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R v DLW **and the Sentience of Animals - By Khan Montelban**

In *R v DLW*, the Supreme Court looked at the definition of bestiality in the *Criminal Code*, and concluded in their majority decision that it required penetration, and that sexual activity with an animal or forced upon an animal were not sufficient to meet this definition.[1] This case, as the Supreme Court held, was about statutory interpretation, not about animal rights. However, such a ruling seems to disconnect the law from the reality of the situation. The facts of the case involved a man using peanut butter so a dog would lick the private parts of his stepdaughters. This action is incredibly harmful and traumatic to the child and the animal, both of whom either did not or were incapable of consenting to the action being forced upon it.

Why is bestiality a crime? The history of criminal code provision shows that initially it was linked with the historical crime of buggery, before being decoupled from it later. Being linked to buggery reflects the theological basis for it initially being outlawed. However, there is no need for a religious or historical basis to outlaw sexual activity with animals, because animals are incapable of giving any meaningful consent to the activity being performed on it. Without being able to consent, there is no way for anyone to force upon them such conduct. This would imply that animals are more than mere property, and that their consent is something to legally take into consideration, recognizing their sentience.

Animals are living things. They breathe, see, hear and most importantly can feel. Going along with the interpretation used by the Supreme Court, with penetration being required, and its historical and religious basis, the act of bestiality seemed to revolve around the person committing the crime, and that they have done something that offends the laws of nature, as opposed to the animal as a victim. This focus on the perpetrator shows a deficiency in our legal system of placing too high an emphasis on precedence and narrow statutory interpretation. More starkly, it showed a lack of empathy on behalf of our judiciary in taking into account the people and living things on the ground who actually suffered in the cases.

To chalk up a case of bestiality strictly in terms of statutory interpretation is one thing, but to interpret it so narrowly as to require penetration reflects that the Court was more concerned with the relationship between itself and the legislature, than it was with the facts and rights of the animals in the case itself. As far as statutory interpretation is concerned, as Abella pointed out in her dissent, the offence of bestiality by 1988 the provision had changed to include any acts with or in the presence of a child, which would seem to broaden the scope of the law to not require penetration. Abella's interpretation is not overly broad, and does not create a new crime, it simply takes into account the history of the legislation as well as common sense and how it relates to the facts in these kinds of cases. The harms of sexual activity with animals are not confined strictly to penetration and the law should recognize that.

Although it is important for the judiciary to not overstep its role and to legislate crimes, in interpreting sexual activity being sufficient to fulfill the definition of bestiality, a new crime was not

[1] *R v DLW*, 2016 SCC 22

really being created. The offender could still be convicted of child abuse or sexual assault on a child in this case, however by broadening the scope of the bestiality provision, the court would be taking into account the sentience and rights of the animal as well.

Recognizing the sentience of animals would understandably open a wide variety of legal and moral implications. From both a producer's and consumer's standpoint, the farming of meat would raise legal issues, in that animals are killed without their consent as sentient creatures. Defining them simply as property helps prevent these issues from being raised. Further questions, such as sterilizing animals or using them in laboratory experiments will also be raised if the Court was to recognize the sentience of animals. However, although the legal implications of recognizing animal sentience will lead to difficult legal questions to answer, these future difficulties should not deter the court from this recognition. This is not to advocate for any specific legal consequences, but just to say that asking and attempting to answer the questions, however difficult, is a process that should begin, and the practical difficulties regarding industry or the choice of consumers should not unilaterally prevent it from being asked.

Additionally, going along with the Court's desire to be restrained in their interpretation, even if they had interpreted any sexual activity at all as being sufficient for bestiality, the recognition of sentience would have been implied, with Parliament having the final authority to expressly recognize or codify them as not being property. Broadening the scope of the provision would have only been filling in an interpretive gap left by parliament, one which to be frank was easily filled. Any practical or legal concerns, whether regarding the meat industry, consumers, or creating common-law offences, were either minimal or justified in the circumstances.

To conclude, *R v DLW* was a missed opportunity for the court to start the legal conversation regarding the sentience of animals. By broadening the scope of the bestiality provision to include any sexual activity, they would have been both protecting animals, children, as well as taking steps towards recognizing that animals are living things and should be afforded rights as such.