PROPERTY ON THE BORDERLINE: A COMPARATIVE ANALYSIS OF THE LEGAL STATUS OF ANIMALS IN CANADA AND THE UNITED STATES

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This Article reviews recent animal-related law reform in the United States in the areas of criminal, tort, family, and estate laws, and juxtaposes these developments with the current state of similar areas of law in Canada. While neither country may be described as “animal-friendly,” the article suggests that the United States is far more willing to challenge the traditional classification of animals as property at least where companion animals are concerned. Canada, in contrast, has remained essentially conservative, failing to engage with the posthumanist questions revisiting animals’ legal status as property that have begun to emerge in American jurisprudence. The international comparison helps elucidate a progressive potential in American animal law that might not have been apparent otherwise. As Canadian jurists often look to American legal developments when considering legal innovation, the comparative analysis should serve as a prompt to Canadian lawmakers to retreat from the country’s comparatively stagnant approach to the legal treatment of animals.

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I. Introduction

It is often remarked that the sense of a collective Canadian identity is elusive. Yet, when pressed for descriptors, Canadians often identify themselves in relation to Americans, pointing out contrasts in the core values and commitments of the two countries.¹ In this comparison, a higher moral ground is often claimed. Many Canadians are inclined to imagine Canada as a kinder, gentler version of its Southern neighbor, largely due to differences in commitments to social benefits, foreign policy, and the distribution and conceptualization of property rights.² That Canada offers universal health care, quality public education, and more generous parental leave, unemployment insurance, old age security, pensions and social assistance are all taken as signs of a larger social safety net and a more compassionate society.³ Canada’s position on issues that typically provide a litmus test of the progressiveness of an industrialized nation – abortion, capital punishment, same-sex marriage, gun control, large military budgets, belief in government regulation⁴ – also imparts a sense globally that Canada performs better than most and certainly better than the United States in operationalizing social citizenship for its residents.⁵

While this assessment of Canada as a compassionate nation may be accurate vis-à-

³ Arjumand Siddiqui & Clyde Hertzman, "Towards an epidemiological understanding of the effects of long-term institutional changes on population health: a case study of Canada versus the USA" (2007) 64:3 Social Science & Medicine 589.
vis the United States and perhaps even vis-à-vis many other nations worldwide, it is a statement that would be applicable to human rights issues only. With respect to its animal inhabitants, the statement is difficult to support. As this Article illustrates, Canada fares no better and at times lags behind the United States in some of the recent, albeit limited, legal reform for animals that has occurred in American jurisdictions. This is not to suggest that the United States is an animal-friendly jurisdiction. Overwhelmingly, the legal situation for animals is the same in both countries: one of abject status, domination and exploitation. Nevertheless, there are some differences that are noteworthy.

This Article compares the laws in the United States and Canada (at the federal and provincial levels), in several areas that have been the sites of animal-related law reform in the United States. This Article does not attempt to track all the recent US changes in relation to animals – only those that have emerged in routine areas of the common law that can be said to be primarily animated by a concern to value animals as something other than or more than property. As shorthand, these measures are termed “animal-

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6 To say that Canada is more compassionate is not, of course, to deny the serious violations of human rights that still occur within Canada’s boundaries. An obvious example arises from the existence of Canadian boundaries in the first place and the violence this enacts on indigenous peoples. For a discussion of the similarity of the resistance facing indigenous peoples in both Canada and the US in terms of political and judicial respect for Aboriginal and treaty rights, please see Anthony G Gulig, “Whales, Walleyes, and Moose: Recent Case Studies in a Comparison of Indian Law in the United States and Canada” (2005) 16:1 Native Studies Review 91. Interestingly, Gulig identifies the opposition indigenous peoples face from animal rights and environmental non-governmental actors as a substantial force of resistance to current indigenous legal claims regarding “natural resources” (ibid at 94).

7 It is intriguing to consider the particular social, cultural, economic and historical trajectory that led these two countries to this particular juncture – where one may be said to be more advanced on human rights issues yet comparable or even backward on animal rights issues than the other. This weighty question is set aside here.

8 Nor is it to suggest that the United States is an international leader in area of animal rights. As an example, the United States “remains the only nation in the industrialized world that continues to conduct invasive experiments on chimpanzees”: People for the Ethical Treatment of Animals, “Urge Congress to Support Great Ape Protection”, online: PETA, <https://secure.peta.org/site/Advocacy?cmd=display&page=UserAction&id=3705&autologin=true&c=wee kly_enews>; a list of countries with bans on the use of chimps in medical experiments can be found at Project R&R: Release and Restitution for Chimpanzees in US Laboratories, “International Bans”, online: <http://www.releasechimps.org/mission/end-chimpanzee-research/country-bans/#axzz1TRSMNIv1>.
friendly”. The label “animal-friendly” is used in a very diluted sense to signify an act that goes against the mainstream legal property position on animals, but may not have any substantive effect beyond the symbolic. Significantly, such measures are still anthropocentric as they are often animated by the value placed on human relationships (and thus humans) with animals rather than the value of animals themselves. The logic of human domination and hierarchy are not questioned in these cases and statutes. It is no accident that these “animal-friendly” legal developments relate primarily to domestic animals that reside within human lives as human companions and provide “important relationship functions” (companion, best friend, child-substitute, etc). 9 It is also worth noting that the timing of many of these legal developments corresponds to the rise of intense fetishization of animals as objects of human love and related consumption in the United States and other affluent geopolitical spaces. This rise in extensive consumption of and for animals as companion animals, implicated as it is in problematic dynamics of class, race and globalization, is not necessarily a “progressive” social development. 10

The label of “animal-friendly” is not intended to discount this larger sociocultural context or argue that these developments will lead to benefits for animals other than companion animals. It is meant to connote, however, a standpoint in certain legal texts wherein the property status of animals is questioned. That is, what circulates in the legal discourse regarding the contestation of the laws discussed is an emergent resistance to the law’s classification of animals as simply property; in this regard, the measures are not

10 Ibid at 898-903. See also James Kim, “Petting Asian America” (2011) 36:1 MELUS 135. At the same time, the phenomenon of valuing domestic animals may at least partly serve as a corrective for a historical masculinist devaluation of animals located in the domestic sphere due to the latter’s association with women. In this mindset, wild animals are seen as more deserving of human regard. See Josephine Donovan, “Correcting a Masculine Bias in American Studies” (2007) 15 Animals & Society 209.
welfarist as that term is commonly defined in animal law and advocacy circles but abolitionist in design.\textsuperscript{11} It is in this destabilization of animals’ traditional legal status in the common law that the developments may be viewed as “animal-friendly” and “progressive”.

To be clear, this Article does not suggest that these measures indicate a break or even new momentum in how the United States treats animals (instrumentally, like other

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\item The debate over whether welfarist measures – understood as those that promote “humane” treatment but not the end of animal exploitation – are useful for animals is long-standing within animal ethics. For an extensive discussion of the differences and desirability of welfarist versus abolitionist (those that impugn animals’ property status and exploitation) measures, see the recent exchange by leading proponents in Gary L. Francione and Robert Garner, \textit{The Animal Rights Debate: Abolition or Regulation?} (New York: Columbia University Press, 2010). Due to the desire to stay away from measures that do not disrupt the traditional property paradigm, the recent and prominent developments in animal-related criminal law domestic violence statutes are not discussed. In the face of a growing body of studies demonstrating the link between violence against animals and domestic violence, various jurisdictions have modified laws to better prevent domestic violence against humans. For examples of the studies in this area, see P Carlisle-Frank, JM Frank & L Nielsen, “Selective Battering of the Family Pet” (2004) 17:1 Anthrozoos: A Multidisciplinary Journal Of The Interactions Of People & Animals 26; CA Faver & EB Strand, “To Leave or to Stay?” (2003) 18:12 Journal Of Interpersonal Violence 1367; CP Flynn, “Why Family Professionals Can No Longer Ignore Violence Toward Animals” (2000) 49:1 Family Relations 87; and FR Ascione, “Battered women's reports of their partners' and their children's cruelty to animals” (1997) 1:1 Journal of Emotional Abuse 119. For a review of the above studies and a list of current states in the U.S. with cross-reporting legislation see Sarah DeGue & David DiLillo, “Is Animal Cruelty a 'Red Flag' for Family Violence?” (2009) 24:6 Journal Of Interpersonal Violence 1036. These studies highlight the fact that perpetrators of domestic violence often have a history of cruelty to animals and terrorize the family “pet” as a precursor or as part of domestic violence against their female partners and children. Aware of the bond between the family companion animal and the members of the family, the perpetrator will often exploit this relationship to terrorize his partner and children by: 1) threatening violence against the animal if the woman leaves (ibid at 1038-1039); 2) abusing, torturing and killing the animal and making the woman or children watch (ibid); and 3) forcing the animal and female partner to engage in sexual interactions (FR Ascione, CV Weber & DS Wood, "The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who are Battered" (1997) 5:3 Society and Animals 205) In response, a growing number of states have enacted measures to: 1) include animals in domestic violence protective orders (Stephan K Otto, “Animal Protection Laws of the United States and Canada” Animal Legal Defense Fund (June 2010), online: <http://www.aldf.org/article.php?id=259>); 2) create a separate offence for using animals in sex acts (ibid); and 3) list perpetrators of cruelty to animals in abuser registries (for example, \textit{Through Their Eyes: The National Abuse Registry}, online: <http://www.inhumane.org/>). Canadian legislation appears to be much further behind; there is no legislation anywhere in Canada authorizing cross-reporting (see Otto, \textit{supra}). These measures are not discussed since they are not primarily motivated by the animal suffering but rather by the human suffering involved in this violence. Preventing violence against animals is incidental to the main purpose of preventing domestic violence (understood as violence against humans). This is not suggest that these measures are not useful or that animal advocacy organizations that support and mobilize for them are misguided. Rather, this Article focuses on animal-related reforms where the primary purpose is to agitate for a different valuation and conceptualization of animals than their legal property status allows. For a review of the developments in this area in general please see Charles Siebert, "The Animal-Cruelty Syndrome", \textit{The New York Times Magazine} (11 June 2010) 42.
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countries). Rather, the argument identifies the points of instability in the current legal anthropocentric order that have emerged in the United States to reveal the posthumanist questions that are entering legal discourse, however minimally, that have yet to emerge in Canada in any significant way. In this respect, the United States offers some viable non-welfarist legal developments for Canada to adopt in the pursuit of substantive and effective animal law reform.

While these animal-friendly developments in the United States are minor, new and still precarious, a comparative analysis is useful. Canadian courts still regard American case law as persuasive, even though it is not binding precedent, and Canadian legislators often take cues from their American counterparts. What transpires legally in the United States can exert influence in Canada. More importantly, however, a comparative analysis gives the sense of the dynamism in this emergent area of law that might not otherwise be apparent if only the Canadian legal landscape were to be canvassed. Such an analysis has the potential to prompt Canadians to ask why we have remained stagnant in relation to our property classification for animals for so long, not just in relation to companion animals but other animals as well.

The Article proceeds in five parts. Part II briefly compares the anti-cruelty statutes in both countries in order to highlight several ways in which Canada lags behind its neighbor in criminal law reform with respect to animals. Parts III, IV and V compare the recent treatment of animals in Canada and the United States in three areas of civil law: torts, family and estates. The survey of these classic American civil law topics conducted


by Susan J. Hankin\textsuperscript{14} is very helpful in this regard and her findings are discussed below.

Part VI discusses a recent American trend in the language used around companion animals. In all of these doctrinal areas, the Article demonstrates the comparative stagnation of Canadian law when contrasted with American developments.

\textbf{II. Comparing the US and Canada: Beyond Anti-Cruelty}

The anti-cruelty law in both countries is generally ineffective in providing protection for animals.\textsuperscript{15} It merits noting, however, that many American states increased penalties under their anti-cruelty laws earlier than Canada did and that almost all US states carry higher incarceration periods for convictions under these laws than Canada does.\textsuperscript{16} Amendments made to anti-cruelty provisions in the Canadian Criminal Code in 2008 increased potential fines increased from $2,000 to $10,000 and the maximum limit

\textsuperscript{14} Susan J Hankin, "Not a Living Room Sofa: Changing the Legal Status of Companion Animals" (Winter 2007) 4:2 Rutgers JL & Pub Pol'y 314 [Hankin, “Sofa”].

\textsuperscript{15} Anti-cruelty laws in Canada fail to protect animals from abuse inflicted in industries such as medical research and agriculture: John Sorenson, "'Some Strange Things Happening in our Country': Opposing Proposed Changes in Anti-Cruelty Laws in Canada" (2003) 12:3 Social & Legal Studies 377. Sorenson notes that under proposed amendments, "[i]nfllicting pain and suffering on animals would still be considered acceptable as long as this served some lawful purpose". Anti-cruelty laws are also designed to protect human interests, whether economic or bodily, as opposed to protecting any separate interest of the animals themselves: see Lyne Letourneau, "Toward Animal Liberation? The New Anti-cruelty Provisions in Canada and their Impact on the Status of Animals" (2003) 40:4 Alta L Rev 1041 at 1051-1054, analyzing the way in which anti-cruelty laws in Canada are concerned with the protection and enhancement of human interests, rather than with the recognition of animal interests; Joseph G Sauder, "Enacting and enforcing felony animal cruelty laws to prevent violence against humans" (2000) 6 Animal Law 1, highlighting the message that anti-cruelty laws must be enforced in order to protect humans from violence, rather than valuing animals’ bodily interests separately from humans; and Elaine L Hughes & Christiane Meyer, "Animal welfare law in Canada and Europe" (2000) 6 Animal Law 23 at 35-41. Hughes and Meyer emphasize the way in which the definition of cruelty ("unnecessary suffering") in Canada supports a “utilitarian calculus” in which pain and injury to animals is permissible where the end result is considered “beneficial” for humans (ibid at 37). See also Gary L Francione, Animals, Property, and the Law (Philadelphia: Temple University Press, 1995) at 119-161 [Francione, “Animals”], and Darian M Ibrahim, "The Anticruelty Statute: A Study in Animal Welfare" (2006) 1 J Animal L & Ethics 175, both of whom come to the same conclusion about American laws.

for incarceration from 6 months to 18 months. Of the 47 states which had animal cruelty felony statutes on their books by 2011, only 8 states had maximum incarceration periods equal to or lower than Canada’s 18 months, with the rest in the range of 2 to 10 years. Thirteen states had higher maximum fines than Canada; these ranged from a low of $15,000 (Alabama) to a high of $500,000 (Colorado). Another 11 states had the same $10,000 maximum as Canada. Most states also included provisions for a lifetime ban on animal ownership, which Canada only added with the 2008 amendments. A third of states also included a provision for community service or some other form of restitution and 29 states allow a court to order psychological counseling for the convicted person – measures the Canadian version has yet to adopt.

Noting these increased provisions for incarceration is not an endorsement of longer prison terms or a suggestion that such American laws are more progressive than Canada’s anti-cruelty regime because of them. While these differences may be attributed to a

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18 “The HSUS Praises Mississippi Governor for Signing Felony Animal Cruelty Bill Into Law”, (27 April 2011), online: The Humane Society of the United States <http://www.humanesociety.org/news/press_releases/2011/04/_mississippi_felony_cruelty_law_042711.html>. The majority of these changes were made prior to the Canadian amendments, with 41 states implementing their felony statutes by 2004: see Allen, supra note 16 at 446. Note also that all 50 states have animal cruelty statutes; in the three that do not have felony offences, animal cruelty is classified as a misdemeanor (ibid).
20 Ibid.
21 Ibid. See also Criminal Code, supra note 17.
22 Ibid. See also Criminal Code, supra note 17.
23 Allen, supra note 16 at 456. See also Anita Dichter, "Legal definitions of cruelty and animal rights" (1978) 7 BC Envtl Aff L Rev 147 at 160-161, discussing the ways in which restitutionary measures take a step further than fines paid to the state in recognizing animal rights. She argues that animal rights are only recognized by measures in which “relief for infringement” benefits the animal directly – as it may with restitutionary measures that require that the animal’s veterinary costs be covered.
24 Cruelty Chart, supra note 19.
25 The literature on the regressive and racialized dynamics of the prison industrial complex is well developed. For a sampling, see Stormy Ogden, “The Prison-Industrial Complex in Indigenous California”
range of factors – from approaches to crime in general to the effect of animal advocacy lobbying\textsuperscript{26} – it is nevertheless difficult to single out Canada as a leader in animal law reform and at least arguable that it is behind many US states in its treatment of the issue.

It is important, however, to go beyond the ideological borders of anti-cruelty statutes because such statutes, even those with elevated penalties, do not contest the property status of animals in law. Instead, they reinforce a traditional Kantian view of animals wherein kindness to animals is obligated due to the human benefits such kindness cultivates.\textsuperscript{27} The Article thus also examines those legal subject areas where courts and legislatures have entreated a disruption to the traditional property categorization and the related cultural conceptualizations of animals that transcends, even if momentarily, this Kantian view and seeks to embed animals in a more relational context. My focus here is on a few ripples in the ocean of American laws relating to animals that correlate to a different view of animals and their relationships to human

\textsuperscript{26} Indeed, as Allen, \textit{supra} note 16 argues, the lobbying efforts of the Humane Society of the United States through its First Strike Campaign (designed to educate lawmakers and the public on the links between animal cruelty and violence against humans) had a “significant role” in the impressive rise of animal felony laws in US states from the 1990s onward (\textit{ibid} at 452). Three variables controlled the success of these efforts: the impact of lobbying positively correlated with a state’s HSUS membership numbers, and the existence of such laws in neighbouring states in the region, while the strength of the hunting lobby in a particular state had a negative effect on the HSUS lobbying (\textit{ibid} at 451). Allen also concluded that while the HSUS’s lobbying impacted the adoption of animal felony laws, it did not appear to have an effect on the stringency of the sentencing provisions (\textit{ibid}).

\textsuperscript{27} Immanuel Kant, “Duties to Animals” in Tom Regan & Peter Singer, eds, \textit{Animal Rights and Human Obligations} (New York: Prentice-Hall, 1976) 122; here, this excerpt from Kant provides the cornerstone of his view: “Our duties towards animals are merely indirect duties towards humanity.” For an explication of some of the issues raised by a Kantian view of animals, see J Skidmore, “Duties to Animals: The Failure of Kant’s Moral Theory” (2001) 35 The Journal of Value Inquiry 541. For the argument that animal cruelty laws are premised on this Kantian view, see generally the sources at note 14.
beings. These ripples, unlike anti-cruelty laws, question the property classification and have occurred largely in the civil realm through legislatures and courts.

III. Tort: The Measure of Damages for Injuries to Companion Animals

A large proportion of American and Canadian households include a nonhuman member. Many studies reveal that humans who live with animals classify their companion animals as part of their families and even regard them as their children. The level of emotional attachment that these individuals have to their companion animals can run very high and exceed that to human family members. Thus, when harm befalls a companion animal, the feelings of loss and distress can be severe. Society does not yet permit the equation of human suffering upon the injury or loss of an animal to that experienced upon the injury or loss of a human family member. Tort law, through the compensation of individuals for the emotional distress suffered when a loved one is injured through the negligent actions of another, is very much a part of this


29 Ipsos-Reid, “Paws and Claws: A Syndicated Study on Canadian Pet Ownership” (June 2001), online: <www.ctv.ca/generic/WebSpecials/pdf/Paws_and_Claws.pdf> [“Paws and Claws”]. Pets are viewed more as a part of the family rather than simply as dependent animals, with 26 percent seeing their pet as the “baby in the family” and 57 percent viewing the pet as a member of the family. Overall, seven in ten (69%) pet owners (eight in ten cat owners and six in ten dog owners) allow their pets to sleep on the owners’ beds. Six in ten pet owners (57%) have their pet’s pictures in their wallets or on display with other family photos (ibid at 4-5).


anthropocentric ordering of whose lives count and for how much. Nevertheless, an increasing number of tort cases have been litigated where the plaintiffs claim compensation for their (positive) affect-inspired actions and responses to their companion animals.

A. United States

In fact, tort law is one of the most dynamic legal areas in terms of judicial and legislative acknowledgments of the inaccuracies and problems with the current status of animals as property. The traditional approach to damages in a claim for negligent injury or death to a companion animal would be to award the “fair market value of property.”33 Under this pure economic valuation system, damages are generally low; as property, an animal – particularly one that is adopted, or elderly – has little monetary value.34 However, a growing number of cases have awarded damages beyond this metric, with courts giving awards for veterinary expenses, emotional distress, loss of companionship, or “special value” when a companion animal is injured or the subject of wrongful death.35

Both courts and state legislatures have allowed plaintiffs compensation for the cost of “reasonable veterinary treatment”36 even where those expenses exceed the fair market

36 Zager v Dimilia, 524 NYS (2d) 968 (NY J Ct 1988) at 970. See also Hyland v Borras, 719 A (2d) 662
value of the animal.\textsuperscript{37} Many of these cases acknowledge the difficulties inherent in the traditional market value approach. In \textit{Burgess v Shampooch},\textsuperscript{38} the Court of Appeals for Kansas noted that the economic value of companion animals is “difficult if not impossible to appraise” as the “real value … as a household pet is noneconomic.”\textsuperscript{39} They allowed an award of $1308 after the plaintiff’s terrier (originally purchased for $175) suffered a hip injury at the defendant grooming company.\textsuperscript{40} While these decisions still work within the framework of an economic valuation of companion animals, they also recognize that a companion animal has an intrinsic value that makes expenses for “repair” foreseeable, as an animal cannot be “replaced” in the way that an item of personal property could.\textsuperscript{41} In \textit{Saratte v Schroeder},\textsuperscript{42} the Court held that veterinary costs could be claimed even where the plaintiff had ignored a veterinarian’s recommendation that she euthanize her severely injured dog, noting that she “acted reasonably in trying to save her dog.”\textsuperscript{43}

Other courts have approached the question of the “value” of companion animals by

\footnotesize{(NJ Super Ct App Div 1998) \textit{Hyland}, allowing $2500 in damages for injuries to a ten-year-old shih tzu with a market value of approximately $500; and \textit{Leith v Frost}, 899 NE (2d) 635 (Ill App Ct 2008), allowing $4784 in veterinary expenses for injuries for a dachshund valued at $200. See Hankin, \textit{supra} note 14, at 328-329, noting this trend as well as a Maryland statute permitting compensation for veterinary expenses; and Byszewski, \textit{supra} note 35 at 218.}


\textsuperscript{38} 131 P (3d) 1248 (Kan Ct App 2006) [Burgess].

\textsuperscript{39} \textit{Ibid} at 1252. The court also quotes the plaintiff’s reason for her reluctance to put an economic value on Murphy, the terrier: “What is the value of a wet face licking received first thing in the morning? … What is the value of years of companionship, of training, of shared love?” (\textit{Ibid} at 1250).

\textsuperscript{40} \textit{Ibid} at 1253. The California Court of Appeal recently followed \textit{Burgess} in allowing a claim for $36,000 in veterinary expenses to go forward despite the fact that this “repair” cost far exceed the market value of Pumkin, an adopted cat who had been shot by a pellet gun (\textit{Kimes v Grosser}, No A128296, 2011 Cal App LEXIS 671 (Cal Ct App 2011) at 1).

\textsuperscript{41} \textit{Hyland, supra} note 36 at 664: “In that sense then, a household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness.”

\textsuperscript{42} 2009 Ohio 1176 (Ct App 2009). The court in this case also reviews a number of other cases where damages were awarded for veterinary expenses (at para 17).

\textsuperscript{43} \textit{Ibid} at para 18.
considering the “special value”\textsuperscript{44} of the animal to the owner.\textsuperscript{45} In these cases the value of the animal has been found to include intangibles such as companionship.\textsuperscript{46} A few courts have even awarded damages for emotional distress and loss of companionship suffered by the human owner.\textsuperscript{47} Although these decisions are focused on the value of the animal to the owner or on the emotions of the owner, they also acknowledge the legitimacy of human bonds with companion animals and often theorize animals as family members, rather than as possessions. In \textit{Vaneck v Cosenza-Drew},\textsuperscript{48} for example, the Court held that

\textsuperscript{44} \textit{Bueckner v Hamel}, 886 SW (2d) 368 (Tx Ct App 1994). In a concurring opinion, Andell J. affirmed the damages award on the basis of the “intrinsinc or special value of domestic animals as companions and beloved pets,” noting that “I consider the general rule of market value to be inadequate for assessing damages for the loss of domestic pets” (ibid at 377).

\textsuperscript{45} \textit{Mercurio v Weber}, 2003 NY Slip OP 51036U (Dist Ct 2003). The court held that the value of the companion animals could include the value to the human owner of loss of companionship. See also \textit{Mitchell v Heinrichs}, 27 P (3d) 309 (Alaska Sup Ct 2001); \textit{Anzalone v Kragness}, 826 NE (2d) 472 (Ill App Ct 2005); \textit{Jankoski v Preiser Animal Hospital}, 510 NE (2d) 1084 (Ill App Ct 1987); and \textit{Bluestone v Bergstrom}, No. 00CC00796 (Orange County Super Ct 2004), cited in Terry Carter, “Beast Practices”, (2007) 93 ABA J 39 at 41, and described in Cristin Schultz, “Hefty pet lawsuits may collar veterinarians: US jury awarded dog owner $39,000”, \textit{Calgary Herald} (22 June 2005) A14. The jury award for the wrongful death of the companion dog include $30,000 meant to reflect the special value of the animal to the plaintiff, rather than market value, which was $10.

\textsuperscript{46} \textit{Brousseau v Rosenthal}, 443 NYS (2d) 285 (NY Civ Ct 1980). In a bailment case in small claims, the plaintiff’s dog had died at the defendant’s kennel. On the question of damages, the Court said, “It would be wrong not to acknowledge the companionship and protection that Ms. Brousseau lost with the death of her canine companion of eight years. The difficulty of pecuniarily measuring this loss does not absolve the defendant of his obligation to compensate plaintiff for that loss” (ibid at 286-287). Other factors that may be considered in setting a “special value” beyond fair market may include more economically-motivated considerations, such as the age and breed of the animal or any special characteristics or skills it offers to the owner. See Byszewski, \textit{supra} note 35 at 218.

\textsuperscript{47} \textit{Campbell v Animal Quarantine Station}, 632 P (2d) 1066 (Hawaii Sup Ct 1981). The plaintiff’s dog died of heat prostration after the defendant kept her in a ventilation-free van exposed directly to the sun (at 1067). The court permitted recovery for mental distress, although this was specifically based on a “unique approach” to “recovery for mental distress suffered as a result of the negligent destruction of property” in Hawaii (at 1071). See also \textit{Burgess v Taylor}, 44 SW (3d) 806 (Ky Ct App 2001), in which the Court affirmed a jury award of $126,000, including damages for emotional distress, in a case where the defendants had agreed to pasture the plaintiff’s horses, only to sell them for slaughter, lie about their actions to the plaintiff, and hide the deaths of the horses from the plaintiff until it was too late for her to rescue them; \textit{Brown v Muhlenberg}, 269 F (3d) 205 (3rd Circ 2001); \textit{Womack v Von Rardon}, 135 P (3d) 54 (Wash Ct App 2006), where recovery for emotional distress was allowed after the defendants burned the plaintiff’s cat to death (at 543, 546-547); and a case discussed in “Pet owner wins record award after cat killed”, \textit{National Post} (10 May 2005) A18, in which a jury gave $45,000 following the death of the plaintiff’s cat. See Hankin’s discussion of these cases, \textit{supra} note 8, at 328-337, and Byszewski, \textit{supra} note 35 at 220-223, discussing cases permitting recovery for emotional distress and the distinctions made in the courts between intentional and negligent infliction of emotional distress.

\textsuperscript{48} 2009 Conn Super LEXIS 1056 (Conn Super Ct 2009) [\textit{Vaneck}]. See Karp 2010, \textit{supra} note 37, for
there was no reason to preclude a claim for emotional distress where the plaintiff had witnessed a car accident in which the defendant struck his dog.\textsuperscript{49} In their findings, the Court emphasized the “close relationship” the plaintiff had with the dog, analogized statutory protections for companion animals to those provided for dependent children, and referred to pets as holding “a distinct, identifiable and legally protected place within the human family unit”.\textsuperscript{50} As a result, Vaneck held that a pet owner was a “foreseeable victim of bystander emotional distress” in cases of injury to companion animals.\textsuperscript{51}

Beyond the courts, a few legislative jurisdictions – so far, Illinois and Tennessee – have also enacted legislation governing non-economic damages for the loss of companion animals.\textsuperscript{52}

It is important to remember that the development above is an emergent one and not yet near the norm of decisions in this area.\textsuperscript{53} The majority of courts continue to award the

\textsuperscript{49} Vaneck, supra note 48 at 7.
\textsuperscript{50} Ibid at 14-15.
\textsuperscript{51} Ibid at 15.
\textsuperscript{52} In Illinois, 510 Ill Comp Stat tit 70 § 16.3 (2010) holds that “damages may include, but are not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner. In addition to damages that may be proven, the owner is also entitled to punitive or exemplary damages of not less than $500 but not more than $25,000 for each act of abuse or neglect to which the animal was subjected.” In Tennessee, Tenn Code Ann § 44-17-403 (2000) sets the potential non-economic damages for the death of a companion animal at $5000 as compensation “for the loss of the reasonably expected society, companionship, love and affection of the pet.” Illinois and Tennessee alone have explicit legislation governing non-economic damages for the loss of companion animals. However, Oklahoma, Rhode Island, and Connecticut allow for damages above fair market value: Okla Stat Ann tit 23 § 68 provides exemplary damages for wrongful injuries to animals committed willfully or by gross negligence, in disregard of humanity; RI Gen Laws § 4-1-5 (2009) allows for triple damages for the malicious injury or killing of an animal who is owned by another person; and under Conn Gen Stat Ann § 22-351a (2009), liability for intentionally killing or injuring a companion animal (in addition to the fair market value of an animal) may result in punitive damages as well as damages for veterinary care and burial services. See Otto, supra note 11. See also Sabrina DeFabritiis, “Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace”, N Ill UL Rev [forthcoming], online: SSRN <http://ssrn.com/abstract=1767326> at 37-39, n 124, for an overview of proposed legislation in this area.
\textsuperscript{53} Hankin, “Sofa”, supra note 14 at 327. Many cases are litigated in which courts acknowledge the unique value of the companion animal but refuse to move from the classification of animals as property and the
traditional fair market value for injuries to animals, with some noting that any changes in this area should come from the legislatures.\textsuperscript{54} Even where animal-friendly arguments succeed in becoming “property-contesting” rulings, the effect is limited to that state.\textsuperscript{55}

Equally worthy of emphasis is the anthropocentric orientation that still animates these cases and statutes. Arguably, what is valued is the human relationship to animals rather than the animal herself or himself.\textsuperscript{56} In fact, a number of cases have specifically addressed the fact that the animals themselves have no claim for emotional or mental distress, even though they suffered the injury.\textsuperscript{57} Yet, in spite of this and the fact that these

\textsuperscript{54} See the recent decision of \textit{McDougall v Lamm}, No A-2477-0971, 2010 NJ Super Unpub LEXIS 2949 (NJ Super Ct App Div), where the court pushed responsibility up the chain: “In the final analysis, we conclude that if a cause of action for the emotional distress of a dog owner in watching the shocking and violent death of her dog is to be recognized, such recognition should come either from our Supreme Court or from the Legislature” (at II). See also \textit{Pickford v Masion}, 98 P (3d) 1232 (Wash Ct App 2004). “Pickford, with good reasons, maintains that Buddy is much more than a piece of property; we agree. Still, no Washington case has recognized the claims [for emotional distress] that Pickford urges us to find. Such an extension of duty and liability is more appropriately made by the legislature” (at 1235).

\textsuperscript{55} Decisions in this area may also be somewhat inconsistent from state to state because legislation regarding recovery for mental or emotional distress varies widely: see Byszewski, supra note 35 at 220. For example, some states may refuse recovery for non-economic damages for injury to a companion animal because state legislation does not permit such recovery for the death or injury of a human being. In \textit{Kaufman v Langhofer}, 222 P (3d) 272 (Ariz Ct App 2009), a veterinary malpractice suit where the plaintiff sued after the death of a scarlet macaw, the court said that “[e]xpanding Arizona common law to allow a pet owner to recover emotional distress or loss of companionship damages would be inappropriate as it would offer broader compensation for the loss of a pet than is currently available in this state for the loss of a person” (at 278-279). See also \textit{McMahon v Craig}, 97 Cal (3d) 555 (Cal Ct App 2009); and \textit{Krasnecky v Meffen}, 777 NE (2d) 1286 (Mass App Ct 2002).

\textsuperscript{56} Non-economic damages based on the loss of companionship of an animal are now commonly awarded in US courts. However, they are designed to compensate the owner and are not recognizant of the animal’s distinct interests, as loss of companionship is remedied by assessing the “intrinsic value” of the animal as damaged property. For example, in \textit{Stephens v Target Corp}, 482 F Supp (2d) 1234 (WD Wash 2007) the judge struggles to explain that the application of this assessment to a dog is admittedly (and awkwardly) based on the animal’s “utility” and must be confined by “the limitation on sentimental or fanciful value” (at 1236).

\textsuperscript{57} See \textit{Oberschlake v Veterinary Associates Animal Hospital}, 785 NE 2d 811, (Ohio Ct App 2003), in which the vet erroneously attempted to re-spay Poopi, a poodle, while she was having her teeth cleaned (at 812). The Court noted “that the Oberschlakes have also included a claim for Poopi’s own emotional
judgments have not explicitly changed the object status of animals to a subject status as persons, they still posit a more progressive view of an animal’s value: animals are worth more than their price tag indicates. They are recognized not as commodities, but as relational beings. Indeed, despite their marginal status, the developments in this area are sufficiently subversive to catch the attention of interested constituencies. Even unsuccessful claims for non-economic damages have helped bring the issue to the forefront. In an article written before the decision was passed down in Goodby v Vetpharm, a case where the plaintiffs were attempting to claim non-economic damages for the death of their cats by veterinary malpractice, the American Veterinary Medical Association (AVMA) noted: “…although limited to the [S]tate of Vermont, the Court’s decision has the potential to reshape animal jurisprudence in this country as well as the practice of veterinary medicine”.

B. Canada

Tort reform is one area where Canada may be said to have kept pace with American developments. Similar contestation of the property categorization, as a result of the recognition of the emotional bonds that humans have with animals, is apparent in a fair

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58 974 A (2d) 1269 (Vt Sup Ct 2009). Although acknowledging that “pets have special characteristics as personal property” (at 1273) and considering the argument tabled by the plaintiffs and the amicus curiae, the Animal Legal Defense Fund, that companion animals should be “more properly considered as family members than personal property” (ibid), the Court held that the legislature was the proper institutional body to make such a change in the law (at 1274).

number of Canadian cases. Again, as in the United States, these cases are not the norm.\textsuperscript{60} A case like \textit{Gandy v Robinson},\textsuperscript{61} like its American counterpart of \textit{Carbasho v Musulin},\textsuperscript{62} is exemplary of decisions to award the plaintiff no damages when her or his companion animal suffers an injury. Other Canadian cases have awarded damages only according to the typical metric of fair market value.\textsuperscript{63} Some cases, however, have exhibited more openness to extensions of tort law principles. For example, as in the American case law, some courts have allowed for the reimbursement of veterinary bills.\textsuperscript{64} In these decisions, courts have held that incurring veterinary expenses a few thousand dollars in excess of the purchase or adoption price of the animal was foreseeable and thus recoverable.\textsuperscript{65}

\textsuperscript{60} The trend towards animal-friendly decisions in Canadian torts law is also, other than a small number of cases, a fairly recent development (see \textit{Newell v Canadian Pacific Airlines Ltd} (1976), 14 OR (2d) 752, 74 DLR (3d) 574 (Ont Co Ct) and \textit{Somerville v Malloy}, 92 ACWS (3d) 560, [1999] OJ No 4208 (QL) (Ont Sup Ct) for examples of some older decisions; see also Jessica Dellow, “Valuing Companion Animals: Alternatives to Market Value” (2008) 17 Dalhousie J Legal Stud 175 at 187-188, discussing reasons why these cases may have been anomalous at the time). As of 2005 legal commentators were acknowledging the American decisions but noting that Canada was still committed to awarding damages for market value: Tim Wilbur, “Will Canadian courts go to the cats and dogs?” 25:8 Lawyers Weekly (QL). As seen below, the majority of the animal-friendly decisions in Canada were handed down post-2005.

\textsuperscript{61} 108 NBR (2d) 436, 22 ACWS (3d) 440, 1990 CarswellNB 140 (WL Can) (QB) [\textit{Gandy} cited to WL Can]. The case involved what McLellan J called a “defective dog” (at para 1). The owner of the dog sued the defendant sellers of the dog for either the cost of a hip surgery for the Labrador retriever or the return of the original purchase cost. The defendant was willing to refund the purchase cost or provide a replacement dog, but only if the original dog was returned or destroyed (at para 5). The judge described the original transaction as no different from the purchase or sale of a “home entertainment system or burglar alarm” and refused recovery (at para 11).

\textsuperscript{62} 618 SE (2d) 368 (W Va Sup Ct App 2005). The plaintiff sought damages after her dog was killed in a collision with the defendant’s vehicle. The judge insisted upon the legitimacy of the personal property label for dogs and held that damages (even for the negligent infliction of death) for sentimental value, mental suffering, and emotional distress were not recoverable (at 371). The Court acknowledged that the plaintiff felt that the loss of a pet is not comparable to the loss of an inanimate object, and even quotes a decision from a Wisconsin Court wherein the judge reasons that property is an inadequate label for dogs (\textit{ibid}). Nevertheless, the Court insists upon the inflexibility of both precedent and statute concerning the loss of pets (\textit{ibid}). The dissenting judge does write a scathing review of the decision, stating that the common law is created and therefore changeable by judges and that the majority is mistaken in not attaching any value to the emotional aspect of a pet relationship (at 372).


\textsuperscript{64} \textit{Xu v Chen}, 2008 BCPC 234, [2008] BCJ No 1569 (QL).

\textsuperscript{65} \textit{Hrynewich v Lafferty}, 2005 SKPC 65 at para 10, 141 ACWS (3d) 896, [2005] SJ No 460 (QL) Goliath J, “While the total of $2,337.94 seems to be a somewhat exorbitant sum to expend on a $50.00 pet, I am
Most notably, a few Canadian courts have awarded damages for emotional distress suffered by the owner(s) for the loss of or injury to their companion animals. Awarding damages for emotional distress goes several steps beyond compensating for costs incurred in acquiring or repairing an object (as represented by fair market value or veterinarian bills). Recognizing emotional distress as a ground for damages in relation to an animal affirms the relational (rather than economic) value the animal holds. For example, in *Brown v Edwards* the court awarded $3500 in damages for pain and suffering after carefully detailing the relationship that the plaintiff Brown family had with Tina, the deceased Dalmatian. The court emphasized that Tina slept in the Browns’ bed, went everywhere with the family, and was in fact an “important and rewarding member of the family.” The Canadian jurisprudence even includes a case where the companion animal at issue was not in the plaintiff’s care and custody, but had been adopted by the defendant. The plaintiff’s “special relationship” with one particular kitten was found to be grounds for damages for emotional distress after the defendant breached a contract promising to keep the plaintiff apprised of the whereabouts and treatment of the adopted pet.

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66 Arnold v Bekkers Pet Care Inc, [2010] OJ No 2153 (QL) (Sup Ct (Sm Cl Div)); while the court held that an exclusion clause limited the defendant’s liability, they also confirmed that in the absence of the clause the plaintiff could have recovered for mental distress caused by the death of her dog (at para 74). See also Surette v Kingsley (cob Paws for Thoughts?), [2000] NBJ No 532 (QL) (Sm Cl Ct); Nevelson v Margaski, [2006] OJ No 3132 (QL) (Sm Cl Ct); and Crichton v Noon, [2005] OJ No 4230 (QL) (Sm Cl Ct).

67 [2005] OJ No 1800 (QL) (Sm Cl Ct).

68 *Ibid* at paras 21-22. The damage award for the Browns was overturned on appeal (*Brown v Edwards*, [2006] OJ No 3595 (QL) (Ont Sup Ct)), but not for any reason connected to the recognition of the family’s pain and suffering. Rather, the trial court judge had applied the standard of care in bailment incorrectly (at para 1).

The recent case of *Ferguson v Birchmount Boarding* provides an example of the way in which these decisions can challenge the property status of animals. In *Ferguson*, the respondent had left his dog with the appellant kennel during a vacation and the dog had escaped through a negligently constructed fence. On appeal, the Court was asked to disallow the damages for pain and suffering awarded by the Trial Court on the basis that the dog was a chattel. The appellant argued that there was precedent precluding such an award with respect to an animal. The Appellate Court disagreed, distinguishing the various cases offered as precedent by the appellant, including *Pezzente v McClain*. In *Pezzente*, the plaintiff sued the seller of her dog in breach of warranty for the veterinary costs she incurred to heal the dog, claiming the seller knew of the dog’s health problems prior to the purchase. The Court engaged in a critical analysis of the property categorization for dogs, including citing a quaint passage listing all the benefits (companionship, mood lifting, exercise partner, loyalty) dogs bring to their human companions. In the end, however, the *Pezzente* Court left the property categorization undisturbed, despite recognizing the “coldness” of classifying a dog as a “consumer product”. In response, the *Ferguson* Court held that the characterization of a dog as a “consumer product” was an error in law, stating further that *Pezzente* was facts-driven.

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70 Ibid at para 11.
71 79 OR (3d) 681, [2006] OJ No 300 (QL) (Div Ct) [*Ferguson* cited to QL].
72 Ibid at para 18. The Trial Court had awarded the respondent $1417.12 in damages as replacement cost for the dog and for the pain and suffering the respondent incurred upon hearing of the escape and worrying about the fate of the dog: *Ferguson v Birchmount Boarding Kennels*, 141 ACWS (3d) 414, [2005] OJ No 3229 (QL) (Sm Cl Ct) at para 47-48.
73 *Ferguson*, *supra* note 71 at paras 19-23.
74 *Supra* note 63.
75 Ibid at para 6.
76 Ibid at para 12.
77 Ibid at paras 4, 16.
and in any case a breach of warranty case under the *Sale of Goods Act*, not a torts case.\(^{78}\) The award for mental distress in *Ferguson* was upheld.\(^{79}\)

Recognizing the emotional attachments that humans have with animals also led to a recent award for non-pecuniary loss in Quebec. In *MD v Dumont*,\(^{80}\) the Court reviewed a series of Quebec cases involving the award of “moral damages” for emotional distress. The Court followed these cases, but took care to note that such awards were “modest”\(^{81}\); it awarded the plaintiff $3,000 – a much smaller sum than the $30,000 the plaintiff had claimed for the death of her horse.\(^{82}\) Still, *Dumont* represents another addition to the developing Canadian jurisprudence in this area.

**C. Summary**

Animal-friendly tort law reform is present in both America and Canada, with courts awarding damages for veterinary expenses, emotional/mental distress, special damages, punitive damages or moral damages. Interestingly, it would appear that Canadian courts are equally willing to award these types of damages; however, they are also likely to retain personal property as the applicable legal category for animals. In Canada, there are currently no cases where courts have affirmed a non-property status for animals – just those where they acknowledge the unique relational aspects of the “value” that animals have for humans.

\(^{78}\) *Ferguson*, supra note 71 at para 20.

\(^{79}\) *Ibid* at para 25.

\(^{80}\) 2009 QCCQ 2519, [2009] JQ No 2492 (QL) (CQ Civ).

\(^{81}\) *Ibid* at paras 21-27.

\(^{82}\) *Ibid* at para 28.
IV. Family Law and Custody: The Best Interests Standard

The normal treatment of animals under family law is as property, with distribution according to the standard division of matrimonial property. 83 This legal route does not consider the claims of litigants that animals are beloved members of a family, more closely related in status to a child than to a piece of furniture. 84 Inquiring into who purchased an object and for how much as a legal method for deciding who keeps the object does not allow for considerations of love, caregiving, and emotional valuation, 85 which individuals may wish to be decisive factors in the disposition of a companion animal. Unlike custody principles (applicable to human children), which advert to the best interests of the charge, 86 family law principles for the distribution of property do not take care and emotion into account. 87 Family law thus devalues the relationship humans have with companion animals regardless of who purchased them and for what value.

83 Family Relations Act, RSBC 1996, c 128 [FRA]. In British Columbia, the division of matrimonial property is governed by Part 5 and 6 of the FRA. Under this regime, each spouse is presumptively entitled to an undivided half interest in the family assets as a tenant in common upon marriage breakdown (ibid, at s 56(2)).
84 See Mantella v Mantella, 80 OR (3d) 270, 267 DLR (4th) 432, [2006] OJ No 1337 (QL) at para 38 (Ont Sup Ct), where the judge refers to the conflict between the desires of litigants and the property status of animals, mentioning the “extraordinary expense and emotions spent by some litigants on ‘custody’ and ‘access’ issues respecting pets, which the law regards as simple chattels, like couches and cutlery.” For an example of the traditional treatment of animals under family law in America, see DeSanctis v Pritchard 803 A (2d) 230 (Pa Super Ct 2002), in which one party attempted to enforce shared custody of the family dog, Barney. The judge dismisses the possibility of such an arrangement by saying that Barney is “personal property” and that such an arrangement would be “analogous, in law, to a visitation schedule for a table or a lamp” (ibid at 232).
85 See “Paws and Claws”, supra note 29.
86 Under both the Divorce Act, RSC 1985, c 3(DA), which applies when a couple was married and are now seeking a divorce, and the FRA, supra note 83, which applies when there was no marriage prior to relationship breakdown, the best interests of the child are key in determining custody of a human child. The DA states, “In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child” (at s 16(8)). Similarly, the FRA states: “When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child …” (at s 24(1)).
87 In order to vary the presumptive equal division of family assets upon marriage breakdown, either party can apply for reapportionment under s 65 of the FRA, supra note 83. However, s 65 does not consider factors such as care and emotion, instead focusing on factors such as the method of timing of the acquisition of the property in question (at ss 65(1)(c)(d)).
A. United States

Yet, many litigants have brought cases seeking another resolution to decide who keeps the family companion animal upon marital breakdown. The Animal Legal Defense Fund has noted a marked rise in the litigation of animal family law cases, a substantial number of which show a shift from the traditional approach to a view of animals as something more than inanimate property. Some courts have been sympathetic to animal caregivers and applied the “best interest standard” from child custody principles to decide the disposition of a companion animal. In one example, during a dispute over the residence of a cat, the court acknowledged the strong emotional ties formed between humans and companion animals and decided it would be “best for all concerned” if Lovey, the cat, “remain where he has lived, prospered, loved and been loved for the past four years.” Use of the best interest standard has allowed courts to consider factors such as stability, safety, and the emotional bonds between companion animals and humans. For example, in Whitmore v Whitmore, the husband appealed a

88 Christopher T. Wharton, “Fighting Like Cats and Dogs: The Rising Number of Custody Battles Over the Family Pet” (2007-2008) 10 JL & Fam Stud 433 at 436. For an example of the type of effort put into modern animal custody cases, see Bowles v Bowles, 2010 Va Cir LEXIS 127, in which the separating couple presented a wealth of evidence in their attempts to gain custody: “Two veterinarians testified as to the animal's health and to the care given to it by each of the parties. Wife's mother, who cares for the dog when Wife is at work, testified as to the dog's actions when going to and returning from visitations with Husband. She also testified as to the dog's behavior around Wife. Both Husband and Wife testified about their interaction with the dog” (at 7-8). The end result for the litigants was a temporary visitation schedule combined with an order to sell the dog to whichever of the applicants was the highest bidder (at 8).


91 Raymond, supra note 90 at 309.

92 See Rebecca J Huss, "Separation, Custody, and Estate Planning Issues Relating to Companion Animals"
decision to grant custody of a companion dog to his wife upon divorce, claiming that the trial court had erred in failing to consider the emotional value of the dog and the dog’s best interests. In dismissing the appeal, the judge emphasized that the trial court had in fact correctly considered the fact that the wife had “provided the dog with a stable and caring residence.” In another case, the safety of the companion animal was a factor influencing the custody award. The standard has also been applied in a family dispute outside of the context of divorce. The case of Placey v Placey dealt with a dispute between a mother and a daughter over who was the owner of a dog, Preston. The Court, in attempting to determine which party was Preston’s owner, did so by reference, not to property laws, but to Preston’s interests. “Preston would be better cared for in the family home occupied by the mother,” the Court noted. They weighed the suitability of the parties’ living accommodations and found that the daughter, who was living in a hotel, would not be able to provide the yard that Preston needed. In the end they affirmed the trial court’s decision and explicitly endorsed the lower court application of the best interests standard: “Thus, it appears that the trial court considered the best interest of

(2003) 74 U Colo L Rev 181 [Huss, “Estate Planning”] at 227-229, discussing the ways in which child custody statutes could be used to formulate the factors to consider in determining the “best interests” of a companion animal. Huss also discusses a number of cases dealing with both the non-application and the application of a best interest standard, at 225-227.
93 2011 Va App LEXIS 57 (Va Ct App 2011).
94 Ibid at 9-10.
95 Juelfs v Gough, 41 P (3d) 593 (Alaska Sup Ct 2002) at 595. The court denied a request to enforce a shared-custody arrangement for a companion dog because the dog had previously been attacked by other dogs at one party’s home.
96 51 So (3d) 374 (Ala Ct Civ App 2010) [Placey].
97 The dispute in Placey arose after the parents received a Protection from Abuse Act order against their daughter, who had behaved violently towards them and threatened to kill them. The daughter appealed for the return of some items she claimed as her property, particularly the dog, Preston; at one point she had forcibly removed the dog from her mother’s custody, only to have the court require that she return it. She argued that as she had signed the adoption papers for Preston, ownership could not be transferred under the Protection from Abuse Act (ibid, at 375-376).
98 Ibid at 379.
99 Ibid.
Preston in determining that the mother was Preston’s true owner.”

American courts have also made dispositions that resemble shared custody or visitation rights, such as in Houseman v Dare, a 2010 decision of the Superior Court of New Jersey, Appellate Division. In that case, having determined that there was no prior agreement as to the disposition of the dog on the dissolution of the relationship, the judge ordered that the parties were to alternate possession of the dog equally throughout the year. Some courts have also approved settlement agreements in a divorce proceeding that award not only custody, but also economic support to one spouse for the care of an animal; the latter is known as “petimony.” These developments in the US are “property-contesting” inasmuch as they treat animals more as children through support principles than as property through a one-time division of assets. Nonetheless, it is the anthropocentric focus on the humans’ affection for the animals that explains the results in these cases. Still, the developments mark a positive trend when compared to the more conservative Canadian family law landscape for animals.

Issues of custody and possession have also arisen in the United States outside of the

100 Ibid.
101 See Huss, “Estate Planning”, supra note 92 at 223-224. The cases, mostly decided at the district court level, grant the litigants orders that vary from custody for one month out of the year to a week out of every month.
103 Houseman, supra note 102.
104 Huss, “Estate Planning”, supra note 92 at 223, noting a number of trial decisions with petimony awards.
105 See Hankin, “Sofa”, supra note 14 at 351, supporting the best interest standard on the grounds that it “makes good sense given the ways in which many human families regard their pets as part of the family and how most people regard their pets in ways very different from the way they regard their inanimate property.” See also Huss, “Estate Planning”, supra note 92 at 184, discussing the ways in which the benefits which accrue to humans from relationships with animal companions have begun to change the societal and legal approach to the valuation of those companions.
context of divorce and separation. In these disputes – many caused by lost pets and subsequent adoptions – the courts have shown some willingness to consider the interests of companion animals. In *Morgan v Kroupa*, the Court challenged the theory that pets are property by refusing to apply the provisions of a lost property statute to the case of a lost dog. The Court held that the finder could keep the dog, overruling the original owner’s claim for conversion, and emphasized that it was in the public interest for the law to support those who take in and care for stray animals. The same idea – that the law, by protecting the identities of the adoptive families of companion animals, in turn protects animals by promoting adoption instead of euthanasia – underlies a series of cases dealing with lost-and-adopted animals. The recent case of *Feger v Warwick Animal Shelter* is typical of the judicial reasoning in these cases. The defendant animal shelter had requested an order protecting the identity of the adoptive

106 The use of the term adoption (usually by animal shelters and humane societies), rather than sale, even where some money changes hands, may provide some protection for animal interests in itself. Huss, *ibid*, points out that “using the term ‘adoption’ rather than ‘sale’ emphasizes that the agreement transfers a living being” (at 204-205) and that the use of an adoption agreement in place of a contract of sale may allow animal shelters to step in and repossess an animal if they suspect that it is subject to abuse (at 205).

107 The aftermath of Hurricane Katrina lead to a high number of disputes over lost and subsequently adopted animals. See Megan McNabb, “Pets in the Eye of the Storm: Hurricane Katrina Floods the Courts with Pet Custody Disputes” (2007) 14 Animal L 71. McNabb discusses the issues raised by the possible application of the best interests standard following a disaster situation, particularly looking the impact of race and poverty. She also discusses the way in which media and public scrutiny impacted the outcome of some of the disputes.

108 707 A (2d) 630 (Vt Sup Ct 1997).


110 *Ibid* at 634: “The public interest in encouraging finders to care for and shelter lost pets necessarily qualifies the owner's right to possession. Where, as here, the finder of a lost domestic animal diligently attempts to locate its owner and provides care, shelter and companionship to the animal for over a year, a trial court does not abuse its discretion in awarding possession to the finder.”

111 *Lamare v North Country Animal League*, 743 A (2d) 598 (Vt Sup Ct 1999); and *Johnston v Atlanta Humane Society*, 326 SE (2d) 585 (Ga Ct App 1985). For discussion of both these cases as well as a similar Alaskan case, see John J Tiemessen & Jason A Weiner, “The Golden Retriever Rule: Alaska’s Identity Privilege for Animal Adoption Agencies and for Adoptive Animal Owners” (2007) 21 Alaska L Rev 77. Tiemessen and Weiner suggest that the protection of the identity of the adoptive families amounts to a type of testimonial privilege (at 78). They also note that a failure to protect the identities “could lead to the collapse of the animal adoption infrastructure and the unnecessary destruction of animals” (at 88).

112 870 NYS (2d) 124 (Sup Ct App Div 2008).
owner of a cat that the plaintiff alleged was her own lost companion animal. The court affirmed the order, suggesting that such protection for adopters was necessary in order to encourage animal adoption and avoid the “needless euthanasia of animals”. The original owner’s property right was trumped by public policy favouring the need to provide stable care for companion animals.

In the case of Cat Champion Corporation v Primrose, the court again supported the rights of adopting parties against the original owner of a group of cats. Cat Champion, a cat-rescue organization, had taken custody of 11 cats after the owner was found to be neglecting them. However, as the organization had no legal title in the cats, they did not have the ability to place the cats in adoptive homes, only to continue caring for the cats indefinitely or return them to the abusive owner. The appellate Court, in a creative ruling, appointed Cat Champion as a fiduciary “for the limited purpose of providing continuing care for the Respondent’s cats while determining the best legal, permanent placement for the cats”. With this power, the organization was able to find new homes for the cats. The Animal League Defense Fund, which provided legal aid in the case, celebrated the case as the first time in the United States that a fiduciary had been appointed on behalf of an animal owner with the purpose of enforcing the best interests of companion animals.

113 Ibid at 127.
114 149 P (3d) 1276 (Or Ct App 2006).
115 Ibid at 1277-1278.
116 Ibid at 1278.
117 Ibid at 1280-1281.
B. Canada

Like their American counterparts, some Canadian judges seem hesitant to treat animals simply as personal property in the family law context. This hesitation stems, however, not from any direct valuation of the animal but rather the strong bonds that humans form with animals. Yet, unlike the American jurisprudence, the cases, with few exceptions, do not challenge the property status of animals and in some cases even go so far as to staunchly affirm it. In the recent case of Ireland v Ireland, a Saskatchewan court rejected any potential application of child custody principles to animals:

[A] dog is a dog. Any application of principles that the court might normally apply to the determination of custody of children are (sic) completely inapplicable to the disposition of a pet as family property. Any temptation to draw parallels between the court’s approach in this case to the principles applied to settle child custody disputes must be rejected.

The court’s order emphasized the property approach to companion animals by terminating a interim order which had permitted shared possession of the divorcing couple’s dog, Kadi; awarding full ownership of Kadi to one party; and ordering that party to pay the other $350, half of Kadi’s original purchase price.

Although Canadian couples have been drawing up separation agreements that include custody-like dispositions for companion animals for a number of years now, far fewer cases are litigated than in America. Cases like Ireland suggest that couples that attempt to enforce these custody arrangements in Canadian courts may not be

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119 2010 SKQB 454 at para 9, [2010] SJ No 756 (QL) [Ireland].
120 Ibid at para 12.
121 Ibid at para 15.
successful. The judge in Ireland expressed a fear that the trial would lead to a flood of future animal custody litigation and described the case as a waste of the court’s time—hardly promising for litigants who want to try their interest in a companion animal on grounds other than the traditional property approach. Even in cases where the courts have been willing to recognize a non-economic value in companion animals, the end result has been similar. For example, in Gardiner-Simpson v Cross, a 2008 Nova Scotia case involving a dispute over the ownership of a dog after a relationship breakdown with a Separation Agreement that was silent as to whom Jersey, the dog now the subject of litigation, would live with, the Court states:

Emotion notwithstanding, the law continues to regard animals as personal property. There are no special laws governing pet ownership that would compare to the way that children and their care are treated by statutes such as the Custody and Maintenance Act or the Divorce Act. Obviously there are laws that prohibit cruelty to animals, but there are no laws that dictate that an animal should be raised by the person who loves it more or would provide a better home environment. As such, slightly distasteful as it may be in the case of two loving and devoted pet owners, I must consider which one has the better property claim.

The Court is aware of the cultural attitudes surrounding beloved companion animals and the non-property perspective many human owners attach to them. Yet, the Court is swayed by the dominant cultural and legal position that animals are still property. The

124 Ireland, supra note 119 appears to overrule an earlier decision of the Saskatchewan Queen’s Bench, Gauvin v Schaeffer, 2003 SKQB 78, 36 RFL (5th) 121, [2003] SJ No 117 (QL) [Gauvin], where the Court orders that the divorcing couple share Shikydoe, a Husky, with each one having custody in alternating weeks. Although the Court acknowledges that Shikydoe’s value is not the $150 for which he was purchased—“his real value is much higher and founded in the intrinsic nature of the relationship which he has formed with the other members of his pack, the plaintiff and the defendant, over his lifetime”—the Court also holds that “title” in Shikydoe can be “distributed” under the Family Property Act (at para 13). The seven-year progression from Gauvin to Ireland suggests that momentum is currently not on the side of a non-property approach to animals in family law.
125 Ireland, supra note 119 at paras 9, 13.
126 2008 NSSM 78, [2008] NSJ No 558 (QL) [Gardiner].
127 Ibid at para 40.
128 Ibid at paras 3-5 (italics added).
Court’s reasoning reflects a tension between the two approaches and thus betrays the cultural disconnect between how human owners feel about their animals and the laws that prevail. The Court in *Gardiner* proceeds with this hybrid analysis in explaining why joint property is not a desirable solution, first analogizing to the biblical tale of King Solomon,129 and then acknowledging that animals may carry an intangible value.130 As to the choice of which principle to apply, the Court reasons that “the only practical and humane thing is to do as I propose to do and attempt a principled analysis of the legal ownership”.131 It is rare to consider humane principles in relation to property – the word is a further indication of the tension between law and culture.

A similar result – the adoption of property as the appropriate legal category despite the recognition of humans’ relational valuation of their companion animals – is reached in *Warnica v Gering*,132 a 2004 decision of the Ontario Superior Court involving the “custody” of a dog, Tuxedo, after the breakdown of a relationship.133 In *Warnica*, the parties did not contest that the respondent purchased the dog from the local pound for $100 or that Tuxedo primarily lived with the respondent; rather, they disagreed as to whether or not the dog was bought as a present for the applicant.134 There was some discussion by the Court as to whether this was properly a family law case since the parties only admitted to dating, albeit over an 11-year period, and the respondent denied

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129 *Ibid* at paras 6-8. Paragraph 8 reaches to religious narrative to illustrate the point: “In matrimonial cases, parties often agree to sell jointly owned assets (whether realty or personalty) and split the proceeds. The problem would take on a Solomonic quality, where splitting the asset (be it a dog or a child) destroys the thing for both of them. Selling the dog to an outsider would only double the pain.”

130 *Ibid* at paras 8 and 9.


132 136 ACWS (3d) 278, [2004] OJ No 5396 (QL) (Ont Super Ct) [*Warnica* cited to QL].

133 *Ibid* at paras 1-4.

The applicant had commenced the action as a family law matter seeking joint custody of Tuxedo, but the respondent, with whom the dog currently lived, favored Superior Court jurisdiction. Both parties sought a custody order – a remedy typically reserved for human children and not property – in relation to Tuxedo. Tellingly, once the jurisdiction of the Family Court was impugned by the respondent, the applicant moved to amend his application to include a claim for Tuxedo in property law terms. He requested a declaration that the respondent held Tuxedo in constructive trust for both of them in equal shares and a direction that he should have temporary possession of the dog for alternating one-week periods.

Reframing the applicant’s interest in conventional property law terminology, rather than family law terms, elicited the Court’s approval. However, the judge not only rejected the direct application of custodial principles from family law, but also what the Court saw as the indirect application of such principles in the concept of shared possession:

A pet could be shared, as happened in the case of Rogers v Rogers. In my view that would be akin to a custody access/order. Whether in the Family Court or otherwise, I do not believe that any court should be in the business of making custody orders for pets, disguised or otherwise. To the extent that any of my colleagues may feel otherwise, I respectfully disagree. Obviously, I acknowledge that pets are of great importance to human beings. Strong bonds develop between them and the human beings that look after them. To some people, the relationship with their pets takes on a significance exceeding that of any other. They go to extraordinary lengths to preserve that relationship; even at a cost that some would say is disproportionate. Some may consider them to be children; however, they are not children.

The Court is firm in holding that cultural views and human sensibilities toward companion animals, while weighty and uncontested, will not change the latter’s legal

135 Ibid at para 2.
136 Ibid at para 25.
137 Ibid at para 1-2.
138 Ibid at para 5, per Timms J.
139 Ibid at para 19.
status. There is no “best interest” calculation here adverting to ties of affection or even caregiving. Further on, the Court explicitly notes: “It would appear as if the applicant’s involvement with the dog was totally dependent upon his relationship with the respondent. The applicant may have spent money for such things as dog food and the like and he may have spent time caring for the dog. I do not consider that to be relevant to who owns the dog.” Again, family law custody principles are based on, among other facts, emotions and relationships. These factors are not regarded as relevant to the lives of non-persons, despite the literature on what companion animals need to prosper, because as non-persons their well-being does not count. The property rights of the human owners do. Timms J. dismissed the application, which he noted had already involved the attention of two other judges in the litigation history, for being a waste of the Court’s time, a view that was confirmed upon appeal by the Ontario Court of Appeal in a seven-paragraph endorsement. If the Appellate Court was inclined to comment on the novel application of custodial principles to companion animals, it declined to do so anywhere in the endorsement. Instead, the Ontario Court of Appeal stated:

Given the unusual nature of this claim and the material before him, the case conference judge was entitled to conclude that the claim would likely fail both on jurisdiction and on the merits, and that in view of the pressing workload of the Family Court the case did not warrant a full trial.

With the endorsement, the Court closed an “unusual” and rare opportunity for a high level court to develop jurisprudence in this area. It is reasonable to presume the

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140 Ibid at para 28.
141 See FRA, supra note 83. One of the factors listed in the FRA as a consideration in determining what is in the best interests of the child is “the love, affection and similar ties that exist between the child and other persons” (at s 24(1)(c)).
142 Warnica, supra note 132 at paras 24, 29.
143 Warnica v Gering, 142 ACWS (3d) 87, [2005] OJ No 3655 (QL) (CA) [cited to QL].
144 Ibid at para 6.
“unusualness” of the claim may not have been a factor favouring the application’s
dismissal had the justices viewed the matter of what happens to companion animals upon
breakdown with more regard.

That the courts in the cases above prefer the conventional property analysis and
decline to extend the law in a new direction is not surprising. There is very little
Canadian jurisprudence applying a best interest standard to companion animals in family
law or in any other legal area. Even in cases where courts have permitted something
similar to shared custody, the use of a best interests standard has been rejected. In Rogers
v Rogers the court considered whether the prime consideration should be “the welfare
or the best interests of the animal … as in the case involving the custody of children” or
“the preservation of the animal as a chattel as with any work of art, antique piece of
furniture or heirloom” and held that the latter was the “governing consideration.”
The property status of animals is contested by the court in Millar v. Homenuik; however,
this contestation occurs in dicta as the Court does not end up making an award
regarding the animals. In regard to a dispute between the parting spouses over two cats,
the Court states: “in my view, there is no property in a cat, or two cats. Cats confer their
presence on people, they do not become their chattels”. What is more, this statement is

145 [1980] OJ No 2229 (QL) (Ont Dist Ct) [Rogers]. The court awarded the applicant visitation rights with
the dog, Daman, on alternating weekends and alternating Wednesday nights (at para 33).
146 Ibid at para 25.
147 Ibid at para 27. The judge did note that “a dog has feelings, is capable of affection, needs to be shown
affection” and that “its needs must be provided for and that, generally, it must be treated humanely and
with all due care and attention to its needs and that these factors are to be considered as well in determining
the right to possession or access thereto.” However, as with the cases of Ireland and Gauvin (see
accompanying text at note 12), the approach described in Rogers was explicitly dismissed in the more
recent case of Warnica, supra note 132 at para 19.
149 This is because in the Court’s view the husband only expressed a “wish” regarding the cats as per his
testimony; the judge colorfully states: “I am not here for wish fulfillment.” Ibid at para 16, per Wilson J.
150 Ibid at para 16.
made by a judge who does not revert to the “human bonds with animals” justification. In a statement that seems not to recognize the strong bonds that people can form with animals, a bond that other courts have recognized even as they determine the “custody” of animals based on traditional property principles, the Court noted the expense of owning cats and suggested that the plaintiff “might well be advised to give up the luxury of these cats.”

More promising, although still displaying a bifurcated analysis, is *Boschee v Duncan*, a case decided by the Court of Queen’s Bench in Alberta in 2004. Here, the Court does not explicitly discuss the property status of animals, but integrates non-property family support provisions to deal with an animal. Again, without undertaking any fraught sense of what the dog at issue represents, the Court awards a woman $200 per month as “dog maintenance” in addition to spousal support to compensate her for the time and expense required to look after her former partner’s St. Bernard dog. “Dog maintenance” or “petimony” is different from spousal support (compensating a spouse for the sacrifice of lost opportunities while she or he performed the unremunerated social reproductive work of the family) as well as child support (the right of the child for maintenance from her or his parents). Here, the woman is not being compensated for past sacrifices and the dog is not understood to have a right to support. Nonetheless, the dog is partially placed by the Court into a non-property framework that resembles the

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151 Ibid at para 16
153 Ibid at para 11.
154 Ibid at paras 2-3, 11. Her ex-partner could not take the dog with him due to a lack of pet-friendly rental accommodation.
156 Ibid at 388-462.
function of child support – providing for a dependent charge. Moreover, support or “maintenance” provisions are decidedly different in purpose and conceptualization than property principles.\textsuperscript{157} Division of family property is a one-time event; the disposition of assets upon breakdown is typically final and not revisited on an ongoing basis in the future.\textsuperscript{158} Support, however, is. It is recurring and variable as the needs and abilities to pay of the parties shift over the years.\textsuperscript{159} It is exceedingly rare for an ongoing “maintenance” amount to attach to an object of property.

Canadian courts have been more willing to consider the use of a best interest standard in animal custody claims once outside the realm of family court.\textsuperscript{160} Watson v Hayward,\textsuperscript{161} a 2002 decision of the British Columbia Provincial Court that arose out of small claims litigation, involved an owner seeking the return of his dog from the breeder after the breeder had agreed to look after the dog for a short time but found evidence of neglect. In Watson the Court states: “a domestic animal is personal property under common law” and goes on to cite Vallance v Naaykens,\textsuperscript{162} which cites another case\textsuperscript{163} in

\textsuperscript{157} The obliging language of maintenance provisions applied to the support of a pet symbolizes a judicial recognition that an animal must be treated as more than an item of property that by default is split in equal halves upon a family breakdown.

\textsuperscript{158} See Part One of the FRA, supra note 83 at s 20 for the explicit exemption of matrimonial property from an application to vary or rescind an order.

\textsuperscript{159} See the DA, supra note 86 at s 17 for the provision governing the variation, rescission, or suspension of custody or support orders; and Part 7 of the FRA, supra note 79 at s 91(4).

\textsuperscript{160} There is no obvious reason for the difference in approach, other than perhaps the fear (of a flood of pet custody litigation in the family courts) expressed in Ireland, supra note 119. Note also that the Canadian courts are equally willing to dismiss the use of a best interest standard outside of the family law realm as they are within; see for example Savoie v Dowell, 2009 NSSM 5, [2009] NSJ No 45 (QL), a non-family custody dispute over a dog, where the Court noted that “[a]t law, dogs are property. The ‘best interest of the dog’ is not a concept any more relevant to the law than would be the best interest of the motorcycle in a dispute over a Harley-Davidson” (at para 8).

\textsuperscript{161} 2002 BCPC 259, [2002] BCJ No 1628 (QL) [Watson].

\textsuperscript{162} 2001 BCSC 656, 104 ACWS (3d) 862, [2001] BCJ No 959 (QL) [Vallance]. Vallance dealt with the enforceability of a restraint on alienation in a contract for the sale of a dog. The Court, in determining that it was not, in the situation in question, enforceable by specific performance, also touched on the difference between a contract for sale and an “adoption agreement” (at para 7). The Court describes these agreements as attempting to retain a “limited property interest” in the animal as well as attempting to support any
which the Court quotes a prominent religious text of the ethnocultural and religious majority in Canada, Genesis, to show that domestic animals are the subject to absolute ownership. However, in *Watson*, the Court also notes that “unlike claims over inanimate property, competing claims over domestic animals may take into account a broader range of factors,” including the best interests of the domestic animal.

Ultimately, the Court granted interim custody to the breeder while providing the owner with unsupervised access twice weekly. This order resembles a custody order – it establishes an ongoing relationship and involves the best interests of the charge; it is not a “possession” order within the property realm that makes a final disposition of property rights. In another case, the BC Supreme Court was called upon to determine whether the BC SPCA or the original owner of a dog would receive interim custody. The dog had been found by the animal rescue organization in a dumpster in bad condition; the applicants, the original owners, claimed they had lost the dog some days before. The Court stated that as this was an application dealing with custody, not possession, it could be considered “in the context of child custody where the applicable test is … a ‘best interests’ test.” As a result of some evidence of neglect by the owners, the Court held that this standard required that the dog remain in the custody of the SPCA pending the repossession action. The case implies that an agreement which attempts to limit property rights in this way would be hard to enforce, especially against a third party (at paras 13-15).

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165 Ibid at para 33.
166 Ibid at para 36.
168 Ibid at para 33. The Court also delves further into what is required of the owner of a companion animal and determines that there is no “positive legal obligation to incur possibly large medical bills to attend to all of the health problems that may beset their pet as it grows old” (at para 37).
outcome of animal cruelty charges against the original owners. A dispute between a dog’s breeder and owner in Ontario’s Small Claims Court also led the Court to advert to the animal’s best interests – here defined in terms of the provision of veterinary care – to decide who would receive permanent possession of the animal.

C. Summary

*Boschee* is the only Canadian family law case where something other than the traditional principles of family property distribution upon marital breakdown are applied. Even then, it is not a case that explicitly disputes the property status of animals. While a few other cases demonstrate a hybrid sensibility around animals, acknowledging that *culturally* they are not property in the ordinary sense due to the emotional bonds and relationships humans have with them, in none of these are the courts prepared to take a different legal route. The best interests standard has never been applied in a Canadian family law case and only a few times has it entered into decision-making in other animal custody disputes. Compared to American jurisdictions, which have more frequently awarded “petimomy” and applied a best interests standard, the precedent for best interest or even “maintenance” standards in family law cases is considerably less in Canada.

V. Estates: Companion Animal Trusts

A disparity between Canadian and American cases is also evident in estates law. Since animals are property, they are not permitted to be the recipients of property. A

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169 *Ibid* at para 39: the Court notes that it is “troublesome that the trial is so many months away,” but then says that they “must not give this factor more importance than Jasper's best interests.”

170 *Frustaci v Oddie*, [2005] OJ No 5362 (QL) (Sm Cl Ct) at para 16.
“thing” cannot inherit a “thing”; only a legal person can inherit property. It is thus difficult for testators or testatrixes to leave their companion animals gifts or inheritances in wills as they would to a human being. Even equitable principles cannot fix the common law’s shortcoming in this regard. Generally, under the common law of trusts, the beneficiary of a trust had to be human. This would mean a trust to benefit a companion animal would be either unenforceable or invalid. This legal and equitable lacuna thus leaves a pressing dilemma for owners of animals who wish to guarantee that their animals will be well taken care after their deaths or even during their lifetimes if the owners become incapable of providing care.

A. United States

Traditionally, the success of a trust for a companion animal in the United States was entirely at the discretion of the trustee or the whim of the courts. Courts could invalidate testamentary arrangements for animals on a variety of grounds (the rule against perpetuities or public policy, for example), although in some cases they upheld the testator’s intent as “honorary” trusts or discretionary gifts, which were not enforceable against the trustee. Where the trust was valid but not enforceable, the testator’s wishes

172 Eileen E Gilles & Martha Milczynski, The Law of Trusts, 2d ed (Toronto: Irwin Law, 2005) at 38. Only legal entities may hold title to property, and the only two recognized legal entities are human beings and corporations. “All persons, including minors, mentally incapacitated persons, bankrupts, and corporations, can be the beneficiaries of a trust…A trust may even benefit unborn or unascertained persons.”
174 Ibid at 619, listing famous examples of people who have attempted to give to their companion animals upon death or who have expressed an intention to do so.
175 Ibid at 628-649.
176 Ibid at 631-633.
177 Ibid at 635-649.
would only be met where the trustee chose to support the companion animal as requested.\textsuperscript{178} Producing a trust that could meet the settlor’s needs was a difficult, uncertain proposition.\textsuperscript{179} Starting in 1990, the United States dealt with this dilemma through the statutory recognition of trusts for companion animals.\textsuperscript{180} Enforceable “pet trusts” are now permissible in 45 states.\textsuperscript{181} This development may be attributed to the adoption of Section 2-907 of the \textit{Uniform Probate Code} and the more recent \textit{Section 408 of the Uniform Trust Code}, which first provided for animal care through trusts at the federal level.\textsuperscript{182} Most states modeled their laws after the companion animal trust provisions from the Uniform Probate Code or Uniform Trust Code, which respectively deal with testamentary and \textit{inter vivos} trusts. A few others opted for more independent

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\textsuperscript{178} Ibid at 629-630.
\textsuperscript{179} Breahn Vokolek, “America Gets What it Wants: Pet Trusts and a Future for its Companion Animals” (2007) 76 UMKC L Rev 1109 at 1115-1121, discussing the issues with the traditional trust approach.
\textsuperscript{180} Beyer, “Pet Animals”, \textit{supra} note 171 at 650-656. See also Susan R Abert, “Pet Trusts: The Uniform Trust Code Gives Enforceability a New Bite” (2005) 46 NHBJ 11 and Vokolek, \textit{supra} note 179 at 1130, indicating that the statutory pet trusts provided a stability that the American pet-owning public had sought in pet trusts. Perhaps the only major issue remaining for Americans in states with statutory pet trusts is the possibility of a court determining that the designated trust amount is too large. See Ashley Glassman, “Making Pet Trusts Instruments of Settlors and Not of Courts” (2010) 89 Or L Rev 385.
\textsuperscript{181} In 2011 Massachusetts became the 45th state to enact statutory pet trust laws: Danny Meek, “Massachusetts Governor Signs Pet Trust Legislation” (10 January 2011), online: Pet Trust Law Blog \textless http://www.pettrustlawblog.com\textgreater . For a list of states with companion animal trusts, see Gerry W Beyer, \textit{State Pet Trust Statutes}, online: ProfessorBeyer.com \textless http://www.professorbeyer.com/Articles/Animal_Statutes.htm\textgreater [Beyer, \textit{Pet Statutes}].
\textsuperscript{182} See UPC § 2-907 (1990), online: Penn Law \textless http://www.law.upenn.edu/bll/archives/ucl/upc-final2005.htm\textgreater ; UTC § 408 (2000), online: Penn Law \textless http://www.law.upenn.edu/bll/archives/ucl/uta/2005final.htm\textgreater ; and David M English, “Uniform Trust Code (2000): Significant Provisions and Policy Issues” 67 Mo L Rev 143. The core substantive provision of the UPC states: “Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor’s intent” (UPC, \textit{supra} The parallel provision of the UTC states, § 408 states: “A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.”
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All of them, however, enable individuals to set up provisions of care for animals that survive them, making animals the beneficiaries of these trusts. Individuals are able to designate in their trust documents the person who will enforce the terms of the trust. Where no such individual is pre-designated, then a court may appoint an individual to that position. The UTC further comments that fiduciary principles are to inform the appointment of this individual. Hankin notes the remarkable quality of this comment in the UTC when she writes that “this provision comes closer than any currently codified law to giving the animals it covers a status that is similar to that of persons”.

B. Canada

Similar statutory trust provisions for animals do not yet exist in Canada, leaving owners to navigate the complicated terrain of the common law. Testators may choose to provide for their companion animals by bequeathing them to their beneficiaries or by

183 See Beyer, Pet Statutes, supra note 181, for a list of which statutes follow the UPC and UTC and which do not.
185 UPC, supra note 182 at § 2-907(c)(4) and UTC, ibid at § 408(b) (2003).
186 Ibid.
188 The early common law, as developed in England, recognized trusts in favor of specific animals as a form of non-charitable purpose trust: Mark R Gillen & Faye Woodman, eds, The Law of Trusts: A Contextual Approach 2d ed (Toronto: Emond Montgomery Publications Ltd, 2008) at 217, noting the three exceptions to the general rule that non-charitable purposes trusts are not enforceable (food and shelter for animals, graves, burial monuments). Early cases such as Pettingall v Pettingall 11 LJ Ch 176 (1842), as cited in Beyer, “Estate Planning”, supra note 180 at 621, allowed testators to provide amounts for the care of companion animals. Beyer notes (at 624) that this acceptance of trusts for the maintenance of specific animals has been adopted in many common law nations, but does not speak specifically of the law in Canada. Gillen, supra at 217, suggests that the three exceptions have been adopted into Canada, but cites and mentions only cases and law related to the maintenance of gravesites and monuments. While it is possible that this type of pet trust has been adopted into Canadian law, no case law appears to support its modern use and even if it were applicable, a number of issues would face testators; some provinces treat purpose trusts as powers, which are discretionary, and the rule against perpetuities would still apply (Gillen & Woodman, supra at 226-227).
charging their executors to find suitable homes for the animals.\textsuperscript{189} These routes essentially transfer the ownership of the animal from one person to another. The problem with these arrangements from the animals’ and benevolent testator’s perspective is that there is nothing in the law preventing the new owners from mistreating or killing the animals since the animals continue to be property without any legal rights or protections. These animals were lucky to have a caring testator who, when alive, treated the animals well and gave thought to their well-being after the testator’s death. The animals may not be so lucky with their new owners and, because the scope of anti-cruelty laws in Canada is minimal, there is nothing the law will do to immunize them from an exploitative relationship or even death.\textsuperscript{190}

Unlike most jurisdictions in the United States, Canadian provinces have not adopted specific statutes relating to companion animal care through trusts after an owner’s death. At common law, although charitable trusts to benefit animals en masse are generally valid,\textsuperscript{191} judges have been inconsistent in recognizing trusts for the care of

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\textsuperscript{189} For a recent example of a testator taking this route, see Levi-Bandel v Hunter Talesiesin Estate, 2011 BCSC 247, [2011] BCJ No 313 (QL). In this case the testator made a “Cat Bequest,” as the court calls it (at para 2), giving $25,000 to one of the executors of the estate to provide for care and maintenance of two cats. The will also required that the executor find a suitable caretaker and home for the cats. Outside of the issues mentioned below with regards to this type of testamentary disposition, this case indicates that such gifts may be the cause of other issues; here the other executors challenged the ability of the executor in charge of the Cat Bequest to both administer the money and keep the cats at her own home as a possible “conflict of interest” (at para 8).

\textsuperscript{190} See Criminal Code, supra note 17 at ss 445.1-448. The legal definition of cruelty to animals as “unnecessary suffering” gives the owner of an animal wide discretion in its treatment.

\textsuperscript{191} Ontario (Public Trustee) v Toronto Humane Society, 60 OR (2d) 236, 40 DLR 4th 111, 1987 CarswellOnt 649 (WL Can) at para 39 (SC), stating that “gifts for the prevention of cruelty to animals have long been upheld as charitable.” See also Gillen, supra note 188 at 253. However, even this recognition of charitable trusts in relation to animals follows an anthropocentric logic. While trusts for animal welfare organizations have been found to be “charitable” and thus valid, the requirement that the trust is “for the public benefit” insists that the benefit accrue to humans. It is not enough to simply help animals – the benefit must relate to a human public interest. Animal welfare organizations are “charitable”, then, since their public benefit – the alleviation of animal suffering – qualifies as a benefit to humans (i.e., following Kant’s view as to why humans have indirect duties to animals, cultivating kind sensibilities to animals is presumed to foster good will to other humans) (see Canada Revenue Agency, The Promotion of Animal}

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individual animals. The same issues that faced American testators prior to the statutory enactments remain in Canada: beneficiaries of trusts have traditionally been human, and trust law generally requires beneficiaries to be able to enforce their trusts against a wayward trustee. Animals are nonhuman and do not have standing in court to enforce a trust. They thus do not fit easily into the conventional mandates of trust principles under the common law.

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Welfare and Charitable Registration (Ottawa: CRA, 2011) online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnslttns/pwcr-eng.html> at 2). The prevailing anthropocentric logic of charitable trusts also lies in the “without political purposes” requirement, which may easily result in the trust’s failure. This precedent allows judges to fail charitable trusts for the promotion of animal welfare despite their general acceptability if the organizations engage in law reform (ibid at 72-73).

192 In Re Murnane Estate, 116 Man R (2d) 247, [1996] MJ No 604 (QL) (QB) [Murnane cited to QL], Granfield Estate v Jackson, 27 ETR (2d) 50, [1999] BCJ No 711 (QL) (SC), Re Smith Estate, [1953] CCS No 1297, (1953) 9 WWR 173 (BCCA) and MacMillan v. McCormick, 2007 BCSC 1727, [2007] BCJ No 2563 (QL) the testators’ preferences to benefit animals over their family members were upheld; however, the Courts’ reasons are based not on the distinct eligibility of animals as beneficiaries, but rather on the testators’ explicit intentions to exclude their family members.

193 Gillese, supra note 172.

194 Alain Roy, “Je legue l'universalite de mes biens meubles et immeubles a mon Compagon bien-aime...Fido - Les Liberalites Consenties aux Animaux ou l'amorce d'un virage anthropomorphique du Droit” [I Bequeath the Totality of my Property to my Beloved Companion Fido .... Liberalities Granted to Animals or the Beginning of a Shift in Anthropomorphic Law], (2004) 38:3 RJT 613. Similar to the rules of common law, the civil law of Quebec also classifies animals as personal property; thus they are ineligible to be direct beneficiaries. Bequeaths of money to persons in trust for the sole benefit of an animal, however, have existed in France since the 19th century and are rooted in property maintenance provisions. The civil law of Quebec categorizes animal maintenance trusts as “private,” pursuant to Article 1268 CCQ which states: “[a] private trust is a trust created for the object of erecting, maintaining or preserving a thing or of using a property appropriated to a specific use, whether for the indirect benefit of a person or in his memory, or for some other private purpose.” Private trusts for the benefit of animals, however, may be usurped by the trustee and/or heirs to the estate if a court agrees that the designated amount or the conditions of the trust seem superfluous or extravagant. According to Roy, contrary to some U.S. statutes that forbid court reductions of pet trusts, Quebec courts are authorized to revoke or modify the bequest, or amend the trust pursuant to Articles 771 and 1294 CCQ. Similar to the common law, Roy points out that French case law permits the entire testamentary disposition to be cancelled if its conditions are deemed to be impossible or adverse to public policy, and further, the entire will could be compromised if the court interprets the testator’s preference for animals as a sign of mental incapacity. There is, however, one aspect of the civil law of Quebec that is more hospitable to animal trusts than is the common law: pursuant to Article 1273 CCQ a private trust may exist in perpetuity. Contrary to the common law rule, because a trust in Quebec civil law may exceed the 21-year deadline it may therefore survive the lifetime of animals such as horses, exotic birds, or other pets that enjoy longevity. According to Roy, similar legislation has been adopted in the U.S. for pet trust purposes. For example, New York has recently enacted such legislation: Gerry W Beyer, “New York Exempts Pet Trusts from the Rule Against Perpetuities” (7 June 2010), online: Wills, Trusts & Estates Prof Blog <http://lawprofessors.typepad.com/trusts_estates_prof/2010/06/new-york-exempts-pet-trusts-from-the-rule-against-perpetuities.html>.
There are few examples of valid and enforced trusts for animals in Canada. Even where testators’ trusts for animals have been allowed to stand, courts have reduced the amounts where an immediate family member – even an adult child – applied under wills variation statutes to contest the vast majority of the estate being left in trust to the companion animal.\textsuperscript{195}

The temporary trust arrangement whereby the executor stands in relation to the testator’s animals as trustee, however, has not proved as problematic for the courts. This is not surprising since in the administration of estates, the time period between a testator’s death and the distribution to the beneficiaries – where property is bequeathed absolutely – is a time of transition for the assets. These assets are referred to as the assets of the estate and the law has traditionally held that an executor is to hold them in trust for the beneficiaries during this period.\textsuperscript{196} Courts have not singled out animals for special treatment in this regard. Thus, courts have indirectly recognized temporary trusts for animals in situations where executors have charged their executors with their care as a trustee and the executors have claimed expenses from the estate for the animals’ care.\textsuperscript{197}

In cases where courts have denied animal-related expenses claimed by executors, the executor’s conduct was found to be somehow objectionable and not done in good faith.\textsuperscript{198}

\begin{footnotesize}
\begin{enumerate}
\item Marsh v Marsh Estate, 19 ETR (2d) 184, 71 ACWS (3d) 802, [1997] BCJ No 1286 (QL) (SC).
\item Gillese, supra note 172 at 5.
\item The case of O’Sullivan v O’Sullivan, 32 ETR (3d) 135, 2007 CarswellOnt 2462 (WL) (Sup Ct) is categorized alone as exemplary of a court awarded disbursement for care of the testator’s two cats (among other expenses). Note that the defendant’s siblings had brought the suit because they felt that the pet expense was part of a larger and inappropriate sum that their brother extracted from the estate as compensation for his expenses as trustee. The Court found that this was a fair and reasonable allowance. In Gillespie Estate v Gillespie (Committee of), [1999] MJ No 330 (QB), the executors paid themselves out of the estate to compensate themselves for their expenses related to telephone calls, a change in the locks on the testator’s house, where one of her sons and his pets were living and the executors wanted out, and to board her pets. The latter two actions of changing the locks and boarding the pets in kennels were called “mean spirited and high handed” by the judge (Gillespie, supra at para 28). The Court disallowed the disbursements but nothing in the reasoning process indicates that the animal-related
\end{enumerate}
\end{footnotesize}
Beatrice Watson-Acheson Foundation v Polk\(^\text{199}\) illustrates these principles well. In Beatrice, one of the executrices, Polk, who owed a $145,000 debt to the testator that she did not disclose, took in the testator’s animals. She then claimed that her debt should be forgiven as she would otherwise be forced to sell her home and would probably have to put down the animals due to the difficulty of finding another animal-friendly accommodation for them. She also claimed several thousand dollars in disbursements for the animals’ care while in her possession. The other executrix, Deigan, applied to remove the debtor executrix, Polk.\(^\text{200}\) The judge reasoned that part of the inappropriateness of Polk’s claimed disbursement was based on the finding that she did not “adopt” the animals as would be expected of a loyal executrix, but actually charged the estate for their expenses and then used the animals to avoid her debt. Ironically, but revealing of the abject status that property conveys upon a commodified being, had Polk “adopted” the animals, thus acquiring ownership, she would be able to do with them what she pleased:

There is both a proprietary and a humanitarian aspect to this. If the animals belong to her, she is entitled to do as she wishes. If they belong to the estate (and in my view, the fact that she did not take financial responsibility for them is indication that they do), then she has no entitlement to unilaterally have them destroyed. It is in either case a startling position for her to take as a person professing to be deeply committed to kindness to animals. All of the parties in this matter are engaged in the promotion of kindness to animals. In this context, the threat to destroy the animals if the loan were enforced would have to have been calculated to deter enforcement. In short, Ms. Polk has tried to use her possession and control over the fate of the animals as a shield against enforcement of her debt.\(^\text{201}\)

Because Polk claimed her expenses of care against the estate, and thus signaled herself to be a non-owner, she was held to a higher standard regarding the animals, who still

\(^{199}\) 24 ETR (3d) 124, [2006] OJ No 2518 (QL) (Sup Ct) [Beatrice cited to QL].

\(^{200}\) Ibid at para 52.

\(^{201}\) Ibid at paras 29-30, per W Low J.
belonged to the estate. As the executrix, we can infer from the Court’s statements that at the very least her decisions vis-à-vis the animals should be guided by her fiduciary duties to the testator and the estate. That she was using the animals to avoid her debt struck the Court as a “startling position” because of her professed commitment to animals; here, the Court took a humanitarian approach to the decision. As the Court had already conceded she would be on a stronger footing to make such a claim if she had been the owner of the animals, however, the case also has a proprietary aspect and reveals the power of the ownership designation vis-à-vis the fate of the animals. While in limbo during the period of estate administration, the animals are “protected” by the benevolent wishes of the testator, which the executors are bound as trustees to carry out.

Thus, while the common law may allow an elevated protection for animals through trusts principles due to a desire to safeguard the wishes of the testator during the period of estate administration, this relationship will be over once the assets have been distributed. It is rare for a Canadian court to recognize a trust arrangement after that time. One case in which a court did recognize a trust for an individual animal after probate was where a pre-existing trust agreement was incorporated into the will to care for the companion animal. 202 In *Re Murnane Estate*, 203 the executrix applied to the Court for advice and direction as to how to interpret the will of the testator that referenced a pre-existing agreement that provided that the executrix was to take charge of a $5000 trust for the benefit of the testator’s companion animals. The Court upheld the validity of the agreement and its proper incorporation into the will. 204 The Court took this decision even

202 *Murnane*, supra note 192.
203 *Ibid*.
204 *Ibid* at para 11.
though the companion animals were favored over the testator’s surviving adult human children. The fact that the testator expressly excluded some of his children from his estate may have facilitated this result.\textsuperscript{205}

While \textit{Murnane} is favourable to the establishment of trusts for companion animals it must be remembered that the amount at issue – $5000 – was small and that the trustee was to be the executrix, a person already in the role of trustee vis-à-vis the testator’s assets, rather than a third party unrelated to the administration of the estate. One is hard-pressed to find precedent where trusts have been upheld or otherwise recognized for substantial amounts, especially where surviving human children contest the amount set aside for animal companions.

\textbf{C. Destruction by will}

The anxiety of ensuring that one’s loved ones will be lovingly attended to after their death is not a remote public sensibility. Given the large number of Canadian households that house companion animals, it may be assumed that the worry of caring for an animal after one’s death is a common concern.\textsuperscript{206} For some owners, the worry that animals will likely be abused or suffer from a miserable life once they have gone have prompted some to take “pre-emptive action” against what they believe is inevitable. These owners include a provision in their wills asking for the animals to be destroyed once they are dead.\textsuperscript{207} In a number of American cases, courts have refused to enforce

\begin{flushright}
\textsuperscript{205} \textit{Ibid} at para 19-23. \\
\textsuperscript{206} An estates lawyer in Toronto notes that as of 2010, one out of three clients wished to address the future of their companion animals by testamentary provision: Gary Marr, "More inheritances going to the dogs; Planning for posthumous pet care makes sense", \textit{National Post} (15 September 2010) FP12. \\
\textsuperscript{207} Frances Carlisle, “Destruction of Pets by Will Provision” (1981) 16 Real Prop Prob & Tr J 894; and Taimie L Bryant, “Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of
these testamentary provisions and instead made alternate arrangements for the care of the companion animals.\footnote{Capers Estate, 34 Pa D & C (2d) 121 (PA CP 1964) [Capers Estate]; In Re Estate of Howard Brand, No 28473 (Vt Prob Ct 17 Mar 1999) [Howard Brand], accessed online: Animal Legal & Historical Centre, <http://animallaw.info/pleadings/pb_pdf/pbusvbrandorder.pdf>; and Smith v Avanzino, No 225698 (Cal Super Ct 17 June 1980) [Smith], cited in Bryant, supra note 207 at 307.} The refusals, which in each case were motivated by intense public outcry, were legally grounded in arguments around public policy.\footnote{The Court in Capers Estate, supra note 208, used two arguments: first, that killing the two dogs no longer matched the testator’s intention (to protect the animals from abuse), because a suitable caretaker had been found (at 129), and second, that it would be against public policy to permit their destruction (at 132). They also cited the influence of “public sentiment” (at 131). In Smith, supra note 208, the legislature intervened (see Bryant, supra note 203 at 307). In Howard Brand, supra note 208, the Court again relied on public policy and used the doctrine of cy pres to enforce the care of the horses in “a manner which closely resembles the life they enjoyed while Howard Brand was living” (at 6). In this case public outcry took the form of a coalition attempting to save the horses (at 2).} In one case, the Court noted that “[o]ur social history and cultural development illustrate an increasing understanding of … the rights of nonhuman animals. Consequently, public policy and Vermont law should operate to allow these animals the opportunity to continue living”.\footnote{Howard Brand, supra note 208 at 6.} These decisions show courts valuing animals as living beings, not property;\footnote{Howard Brand, supra note 208 at 6.} one commentator notes that they “interrupt the feedback loop between animals as property and the ease with which we kill them.”\footnote{Bryant, supra note 207 at 302.} The reaction to the provisions dealing with animals can be contrasted with judicial reaction to a provision in one case that required that the executor destroy the testator’s car.\footnote{Howard Brand, supra note 208 at 2.} The Court had no interest in intervening to defend the Cadillac, but set aside the provisions relating to the companion animals.\footnote{Ibid at 2, 6.}

In Canada, there is only one example of a court invalidating a provision that dictated that animals be destroyed after a testator’s death. The Re Wishart Estate\footnote{129 NBR 2d 39, 1992 CanLII 2679 (QB) [Wishart cited to CanLII).} case
involved four horses and a will provision that asked the RCMP to destroy the horses.\textsuperscript{216} The RCMP refused and the case quickly became, as with the American cases, the subject of public outcry.\textsuperscript{217} Though the evidence showed that the intent of the testator was to ensure his animals did not suffer at the hands of an unkind new owner, the Court refused to honor the testators’ wish.\textsuperscript{218} Instead, the Court established conditions – largely providing for the oversight of the local SPCA and undertakings for proper food, shelter and veterinary care – to ensure the horses were properly cared for by their new owner.\textsuperscript{219} As with the American cases, the Court invoked public policy as the legal basis for the decision.\textsuperscript{220} Interestingly, in citing precedent for the decision and for the role of public policy in testamentary dispositions, Riordan J relied almost entirely on American case law.\textsuperscript{221}

\textbf{D. Summary}

The \textit{Wishart} case and its American counterparts indicate how far a testator may be willing to go in order to circumvent future abuse of companion animals. It is important to note that \textit{Wishart} involved horses, a species of animals that receives more positive cultural attention than many other animals,\textsuperscript{222} and that the case received widespread

\begin{itemize}
\item \textsuperscript{216} \textit{Ibid} at 1.
\item \textsuperscript{217} \textit{Ibid} at 1. See also “Funds raised to battle for draft horses”, \textit{The Vancouver Sun} (19 September 1992) A12.
\item \textsuperscript{218} \textit{Wishart}, supra note 215 at 5-7.
\item \textsuperscript{219} \textit{Ibid} at 7-8.
\item \textsuperscript{220} \textit{Ibid} at 15-16.
\item \textsuperscript{221} \textit{Ibid} at 12-14. See also Howard Brand, supra note 208 at 4, where the Court notes the American influence on the \textit{Wishart} decision.
\item \textsuperscript{222} In fact the Court in \textit{Wishart}, supra note 215, notes the possible link between the species of animal and the public outcry: “One can speculate that if the subject animals were pigs rather than horses, such opposition would not have been forthcoming. The horse is and always has been highly regarded by mankind” (at 1). See also MC VanDierendonck & D Goodwin, “Social Contact in Horses: Implications for Human-Horse Interactions” in Francien De Jonge & Ruud van der Bos, eds, \textit{The Human-Animal}
public attention.\textsuperscript{223} In a similar situation, not all animals may be as lucky.\textsuperscript{224} The American implementation of enforceable statutory pet trusts offers testators an alternative method of protecting companion animals from cruelty. Without the options offered by such provisions, more Canadian owners may choose pre-emptive disposition of their animals.

\textbf{VI. Guardianship: A Replacement for Ownership}

Guardianship describes a legal relation where one party is in charge of another whose capacity falls short of the standard that is attributed to the mythical yet common legal rational actor.\textsuperscript{225} We have guardians for those whose mental capacity the law considers below a certain standard and we have guardians for children, whose mental capacity the law presumes is not ready for decisions regarding their property and personal care.\textsuperscript{226} Guardians are fiduciaries who must act in the best interests of their charges.\textsuperscript{227}

\textsuperscript{223} Hankin, “Sofa”, \textit{supra} note 14 at 356.
\textsuperscript{224} See Bryant, \textit{supra} note 207 at 308, suggesting that animals may have been destroyed in cases where there is no public outcry and the executors are willing to comply with the provision.
\textsuperscript{225} \textit{Black’s Law Dictionary}, 8th ed, \textit{sub verbo} “guardianship”: “The fiduciary relationship between a guardian and a ward or other incapacitated person whereby the guardian assumes the power to make decisions about the ward’s person or property. A guardian is almost always an involuntary procedure imposed by the state on the ward.”
\textsuperscript{227} \textit{Black’s Law Dictionary}, 8th ed, \textit{sub verbo} “fiduciary”: “A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. One who must exercise a high standard of care in managing another’s money or property.” See also Eileen Gillese, \textit{supra} note 172 at 10.
Guardianship thus signals a protective stance; the guardian cannot act according to his or her own wishes but must make careful assessments on behalf of the charge. We do not yet have guardianship for animals because animals are property. Only persons may be the subjects of this protective authority.

A. United States

Yet, in recent years, some parts of the United States have witnessed an interesting development. Eighteen American municipalities (disproportionately in California) and one state (Rhode Island) have officially changed the term assigned in municipal and state documents to the legal person (human or corporate) who owns a companion animal.228 Instead of “owner”, these persons may now be referred to as “guardian”.229 The animal advocacy organization In Defense of Animals is to be credited with this trend.230 The organization’s Guardian Campaign asks cities to pledge to change the language addressing the relationship of humans with animals in their care and control in all of their by-laws, forms, signs and other documentation.231 The change in all of these jurisdictions has not changed the law; animals are still owned by their guardians and the term

229 See for example the Rhode Island legislation, RI Gen Laws tit 4 § 4-1-1(4) (2010). The statue states that “‘Guardian’ shall mean a person(s) having the same rights and responsibilities of an owner, and both terms shall be used interchangeably. A guardian shall also mean a person who possesses, has title to or an interest in, harbors or has control, custody or possession of an animal and who is responsible for an animal's safety and well-being.”
230 As of May 2011, the most recent adoption of the Guardian Campaign language by a municipality was in December 2008; although acknowledging some “lost momentum” (see R Scott Nolen, “After more than a decade, has pet guardianship changed anything?”, Journal of American Veterinary Medical Association News (1 April 2011) online: American Veterinary Medical Association <http://www.avma.org/onlnews/javma/april11/110401a.asp >), the Guardian Campaign aims to add five more municipalities to the list in 2011 (The Guardian Campaign, “Help IDA Reach Our Goal of Five More Guardian Cities in 2011 “, online: The Guardian Campaign <http://www.guardiancampaign.com>.
“guardian” does not legally create a guardian relationship or other legal fiduciary duty.232 The change resides at the symbolic level only.233 Yet, despite the Guardian Campaign’s non-interference with property rights of its owners, the semiotic shift has garnered resistance from those fearful of the legal changes that it may stimulate in the future.234

This resistance can be understood as a result of the a concern that the term signals a shift away from the entitlement-based ownership model of property toward a duty-centered model motivated by an ethic of compassion.235 The Guardian Campaign stresses that the terminology shift to “responsibility for” animals rather than “rights in” them is motivated by compassion. The preface to the pledge for individuals to take on the Campaign’s website states:

This shift promotes a more compassionate relationship between people and other species. The term ‘guardian’ does not change legal standing, but it does more accurately describe the responsibility we have for the wellbeing, treatment, care,

232 A few American courts have also applied the word guardian in a legal sense with regards to a companion animal: see In Re Callan Jr, D-2252 (Tenn Prob Ct 10 April 2007), accessed at Animal Legal & Historical Center, “Pleadings and Briefs”, online: <http://animallaw.info/pleadings/pb_pdf/pbustncallan_guardian_appointment.pdf>, in which the court appoints a guardian ad litem to review the custody and care of the testator’s dog. The court notes that the guardian “is not an advocate for the dog, but has a duty to determine what is best for the dog’s welfare” (ibid at 1). See also Paria Kooklan, “Animal Law Gaining Ground in the United States” (28 February 2008), online: Animal Legal Defense Fund, <http://www.aldf.org/article.php?id=598>.

233 See for example Santa Clara County, California, Code of Ordinances tit B § B31-1(n) (Sup 2011): “The use of the term ‘guardian’ or ‘guardianship’ is solely to influence the public for the responsible treatment of animals and does not change the legal rights or duties of animal owners.”

234 Armstrong, supra note 231 at 8. See also Susan J Hankin, “Making Decisions About Our Animals’ Health Care: Does it Matter Whether We Are Owners or Guardians?” (2009) 2 Stan J Animal L & Pol’y 1 at 8 [Hankin, “Owners”]; Huss, “Estate Planning”, supra note 92 at 199-200; and Stephanie Fellenstein, “Pet owner or guardian?” DVM: The News magazine of Veterinary Medicine 42:1 (January 2011) 30. Adrian Hochstadt, a representative of the American Veterinary Medical Association, expresses concern that the switch from “owner” to “guardian” will lead to more litigation, higher costs for animal care, and fewer pet adoptions. He says that guardianship law “evolved around people” and “was not intended for animals” (ibid).

235 See Janice Sparhawk Gardner, “Will Guardianship Make Things Better or Worse?”, Dog World, 86:10 (October 2011) 18, citing the American Kennel Club’s opposition on the grounds that the use of guardianship may place restrictions on the breeding and selling of puppies. See also The Council of State Governments, Resolution on Animal Guardianship and Liability Legislation. (29 September 2004) online: CSG <http://www.csg.org>, opposing guardianship legislation on the grounds, among other things, that it would increase the cost of livestock production.
and quality of life of our animal friends.\textsuperscript{236}

Thus, while not enforcing a legal duty, it is clearly meant to disrupt the commodity paradigm into which we place animals and elevate a caregiving one that values animals in and of themselves and the relationships humans have with them.\textsuperscript{237} The Pledge that individuals can take through the Guardian Campaign asks them to signal ongoing adherence to the following commitments:

- Call myself and others "guardian" rather than “owner”
- Make a lifetime commitment to my animal companions
- Adopt animals only – never buy or sell
- Spay or neuter my animal companions for their health and to prevent overpopulation
- Provide nutritious food, fresh water and daily exercise for my animal companions
- Care for the emotional needs of my animal companions
- Refer to my animal companions as “he” or “she,” not “it”.\textsuperscript{238}

It is clear that the ownership model’s conceptualization of ownership as entitlement-based is displaced by a relational framework of responsibility. Hankin notes this underlying value to the otherwise symbolic shift in terminology:\textsuperscript{239}

\begin{quote}
While the language change, by itself, is merely symbolic, this symbolism is an important step toward recognizing that companion animals are fundamentally different from inanimate property. Although still within the ‘property’ construct, the legal status of companion animals has been incrementally changing in recent years in ways that increasingly recognize the value of companion animals. Along with these incremental legal changes, the difference between the sentient animals with which we choose to share our lives and, say, the objects that we use to
\end{quote}


\textsuperscript{237} The Guardian Campaign, \textit{The Guardian Pledge}, online: The Guardian Campaign <http://www.guardiancampaign.com>. The introduction to the Campaign’s main page states: “As more people consider using the updated term ‘animal guardian,’ evidence of society's deep personal relationship with dogs, cats and other animal companions comes to light. Society's views change over time and every so often, society calls for a language facelift. It is not so long in human history that women, children and others were seen, in legal terms, as merely property. It appears that society is ready to acknowledge that animals, too, are worth something more than their price tag.”

\textsuperscript{238} \textit{Ibid.}

\textsuperscript{239} Hankin, “Owners”, \textit{supra} note 234.
furnish our homes needs to be reflected in the language we use.\textsuperscript{240} Hankin adds her voice to a chorus of others who insist that how we refer to animals speaks volumes as to how they will be treated.\textsuperscript{241} Commodified language is inclined to entrench commodity treatment (consider the consumption that “beef”, “pork” and “meat” entails in marketing over “cows”, “pigs” and “dead animals” or “animal corpses”).\textsuperscript{242} Although it does not prompt a change in their legal status, calling humans “guardians” rather than “owners” could arguably encourage a shift in cultural attitudes towards what is expected within this relationship. A national study focused on the identifiers used by human persons for their relationships with animals found “clear differences with regard to attitudes towards pets, beliefs about companion animals in general, and treatment of companion animals” between those who identified as “owners” and those who identified as “guardians.”\textsuperscript{243} Guardians were more likely to exhibit attitudes towards animals that theorized them as family members, not property, and also reported generally more responsible treatment of animals in their custody.\textsuperscript{244} While the results of the study were not clear as to the directionality – did those who identified as guardians do so because of pre-existing attitudes towards companion animals, or were their attitudes a result of adopting the term guardian? – the potential power of language in changing the treatment

\begin{footnotesize}
\textsuperscript{240} Ibid at 7-8.
\textsuperscript{242} Carol Adams has revealed the critical role of language in turning animal bodies into “absent referents”, a process that absents the sentient, living and breathing being from our consciousness when we sit down to a non-vegetarian meal by turning him or her into an object. See Carol J Adams, \textit{The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory} (New York: Continuum, 2000) at 51.
\textsuperscript{244} Ibid at 238-239.
\end{footnotesize}
and status of animals is clearly identified.\textsuperscript{245}

B. Canada

Thus far, Windsor is the only Canadian municipality that has taken the step of passing a municipal pledge to call “owners” of animals “guardians” instead.\textsuperscript{246} Animals are still referred to as the property of their owners everywhere else in Canada. There have also not been any legal proposals to this effect in any other municipal jurisdiction to date; a motion to change the wording or other legal measure has not appeared on the agenda of any municipality. The American-based focus of In Defense of Animals helps to explain this absence, as does the fact that Canadian-based groups have not promoted similar campaigns here to alter municipal discourse.

C. Summary

While the use of a ‘guardian’ designation has not changed the law in the United States, it has offered some communities the opportunity to shift cultural and linguistic approaches to human relations with companion animals. Given the link between cultural dialogues and law,\textsuperscript{247} it would be shortsighted to dismiss the possibility for legal reform arising out of the Guardian Campaign. In Canada, however – where, as we have seen, the country already lags behind in the legal sphere – even this alternative venue for change remains unavailable.

\textsuperscript{245} Ibid at 239.
\textsuperscript{246} Guardian Community, supra note 228.
\textsuperscript{247} See Gaurav Desai, “Introduction: Culture before the Law” (2001) 100:4 South Atlantic Quarterly 855 (along with the other articles in the issue) for a diverse look at the links between culture and the law.
VII. Conclusion

As much as the culture wars may plague progressive political and legal developments in the United States with respect to human rights and social justice, the US has still managed to progress more in animal-based law reform than Canada in several key legal areas. In family law, the application of a best interests standard is much more common in the US; courts have also shown a greater degree of willingness to hear questions related to animal custody. Canadian courts, conversely, continue to avoid such issues where possible or, when the question must be addressed, to deny much consideration of the animal’s interests in the outcome. In the field of estates, the American legislative scheme has advanced outcomes for animals far beyond anything offered in Canada, where attempts to incorporate companion animals into an estate remain at the whim of the common law. As discussed, although the risk to animal lives in this area may be high, few protective solutions are available to testators in Canada. Even in torts, where Canadian courts have so far managed to keep up with American reforms, the country’s regime for companion animal injury valuation threatens to slip behind, as the number of cases addressing the issue (and the weight of scholarly attention) has been much higher in the United States.

It may strike many Canadians as unusual to find a progressive social movement where Canada follows the American lead. Yet, given the absence of concerted legislative

248 The strong divide in opinions that the “culture war” in America represents is often seen as holding back progress or even limiting discussion on contentious issues: Jane Lampman, “Signs of a truce in America’s divisive culture war?” Christian Science Monitor (11 October 2007) 2. Issues ranging from same sex marriage (“New fuel for the culture wars; Gay marriage”, The Economist (28 February 2004) 30), to abortion (Konrad Yakabuski, “Budget battle lays bare American culture war”, The Globe & Mail (9 April 2011) A18) and capital punishment (David Garland, “The cultural uses of capital punishment” (2002) 4 Punishment & Society 459) are seen as suffering under the impact of this division.
and judicial reform in Canada, when compared to the United States the difference is marked. The stagnation of Canada in the legal treatment of its animals is even more apparent when recent international measures in other industrialized nations are considered. Instead of considering international leads to abolish certain practices in the transportation and confinement of agricultural animals, animal testing and animal trade, for example, Canada appears to be actively resisting international reform efforts. The federal government’s repeated and staunch defense of the commercial sealing hunt despite widespread international condemnation and the ban of seal-related products by the European Union is a prominent example. The impediments to the revival of substantively-oriented, non-welfarist reforms to the anti-cruelty provisions in the Canadian Criminal Code, however minimal their potential legal effect, are another.

249 Veal crates were abolished in the UK in 1990 and by the European Union in 2007 (Compassion in World Farming, “Our Achievements”, online: <http://www.ciwf.org.uk/about_us/history_achievements/achievements.aspx>); sow stalls, similarly, were banned by the UK in 1999 and will be phased out by 2013 across the European Union (ibid). Battery cages for hens will be completely banned in the EU by the end of 2012 (ibid). For commentary about Canada’s comparative efforts, see Lynn Kavanagh, “Inching toward humane treatment for food animals”, The Vancouver Sun (14 June 2007) A15; Peter Fricker, “Unlike Canada, EU surges ahead on animal welfare reform”, The Toronto Star (04 June 2009), online: <http://www.thestar.com/comment/article/645184>; and Canadian Federation of Humane Societies, Canadian Funding Policy for Farm Animal Welfare – 2009, online: <http://cfhs.ca/info/reports>. Europe has also led a movement to stop toxicity testing in animals (see Alison Abbott, “Toxicity testing gets a makeover: Europe aims to make chemical-exposure studies more predictive while using fewer animals” (2009) 461:7261 Nature 158; and Trisha Gura, “Toxicity testing moves from the legislature to the petri dish – and back again” (2008) 134:4 Cell 557). For a discussion of how these and other European initiatives gained popular support, see Robert Garner, “A Defence of Broad Animal Protectionism” in Francione & Garner, supra note 11, at 157-161. For a critique of these initiatives as ineffective because of their welfarist designs and purposes, see Francione, “The Abolition of Animal Exploitation” in Francione & Garner, supra note 11, at 42-45.


251 A series of proposals to amend the Criminal Code, supra note 12, to better reflect the animal-friendly bent of today’s society were made in the early 2000s; see Sorenson, supra note 10, for a discussion of the political and industrial opposition to the changes. As a result of this opposition, the more substantive provisions were replaced by an amendment offering stiffer penalties: see Joan Bryden, “Liberals scrap over animal-cruelty bills”, The Globe and Mail (26 February 2007) A11. The most recent attempts at reinstating the substantive amendments, Bill C-229, An Act to Amend the Criminal Code (Cruelty to Animals), 1st Sess,
There could very well be valid reasons for this lag having nothing to do with attitudes toward animals. The higher frequency of litigation in the areas discussed above and the greater number of jurisdictions able to legislate are two factors that point to increased opportunities for legal change in the United States. Indeed, it would be premature to conclude that Americans have a greater regard for companion animals.

What this Article demonstrates, however, is the disparity between the two countries with respect to recent criminal and civil law animal-friendly law reform and Canada’s comparative position on the human rights stage as opposed to the animal rights stage. While Canada, relatively unaffected politically by the culture wars to its south, may plausibly be viewed as a more compassionate society than the United States in terms of how it treats the humans within its borders, the same cannot be said for the animals inside its territories.

40th Parl, 2008, is stalled at first reading. See IFAW, supra note 20 for some discussion of what reforms the Canadian legislation would require to match the standard set by international legislation.