

By Tim Cox

### DLW: The Struggle to Recognize Animal Sentience

Bestiality is arguably one of the most taboo topics in criminal law. So much so that the lack of conversation pertaining to it in criminal courts is more telling than what has been said. The struggle with bestiality became apparent in *R v DLW*, where the court struggled to make sense of an offence that is rarely explicitly analyzed.<sup>1</sup> Perhaps the most striking quote in Gacek and Jochelson's piece on animal justice and sexual abuse is that "Animals... are the only sentient beings who remain property in law. Even inanimate constructs such as churches and corporations have become legal persons able to assert their interests in courtrooms and legal settings."<sup>2</sup> In *DLW* the court rejected a progressive approach to bestiality, and instead chose to strictly interpret the offence as requiring penetration.<sup>3</sup> Such an interpretation ignores the harm inflicted on animals and keeps the offence within the technical realm. There are several reasons that a court may be hesitant to recognize the sentience of animals, two of which could be the commodification of animals for capital gain, and a long social history intertwined with racism, sexism, and homophobia.

The quote above is so striking, because it points out that courts have given legal rights to corporations, which are conceptual constructs and not real tangible things, and yet they fail to recognize the legal rights of animals as sentient creatures. Sentience means to be subjectively aware, to possess consciousness. This includes the ability to have positive and negative experiences, and to feel pain.<sup>4</sup> Corporations cannot do any of these things, and yet they are recognized as legal 'persons' in law. The reasons for this are likely based in part on capital. Animals are commodified for the purpose of capital gain. Recognizing that animals have emotions and a consciousness would trouble industry, the meat agricultural industry specifically. Critics of bestiality have pointed out that "inherent in antibestiality laws is a profound contradiction given the other ways in which Western society condones the sexual abuse and misuse of animals."<sup>5</sup> The meat agriculture industry engages in artificial insemination, forcible mating and other forms of animal abuse, yet these behaviours are not condemned in the same way that bestiality is. Reasons for this could include a focus on prohibiting sexual contact that is not procreative (as antisodomy laws did), the fact that the meat industry is largely invisible to the general population, and the draws of capitalism.<sup>6</sup> Our society is geared towards economic progress, and recognizing the sentience of animals would call into question the ways that the meat industry treats animals. Provincial legislation on animal cruelty in Manitoba specifically allows harm or suffering to animals for the purposes of animal agriculture.<sup>7</sup> This exception in the *Animal Care Act* is telling of the greater importance society places on economic gain over the protection of animals, and could help to explain why a corporation has greater legal standing than a living, breathing animal.

The second consideration in the law's failure to recognize animal sentience is the way that Western society has constructed human subjectivity. Human exceptionalism is the idea that humans

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<sup>1</sup> *R v DLW*, 2016 SCC 22.

<sup>2</sup> James Gacek & Richard Jochelson, "'Animal Justice' and Sexual (Ab)use: Consideration of the Legal Recognition of Sentience for Animals in Canada" (2017) 40:2 Man LJ 335 at 356.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Supra* note 2 at 359.

<sup>5</sup> Richard Jochelson, James Gacek, *Sexual Regulation and the Law: A Canadian Perspective* (Bradford:Demeter Press, 2019) at 248.

<sup>6</sup> *Ibid.*

<sup>7</sup> *The Animal Care Act*, CCSM 2015, c A84, s 3(1).

are fundamentally different from animals, and white exceptionalism further builds on this to suggest that white people are less animal than other races.<sup>8</sup> According to Jochelson et al, “Animality has often been positioned in opposition to civilized humanity in the civilizing process.”<sup>9</sup> To create subjectivity in humans, the law has criminalized the crossing of the inter-species border through bestiality, which consequently also denies animal subjectivity.<sup>10</sup> This denial of subjectivity is what has informed racism, sexism, and homophobia. By ‘animalizing’ groups of people, the dominant group is able to assert that they are superior. As an example, the first national animal rights movement argued that foreigners were a threat to animal rights and guilty of bestiality. These movements took pride in “the gentle treatment of animals by white people.”<sup>11</sup> These narratives are common in the colonization of Indigenous peoples, the slave trade, and even in early Christianity where sex with a member of another religion was considered bestiality.<sup>12</sup> Sexism also played into this narrative, making women especially vulnerable to sexual abuse in times of slavery. When white masters had sex with black female slaves, it was considered an animalistic act, if not outright bestial.<sup>13</sup> The connection to homophobia is far less legally philosophical. Sodomy and bestiality were connected in law until the mid-twentieth century.<sup>14</sup> Recognizing animal sentience would undo the long history of using animals to define the parameters of human subjectivity and civilized society. It would raise serious questions about the way society has been constructed on the assumption that humans are fundamentally different, and therefore superior to other life forms. These are questions that the court is perhaps not best situated to address.

Both of these considerations, socio-legal history and economy, perhaps help to explain the reasons that the court has failed to recognize animal sentience in law, despite strong arguments from animal rights advocates. The amendments to bestial law following *DLW* have allowed for forms of bestiality other than penetration to be prosecuted in law, but they have not addressed the issue of animal sentience. Gacek and Jochelson pointed out that “Scientific knowledge accumulated over many decades has amplified and demonstrated that animals are more than property - they are beings with emotions, consciousness, and sentience.”<sup>15</sup> Yet the law fails to address any of these arguments when dealing with bestiality. The one bright side is the strong dissent in *DLW* by Justice Abella. Paired with the amendments on bestiality law, which at the very least recognize the need for a broader definition of bestiality, there is hope that future cases can begin to take a more progressive stance on animal rights, and perhaps begin to untangle the social and economic impacts of animal sentience. That is, if a court can bring themselves to explicitly discuss bestiality.

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<sup>8</sup> *Supra* note 5 at 245.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid* at 245-246.

<sup>11</sup> *Ibid* at 246.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* at 247.

<sup>14</sup> *Ibid* at 219.

<sup>15</sup> *Supra* note 2 at 336.