciding whether to recognize *solatium doloris* in Quebec civil law."[164] Hence, the law now allows compensation for this type of injury.

Despite the disadvantageous influence of *Canadian Pacific* on Quebec civil law, some courts still granted *solatium doloris* in specific cases, and even in cases involving the loss of an animal. Here is a famous example. In 1978, the judge in *Régnier c. Gosselin*[165] granted *solatium doloris* damages for the loss of the plaintiff's favourite animal, noting the evolution of mores regarding animals to justify the decision. The idea of animals' sociability had already entered the jurists' discourse:

> As for the sentimental value, if the Courts have always hesitated to welcome, with open arms, the solatium doloris, it remains certain that with the evolution of mores, the phenomenon of declining birth rate, the phenomenon equally-contemporary of the extension of age with as a corollary the attachment that some people, as they age, may feel for an animal, so it remains, I say, that it is not indecent nor repugnant to recognize, not so much emotional value but a compensation for the troubles, proceedings and worries for a favourite animal. From the perspective of this case, faced with the very relative elements of the appropriate criteria, this Court considers fair to award an amount of $75, in addition to the material value of $200 already mentioned, that is to say a total of $275.[166]

More recently, following *Augustus* in 1996, other judges have explained that animals' status as property does not prevent humans from feeling pain as a result of losing them. We

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160 *Ibid* at para 27.
161 *Canadian Pacific Ry Co v Robinson*, [1887] 14 SCR 105 [*Canadian Pacific*].
162 *Augustus*, *supra* note 158 at para 29.
163 *Ibid* at para 31.
164 *Ibid* at para 32.
165 *Régnier*, *supra* note 157.
166 *Ibid* at para 10 [translated by authors]:
> [Q]uant à la valeur sentimentale, si les Cours ont toujours hésité à accueillir, à bras ouverts, le solatium doloris, il reste certain qu'avec l'évolution des moeurs, le phénomène de la dénatalité, le phénomène également contemporain du prolongement d'âge de la population avec comme corollaire l'attachement que certaines personnes, alors qu'elles vieillissent, peuvent éprouver pour un animal, il reste donc, dis-je, qu'il n'est pas indécent et qu'il ne répugne pas à l'esprit de reconnaître, non pas tellement une valeur sentimentale comme une indemnisation des ennuis, démarches et soucis pour un animal favori. Dans l'optique de ce dossier, face aux éléments très relatifs de critères appropriés, cette Cour croit équitable d'accorder un montant de $75, en plus de la valeur matérielle de $200 déjà mentionnée, soit donc un total de $275.

wish to highlight a few passages where judges have explicitly stated that although animals are movable property, this does not limit the intimate relationships humans and animals may develop.[167] These passages reveal that animals were not considered to be mere things, but rather, beings invested with sociability.

In 2002, in *Wilson c. 104428 Canada Inc.*, the Superior Court of Quebec concluded that an injury to an animal may cause non-pecuniary damages due to the subjective value of the animal for their owner, a position that has routinely reappeared in subsequent case law:

> Current law considers an animal to be property. Thus, the rules applicable to damage to property are also applicable to damage to an animal. Damage assessment will therefore be done by establishing the monetary loss caused by the loss of the animal. It seems that this loss will be calculated in the same way as the value of the loss attributed to an inanimate object, which in many cases will be the price paid.
>
> On the other hand, there are, however, situations for which it will be possible to award damages for the extra-patrimonial injury caused by the infringement on a property. At the very least, this is the view of eminent authors in the field of civil liability. Indeed, this possibility is due to the fact that sometimes, the objective assessment of the value of objects of property "does not reflect the real subjective value that they have for the victim ," especially in the case of the loss of an animal.[168]

Discourse on the mutual connection that can develop between humans and animals is seen in the 2005 case of *Bricault c. Québec*, where the Quebec Court affirmed that the loss of an animal is not similar to the loss of a human being, but recognized that humans and animals develop deep relationships, and as a result, damages must be granted as a consequence of the emotional value of animals in addition to their commercial value:

> The Court considers that a dog is not a human person and that moral damages cannot have an appreciable value. An animal is an object of commerce and is associated with movable property.
>
> …
>
> It is true [however] that there is a certain relation between an animal and a human being which differs from that of an object with man. It is a living thing with which there can be an inter-relationship with man. Some

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167 In addition to cases cited below, see also *Gagnon c Prévost*, 2004 CanLII 1994 (QC CQ) ("[i]l est reconnu par la jurisprudence qu'un animal est un bien meuble … Le Tribunal est d'avis que ce n'est pas parce que l'objet endommagé est un bien meuble qu'un créancier est limité à la seule valeur économique de ce bien" at para 8 [citations omitted]).

168 *Wilson c 104428 Canada Inc*, 2002 CanLII 24889 (QC CS) at paras 204–205, 206–209 [translated by authors] [citations omitted]:

> Le droit actuel considère un animal comme étant un bien. Ainsi, les règles applicables lors d'atteinte à un bien sont également applicables à l'atteinte faite à un animal. L'évaluation des dommages se fera donc en établissant la perte monétaire engendrée par la perte de l'animal. Il semble bien que cette perte se calculera de la même façon que la valeur de la perte attribuée à un objet inanimé, laquelle, dans bien des cas, sera le prix payé. Par contre, il existe toutefois des situations pour lesquelles il sera possible d'attribuer des dommages pour le préjudice extra-patrimonial causé par l'atteinte à un bien. C'est, à tout le moins, le point de vue d'éminents auteurs dans le domaine de la responsabilité civile. En effet, cette possibilité est due au fait que parfois, l'évaluation objective de la valeur des biens 'ne reflète pas la valeur subjective réelle qu'ils ont pour la victime', notamment dans le cas de la perte d'un animal.

> judges attribute a sentimental value which may give rise to moral damages. However, these have only symbolic and nominal value.[169]

In 2006, the Court in *Chalifoux c. Major* noted that "rules applicable in the event of damage to property are generally the same which must be applied in the case of an animal," and granted damages for the loss of enjoyment of the animal for years to come as well as for the emotional shock of their loss.[170]

In 2008, in *Dagenais c. Plante*, the Court explained that the loss of an animal, which is qualified as a companion, despite being an object of property, can cause damage that is not only material:

> A priori, we consider that an animal is a commodity and that its loss is compensated by the reimbursement of its value and the costs incurred if applicable, as in this case.
>
> However, both doctrine and jurisprudence now agree that the loss of an animal can result in damages other than strictly material; the victim having the right to receive compensation for moral injury resulting from the loss of a pet.
>
> Indeed, an animal is very often a companion to which one becomes attached whose loss leaves a void that is difficult to fill.[171]

The place an animal occupies in the life of a family, including their positive impact on a family's well-being, was put forward in the 2011 case of *Benoit c. Canuel*.[172] In this case, the Court explained that damages in addition to an animal's commercial value must be granted in order to fully compensate the animal's owner for their loss. This conclusion is possible because, in certain situations, the objective assessment of the value of goods does not reflect

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169 *Tétrault Bricault c Québec (Procureur général)*, 2005 CanLII 48075 (QC CQ) at paras 28, 31 [translated by authors]:

> Le Tribunal considère qu'un chien n'est pas une personne humaine et que les dommages moraux ne peuvent avoir une valeur appréciable. Un animal est un objet de commerce et s'associe à un bien meuble.… Il est vrai [cependant] qu'il existe une certaine relation entre un animal et un être humain, laquelle diffère de celle d'un objet avec l'homme. Il s'agit d'une chose vivante avec laquelle il peut y avoir une inter-relation avec l'homme. Certains juges attribuent une valeur sentimentale pouvant donner ouverture à des dommages moraux. Toutefois, ceux-ci n'ont qu'une valeur symbolique et nominale.

170 *Chalifoux c Major*, 2006 QCCQ 6906 at paras 52, 56–57 [*Chalifoux*] [translated by authors] [citations omitted]:

> Les règles applicables lors d'atteinte à un bien sont généralement les mêmes qui doivent recevoir application lorsqu'il s'agit d'un animal.… Pour la perte de jouissance du chien pour les années à venir, le Tribunal accorde la somme de 2 000 $, considérant qu'il s'agissait d'un chien de cinq ans dont la présence bénéficiait à la famille composée du père et de sa fille. Il convient de compenser de telles pertes mais de façon modeste. De même, pour le choc émotif, le Tribunal accorde la somme nominale de 1 000 $, perte non économique qu'il convient néanmoins de compenser.

171 *Dagenais c Plante*, 2008 QCCQ 586 at paras 39–41 [translated by authors]:

> À priori, on considère qu'un animal est un bien et que sa perte est compensée par le remboursement de sa valeur et des frais encourus le cas échéant, comme dans la présente espèce. Cependant, tant la doctrine que la jurisprudence conviennent maintenant que la perte d'un animal peut entraîner des dommages autres que strictement matériels; la victime ayant le droit de recevoir réparation pour le préjudice moral résultant de la perte d'un animal de compagnie. En effet, il s'agit bien souvent d'un compagnon auquel on s'attache et dont la perte laisse un vide qu'il est difficile de combler.

172 *Benoit c Canuel*, 2011 QCCQ 1463.

the subjective value they have for the victim, especially in the case of the loss of an animal.[173]

In the same spirit, in 2014 — just a few months before Quebec's animal law reform — the Court of Quebec in *Côté c. Lachance* explained that:

> In general, the objective value (market or economic value) forms the basis for calculating compensation. However, in the hypothesis of the loss of an animal 'this price does not reflect the real subjective value it has for the victim'. Hence, case law grants, in addition to the objective value of the animal, compensation for the non-pecuniary damage resulting from its loss.[174]

While conducting our research, we traced more than 38 decisions, between the enactment of the *Civil Code of Quebec* in 1994 and the animal law reform of 2015, that granted damages for the emotional loss of an animal.[175]

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[173] *Ibid* at paras 29–33 [citations omitted]:
> Généralement, lorsqu'il y a atteinte à un bien, les tribunaux admettent habituellement qu'un préjudice patrimonial existe découlant des dommages matériels occasionnés. En ce cas, l'octroi d'un montant d'argent à titre de dommages se fera selon le principe de la restitution intégrale qui sera établie selon la valeur intrinsèque du bien, soit sa valeur économique ou sa valeur marchande. Le droit considère un animal comme étant un bien. Les règles applicables lors d'atteinte à un bien sont également applicables à l'atteinte faite à un animal. Les tribunaux reconnaissent qu'il existe des situations pour lesquelles il sera possible d'attribuer des dommages pour le préjudice extrapatrimonial causé par l'atteinte à un bien. Cette possibilité est due au fait que parfois, l'évaluation objective de la valeur des biens ne reflète pas la valeur subjective réelle qu'ils ont pour la victime, notamment dans le cas de la perte d'un animal. Il est reconnu par les tribunaux que l'animal domestique occupe souvent une place prépondérante dans l'esprit de son maître et des autres membres de la famille. Certains propriétaires d'animaux reconnaissent des vertus thérapeutiques.

[174] *Côté c Lachance*, 2014 QCCQ 597 at paras 23–24 [translated by authors] [citations omitted]:
> En général, la valeur objective (valeur marchande ou économique) constitue la base du calcul de l'indemnisation. Toutefois, dans l'hypothèse de la perte d'un animal « ce prix ne reflète pas la valeur subjective réelle qu'il a pour la victime ». Ainsi, la jurisprudence accorde, en plus de la valeur objective de l'animal, une indemnité pour le préjudice non pécuniaire découlant de sa perte.

[175] In addition to cases cited elsewhere in this section, see also *Giguère c Cloutier*, [1994] JQ no 2226 at para 14 (granting damages for the "perte qui peut être considérée au niveau affectif"); *Doyer c St-Germain*, AZ-99036347, [1999] BE 99BE-760 (not granting *solatium doloris* damages but explaining that an owner who spent more than six times the animal's commercial value in veterinary services in trying to save him acted with diligence and that he must be compensated for these services: "Après sept ans, le requérant s'était attaché beaucoup à son chien au sujet duquel il avait consacré beaucoup d'énergie, de temps et d'argent. Il était donc raisonnable qu'il veuille faire soigner d'autant plus que la blessure de son chien, tel que ci-haut mentionné, pouvait être guérie"); *L'Écuyer c Bergeron*, 2001 CanLII 11533 (QC CQ) at para 10 (granting "[d]ommages moraux, troubles et inconvénients"); *Beaudin c Henri*, 2002 CanLII 25761 (QC CQ) at paras 17–18 ("[il est certain que la perte d'un animal domestique peut causer de la peine et de la tristesse au sein d'une famille, mais on ne peut accorder un montant aussi étendu que celui réclamé. Le Tribunal est d'avis que les indemnités déjà accordées, augmentées d'une somme de 300 $, répareront la perte"); *Morneau c Demers*, 2003 CanLII 12260 (QC CQ) at para 3 (granting damages "pour préjudice moral, peine que la perte de l'animal a pu causer et certains troubles et inconvénients"); *Vandal c Lapointe*, 2003 CanLII 33086 (QC CQ) at para 22 (granting "dommages et intérêts pour les dommages moraux personnels subis par les requérants"); *Duguay c Coulombe*, 2004 CanLII 10591 (QC CQ) at para 22 (granting "*dommages moraux causés à la demanderesse par le décès de son cheval*"); *Beaulieu c Payette*, 2005 CanLII 6226 (QC CQ) at para 20 (granting damages for the "séquelles causées par la perte de sa chienne" at para 20); *Lefebvre c Lapointe*, 2005 CanLII 25003 (QC CQ) at para 7 (granting "dommages pour perte d'un animal aimé et souffrance de le voir mourir"); *Boulay-Leduc c Dupuis*, 2006 QCCQ 12481 at para 20 (granting damages because the plaintiff "a été particulièrement affectée par la perte de sa chienne"); *Bujold c Gauthier*, 2006 QCCQ 14395 at para 10 (granting damages for "la perte de son animal et les inconvénients subis par lui à titre de propriétaire"); *Esin c 9001-3657 Québec Inc (École de dressage Lamarche et Pinard)*, 2006 QCCQ 16622 at para 28 (granting "100 $, compte tenu d'une part de l'acquisition récente de l'animal et d'autre part de l'attachement significatif envers l'animal, en regard des événements personnels vécus par cette dernière à l'époque où elle a acquis l'animal"); *Delisle c Hiscox*, 2007 QCCQ 4190 at para 23 (granting "dommages moraux"); *Pothier c Azran*, 2007 QCCQ

The conclusion according to which the loss of an animal may justify damages for the emotional injury resulting from their loss is also confirmed by doctrinal authors. Along with the courts, these authors have also emphasized the sociable nature of animals. In *La responsabilité civile*, Jean-Louis Baudouin (former appellate justice), Patrice Deslauriers, and Benoît Moore (current appellate justice) explain that the law of civil liability allows a person who lost their animal because of a third party's fault to be compensated for their material loss as well as for the psychological consequences of this loss.[176] In *Le préjudice corporel*, Daniel Gardner makes similar comments regarding the compensability of the emotional pain resulting from the loss of an animal, pointing out the enormous grief such loss can cause.[177] Sophie Morin, in her 2011 *Le dommage moral et le préjudice extrapatrimonial*, also recognizes the possibility of such compensation, resulting from the relationship and attachment uniting a human guardian and an animal. For Morin, the rupture of such a

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6105 at para 42 (granting damages "pour troubles, inconvénients et perte de jouissance de l'animal de compagnie"); *St-Onge c Hôpital vétérinaire pour oiseaux et animaux exotiques Rive-Sud*, 2008 QCCQ 1529 at para 12 (granting "[d]ommages moraux"); *Poitras c Garon*, 2009 QCCQ 336 at para 17 (granting the "dommages généraux subis par la demanderesse à la suite du décès de son chien"); *Fournier c Desruisseaux*, 2009 QCCQ 462 at para 7 (granting damages "à titre de perte affective"); *MD c Dumont*, 2009 QCCQ 2519 at para 28 ("[l]a demanderesse était très attachée à ce cheval qui occupait une place importante dans sa vie quotidienne. Elle a eu et elle a encore beaucoup de peine à cause de la perte de cet animal et elle a été incapable d'en apprivoiser un autre. Considérant les circonstances du décès et le préjudice moral, le Tribunal estime qu'une somme de 3 000 $ constitue une indemnité appropriée pour la perte non pécuniaire" at para 28); *Sabelli c Arevalo*, 2009 QCCQ 14138 at para 55 (granting damages for "perte de jouissance de la vie"); *Zadorozny c Leclerc*, 2009 QCCQ 14353 at para 20 (granting damages for "pour le choc émotif subi par le demandeur"); *Gélinas c Berger Blanc Inc*, 2010 QCCQ 3573 at para 15; *Lapointe c Querry*, 2011 QCCQ 4831 at paras 19–20:

> En ce qui concerne les dommages moraux, la preuve démontre sans aucune équivoque que l'animal pendant 4 ½ ans a été un compagnon constant du demandeur et de sa famille. L'attachement démontré par le demandeur est bien réel et il n'y a rien de surprenant dans cette affirmation. Quelquefois même cet attachement peut atteindre une grande intensité. Il faut cependant noter qu'il y a dans les sentiments voués à un animal domestique une part de subjectivité qui doit rendre le Tribunal prudent dans l'évaluation de ce type de dommages.

Mitchell c Carrosserie Deslo, 2011 QCCQ 8759 at para 7 (granting "dommages moraux" as "les demandeurs expliquent que le chat faisait la joie de la famille depuis 9 ans et était l'objet d'affection pour leurs deux enfants"); *Baron c Kociolek*, 2012 QCCQ 497 at paras 28, 32–33:

> Tant la doctrine que la jurisprudence conviennent que la perte d'un animal peut entraîner des dommages autres que strictement matériels. La victime a le droit de recevoir réparation pour le préjudice moral résulta[n]t de la perte d'un animal de compagnie.… Mme Baron est particulièrement affectée par la perte de son shih tzu, qui occupe une grande place dans sa vie depuis huit ans. Elle a eu et elle a toujours beaucoup de peine à la suite de sa disparition. Il s'agit d'un compagnon auquel elle s'est attachée et dont la perte laisse un vide difficile à combler.

Perron c Ouellet, 2012 QCCQ 1896 at paras 11,13; *Fortin c Boucher*, 2012 QCCQ 4129 at para 21 ("[l]a jurisprudence reconnaît à la victime le droit de recevoir réparation pour le préjudice moral résultant de la pert' d'un animal de compagnie"); *Rouette c Gauthier*, 2012 QCCQ 13524 at para 25 (granting damages "pour compenser le désarroi subi par la perte du chien pendant la période de neuf mois" while he was away); *Lajoie c Pouliot*, 2013 QCCQ 10699 at para 26 (granting damages "pour le préjudice autre que matériel, considéran' l'importance de la chienne dans la vie du demandeur"); *Langlois c Groleau*, 2013 QCCQ 15021 at para 15 (granting damages for "la peine, la pert' d'un animal"); *Michaud c Courtenay*, 2014 QCCQ 6327 at paras 15–16:

> Le petit colley constituait aussi un membre de la famille en quelque sorte, comme cela est fréquent dans le cas d'un animal de compagnie. De le voir ainsi attaqué et blessé, causa à Michaud une souffrance morale qu'il partagea d'ailleurs avec sa femme et ses enfants, d'autant plus que leur chien ne fut plus le même après sa guérison, notamment en demeurant stressé et nerveux et en faisant ses besoins sur la galerie. Le fait que sa conjointe dut consoler et s'occuper des enfants d'une façon particulièrement intense et les réconforter psychologiquement pendant plus d'un an à cause de cet événement, causa une tension dans le couple et Michaud souffrit d'une « perte de jouissance » au sens propre du terme.

Beaujard c Lebeau, 2014 QCCQ 12922 at para 18 (granting moral damages "*pour la perte de son animal domestique*").

176 Baudouin, Deslauriers & Moore, *supra* note 47 at paras 1–327, 1–439. See also Baudouin & Deslauriers, 7th ed, *supra* note 156 at 436, para 1-421.

177 Gardner, *supra* note 156 at para 15.

relationship is likely to provoke the experience of mourning for the human, who suffers the loss of "property," but especially the loss of *irreplaceable* property.[178] She however suggests that this type of compensation remains exceptional and almost anecdotal,[179] which, it should be noted, our own research does not reveal. To the best of our knowledge, there is no doctrinal source refuting the existence of this compensation rule.[180]

In the legal discourses we examined, we can see that jurists, when confronted with the question of compensation for emotional harm emanating from the loss of an animal, have been careful to point out that an animal cannot be equated to a human person, and to reiterate that the law considers the animal an object of property. However, at the same time, jurists have explicitly distinguished animals from inanimate objects and have highlighted the idiosyncratic relationships and deep connections that can exist between a human and an animal.

Animals thus find themselves confined in an in-between: neither persons nor mere things, animals are a *particular* object of property and their connection with humans has a subjective value that can and must be compensated for.[181] Quebec jurists are of the view that the loss of an animal — and incidentally the loss of a relationship between a human and an animal — cannot be compensated by the sole commercial value of the animal.

Of course, jurists' recognition of this intimate bond, and awarding damages for consequential emotional loss, is in their view far from placing humans and animals on equal footing. It is rather a recognition that the owner-user human, first and foremost, suffers harm when they are deprived of the animal they loved. Judicial discourses stressing the "reciprocal" nature of the bonds uniting humans and animals should thus be taken with a grain of salt to the extent that other discourses qualify the prejudice suffered by a human simply as "the loss of enjoyment" of the animal.

That being said, legal discourses on this particular relationship between humans and animals are unequalled with respect to other objects of property. While other inanimate objects may give rise to damages resulting from emotional pain, such as the loss of a family photo album, a souvenir, or a piece of art,[182] animals are not perceived like any other thing.[183] For instance, when animals are referred to in such cases, terms such as "object," "property,"

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178 Morin, *supra* note 156, part 2, no 3.2.2(ii).

179 *Ibid*, part 2, no 3.2.2(ii). Morin hypothesizes that litigants would be reluctant to claim such damages because proof of the extent of the harm suffered will eventually cost much more than the amount of damages that could likely be awarded by the court, *ibid*, part 1, no 4.1 (i).

180 See also Nathalie Vézina, "Préjudice matériel, corporel et moral: variations sur la classification tripartite du préjudice dans le nouveau droit de la responsabilité" (1993) 24:1 RDUS 161 at 166–67.

181 It should be noted, however, that the courts have repeatedly emphasized that such compensation should remain modest in nature, or that it had only symbolic value.

182 See e.g. *Desrochers c Kodak Canada ltd.*, AZ-75031056, [1975] CP 238 (travel photos); *Fenster c Raoul Blouin Ltée*, 1986 CarswellQue 1235 (photos and personal documents); *Robert c Cimetière de l'est de Montréal Inc*, 1989 CarswellQue 73 (human ashes); *Club international vidéo film CIVF inc c Galerie Encadrex 1991 inc*, 2000 CarswellQue 5544 (lamp); *St-Jean c 142935 Canada inc*, 2002 CanLII 24954 (QC CQ) (family rings); *Moroca c Complexe funéraire Fortin et service d'incinération CIF*, 2005 CanLII 16811 (human ashes).

183 Note that companion animals and some objects of property such as family papers and portraits, medals and other decorations are exempt from seizure in the hands of debtors, see art 694 CCP.

or "things" are often replaced by "companions" or "family members."[184] Jurists have explicitly recognized the affection, attachment, and friendship uniting humans and their animal companions.

Moreover, in addition to being more than any other object of property, animals in these judgments are also more than just *any animal*: animals are individuals. Judges have hinted at a recognition of animals as idiosyncratic beings in the way they talk about them, notably by naming them specifically.[185] As such, the case law we have studied, in addition to highlighting the connections between humans and animals, seems to point to an individualization of the animal. Moving away from the status of a simple object of property, the animal, in this process of individualization, is perhaps moving closer to the status of a subject.

Despite cited case law and doctrinal authors stating that the law allows for the compensation of emotional damages due to the loss of an animal, it should be noted that some judges have fostered a contradictory legal discourse in which this type of suffering is not eligible for compensation.

To justify their decisions, these judges have focused on the classification of animals as objects of property. Interestingly, they have gone beyond merely considering animals as property and have instead fixated on their designation as movables. Judges seem to have employed this legal qualification to trivialize the emotional damages suffered: how could pain be felt for the loss of a *movable*?[186] However, animals' categorization as movables rather than immovables says nothing about the legality of compensating for one's emotional pain resulting from the loss of property. We believe that this emphasis on animals' movability results from a slippage between two definitions of the French word for movable: "*meuble*." Indeed, "*meuble*" means both a movable and a piece of furniture. In fact, outside of the legal community, "*meuble*" is only understood to mean "furniture." Thus, when judges say that one cannot be compensated for the pain resulting from the loss of a *meuble*, they seem to play, either consciously or unconsciously, on this double meaning of the word: how could pain be felt for the loss of a piece of furniture?

For example, in a 1999 case where a veterinary hospital forgot to return the ashes of a cat to his owners, the judge opined that "although a cat may have been a companion, the fact remains that our Civil Code classifies it as a *meuble* (particularly at articles 905 and 907) and the applicant's affections concern the loss of ashes from a *meuble*.[187] In a 2006 case, the judge confessed that she "underst[ood] very well the applicant's and her children's

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184 See e.g. *Dagenais c Plante*, 2008 QCCQ 586 at para 41; *Lapointe c Querry*, 2011 QCCQ 4831 at para 19; *Mitchell c Carrosserie Deslo*, 2011 QCCQ 8759 at para 7; *Baron c Kociolek*, 2012 QCCQ 497 at para 33; *Michaud c Courtenay*, 2014 QCCQ 6327 at para 15.

185 See e.g. *Chalifoux*, *supra* note 170.

186 See Morin, *supra* note 156, part 2, no 3.2.2(ii).

187 *De Belleval c 137888 Canada inc*, 1999 CanLII 10415 (QC CQ) ("un chat a beau avoir été un compagnon, il n'en demeure pas moins que notre Code civil le classe comme un meuble (C.c.Q. 905 et 907) et les affections du requérant concernant la perte des cendres d'un meuble" at para 11) [translated by authors].

attachment to their dog and the pain that his disappearance must have caused."[188] However, she claimed that "these factors cannot be taken into account in determining the loss. The court cannot grant sentimental value to what the law considers as a *meuble*."[189]

More generally, the idea that animals are objects of commerce seems to have convinced some judges that the loss of an animal must be equated to their commercial value, as evidenced by the 2001 decision in *Leffers c. Da Silva*:

> The loss of the cat should be viewed in the same way as the loss of an object of commerce and not as the loss of a human person. Indeed, an animal can be bought in a shop or between individuals for a price fixed by consent and it can be the property of a person, property which can be transferred like an object. The value that should be attributed to the total loss of an animal is calculated in the same way as the value of the loss attributed to an inanimate object. Thus, the price paid for the animal is one of the criteria to be considered in determining its value…. The death of the kitten also did not result in loss of income as is the case, for example, with the death of a racehorse. In this case, the price paid for the purchase of the kitten constitutes the only real assessable loss in money.[190]

This discourse seems to be the minority; however, this time, our research has identified only eight decisions sharing this view for the same time period.[191] Besides, such judicial discourse seems to have faded over time: the decisions we examined as unwilling to award damages belong mainly to the decade 2000, possibly pointing to an evolution of discourses independent of the 2015 reform. The majority view remains that compensation is warranted for the emotional harm resulting from the loss of an animal.

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188 *Duguay c Inspecteur Canin inc*, 2006 QCCQ 7687 at para 25 ("[l]a soussignée comprend fort bien l'attachement de la demanderesse et celui de ses enfants à leur chien et la peine qu'a dû entraîner sa disparition") [translated by authors].

189 *Ibid* at para 25 ("[m]alheureusement, ces facteurs ne peuvent être pris en considération pour établir la perte. Le tribunal ne peut accorder de valeur sentimentale à ce que la loi considère comme un meuble") [translated by authors].

190 *Leffers c Da Silva*, 2001 CanLII 17597 (QC CQ) at para 3 [translated by authors]:
> La perte du chat doit être considérée de la même façon que la perte d'un objet de commerce et non pas comme la perte d'une personne humaine. En effet, un animal peut être acheté dans un commerce ou entre particuliers pour un prix fixé de consentement et il peut être la propriété d'une personne, propriété qui peut être transférée comme un objet. La valeur qui doit être attribuée à la perte totale d'un animal se calcule de la même façon que la valeur de la perte attribuée à un objet inanimé. Ainsi, le prix payé pour l'animal constitue l'un des critères à considérer pour en déterminer la valeur …. La mort du chaton n'a pas non plus entraîné de perte de revenus comme c'est le cas, par exemple, pour la mort d'un cheval de course. En l'instance, le prix payé pour l'achat du chaton constitue la seule perte réelle évaluable en argent.

191 In addition to the cases cited in this section, see also *Roberge c Labrosse*, 2003 CanLII 8688 (QC CQ) at para 7 ("[c]et animal avait une valeur affective inestimable pour elle mais la peine résultant du décès d'un animal ne donne pas ouverture à des dommages moraux"); *Bédard c Pépin*, 2005 CanLII 18052 at paras 12–13 (QC CQ) (acknowledging the existence of two schools of thought on the matter, "la Cour se rallie à l'école pragmatique selon laquelle la valeur marchande d'un animal doit limiter le montant des dommages qui résultent d'une blessure ou de la mort, toutefois consciente que le mérite d'une règle peut être tributaire de ses exceptions," also noting that "la raison commande de penser à l'euthanasie plutôt qu'à dépenser près de cinq fois la valeur du chien en traitements"); *Deraspe c Îles-de-la-Madeleine (Municipalité des)*, 2008 QCCQ 6995 at para 4 ("[m]alheureusement ni la peine qu'elle éprouve, ni le prix des soins ne peuvent faire l'objet d'une réclamation" at para 4); *Hubbard c Lambert*, 2007 QCCQ 145 at para 14 [citations omitted] ("[p]ar ailleurs, la jurisprudence a décidé qu'un animal a beau avoir été un compagnon, il n'en demeure pas moins que le *Code civil du Québec* le classe comme bien meuble. En conséquence, il n'est pas possible d'accorder une indemnité pour préjudice moral résultant de la perte d'un animal"; *Ben-Or c Maison du chien*, 2013 QCCQ 9227 at paras 17, 20 ("[m]algré toute la sympathie que le Tribunal peut avoir envers ce qu'a vécu la demanderesse et sa famille, il doit appliquer la loi. Un chien est considéré comme un bien au sens du Code civil.… Le Tribunal ne peut donc tenir compte des impacts émotionnels et psychologiques du décès de la chienne Labrador sur la demanderesse et sa famille").

These legal discourses, which conceive of the animal through the significant relationships they can develop with humans, suggest that we must confront the claim that the animal is, and has always been, a simple object of property. As Alain Roy observed as early as 2003, "[t]he animal is not something that can be treated through the same legal filter as movable property, at the risk of leading to absurd results unsuited to contemporary realities,"[192] and most judges seem to have shared his view.

Since Quebec's animal law reform in 2015, a new discourse has emerged within the legal community regarding the recognition of significant relationships between humans and animals. According to this discourse, the legal recognition of animal sentience caused a paradigm shift in the value the law should grant to the relationship between a human and an animal. As one judge summarized, since the enactment of article 898.1 of the *Civil Code of Quebec*, "the value of moral damages suffered by a person following the loss of his pet should be higher than before, whilst an animal was considered only as movable property,"[193] and this reasoning also extends to the fear of losing an animal.[194] The discourse supporting such a paradigm shift can also be found in doctrinal writings, which essentially follow the case law on the subject.[195] In 2017, Alain Roy explained that "[d]ue to the change in qualification of the animal, the value of moral damages suffered by a person as a result of the loss of his pet must be higher than before."[196] The next year, Mariève Lacroix and Gaële Gidrol-Mistral wrote that "[v]iewing the animal as a sentient being translates, in terms of moral injury or non-pecuniary loss to the owner, into a higher assessment of the damages awarded."[197] This discourse seems to be settling in.[198]

This discourse, endorsing a paradigm shift between the situation prevailing prior to the 2015 reform and today, is interesting insofar as it postulates that it is only since the reform that animals have been able to transcend their status as mere objects of property. While we hold the view that the qualification of animals as sentient beings brings about a strong

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192 Roy 2003, *supra* note 2 at 807 [translated by authors] ("[l]'animal n'est pas une chose que l'on peut traiter à travers le même filtre juridique que les biens mobiliers, au risque d'aboutir à des résultats absurdes et inadaptés aux réalités contemporaines").

193 *Lavigne c Brousseau-Masse (Chenil Moya)*, 2017 QCCQ 503 at para 71 [translated by authors] [citations omitted] ("*[d]epuis l'entrée en vigueur de l'article 898.1 du Code civil du Québec, le Tribunal estime qu'en général, la valeur des dommages moraux subis par une personne suite à la perte de son animal de compagnie devrait être plus élevée qu'auparavant alors qu'un animal n'était considéré qu'à titre de bien meuble*." See also *Paquin c Langlois*, 2017 QCCQ 6052 at para 95; *Marsan c Vincent (Animalerie Anipro)*, 2017 QCCQ 14824 at para 80; *Desrosiers c Gaudreau*, 2017 QCCQ 16681 at para 86; *Petsoulakis-Xenos c Clinique vétérinaire Liesse inc*, 2018 QCCQ 2286 at para 48; *Walsh c Dandurand*, 2019 QCCS 1403 at paras 110–12; *Lamoureux c Vanieris*, 2019 QCCQ 2866 at para 36; *Ste-Marie c Grandmont*, 2020 QCCQ 1796 at paras 42–45.

194 *Marsan c Vincent (Animalerie Anipro)*, 2017 QCCQ 14824 at para 80.

195 For a nuanced take, see Normand, 3rd ed, *supra* note 26, introduction to Chapter 3.

196 Alain Roy, "Commentaires sous l'article 898.1," in Moore, 2017, *supra* note 83 at 862; Moore, 2018, *supra* note 83 at 898; Moore, 2019, *supra* note 83 at 927 [translated by authors] ("*[e]n raison du changement de qualification dont l'animal a fait l'objet, la valeur des dommages moraux subis par une personne à la suite de la perte de son animal de compagnie doit être plus élevée qu'auparavant*").

197 Mariève Lacroix & Gaële Gidrol-Mistral, "L'animal: un nouveau centaure dans les curies de la responsabilité civile" (2018) 120:2 R du N 371 at 385 [translated by authors] ("[e]nvisager l'animal en tant qu'être sensible se traduit, sur le plan du préjudice moral ou des pertes non pécuniaires du propriétaire, par une évaluation plus élevée des dommages-intérêts alloués").

198 We have found few decisions resisting this position (*Lafrance c Nicol*, 2017 QCCQ 11602 at para 36; *Prud'homme c Prud'homme*, 2019 QCCS 64 at paras 71–73). Judges contend that the legislative recognition of animals as sentient beings does not impact damage assessment, but they agree that the loss of an animal may lead to non-pecuniary damages. For a critical account of this jurisprudential debate, see Michaël Lessard, "Comment calculer les dommages pour la perte d'un animal?" (2021) January Repères 3203.

normative and symbolic change, we also believe that even before, in the way jurists discussed animals and their sociability, animals were no longer regarded as mere objects of property. They were already more.

Certainly, we are of the opinion that the damages previously awarded for the emotional harm suffered from the loss of an animal, which were often quite modest, did not reflect the true value of the connection uniting humans and animals. In this sense, the shift in case law and doctrine towards the awarding of higher damages is welcome.[199]

That being said, perhaps a significant change towards the recognition of animals as beings with whom humans can develop relationships lies in section 8 of the *Animal Welfare and Safety Act*.[200] Indeed, as part of the 2015 reform, this provision now mandates that certain owners provide their animals with socialization that is consistent with their biological needs. This required socialization may have the effect of allowing the animal to be kept in close relationships with humans, but also with other animals.[201] The inclusion of this obligation in the law thus seems to support the transition of the animal from mere property to something closer to a being in their own right. In fact, our journey through the history of animals in the law suggests such an evolution towards the greater recognition of animals as idiosyncratic beings. Let us sum up our findings.

VI. LESSONS FROM LOCATING THE WILD THINGS

Our incursion into where the "wild things" are and have been in Quebec legal discourses indicates a slow, ongoing process of dereification of animals. We perceive a shift from viewing animals as a *resource* for humans — or even as *movables* or *furniture* — to recognizing and respecting animals as *beings*. In this regard, article 898.1 of the *Civil Code of Quebec* has played a significant role by explicitly breaking away from the person or thing *summa divisio* by declaring that animals are not things, but sentient beings. Consequently, a new distinction has emerged, one between beings and things, thereby moving animals to the other side of the fence. Moreover, the fact that this declaration applies to all animals, instead of only certain classes of animals as seen in many other statutes and regulations, demonstrates the full scope of this shift resulting in some dereification of animals. This move towards dereification — which does not, however, amount to subjectivation — can be located, as we have seen, in an ongoing process of recognition of animals beingness in legal discourses, which dates back a few centuries.

Agency. When doctrinal authors have discussed the legal rules relating to the appropriation of animals, they have explicitly mentioned the natural freedom of animals. Wild animals can regain their freedom more easily than other objects of property and semi-wild animals are considered to have the freedom to choose their dwelling, from which their legal status will be derived. They are thus perceived by these authors as agents whose natural state is that of freedom — which obviously distinguishes them from other objects of property.

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199 *Ibid.* One of us detailed his view on this subject.

200 *Animal Welfare and Safety Act*, *supra* note 145.

201 See e.g. *Marquis c Harvey*, 2019 QCCS 4361, and our analysis of this case in Lessard & Plante, *supra* note 5.

The idea of dereification manifests itself notably in the regime of civil liability by the act of an animal. As we have seen, this regime does not apply to animals used as instruments by humans: it applies when, as their own beings, they act on their own volition. Thus, in the eyes of civil liability law, animals are not (always) mere objects, they are beings endowed with agency which can, alas, obligate their owner to repair injuries they cause.

Sentience. The emergence of legislative provisions addressing abuse and ill-treatment of animals and animal welfare also favours dereification, as animals are not conceived as mere things that can be treated with violence or neglect. While these prohibitions have been insufficient in addressing all matters related to animals' treatment and well-being, they have nonetheless transformed the animal — at least to a certain extent — by extracting them more and more from the trappings of property.

The same is true for the body of law relating to animal preservation emerging in Quebec since 1992. Indeed, these legal regimes have shown a concern for animals' sentience that goes beyond criminal regulations concerning abuse, and demonstrate a desire to respect animals' biological needs. Provisions concerning the killing of animals by methods causing fast and painless death have further indicated the legislator's concern, in his recognition of animals' sentience, that animal suffering also be diminished at the moment of death.

Sociability. Finally, when recognizing animals' sociability and the intimate bonds they can develop with humans in cases where damages are claimed for an animal that is killed or injured, we think of animals as beings and not as things. We often conceive animals as companions, even as family members[202] — as beings with a reality of their own, who are not to be assimilated to inanimate objects. In that regard, section 8 of the *Animal Welfare and Safety Act* evidences the increased recognition of animals' sociability and, moreover, the legislators' commitment to promoting this sociability by requiring that animals be provided with stimulation, socialization, and environmental enrichment. Such regimes emphasizing animal sociability demonstrate a progression towards dereification.

Accompanying dereification, our historical explorations seem to demonstrate a shift in the conception of animals as a *collectivity* to animals as *individuals* in the law. Several examples emerge from Quebec's legal landscape, which we should re-emphasize here.

Agency. Under the *Custom of Paris* and the *Civil Code of Lower Canada*, some animals were considered to be parts of greater immovables insofar as these animals were not occupied. Hence, they were said to be immovables as long as they belonged to the dove-cote, the warren, or the pond in which they elected to inhabit. These animals were part of an entity that was bigger than them, a collectivity. This class of animals disappeared with the advent of the *Civil Code of Quebec*. Now, from the point of view of property law, each animal is their own individual to be appropriated as such.

Sentience. This process of individualization also inhabits, we contend, statutes promoting wildlife and animal health protection. While these laws were first aimed at preserving

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[202] See Alain Roy, "La garde de l'animal de compagnie lors de la rupture conjugale" (2022) 51:1 RDUS 249; Lessard & Plante, *supra* note 5.

animals as a group, or even as a resource for humans, they ended up over time protecting individual animals not as members of a group but as individuals. The first versions of the *Act Respecting the Conservation and Development of Wildlife* and the *Animal Health Protection Act* were concerned with protecting game animals and fish as a resource for hunters and fishers as well as domesticated animals as herds. Through time, these regimes showed greater concern for individual well-being. Today, the law obliges owners and custodians of wild animals in captivity and domestic animals to provide for food and water, for a proper shelter, for health care, etc. These provisions show a growing concern for animals as *individuals*, a concern for their *individual* biological needs and for diminishing their *individual* suffering.

Note that individualization under these regimes does not extend equally to all animals. Greater protection and value are afforded to the interests of anthropomorphic animals, namely, those to whom we often attribute human-like characteristics. For instance, as we have seen, the "Safety and Welfare of Animals" division of the *Animal Health Protection Act* exclusively applied to dogs and cats. Following the same spirit, the only regulation currently providing for greater protection under the *Animal Welfare and Safety Act* only applies to dogs and cats. Thus, while there is a discernible trend of individualization, the acknowledgment of individuality varies significantly among different types of animals.

Sociability. Another telling example of this phenomenon, which appears notably when jurists discuss the nature of relationships formed between animals and humans, is the fact of naming the animal. Indeed, in the jurisprudence we have explored regarding cases where damages are claimed for emotional harm caused by the loss or injury of an animal, animals are sometimes referred to by their names. This acknowledgement of an animal's name in written judgments, it goes without saying, reveals an individualization of the animal. The cat is no longer *a* cat. She is *that* cat, who has a name and an identity of her own. She is unique.

As a result of our journey, we have found that, for quite some time now, legal discourses have recognized animals' agency, sentience and sociability. While the declaration that animals are not things but sentient beings has certainly improved this state of affairs, we must acknowledge that animals were not previously considered to be mere things. Throughout our journey tracing where the wild things are and have been in Quebec's legal history, we encountered arguments debunking the myth that the law has been unaware of animals' peculiar characteristics. Such findings invite us to add nuance to our depiction of the law. They also suggest that we must live up to a reality that we have known for centuries about animals' agency, sentience and sociability.

APPENDIX:
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