

Placing “Bestial” Acts in Canada: Legal Meanings of “Bestiality” and Judicial Engagements with Sociality

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Abstract:

This paper undertakes a critical methodology of case law that unpacks the sociality of the legal case. Our paper analyzes the legal case of *D.L.W.* (2016) through the trial, appellate and Supreme Court decisions, and mines the legal texts produced for reasoning and rhetoric pertaining to the interpretation of the legal term bestiality. The future for animal rights activists in Canada seems especially bleak after the case. Wholesale legislative change might provide the only way forward for activists. By unpacking the legislative, social, factual and judicial understandings of bestiality, it is clear the Supreme Court of Canada decision causes more problems for human-animal relations than it solves.

Introduction

Law is created by people, affects people, is applied by people and is reformed by people. Law is also profoundly relational. For example, law can help provide meaning and boundedness to relationships. Unsurprisingly, law provides this same guidance in respect of our relationships with animals. It places animals in a legal context. There has been increasing debate for animal protection and welfare changes in Canada within the past decade; propelled by science and ethics, public interest in animal issues is mounting. Indeed, law reform, seeking that animal regulation be reflective of contemporary insights and values, has been advocated by animal rights activists and legal scholars both within Canada and abroad (Gacek & Jochelson, in progress; c.f. Bisgould, 2014; Bisgould & Sankoff, 2015; Sykes

2015; Sorenson, 2010). Animals, in Canada, do not possess anything approaching the guaranteed rights of persons outlined in the *Canadian Charter of Rights and Freedoms* or other rights legislation; of course, human beings have legal rights that are meant to ensure that our fundamental interests (such as our interest in life, liberty and security of the person) cannot be overridden—except in limited circumstances and on a principled basis. Animals remain mere property under Canadian law, a categorization which troubles many who advocate for animal welfare.

While radical animal law reform is beyond the scope of this paper, we find significance in how the law itself generates legal texts that can be reflective and refractive of potential discursive shifts pertaining to the construction and placement of issues of animal justice. Law is apprised of sociality, can absorb social information, inform how citizens view issues of justice, and is subject to similar phenomena, effects and consequences that one would expect from any media. Of course, law also possesses the power of coercion and can deploy discipline and punishment on its subjects. The judicial decision in particular is intriguing legal media because the judiciary, as arbiters of legal issues before a court, interpret law. Interpretation, though, sometimes leads to reconstitution of law, and what was once innocent behaviour can be reconstituted as, for example, criminal through the adjudicative exercise (and vice versa). Certainly, the judicial decision is capable of shifting legal precedents to align with modern contexts of the law, but it is also capable of toeing a conservative statutory interpretation upholding the original Parliamentary intent that animated a statute when it was drafted. These interpretive approaches are at the heart of the adjudication of bestiality in Canada, a matter recently decided by the Supreme Court of Canada in *R. v. D.L.W.* (2016).

As we will discuss, for animals, freedom from sexual (ab)use in Canada is qualified, at best. In Canada, conceptions of rights for animals remains elusive in the current legislative framework. In thinking through the constitution of bestiality in Canada, a critical

socio-legal analysis, informed by textual and discursive analyses of law, can be informative. Recognizing that we currently stand on scholarship that has come to form the bedrock of critical socio-legal analyses, we endeavour to engage in a discussion which asserts that the study of law can be critical, not positivistic, and yet still be rooted in text. How do shifting legal definitions reflect the discursive activity operating within the dynamics of bestiality law? The ensuing discussion is directed towards answering this question.

Our methodology seeks to expose the judicial packets of reasoning that together form aspects of bestiality law in Canada. We seek to understand how the meaning of “bestiality” shifted between courts and judgments within the superior court trial of *R. v. D.L.W.* (2013), the appellate counterpart (*R. v. D.L.W.*, 2015), and the final Supreme Court of Canada (SCC, 2016) decision in *D.L.W.* We understand these discursive constructions of power and language to have broader regulatory or disciplinary effects on sexuality and human-animal relations. Law, as Golder and Fitzpatrick (2009) argue, is essential both to the making of “knowledge claims” that serve to legitimize discipline and to the exercising of power on recalcitrant subjects. Indeed, for Golder and Fitzpatrick, law is much more than one aspect of our “late modern administered world” (2009, p. 35); law is central to our current social order because it iteratively “determines the security of limits” and responds to the “disruption of those limits and their re-formation” (2009, p. 125). In effect, we demonstrate how bestiality law is not truth per se but is a “mobile and contingent” feature of the social ties that bind (Golder & Fitzpatrick, 2009, p. 125).

A Brief Word About Methods

While legal definitions of criminal behaviour are interesting for their legal effect, we are interested in the way courts marshal these terms as social vacuums, which are then filled with either outdated or overreaching constructs that have the ability to render certain behaviours worthy of criminal sanction. Thus, legal definitions of bestiality matter for us, inasmuch as such definitions refract, reflect,

place and sublimate the social, and can betray the socio-political machinations of the court.

We start from the assumption that legal texts are social constructions—and in so doing they manifest relations of power through the combined efforts of legal language and discursive activity. In this case, judges are not simply applying legislation, but are attempting to interpret legislation. In attempting to give meaning to the law of the sovereign, the judiciary attempts to give meaning to the word “bestiality.” Ultimately, the judiciary is charged with creating and constructing means of interpretation, and through this construction process a judiciary is bound by precedent and the will of Parliament to be certain.

Nevertheless, we cannot discard the sociality existing in the legal case, as the judiciary is also influenced by the social and political environment in which it finds itself. The judicial decision in this way is not profoundly different from other pieces of writing or art. The words represent a reflection and/or refraction of what is happening in the social world in place at the time of the writing. How bestiality law can be (re)shaped is predicated upon how social and political landscapes have shifted and progressed over time. In turn, such shifts influence perspectives of how, where and what is the extent of law’s placement within society (Ettlinger, 2011; Berlant, 2007).

Therefore, one could postulate that we frame our analysis as one part of a larger project which critiques the synchronicity between the expansion and centrality of governance by legal authorities (Hunt, 2002). By doing this, such analysis includes both the social processes beginning outside of the law that become “juridified,” as well as accounting for the ways law structures decisions that govern social outcomes (Hunt, 1997, p. 105; 2002, p. 58). It is through this focus on juridification and the structuring of decisions we can make sense of how outcomes of modern law exhibit new and varied forms of power through the regulation of persons based on distributions around scientific norms (Dean, 2010, p. 140; see also Foucault, 1980; Hunt, 2002). Such regulation, we maintain, can be extended to

include the (sexual) relationships between humans and animals, relationships which are then structured by way of changes to the legal definitions of human interactions with animals.

Simply stated, the judiciary has the power to alter legal conceptions through case adjudication. However, in effect, the judiciary also has the ability to (critically) shift legal discourse to (re)position power relations and social inequalities between humans and non-human beings. In effect, we argue that “legal language is a socially constructed institution in its own right” (Stygall, 1994, p. 4). This can be justified through the underpinned logics and judicial articulations within legal text. Taken together, these judicial determinations of the (re)definition and (re)articulation of bestiality law demonstrates how law’s inherent sociality interweaves with (re)contextualized legal meanings of the nature and degree of harm reflective in judicial decisions. Before analyzing the judicial decisions in *D.L.W.*, tracing the roots of the legislative provisions at issue helps place the legal discussion in an historical context.

The Development of Bestiality Law in Canada

The original presentation of bestiality legislation emerged from English common law, and has its roots in Victorian conceptions of morality. Whether performed by humans or animals, such prohibited conduct included “unnatural” penetrations of vaginas or anuses by penises (c.f. Jones, 2011). This category of offences had been defined in early case law as “sodomy” or “buggery” (Jones, 2011; see also *R. v. Jacobs* [1817]; *R. v. Reekspear* [1832]; *R. v. Cozins* [1832]). As Parliamentary legislation developed, buggery with an animal was defined and applied as bestiality (*R. v. Bourne* [1952]). Buggery was codified in Canada in 1869 as a criminal offence in *An Act respecting Offences against the Person*. Buggery was then re-established in 1886 in *An Act respecting Offences Morals and Public Convenience* in order to remove the minimum punishment of two years and maintain the life imprisonment sentence. Incorporated into the *Criminal Code* in 1892, the offence of buggery read as follows:

Everyone is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. (S.C. 1892, c. 29, s. 174 [55-56 Vict, c. 29])

However, the offence was then re-worded in the 1954 Amendment, which introduced the term “bestiality” and removed the phrase “either with a human being or with any other living creature”:

Everyone who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years. (S.C. 1953-54, c. 51)

Finally, two separate offences were created through the 1985 Amendment: anal intercourse (s. 159) and bestiality (s. 160). Coming into effect in January 1988, these two sections have been (and continue to be) the benchmark for what the judiciary use in their determinations for sexual offences involving human-animal relations.

Specifically, section 160 of the *Criminal Code* maintains three different bestiality offences: the commission of bestiality (s. 160[1]), which carries a maximum sentence of 10 years; compelling bestiality (s. 160[2]), which carries the same penalty; and bestiality in the presence of a child (s. 160[3]): prohibiting both the act in the presence of a child, or inciting the child to commit the act, which carries a minimum of 1 year, with a maximum of 14 years, on indictment.

The subsequent judicial decisions at the trial, appellate and SCC of *D.L.W.* (2013, 2015, 2016) demonstrate how legal interpretations of bestiality law shift with each court’s interpretation and iteration of bestiality. The result is differing placements of the meaning of animal existence in the legal system. The legal rhetoric and reasoning behind each majority ruling (and their dissenting counterparts) is ripe for an analysis that engages with established legal case precedent, parliamentary statute and clashing judicial interpretation. Our attempt to read bestiality law within a modern context in the next section lays bare the inherent power relations within the sociality of the legal

case. Ultimately, we highlight how human-animal relations, through the SCC *D.L.W.* decision, could be reconfigured to unjustly place animals into subordinate states of sexual (ab)use and detrimental suffering. We undertake a review of the *D.L.W.* case with an eye to unpacking its discourses as well as legal effect. By journeying through the case of *D.L.W.* we witness the socio-legal issues placed and reflected within and refracted between the various justices in the adjudication of the case.

Discourses of *D.L.W.*: A Critical Case Review

The case brought before the SCC was an appeal from a decision from the British Columbia Court of Appeal that provided a narrow interpretation of the *Criminal Code* offence of “bestiality.” In *R. v. D.L.W.* (2013) the appellant was charged with a total of 14 sexual offences involving his two stepchildren. The appellant was then found guilty on 13 counts by the trial judge in the Superior Court of British Columbia, including the one count of bestiality.

The Trial Decision

The trial judge, Justice Romilly, noted in his decision that the legal issue which required resolution was whether “carnal knowledge” (i.e., penetration) was an element of the bestiality offence (*R. v. D.L.W.*, 2015, para. 1; *R. v. D.L.W.*, 2016, para. 31), and whether the current term of “bestiality” should include acts of sexual touching with animals without penetration. In effect, he argued an expanded scope of interpretation for the meaning of bestiality. Furthermore, the trial judge noted that the term “bestiality” was undefined by the *Criminal Code* (*R. v. D.L.W.*, 2013, para. 302), and that other jurisdictions such as Australia prohibit any sexual activities with animals; the trial judge favoured an approach consistent with the “criminalizing of non-consensual act[s] generally” (*R. v. D.L.W.*, 2013, para. 308, citing Australian Capital Territory, Explanatory Statement, 2010).

Justice Romilly was of the opinion that in the case of the accused, the bestiality offence must reflect current views of what constitute

prohibited sexual acts (*R. v. D.L.W.*, 2013, para. 310). He noted that legislation related to mores should be read in a “modern context” (*R. v. D.L.W.*, 2013, para. 311), and also enunciated that the mores at the root of animal protection crimes included certain moral understandings:

Members of our society have a responsibility to treat animals humanely, which is especially true for domesticated animals that rely on us. Physical harm is not an essential element of bestiality; that is because, like many sexual offences in the Code, the purpose of the bestiality provisions is to enunciate social mores. Those mores include deterring non-consensual sexual acts and animal abuse. (*R. v. D.L.W.*, 2013, para. 310)

Justice Romilly posits that current social values “abhor *all forms* of touching for sexual purposes on those who do not consent to it... ‘[B]estiality’ means touching between a person and an animal *for a person’s sexual purpose*” (ibid., paras. 311-312; emphasis added). The trial judge relied on recorded guilty pleas for charges under s. 160 where a guilty plea was tendered for mere sexual touching of animals. Therefore, Justice Romilly was able to justify a conviction for the accused for the bestiality offence.

This reasoning introduces a fluid and organic approach to legal understandings of what it means to exist as an animal. Justice Romilly places his reading of the law in an evolved morality that has shifted from the time when the legislation was brought into force. The trial judge reads the *Criminal Code* as a moral document and seeks to infuse modern principles of morality into his interpretation of the law. Importantly, by relying on conceptions of consent in his understanding of bestiality, Justice Romilly draws from the feminist law reform initiatives that transformed sexual assault law between persons. The approach advanced sees the *Criminal Code* as an interconnected web of moral prohibitions that inform one another. Implicit in this interpretation of bestiality are conceptions of the lack of agency of animals and the moral duty of humans to deal with

animals with respect and recognition. Romilly's approach deploys law as a vehicle for achieving these ends.

In his interpretation of bestiality, Justice Romilly includes a broader socio-legal analytic than the other judgments in this case. The consideration of sexual touching of animals without penetration is indicative of societal perceptions of animal welfare; the trial judge upholds the sexual integrity of animals within human-animal interactions. Attempting to enunciate social mores, the trial judge combines societal context with the legislative history of bestiality law to rule on the case before him. Furthermore, he engages with judicial decisions in Australia to exemplify how additional existing international legal authorities adjudicate bestiality cases, and, consequently, why the criminalization of bestiality should expand its scope to include "non-consensual sexual acts and animal abuse" (*R. v. D.L.W.*, 2013, para. 310). By suggesting that "[c]urrent social values abhor all forms of touching for sexual purposes on those who do not consent to it," the trial judge provides progressive language to his decision that considers the growing societal issues with non-consensual sexual relationships (*R. v. D.L.W.*, 2013, para. 311). By accepting the significance of the social within jurisprudential contexts, in effect Justice Romilly places the definition of bestiality within a legal discourse which intends to respect and reflect "*current* views [of] what constitutes prohibited sexual acts" (*R. v. D.L.W.*, 2013, paras. 312, 315; emphasis added). Ultimately, such discourse upholds the modern context of touching between people and animals for a person's sexual purpose.

The Appeal Decision: The Majority

However, at the Appellate level we witness, in the ruling, a growing disparity between conservative and progressive stances of bestiality law. While the ruling majority incorporated both the legislative history and subsequent amendments to the offence, the argument was made that only Parliament retains the authority to create new crimes and amend old ones. Implicitly presented through the Parliamentary committee work and legal reform outlined in the offence's history,

the Appellate majority agreed that the offence reflects what the democratically elected, legislative body passed as law. Indeed, the lack of Parliamentary committee engagement with the specific question of “carnal knowledge” in the amendment processes was an apparent sign that penetration was a requirement for the crime of bestiality (*R. v. D.L.W.*, 2015, paras. 22-24, 39). The majority decision exemplifies language maintaining Parliament’s authority over the definition of offences in Canada:

Bestiality has a *long understood meaning* in Canadian criminal law. At the time the offence was created, Parliament saw fit to adopt language that included an element of penetration as part of offence. If Parliament had intended [...] to sever bestiality from its historical foundation, *one would have expected it to do so directly*, using clear and specific language. (*R. v. D.L.W.*, 2015, para. 38; emphasis added)

The majority of the Court of Appeal disagreed with the trial judge, indicating in their decision that “the words of a statute are to be construed as they would have been the day after the statute passed” (*R. v. D.L.W.*, 2015, para. 20). The majority agreed with the concurring reasons of Justice McLaughlin (now Chief Justice) in *R. v. Cuerrier* (1998) and noted that caution must be exercised when approaching the definition of elements of old crimes:

Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining the elements of an old crime. When courts approach the definition of elements of old crimes, they must be cautious not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct. It is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament’s intent is carried out in the modern era. It is not permissible for courts to overrule the common law and create new crimes that Parliament never intended. (*R. v. Cuerrier*, 1998, para. 395)

The Court of Appeal found that penetration remained an element of the offence even after the offence was amended in 1985 to separate out the offences of buggery (reworded as anal intercourse) and bestiality into different *Criminal Code* provisions (*R. v. D.L.W.*, 2015, para. 23). The Court remained unconvinced that the 1954 amendments prohibited non-penetrative sexual activities with animals: these amendments added the term bestiality (to the buggery offences) and removed the phrases “either with a human being or with any other living creature”—uniting the buggery offences and bestiality provisions in the same section (*R. v. D.L.W.*, 2015, para. 21). The Court of Appeal also referred to various annotations found in the *Criminal Code* prior to 1985 and as late as 2015, and 1970s era Law Reform Commission work, all of which required penetration as an element of the offence (*R. v. D.L.W.*, 2015, paras. 21, 32). The Appeals Court also noted a lack of Parliamentary committee engagement with the specific question of penetration in the amendment processes (*R. v. D.L.W.*, 2015, para. 37). The Appeals Court was thus able to create direct connections between the common law bestiality prohibition, the 1954 legislation and the current *Criminal Code* prohibition. The Court of Appeal therefore acquitted the accused of the bestiality charge.

The majority here is carrying out an approach which defers to the Parliamentary intention of drafters of the legislation. Though the majority likely understands the morality that undergirds *Criminal Code* provisions, they see this morality as the purview of the elected officials that passed the law originally. Hence this is a fixed morality that freezes and places the identity of animals at the time of the legislative provisions enacted. The result is a static approach to law’s morality, justified by conceptions of rule of law that maintain that transparency, accessibility and clarity of the law to humans; these conceptions of rule of law deserve more primacy than shifting or evolving moralities in the context of the criminal case. Thus, the agency of animals is irrelevant to the Court of Appeal majority.

The Appeal Decision: The Dissent

The dissenting decision of Chief Justice Bauman diverges from the ruling majority, as he indicates that in its choice to include “bestiality” to the Code, Parliament must have had a significant reason for such an inclusion (*R. v. D.L.W.*, 2015, para. 46). By suggesting that “words must be given meaning” when they are included in the Code, the dissenting judge married legal text and social context, providing a deeper concern for Parliament’s choice of inclusion (*R. v. D.L.W.*, 2015, para. 46). His decision implicitly sees the dialectical interconnections between each iteration of amendments to the offence, and draws upon the knowledge transmission between law and society to give meaning to the choices Parliament makes when they engage in Code amendments. In so doing, Chief Justice Bauman’s decision reflects the shifting nature of socio-political landscapes, articulates the power imbued within and through language and law, and significantly addresses the need to consider Parliament’s “common sense” for criminalizing human-animal relations that violate the sexual integrity of animals (*R. v. D.L.W.*, 2015, para. 69).

The dissenting opinion at the Court of Appeal found that the 1954 amendments indicated a parliamentary intention to modernize the definition (*R. v. D.L.W.*, 2015, para. 46). Chief Justice Bauman noted that “no legislative provision should be interpreted so as to render it mere surplusage” (citing *R. v. Proulx*, 2000, para. 28, per Chief Justice Lamer, para 46). The Chief Justice further stated:

Parliament chose to add “or bestiality” to the Code. It must be presumed to have had some reason for doing so; the words must be given meaning. If “bestiality” simply meant “buggery with an animal”, then the 1954 Amendment was enacted in vain and “or bestiality” was mere surplusage. (*R. v. D.L.W.*, 2015, para. 46)

The dissent also noted an unexpected corollary of the majority’s reasoning. As Chief Justice Bauman indicated:

[i]nterpreting bestiality as a subset of buggery also gives the offence an illogical scope. If, like buggery, bestiality requires anal penetration, then it is a criminal offence for a human to anally penetrate (or be anally penetrated by) an animal, yet it is perfectly lawful for a human to vaginally penetrate (or be vaginally penetrated by) an animal. I find it difficult to imagine that Parliament intended to impose criminal sanction on the one while letting the other go entirely unpunished. (*R. v. D.L.W.*, 2015, para. 52)

The dissenting view intriguingly uses principles of statutory construction to agree with the lower Court's findings. By comparing the word bestiality to the words around it in the statutory amendments, the dissent is able to read the Code provisions in harmony with a dynamic morality. This is a strategic move that would recognize the agency of the animal (or lack thereof), and provides a reading of the law that is in harmony with shifting morality, but the impetus for this judicial holding is based on interpretive principles rather than conceptions that the morality of the *Criminal Code* is shifting and organic.

The Supreme Court Decision: The Majority

At the Supreme Court level, however, the majority ruling upheld the Appellate Court's decision, indicating the scope of criminal liability must be determined by Parliament, as "judges are not to change the elements of crimes in ways that seem to them to better suit the circumstances of a particular case" (*R. v. D.L.W.*, 2016, para. 3). Writing for the majority, Supreme Court Justice Cromwell adamantly agreed with the majority ruling of the Appellate Court, stating "the old case law is not abundant, but what there is supports the view that penetration was an essential element of the offence" (*R. v. D.L.W.*, 2016, para. 33), and "whatever [bestiality] was called [throughout history], the offence required penetration" (*R. v. D.L.W.*, 2016, para. 24). The SCC majority argues that the early history of the offence in Canada that was commonly called "bestiality" was subsumed under the offences of sodomy or buggery and that penetration was one of its

essential elements. While courts can include broad statutory categories, which are often held “to include things unknown when the statute was enacted,” and “words in constitutional documents must be capable of growth and development to meet changing circumstances” (*R. v. D.L.W.*, 2016, para. 61), the SCC majority suggests such an interpretive approach is not the case for *D.L.W.*, as there exists “no clearly statutory mandate” to extend the scope of criminal liability any further than the current common law definition of bestiality permits or requires (*R. v. D.L.W.*, 2016, para. 70).

Furthermore, the SCC majority indicates the fact that, in amongst the comprehensive revisions and amendments of sexual offences throughout Canadian legislative history, Parliament never sought to change the common law definition of bestiality. Hence, this demonstrates Parliament’s intention to retain the term’s “well-established...[and] well-understood legal meaning” (*R. v. D.L.W.*, 2016, para. 19).

The SCC majority provides a direct, conservative and doctrinal analysis of the bestiality definition. In allowing the appeal by a decision of eight-to-one, the SCC majority follows the Appeal Court’s suit and indicates that Parliament should be left to the creation and (re)definition of crimes. While both the SCC majority and Justice Abella’s dissent view history and precedent as fitting hand in glove of their respective analyses of the bestiality definition, the SCC majority believes that only the drafting legislative body should give meaning to the existing law and that judicial divinations of that law are to be avoided (*R. v. D.L.W.*, 2016, para. 21); it is the sole jurisdiction of Parliament to exert power to alter law if required or warranted, presumably in the absence of constitutional violations (*R. v. D.L.W.*, 2016, para. 3). By examining both the official (English and French language) versions of Canadian criminal law, the majority indicated “[t]here is no difference between the meaning(s)” of bestiality, suggesting that the Crown’s attempt to expand the offence beyond carnal knowledge “reads too much” into the words “*une acte de bestialité*,” and that contrary to the Crown’s argument, the French

version of s. 160 does not support a broader interpretation of bestiality (*R. v. D.L.W.*, 2016, para. 119). Synonymously and conclusively, the SCC majority agreed with the Appellate Court majority, ruling penetration was indeed necessary as an element of the bestiality definition (*R. v. D.L.W.*, 2016, para. 123).

The Supreme Court majority's words affirm the reasoning of the majority in the appellate Court. The Supreme Court majority suggests a legal paradigm where traditional principles of rule of law are paramount. The values inherent in this reasoning is that all humans are bound by the law, and that law ought to be interpreted in light of the intention of its drafters. Thus, criminal regulation should affect discipline of the citizen similarly across temporal periods. This temporally frozen reading of rule of law allows the Court to protect the due process interests of the accused and prevents net widening of criminal offences—transparency, consistency and liberty are the values that underpin this approach. However, those values undermine claims by advocates for animals of sentience, and the need for a duty of care to be deployed unto humans in their dealing with animals. The agency of animals is irrelevant to this analysis, as are the parallel changes in law that developed in the context of the feminist sexual assault law transformations that occurred through the 1990s, in which cases like *R. v. Ewanchuk* (1999) found that consensual sexual conduct between humans required consent to sexual touching that was affirmative, ongoing, conscious and communicated (further developed in later cases like *R. v. J.A.*, 2011). The majority's interpretive approach allowed for reasoning where the issue of consent is irrelevant. This irrelevance dictates that issues in respect of animal agency, sentience and shifting morality are inconsequential to the criminal case.

The Supreme Court Decision: The Dissent

In contrast, Justice Abella's dissent concerns the extent to which Parliament and statutory interpretations reflect societal views of protecting animals from unreasonable cruelty, harm and sexual (ab)use (*R. v. D.L.W.*, 2016, para. 149). While the SCC majority

highlights the legislative history of the term, Justice Abella’s focus on the interweaving of text and context is paramount to a more critically discursive understanding of bestiality. Similar to Chief Justice Bauman’s dissent, Justice Abella argues that Parliament intended to modernize the offence, and that the presumption should be made that Parliament considered the socio-political landscape at each amendment iteration throughout legislative history. In her decision, Justice Abella argues that retaining the penetration element is irrelevant, as the provisions outlined in s. 160 are ambiguous, and does a disservice to society’s disapproval of unnecessary pain, suffering and injury of animals and to the “increased recognition of the importance of protecting animal welfare” (*R. v. D.L.W.*, 2016, para. 140). Moreover, “the creation of a distinct offence of bestiality in the same year the animal cruelty provisions were expanded [by Parliament] to protect more animals from more exploitive conduct” exemplifies Parliament’s intention to approach bestiality differently, as well as acknowledges the shifting legal environment before, throughout and after the amendment iterations (*R. v. D.L.W.*, 2016, para. 141). In effect, the dissenting justice does not see the absence of carnal knowledge as broadening the scope of criminal culpability (*R. v. D.L.W.*, 2016, para. 149). Instead, her decision reflects not only the changing nature of bestiality in a modern context, but of the symbiotic relationship between law and society, how the Court imports meaning and significance from the socio-political landscape, and how judicial decision has the ability to reframe power, control and criminality through the (re)articulation of legal definitions.

Supreme Court Justice Abella’s dissent from the ruling majority, of which we have already quoted at length, provides the critical judiciousness necessary to read the common law definition of bestiality within a modern context:

[*D.L.W.*] is about statutory interpretation, a fertile field where deductions are routinely harvested from words and intentions planted by legislatures. But when, as in this case, the roots

are old, deep and gnarled, it is much harder to know what was planted.

We are dealing here with an offence that is centuries old. I have a great difficulty accepting that in its modernizing amendments to the *Criminal Code*, Parliament forgot to bring the offence out of the Middle Ages. There is no doubt that a good case can be made, as the majority has carefully done, that retaining penetration as an element of bestiality was in fact Parliament's intention.

But I think a good case can also be made that...Parliament intended, or at the very least assumed, that penetration was irrelevant. This, in my respectful view, is a deduction easily justified by the language, history, and *evolving social landscape* of the bestiality provision. (*R. v. D.L.W.*, 2016, paras. 125-127; emphasis added)

To continue to impose the penetrative component of buggery on bestiality, as Justice Abella argues, would leave "as perfectly legal" all sexually exploitative acts with animals that do not involve carnal knowledge (*R. v. D.L.W.*, 2016, para. 142). By considering the sexual harms done to animals by humans, the sexual integrity of the animal becoming violated, and the cruelty imposed upon animals as vulnerable beings, the dissenting judge's argument is indicative of growing concern for understanding human-animal relationships in modern contexts. Rather than expanding the scope of criminal responsibility (as such power is not within the role of the judge, but in Parliament), Justice Abella's decision seeks to acknowledge the societal concern for animal welfare and the inherent exploitation of animals when they are subjected to acts that have a sexual purpose to them.

Justice Abella's dissent is powerful justification of the trial Court's decision. She relies on the absurdity of a statutory construction that would see only some penetrative assaults on animals criminalized while others would remain legally benign. Justice Abella notes the

absurdity of bringing antiquated notions of morality into the legal realm when the social matrix has changed so acutely. She sees room for sociality to inform law, and she provides reasoning that tacitly parallels legal interpretation in the context of regulation of sex and sexual assault between humans. Cases such as *Ewanchuk* (1999), *J.A.* (2011) and *Labaye* (2005) provided case examples where the Court used sociality to update and interpret sexual assault law and the law of sexual regulation to be apprised of modern principles of morality. In the context of sexual assault law, the notion of consent was modernized, apprised of feminist law reform initiatives and in some case Parliamentary legislative changes. The law of sexual regulation was also informed by a new sociality, resulting is a definition of obscenity and indecency that was based on harm defined in a modern context (*R. v. Labaye*, 2005). More recently, modern interpretations of harm were accepted by the Court to call into question and to strike the anti-prostitution provisions of the *Criminal Code* (*R. v. Bedford*, 2013). These interpretations by the high Court suggest that shifting and evolved morality can inform *Criminal Code* interpretation and, undoubtedly, this interpretive context must have shaped Justice Abella’s reasoning. Justice Abella was willing to draw on shifting sociality in respect of animals and humans. The majority of the Court was not so inclined.

Competing Discourses and the Dynamic Social Context

The competing discourses present throughout the judicial processes also reveal the SCC majority’s unwillingness to embrace the liminality of non-human animal existence. An interpretation of bestiality rooted in the intention of Parliament at the time of drafting ignores the changing social contexts that have inured in Canada. In the past, the Court has been willing to consider the shifting meaning of criminal offences when the new interpretation maintained roots in the earliest enactment of the offence. Hence in the context of obscenity and indecency, the Victorian interpretation of speech (for example, through erotic depictions) as criminal when it corrupted the morals of the lower classes was seen as confluent with the modern (post-2005) interpretations of the statute: that criminal speech in this

context was speech that was harmful enough to be incompatible with the proper functioning of society (Jochelson & Kramar, 2011a, 2011b; see also *R. v. Butler*, 1992 and *R. v. Labaye*, 2005). Similarly, modern conceptions of harm have been used to strike the criminal regime in the prostitution context (*R. v. Bedford*, 2013).

In the context of sex work regulation, over time the voices of sex workers were amplified in the discussion. Originally, the role of sex workers and their voices was irrelevant to prostitution regulation. In cases such as *Prostitution Reference* (1990), the majority of the Supreme Court upheld the constitutionality of the regime despite the danger that the regime created for sex workers. In 2013, when *Bedford* was decided, the voice of sex workers was at the epicentre of the Court's declaration that the regime was unconstitutional. The reason given by the Court for this sea change was that dramatic change in social conditions had occurred over two decades. The Supreme Court noted that

the matter...[i.e., sex work criminality]...may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. (*R. v. Bedford*, 2013, para. 42)

The Court stated the above conclusion when reviewing the trial Court's contention that "the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid" (*R. v. Bedford*, 2013, para. 17).

Hence, the shifting morality of sexual regulation has not provided a barrier to Court interpretations of moral issues in other adjudicative contexts. Unlike decisions in the areas of obscenity, indecency and sex work law, the decisions of the majorities in the Court of Appeal and Supreme Court in *D.L.W.* demonstrate that members of the judiciary were unwilling to allow the evolutions of societal conceptions of sexuality to move beyond Victorian conceptions in the context of animal welfare and the law. The result is a regressive

placement of animals in Canadian law, and one that is unlikely to change without legislative reform. Indeed, recent attempts at legislative reform have met with failure. Attempts to modernize animal protection law in Canada were defeated on October 5, 2016.¹ In light of legislative and judicial failures to contextualize the placement of animals in Canada’s criminal and regulatory regime, progressive change in this area seems to have been stunted.

Synthesizing the Placement of Animals

As we have argued though, in other contexts of human sexual regulation, the high Court has allowed shifting moralities to influence its adjudication. They have not applied this approach in the context of animal law. The majority perspectives, then, prefer to rigidly categorize animals as effectively inanimate and non-sentient. Using the original intent of Parliament to decipher sexual conduct and the harm to animals, essentially concretizes our understandings of animal existence in non-modern times. Animals under this approach continue to be unfeeling chattels, and the sexual violation of animals is only relevant when it crystalizes harm or moral corruptibility to humans involved or conscripted in this violation. In the context of lone perpetrators of bestiality, the harms concerned must implicitly be the harm to morality and the inner moral life of the human perpetrator who commits the act. The discursive implication suggests that animals are not worthy of protection in and of themselves, and that animals are mere items to be regulated, in the same way that other commercial goods are to be regulated. Property does not stand to benefit from evolutions in rights progressions that have developed through the eras in North America that saw the abolition of slavery, women’s suffrage, reproductive rights, same-sex marriage and other human rights advancement. A bale of hay does not benefit from these progressions in legal recognition of universal worth; nor do non-human sentient beings.

¹ See <https://openparliament.ca/bills/42-1/C-246/> for details.

This approach is contrasted with the opinions of the *D.L.W.* courts in the trial court, the Appeal dissent and the SCC dissent. The words of these justices suggest that the understanding of crime that interferes with agency must inherently be malleable and must track with societal moral changes. These justices see an interdigitating between suffering of living beings and the meaning ascribed to legal constructs. Unable to rely on constitutional protections that benefit only human beings and persons, these justices instead understand the interpretation of common law as being apprised of the fundamental moral values that exist at the time of interpretation. It would seem that each of these justices understands a simultaneous occupation by the non-human animal of the legal zones of property and rights-bearing subject. To be certain, the rights these animal subjects would bear would be modest at best—the right to not be sexually touched. Such a protection would exist simultaneously at the same time as the status of animals continues as property. Thus, these justices understand non-human animals as existing in legal multiplicities—as things to be owned and as beings entitled to freedom from sexual abuse.

In essence, our analysis of the *D.L.W.* litigation reveals two broadly different judicial interpretive molds. Typified by the majority judgement at the SCC, one approach understands criminal law, in the absence of constitutional challenge, as static (largely to preserve the due process rights of an accused), and sees interpretation as bound by the intent of the drafters of the legislation. This ethic manifests an understanding of non-human animals as singular and universalist—as property. The harms to be prevented are the corruption of human persons and morals. The damage to property itself is of trivial concern.

The second approach, conversely, reveals a criminal law interpretive model that is dynamic, and understands interpretation of words as apprised of societal evolutions in the context of interpretations of harm. Certainly, the intent of drafters is important, but when multiple meanings are possible in the light of legislative shifts and tweaks,

societal conceptions of harm may shed light on ambiguous legal terms. Therefore, the Constitution is not the only means of asserting modern statutory meanings. Societal conceptions of harm and morality may intervene in the interpretive process. This judicial approach allows conceptions of the non-human animal to be complex and multivalent—simultaneously property and a being worthy of dignity. These approaches allow for the possibility of amelioration of suffering even with the absence of constitutional impetus. These approaches suggest concretized utility for conceptions of dignity, absence of suffering and the inviolability of consent. These are values supreme to the intention of the drafter, and it is their immanent character which likely troubles the Court majorities.

Conclusion

A critically discursive understanding of legal text and past law is important in articulating the Court’s adjudication of law. However, it is just as important to situate these constructions in a socio-political place by analyzing the social conditions present in both the relevant adjudicative era and the era in which laws under scrutiny were passed by the Parliament of the day. Our approach presented here looks for logics that underpin the creative and delegated functions of the judiciary.

Illustrative of these claims have been the trial, appellate and SCC cases of *D.L.W.* While the final decision of *D.L.W.* upholds a conservative, doctrinal perspective of the legal interpretation of bestiality—that penetration is a required element of the offence of bestiality within Canada—we look beyond the clashing judicial interpretations presented here, and maintain that even minute changes in judicial interpretations of animal law, though minor in terms of advancing the cause of ceasing animal exploitation or producing law reform deliverables, are still significant. Voices like Justice Romilly, Chief Justice Bauman and Supreme Court Justice Abella suggest that the social has a significant place within legal determinations of common law definitions. Indeed, examining the sociality of the legal case calls upon judges to consider not only to read and adjudicate law

within modern contexts, but to critically reconsider legal definitions and discourses within legislative history, contexts, and broader and shifting socio-political landscapes.

These sorts of microscopic changes that fill legislative lacunae provide critical opportunities in the ways that policymakers, legal professionals and laypeople may place animal rights. When the SCC concluded that bestiality could only be interpreted as a penetrative offence, it avoided the chance for incremental legal change. The majority was thus able to avoid discussing why shifting sociality should be a factor in some legal discussions (sexual regulation of humans) but ignored in others (sexual regulation of animals). Certainly, despite the recent legislative setbacks for animal rights activists, wholesale legislative change might provide the only way forward for activists; at the very least it would be a quicker course to achieve an activist agenda. This does not lessen the need to understand the language of deployment of animal regulation uttered by Canadian courts generally and within *D.L.W.* written rulings specifically. By unpacking the legislative, social, factual and judicial understandings of bestiality, it is clear that the SCC decision causes more problems for human-animal relations than it solves.

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