

‘Animal Justice’ and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada

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ABSTRACT

With the recent developments surrounding *R v DLW* and the legal interpretation of ‘bestiality’ before the Supreme Court of Canada, animal law organizations such as *Animal Justice* insist that Canadians must recognize their obligation to protect the most vulnerable beings in their care, and not subject them to abuse. We argue that there were many avenues of interpretation open to the Supreme Court in adjudicating and addressing the legal definition of bestiality. The majority of the Supreme Court ultimately adopted a conservative approach to statutory interpretation. A strict legal construction and focus on original intent of Parliament foreclosed development of the law towards legal recognition of animal sentience and the concomitant implications for animal rights in Canadian law. In this paper we consider various routes by which a more progressive interpretation of bestiality could have been constructed by the Supreme Court of Canada. When the Supreme Court of Canada concluded that bestiality could only be interpreted as a penetrative offence, it avoided the chance for incremental legal change that could have contributed to the ways Canadians, laypersons, and legal professionals recognized animal

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consciousness. Animal protection and legal animal welfare apparatus in Canada still remain relatively adrift, and less developed than in countries like New Zealand.

I. INTRODUCTION

In socio-legal scholarship and activism, passionate debate and serious reflection on the treatment of animals in Canada have risen to prominence.¹ Some critical scholars note that Canadian animal protection law falls short when it comes to animal welfare; nonetheless, the regulatory field is portrayed by these scholars as on the verge of changing.² Scientific knowledge accumulated over many decades has amplified and demonstrated that animals are more than property – they are beings with emotions, consciousness, and sentience; yet legal regulations often administer animals as mechanistic property, to be utilized by human beings.³ Indeed, propelled by science and ethics, public interest in animal issues is mounting; there is a rising pressure for law reform to ensure that animal regulation be reflective of contemporary insights and values. Human beings have legal rights that are meant to ensure that our fundamental

¹ Maneesha Deckha, “Critical Animal Studies and Animal Law” (2012) 18 *Animal L* 207 [Deckha]; Will Kymlicka & Sue Donaldson, “Animals and the Frontiers of Citizenship” (2014) 34:2 *Oxford J of Leg Stud* 201 [Kymlicka & Donaldson, 2014]; Peter Sankoff, “The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?” (2012) 18 *Animal L* 281 [Sankoff]; Peter Sankoff, Vaughn Black & Katie Sykes, “Introduction” in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Sankoff, Black & Sykes]; John Sorenson, *About Canada: Animal Rights* (Winnipeg: Fernwood Publishing, 2010) [Sorenson].

² Lesli Bisgould, “Gay Penguins and Other Inmates in the Canadian Legal System” in J. Sorenson, ed, *Critical Animal Studies: Thinking the Unthinkable* (Toronto: Canadian Scholars’ Press Inc., 2014) [Bisgould]; Lesli Bisgould & Peter Sankoff, “The Canadian Seal Hunt as Seen in Fraser’s Mirror” in P Sankoff, V Black and K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Bisgould & Sankoff]; Will Kymlicka & Sue Donaldson, “Animal Rights and Aboriginal Rights” in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Kymlicka & Donaldson, 2015]; Katie Sykes, “Rethinking the Application of Canadian Criminal Law to Factory Farming” in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Sykes].

³ Deckha, *supra* note 1; Sankoff, Black & Sykes, *supra* note 1.

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. The same cannot be said for animals.⁴ Humans have the right not to be treated as objects without consent, or as the means to somebody else's ends, sexual or otherwise. As we will discuss, the entitlements of animals for freedom from sexual (ab)use in Canada is anything but definitive. Indeed, in Canada, conceptions of rights for animals remains elusive in the current legislative framework.

While an examination of current debates surrounding animal welfare and protection laws is beyond the scope of our piece, it is noteworthy that present laws which seek to speak to animal welfare and protection acknowledge a "societal concern" about the well-being of animals.⁵ Even so, such laws often ultimately treat animals "as little more than commodities to be allocated, in whole or in parts, among competing human interests".⁶ Generally treated as property, animals are under the control of people for their exclusive use, and as such, property owners have the right to use their property as they see fit. And while the fundamental premises of property law have not changed much since the seventeenth century, humans who were once considered property or quasi-property have since fought and become legal persons. Animals, however, are the only sentient beings who remain property in law.⁷ Even inanimate constructs such as churches and corporations have become legal persons able to assert their interests in courtrooms and legal settings. Since acquiring the status of property, animals have been treated much like machines—objects "that do not think, feel, communicate, have their own interests, or matter in any moral way".⁸

In this paper, we explore how bestiality has been interpreted in Canada's Supreme Court. We examine how the Supreme Court case of *R v DLW* (2016)⁹ could have redefined bestiality in the *Charter*¹⁰ era. The main issue before the Supreme Court was whether bestiality, as a legal offence,

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* [Charter].

⁵ Bisgould & Sankoff, *supra* note 2.

⁶ *Ibid.*

⁷ Bisgould, *supra* note 2.

⁸ *Ibid* at 158.

⁹ *R v DLW*, 2016 SCC 22, [2016] 1 SCR 402 [SCC].

¹⁰ *Charter*, *supra* note 4.

should include all sexual activities perpetrated upon animals or whether the provisions at issue only criminalize penetrative coitus with animals. A narrow reading of the bestiality provisions, espousing a strict interpretation of the offence, was found by the British Columbia Court of Appeal and ultimately, by the Supreme Court of Canada (SCC) to only include coital and penetrative sex with animals in the bestiality offences. Interestingly, for the first time in history an animal rights advocacy group, *Animal Justice*,¹¹ was provided the right to intervene in the case in order to provide context to the SCC's assessment.

In its factum, *Animal Justice*¹² indicated that two fundamental values should be considered when assessing the scope of bestiality: (1) the need to protect vulnerable animals from the risks posed by improper human conduct; and (2) the wrongfulness of sexual conduct involving the exploitation of non-consenting participants.¹³ In issuing its decision using conservative approaches to statutory interpretation, the SCC missed an opportunity for a decision that could have been relatively transformative. How else might the Court have decided? A review of the literature reveals that some possibilities included that: (1) Canadian criminal law could recognize sexual abuse against animals beyond technical protections such as bans against animal penetration; (2) such recognition could have paved a legal path in which animals could be recognized as sentient beings in addition to conceptions of animals as mere property; and (3) judicial perceptions of harm and constructions of *risks* and negative effects of sexual conduct and (ab)use could have been used to constitute more than protections for victims of human against human sexual offences, but extended further into the realm of animal protection.

In this paper we consider ways that the *DLW*¹⁴ Supreme Court of Canada decision could have expanded protection for animals in Canada against harms. There were several options open to the highest court that could have paved the way for a progressive interpretation of anti-bestiality

¹¹ *Animal Justice*, "Home" online: <www.animaljustice.ca>.

¹² *R v DLW*, 2016 SCC 22, [2016] 1 SCR 402 (Factum of the Intervener (Animal Justice)), online: <http://www.scc-csc.ca/WebDocuments-DocumentsWeb/36450/FM030_Intervener_Animal-Justice.pdf> [Intervener].

¹³ *Ibid* at para 1.

¹⁴ SCC, *supra* note 9.

provisions in Canada's *Criminal Code*.¹⁵ Using a harms-based legal test (as for example in cases like *R v Labaye*¹⁶ (2005) discussed below), as a standard for what acts should be considered legal between humans and animals would have been a considerable shift in the protections of animals in Canada. Such a shift would have required somewhat radical reasoning by the Supreme Court in Canada. Less radical would be a judicial interpretation that attempted to contextualize the bestiality provisions by analogizing the prohibition to sexual assault based offences in the *Criminal Code*.¹⁷ Of course, the most radical result would have been a decision which recognized animals as sentient and cognizant beings – such a result would have troubled or complicated the property-based regime of animal markets in Canada, had massive economic ramifications, and was therefore never a possibility for the SCC in this case.

This paper begins with a brief discussion on the tensions that emerged between those that advocated for progressive versus incremental animal welfare law reforms. We see how the application of judicial interpretation poses more problems than solutions within Canadian adjudication. We review our method, in terms of how we believe legal texts can be mined for the logical reasoning that underpins them and for the social processes that impact upon them. We then shift our discussion to the case of *R v DLW*¹⁸ and alternate reasoning that could have been employed by the SCC. As we outline the circumstances of this criminal case, we unpack the legislative, factual, and judicial understandings of bestiality, and the issues that arise when such understandings are analyzed. Following this, we examine the intervener factum of *Animal Justice*¹⁹ to analyze the organization's rationale of the risks posed by failing to interpret the crime of bestiality widely. Taking these perspectives into account, we then propose ways that the *DLW*²⁰ Court could have dealt with the definition and interpretation of bestiality in a modern context. While the possibility exists for a judge to say that a law should be interpreted in the context of the modern version of its original

¹⁵ *Criminal Code*, RSC 1985, c C-46, s 445 [Code].

¹⁶ *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 [Labaye].

¹⁷ *Ibid.*

¹⁸ SCC, *supra* note 9.

¹⁹ Intervener, *supra* note 12 at 5.

²⁰ SCC, *supra* note 9.

purpose, and that legislative reforms recognizing animal sentience has potential, we argue that Canada is an unlikely candidate for these reforms moving forward.²¹ This is further illustrated by the fact that only Justice Abella's dissent was willing to read the statute at issue in a modern context that avoided surplusage and manifest absurdity (discussed below). With the recent New Zealand animal welfare scheme that legally acknowledges the validity of animal sentience, we conclude our paper by examining how the *DLW SCC*²² decision missed an opportunity to galvanize Canadian animal welfare legal reforms.

This paper examines the potential judicial interpretation of human-animal relations, and while we provide possible alternatives of judicial determinations that could have been reached in *DLW*,²³ such options should not be read as mutually exclusive or as a comprehensive list of possibilities. We present our discussion as a means of opening up alternate interpretations for bestiality in Canada. The barrier impeding a judicial interpretation that would mark progress for the causes of animal welfare in Canada is the SCC's finding that bestiality was limited to penetrative coitus with an animal. Nevertheless, had the SCC accepted a wider definition of bestiality than the British Columbia Court of Appeal, the ruling might have moved beyond legal precedent and influenced conceptions of sexuality, choice, and the *risk of harm* as factors to consider in assessing the damage suffered by non-human animals – a tacit recognition of the sentience of animals.

II. A BRIEF NOTE ON ANIMAL WELFARE LEGISLATION, THE ABSENCE OF REVOLUTION AND METHOD

Arguing for a specific legislative and adjudicative outcome in the context of legislation pertaining to animals is a fraught exercise. Tensions emerge between those that advocate for incremental law reform versus those who argue that incrementalism is merely a gentler way of maintaining subjugation of non-human animals. Sankoff summarizes the tension succinctly with a query: “Is there good reason to enact laws protecting

²¹ Sankoff, Black & Sykes, *supra* note 1.

²² SCC, *supra* note 9.

²³ *Ibid.*

animals if those laws inherently recognize the continued exploitation... [of non human animals]?"²⁴ The tension is described by Sankoff as less a matter of philosophy than practice.²⁵ Sankoff ultimately eschews the binary approach, and grounding his work in Habermasian legal ethics, makes a compelling case for legislative approaches that provide room for "public dialogue" and consultation.²⁶ In doing so, he distinguishes between Canada's piecemeal approach to regulation of animals as opposed to New Zealand's animal protection legislation, noting that the latter has the best potential to engage public discussion and infuse values of non-human animal worth into public discourse.²⁷

As will become clear in our discussion, the lack of a flagship Canadian statute dealing with animal protection poses problems for the kinds of solutions courts can craft when addressing problems in the application of judicial interpretation. Piecemeal litigation and prosecution limits the ability of agents of social change to achieve social transformation. However, we see legal decisions as important for both their precedential impact and for the information they provide us about the nature of governance in countries such as Canada.

The discourse within such legal decisions can be viewed as one part of a larger project of governance.²⁸ Thinking of case law this way allows us to analyze 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.²⁹ By focusing 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.³⁰ As explained by Foucault,

²⁴ Sankoff, *supra* note 1.

²⁵ *Ibid.*

²⁶ *Ibid* at 284.

²⁷ *Ibid.*

²⁸ Alan Hunt, "Legal Governance and Social Relations: Empowering Agents and the Limits of Law" in M MacNiel, N Sargent & P Swan, eds, *Law, Regulation, and Governance* (Don Mills, ON: Oxford University Press, 2002) at 54 [Hunt, "Legal Governance"].

²⁹ Alan Hunt, "Law, Politics and the Social Sciences" in D Owen, ed, *Sociology After Postmodernism* (London: SAGE Publications, 1997) [Hunt].

³⁰ Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999) [Dean]; Michel Foucault, "Two Lectures" in Colin Gordon, ed,

...the law operates more and more as a norm, and the juridical institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.³¹

Law can perform a symbolic function by identifying normative social values from which legal subjects are formed.³² However, as we will see, these non-legal social norms at times conflict with liberal norms – that is, with rights or other legislated social values. Our method takes legal text seriously and mines such text for reasoning and rhetoric. Our approach remains mindful of the doctrinal effects, but we also see other rationales underpinning the legal text. As we will demonstrate, the construction of a legal test is more than packaged precedent, but is a consolidated history of the present that reveals the judicial and social rationales of the cases and social phenomenon that preceded the case. One can trace these rationales from case to case in the same way as precedent can, but what we are studying is manifestly different. Our method examines the logics underpinning the articulations of legal tests, and we recognize the legal test itself as a type of technology that delivers the governmental effects of law separate and apart from the law that is itself created. There is, we contend, validity in analyzing law as a type of media, and media analyses can stand to be supported by textual and discursive analytics. What we do with law is no different than what a scholar like Brenda Cossman might do when she compares the development of sexual citizenship in popular culture (see television shows such as “Queer Eye for the Straight Guy” for example) with slower but nonetheless important changes in the conception of sexual citizenship in law.³³

In this way, even minute changes in judicial interpretations of animal law, though minor in terms of law reform deliverables, or in advancing the cause of ceasing animal exploitation, are still important. These sorts of microscopic changes that fill legislative lacunae provide critical opportunities in the ways that policy makers, legal professionals, and

Power/Knowledge: Selected Interviews and Other Writings 1972-1977” (New York: Pantheon, 1980) [Foucault]; Sankoff, *supra* note 1.

³¹ Foucault, *supra* note 30 at 144.

³² Hunt, “Legal Governance”, *supra* note 28; Sankoff, *supra* note 1; Desmond Manderson, “Symbolism and Racism in Drug History and Policy” (1999) 18 *Drug & Alcohol Rev* 179 [Manderson].

³³ Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Palo Alto: Stanford University Press, 2007) [Cossman].

laypeople may discuss animal rights. Even minor legal advances have the potential to bring into cultural consciousness new conceptions of ways to think of and discuss animal life and regulation. Certainly, wholesale legal change might provide a quicker course to achieve an activist agenda, but this does not lessen the need to understand the language of deployment of animal regulation uttered by Canadian courts generally, and within *DLW*³⁴ specifically. As we illustrate with the particular case of *DLW*,³⁵ it is by examining the variety of judicial interpretations of sexuality that have occurred throughout Canadian history that we can further explore the ways such decisions may influence societal discourse moving forward.

III. *DLW*: THE LEGISLATIVE, FACTUAL, AND JUDICIAL BACKGROUND

The original presentation of bestiality legislation emerged from English common law, and has its roots in Victorian conceptions of morality; prohibited conduct included 'unnatural' penetrations of vaginas or anuses by penises, whether by humans or animals.³⁶ This category of offences had been defined in early case law as 'sodomy' or 'buggery'.³⁷ As the law progressed, buggery with an animal was defined and applied as bestiality.³⁸ As a criminal offence, buggery was codified in Canada in 1869 in *An Act respecting Offences against the Person*³⁹, re-established in 1886 in *An Act respecting Offences Morals and Public Convenience*⁴⁰ in order to remove the minimum punishment of two years and maintain the life imprisonment sentence. Incorporated into the *Criminal Code*⁴¹ in 1892, the offence of buggery was stated as follows:

³⁴ SCC, *supra* note 9.

³⁵ *Ibid.*

³⁶ Imogen Jones, "A Bestly Provision: Why the Offense of 'Intercourse with an Animal' Must be Butchered" (2011) 75(6) J Crim L 528 at 528-529 [Jones].

³⁷ *Ibid.*; *R v Jacobs* (1817) Russ & Ry 331, 168 ER 830 [Jacobs]; *R v Reekspear* (1832) 1 Mood CC 342 [Reekspear].

³⁸ *R v Bourne* (1952) 36 Cr App R 1251 [Bourne].

³⁹ *Act respecting Offences against the Person*, SC 1869, c 20, s 63 [Offences against the Person].

⁴⁰ *Act respecting Offences against Public Morals and Public Convenience*, RSC 1886, c 157, s 1 [Offences against Public].

⁴¹ *Code*, *supra* note 15.

Every one 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.⁴²

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':

Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.⁴³

Finally, through the 1985 Amendment, separate offences were created for anal intercourse (s. 159) and bestiality (s. 160). These two sections came into effect in January 1988, and they have been (and still are, currently) the standard for what judges use in their determinations for sexual offences involving the interactions between humans and animals.

The case 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*⁴⁴ offence of 'bestiality.' In *R v DLW*⁴⁵ the appellant was charged with a total of 14 sexual offences involving his two step children.⁴⁶ The alleged events occurred over a ten-year period. One of the most disturbing acts that the appellant engaged in with his step daughters was to compel the family dog to lick the vagina of his older step daughter by spreading peanut butter on her vagina when she was 16 years old. Once the appellant compelled the dog to engage in this act, he would videotape the interaction.⁴⁷ The appellant was then found guilty on 13 counts by the trial judge in the Supreme Court of British Columbia, including the one count of bestiality. However, the appellant only appealed the conviction on the bestiality count, and it was to be determined by the Court of Appeal whether penetration was an element of the bestiality offence.⁴⁸

Section 160 of the *Criminal Code*⁴⁹ 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

⁴² *Ibid*, SC 1892, c 29, s 174 (55-56 Vict.) c 29.

⁴³ *Ibid*, SC 1953-54, c 51.

⁴⁴ *Code*, *supra* note 15.

⁴⁵ SCC, *supra* note 9.

⁴⁶ *R v DLW*, 2013 BCSC 1327 at para 1, BCJ no 1620 (QL) [BCSC].

⁴⁷ *R v DLW*, 2015 BCCA 169 at para 2, 325 CCC (3d) 73 [BCCA].

⁴⁸ *Ibid* at para 1.

⁴⁹ *Code*, *supra* note 15, s 160.

the act in the presence of a child, or inciting the child to commit the act) which carries a minimum of one year, with a maximum of 14 years, on indictment.

The trial judge, Romilly J., noted in his decision that the legal issue which required resolution was 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*⁵⁰, and that other jurisdictions such as Australia prohibit any sexual activities against animals and favoured an approach consistent with the "criminalizing of non consensual act[s] generally."⁵¹

Romilly J. was of the opinion that in the case of the accused, the bestiality offence must reflect current views of what constitutes prohibited sexual acts.⁵² He noted that legislation related to mores should be read in a "modern context"⁵³, 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,⁵⁴ the purpose of the bestiality provisions is to enunciate social mores. Those mores include deterring non-consensual sexual acts and animal abuse.⁵⁵

In so doing, he argued that current social values "abhor *all forms* of touching for sexual purposes on those who do not consent to it... 'bestiality' means touching between a person and an animal *for a person's sexual purpose*."⁵⁶ The trial judge relied on recorded guilty pleas for charges under s. 160 where a guilty plea was tendered for mere sexual touching of

⁵⁰ BCSC, *supra* note 46 at para 302.

⁵¹ *Ibid* at para 308; see also Legislative Assembly for the Australian Capital Territory, "Explanatory Statement for the *Crimes Legislation Amendment Bill 2010*" (2010), online: <http://www.austlii.edu.au/au/legis/act/bill_es/clab2010284/clab2010284.html> ["Explanatory Statement"].

⁵² BCSC, *supra* note 46 at para 310.

⁵³ *Ibid* at para 311.

⁵⁴ *Code*, *supra* note 15.

⁵⁵ BCSC, *supra* note 46 at para 310.

⁵⁶ *Ibid* at para 311-312.

animals.⁵⁷ Therefore, Romilly J. was able to justify a conviction for the accused for the bestiality offence.

However, 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”.⁵⁸ The majority agreed with the concurring reasons of McLaughlin J. (now C.J.), in *R v Cuerrier*⁵⁹ noting 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.⁶⁰

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.⁶¹ Nor was the Court convinced 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.⁶² The Court of Appeal also referred to various annotations found in the *Criminal Code*⁶³ 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.⁶⁴ The Appeals Court also noted a lack of Parliamentary committee engagement with the specific question of

⁵⁷ BCSC, *supra* note 46 at paras 311-312; italics emphasized.

⁵⁸ BCCA, *supra* note 47 at para 20.

⁵⁹ *R v Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier*].

⁶⁰ *Ibid* at para 34.

⁶¹ BCCA, *supra* note 47 at para 23.

⁶² *Ibid* at para 21.

⁶³ *Code*, *supra* note 15.

⁶⁴ *Supra* note 60 at paras 21, 32.

penetration in the amendment processes.⁶⁵ The Appeals Court was thus able to create a straight link between the common law bestiality prohibition, the 1954 legislation, and the current *Criminal Code*⁶⁶ prohibition. The Court of Appeal thus acquitted the accused of the bestiality charge.

At the SCC, the majority upheld the Court of Appeal's decision.⁶⁷ The Court relied on the legal principle that there should be no new common law offences in the era of the *Criminal Code*.⁶⁸ The majority agreed that the statute should be read with the meaning that Parliamentarians had in mind at the point of drafting. Using similar reasoning to the Court of Appeal, the majority found that penetration was a required element of the offence of bestiality. In the absence of clear Parliamentary indications to alter the original meaning of the term, the majority was unable to interpret bestiality as a non-penetrative offence. The majority noted that:

It defies logic to think that Parliament would rename, redefine and create new sexual offences in a virtually complete overhaul of these provisions in 1983 and 1988 and yet would continue to use an ancient legal term with a well-understood meaning — bestiality — without further definition in order to bring about a substantive difference in the law. The new bestiality offences added in the 1988 revisions, while not changing the definition of the underlying offence, added protections for children in relation to that offence. There is nothing inconsistent with the purpose of these new provisions in the conclusion that the elements of bestiality remained unchanged. There is nothing “absurd” about protecting children from compulsion or exposure to this sort of sexual conduct. And, contrary to what Justice Abella writes, it does not follow that all sexually exploitative acts with animals that do not involve penetration are “perfectly legal”: para. 142. Section 160 is not the only protective provision. There were (and still are) other provisions in the *Code* which may serve to protect children (and others) from sexual activity that does not necessarily involve penetration: see, e.g., the current ss. 151, 153, 172 and 173.⁶⁹

Justice Abella wrote a lone dissenting opinion noted that statutory interpretation should not be frozen in time, girded by the folly of strict construction and original intent. Justice Abella wrote that:

⁶⁵ *Supra* note 60 at para 37.

⁶⁶ *Code*, *supra* note 15.

⁶⁷ SCC, *supra* note 9.

⁶⁸ *Code*, *supra* note 15.

⁶⁹ SCC, *supra* note 9 at para 116.

We are dealing here with an offence that is centuries old. I have a great deal of difficulty accepting that in its modernizing amendments to the *Criminal Code*,⁷⁰ 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.⁷¹

To assume the interpretation of the majority's view that the elements of buggery and bestiality were one and the same would mean that the addition of bestiality into the *Code*⁷² would be superfluous; Justice Abella argues that "[n]o legislative provision should be interpreted "to render it mere surplusage."⁷³

Justice Abella argued for a contextual approach to the interpretation of the statute. She noted that the majority's approach "completely undermines the concurrent legislative protections from cruelty and abuse for animals".⁷⁴ She also noted that statutory interpretation should not favour an interpretation that reproduces absurd results.

Section 160(3) is, in my respectful view, inarguably a reflection of Parliament's purpose to protect children from witnessing, or being compelled to commit, bestiality. If all Parliament intended was that children be protected from seeing or being made to engage in acts of *penetration* with animals, one could reasonably wonder what the point was of such an unduly restricted preoccupation. Since it is a "well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" ...surely what Parliament must have intended was protection for children from witnessing or being forced to participate in *any* sexual activity with animals, period.⁷⁵

This lone dissent appeared to draw from the arguments raised by the intervenor, *Animal Justice*. Justice Abella referred to the animal welfarism context raised by the intervenor and adopted some of its arguments.

⁷⁰ *Code*, *supra* note 15.

⁷¹ SCC, *supra* note 9 at para 126.

⁷² *Code*, *supra* note 15.

⁷³ *R v Proulx*, 2000 SCC 5 at para 28, [2000] 1 SCR 61; *R v Kelly*, [1992] 2 SCR 170 at 188, 92 DLR (4th) 643 [*Kelly*]; *Attorney General of Quebec v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831, 20 DLR (4th) 602 [*Carrières Ste-Thérèse Ltée*].

⁷⁴ SCC, *supra* note 9 at para 142.

⁷⁵ *Ibid* at para 147.

IV. ANIMAL JUSTICE'S INTERVENTION: THE (RISK OF) HARM TO ANIMALS

The factum of *Animal Justice*⁷⁶ analyzing *R v DLW*⁷⁷ (2015) cites *R v Menard*⁷⁸ (1978) as an example of how animal cruelty provisions in the *Criminal Code*⁷⁹ provide inadequate means of protecting animals from the risks of harm that arise when they are used for sexual purposes. The current sections create offences of wilfully killing, maiming, poisoning or injuring cattle (s. 444) and dogs, birds, or animals that are not cattle (s. 445).⁸⁰ The pre-existing prohibition prohibited the causation of “unnecessary pain, suffering or injury” to animals (then s. 387(1)(a)). In *Menard*⁸¹, the Quebec Court of Appeal was tasked with considering the meaning of unnecessary pain and suffering under the prohibition and ultimately found that such meaning required an assessment of multiple factors, depending upon the circumstances. First, it must be shown that the animal endured pain or suffering, beyond “the least physical discomfort.”⁸² Once this is proven, a court must take into account if the pain or suffering was inflicted “in pursuit of a legitimate purpose”.⁸³ Indeed, pain or suffering imposed for legitimate human purposes must be examined further; while pain or suffering imposed for “illegitimate purposes are always unnecessary”, inevitability of harm must be considered, as well as “the purpose sought and the circumstances of the particular case”.⁸⁴ This would include taking into account the “privileged place” which humans occupy in nature, relevant “social priorities, the means available [and] their accessibility”, and whether the suffering could have been reasonably avoided.⁸⁵

⁷⁶ Intervener, *supra* note 12 at 5.

⁷⁷ SCC, *supra* note 9.

⁷⁸ *R v Menard* (1978) 43 CCC (2d) 458 (WL Can) [*Menard*].

⁷⁹ *Code*, *supra* note 15.

⁸⁰ *Code*, *supra* note 15, ss 444, 445.

⁸¹ *Menard*, *supra* note 78 at para 46.

⁸² *Ibid.*

⁸³ *Ibid* at para 51.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at para 53.

As *Animal Justice*⁸⁶ indicates, a balancing approach is created from the latter part of the test which measures the social value of the activity—considering the importance of the purpose for inflicting pain and suffering—against the harm caused to the animal, and whether reasonable alternatives were available: “*Menard* makes it very clear that the more social value an activity creates, the more harm can be imposed on animals. In contrast, activities undertaken for illegitimate purposes cannot justify harm”.⁸⁷ According to *Animal Justice*,⁸⁸ touching animals for sexual gratification is an illegitimate activity in society, and as such, “it made sense for Parliament to prohibit this form of contact without any proof that the animal suffered harm”.⁸⁹ In other words, the bestiality offence is not designed to redress situations in which animals have suffered harm; instead, it is to recognize that bestiality, constituted within its nature, uses “vulnerable sentient beings for exploitive purposes and creates needless *risks of harm* by virtue of the wide range of sexual activities involved”.⁹⁰

Furthermore, *Animal Justice*⁹¹ indicates that “s. 445.1 requires proof of harm as an absolute requirement”. However, “without veterinary evidence or testimony describing an undeniable physical injury”, the *actus reus* becomes a more complex situation to discern, making the *mens rea* and the subsequent harm caused more difficult to establish.⁹² Proving bestiality,

⁸⁶ Intervener, *supra* note 12 at 5.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*; In his leading decision on s 387(1)(a), *Menard*, *supra* note 78 at para 46, Lamer J.A. (as he then was), recognized the significance of the 1954 Amendments, noting that “I dare to believe that we were given in 1953-4 a norm which was intended to be more sensitive to the lot which we reserve alas all too often to animals.”

⁹⁰ Intervener, *supra* note 12 at 5, italics in original; It is also consistent with other animal cruelty provisions that focus on risk and do not require proof of actual harm. See s 445(1)(b) (placing poison in a place where it can be consumed by animals) and s 445(1)(c) (failing to provide suitable and adequate food, shelter, and care for an animal).

⁹¹ Intervener, *supra* note 12 at 5.

⁹² Intervener, *supra* note 12 at 5; For instance, in *R v McRae*, 2002 BCPC 651 at para 22, 2002 CarswellBC 3443, McDermid J. indicated that evidence in which an animal yelped after being hit with a metal pole was insufficient to establish suffering: “The fact that [the trial judge] found [McRae] [was] ‘unnecessarily rough’ with the dog is not the same as being satisfied beyond a reasonable doubt that whatever the pain the respondent may have caused his dog exceeded ‘the least physical discomfort.’ The fact that the trial judge failed to draw the inferences [McRae] says [the trial judge] should have drawn does not constitute an error in law in the circumstances of this case.”

however, is more difficult than demonstrating physiological harm to animals. The very nature of bestiality indicates that the act will almost inevitably and typically occur in private,⁹³ suggesting that it will only be in rare instances that examination of the animal near to the time of offending will be possible.

Inevitably, *Animal Justice*⁹⁴ contends that the approach taken in *DLW*⁹⁵ (2013) leaves animals open to vulnerability and to numerous risks.⁹⁶ They insist that a wide array of activities will be permitted if bestiality is restricted to vaginal or anal intercourse. Such activities include (but are not limited to) digital penetration of the vagina or anus, the use of restraints (to permit sexual conduct to take place), physical manipulation of sexual organs, and penetration by the use of sexual implements.⁹⁷ Ultimately, these activities impose unnecessary risks upon the wellbeing of the animals involved, and as “relics of barbarism”, such acts may not have social utility in the modern era.⁹⁸ While it is clear that *Animal Justice*⁹⁹ makes a compelling argument for the rights and wellbeing of animals, the question remains of whether these views can influence Canadian adjudication. The SCC decision seems to answer this question in the negative. What were some other judicial approaches that the SCC could have undertaken to avoid the potential for a regressive decision?

⁹³ Cossman, *supra* note 33 at 7.

⁹⁴ Intervener, *supra* note 12 at 5.

⁹⁵ BCSC, *supra* note 46.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*; both the BC Court of Appeal and the appellant in *DLW* are somewhat vague about acts of this sort, as both repeatedly use the term ‘penetration’ rather than intercourse. Nevertheless, the court’s reasons in *DLW* make it significantly clear that the focus is not on penetration generally, but exclusively on contact between a penis and anus or a penis and vagina (for example, see Reasons for Judgement in *BCCA*, *supra* note 47 at 6, 21, and 36).

⁹⁸ Sorenson, *supra* note 1.

⁹⁹ Intervener, *supra* note 12 at 5.

V. IS THERE AN APPPOSITE AREA OF LAW? MODES OF MEANINGS FOR BESTIALITY IN CANADA

If McLaughlin C.J. is correct in her *Cuerrier*¹⁰⁰ (1998) comments that we must exercise caution when we approach the definition of elements of old crimes, it is because she relies on the *law of liberty*: that which is not expressly forbidden is allowed. Indeed, while animal abuse considers incursions on the animal, bestiality emphasizes carnal sins derived from Victorian and Judeo-Christian morality. As such, morphing the latter (bestiality) into the former (abuse) by having the SCC change the law would cover more activities, but for more empirically sound reasons (i.e. animal sentience versus opaque morality). The strict construction approach of the bestiality prohibition (i.e. where penetration was mandated) undertaken by the majority of the Supreme Court of Canada lays bare the Victorian sensibilities of sexual regulation, because rather than focusing on risk, the law would be aimed at merely condemnation of the immoral. If this is the case, then the SCC *DLW*¹⁰¹ decision stands in stark contrast to the interpretation of other morality-based laws rooted in Victorian morality, such as the obscenity and indecency provisions of the *Criminal Code*.¹⁰²

In *Sex and the Supreme Court*, Jochelson and Kramar traced the development of obscenity and indecency law in Canada to its current state - that is from its inception in the Victorian era *Hicklin*¹⁰³ case through to the SCC case of *Labaye*¹⁰⁴ in 2005. Legal scholars and socio-legal scholars alike would agree that the test in this time frame moved from being one that criminalized the indecent and obscene by targeting expression that corrupted the morals of children, men, and the working class (*Hicklin*¹⁰⁵), and eventually was re-articulated by the SCC. In this re-articulation, the SCC held that obscenity and indecency charges needed to be substantiated by assessing whether the Crown can establish the nature and degree of *harm* beyond a reasonable doubt.¹⁰⁶

¹⁰⁰ *Cuerrier*, *supra* note 59 at para 34.

¹⁰¹ SCC, *supra* note 9.

¹⁰² *Code*, *supra* note 15.

¹⁰³ *R v Hicklin*, LR 2 QB 360 (1868) (England).

¹⁰⁴ *Labaye*, *supra* note 16.

¹⁰⁵ *Supra* note 103.

¹⁰⁶ Richard Jochelson & Kirsten Kramar, "Governing through Precaution to Protect

Jochelson and Kramar argue legal tests *are* social constructions – that tests which govern the meaning of indecency and obscenity (once defined by community standards but now defined by the harms test) manifest relations of power through the combined efforts of legal language and discursive activity. Judges then 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 words obscenity and indecency. The earlier attempt to give meaning to obscenity and indecency was articulated in the moral corruption standard, and the latter attempt by the Court to give meaning to the phrases is governed by the harm test. The creation of judicial tests is inherently both delegated and created, by which the state has provided the judiciary with the opportunity to interpret law and has thus delegated interpretive functions to an independent body. The body (the judiciary) in turn is charged with creating and constructing means of interpretation. In this construction process a judiciary is bound by precedent and the will of Parliament to be certain. However, 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. Therefore, the early obscenity and indecency jurisprudence understands moral corruption to be reflective of a certain Victorian tension underpinning the expression and consumption of sexuality at the time – for example, that the proliferation of pornography into the unruly classes was seen by high society to threaten the functioning of the social world at the time of the early decisions. Similarly, in *Labaye*¹⁰⁷, where the Court has shifted its approach in defining indecency and obscenity by the assessment of harm, the Court is also socially situated. The Court contended with legislative changes in the late 1950s to the meaning of obscenity and indecency. The Court had also faced the identity politics challenges of feminist activism in the context of both heterosexual

Equality and Freedom: Obscenity and Indecency Law in Canada after *R v Labaye* [2005]" (2011) 36:4 Can J of Sociology 283 at 297-298 [Jochelson & Kramar, 2011].

¹⁰⁷ *Labaye*, *supra* note 16.

pornography¹⁰⁸ and queer pornography.¹⁰⁹ In both cases, the Court had ruled in favour of censorship, but in the context of a swinger's club (*Labaye*),¹¹⁰ the SCC begins to question both the role of the community and of the effects of sexual expression on individuals and society.¹¹¹

The development of indecency and obscenity law in Canada leads to several observations about the Court's approach to moral law rooted in Victorian sensibilities. First, the Court is sensitive to identity politics concerns as illustrated by the types of harm articulated. Second, the Court, while purporting to require more stringent proof from the Crown, allows that risky behaviours may require less proof. Thus, the Court is animated by a precautionary logic that loosens evidentiary thresholds in more 'threatening' scenarios. Third, this precautionary logic aligns with a late modern anxiety, which views society as facing threat and in need of protection. Fourth, this precautionary logic is produced in the name of what is required to best serve the 'proper functioning of society'.¹¹² The proper functioning of society is something that Courts have been guarding since the early moral corruptibility approach and thus, it is interesting to observe that despite the differing social eras, the judiciary in both cases is interested in ensuring that society functions 'properly'. This functionalist account of the social world, together with the risk-based logics that emerged in late modernity allows for the creation of the harm test, which serves both of these rationales.¹¹³

The discussion of obscenity and indecency law's evolution in Canada dovetails well with thinking about ways that the SCC majority could have dealt with the interpretation of bestiality in a modern context. The prohibition against bestiality is rooted in the Victorian prohibitions against sodomy and buggery. These prohibitions were directly related to Judaeo-Christian ethics about moral forms of sexuality. The law reform over the last one hundred years has seen the gradual creation of separate bestiality provisions, and a lack of definition for the term bestiality. One approach to

¹⁰⁸ *R v Butler*, [1992] 1 SCR 452 at 464, 89 DLR (4th) 449 [*Butler*].

¹⁰⁹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 [*Little Sisters*].

¹¹⁰ *Labaye*, *supra* note 16 at para 78.

¹¹¹ Jochelson & Kramar, 2011, *supra* note 106.

¹¹² *Ibid* at 290.

¹¹³ *Ibid* at 285.

filling the legislative lacunae would be to apply a harms-based test like the Court developed in *Labaye*.¹¹⁴ In *Labaye*,¹¹⁵ the majority noted that obscenity and indecency provisions could be made out when the nature of harms is identified and when the quantum of harm is significant enough to be incompatible with society's proper functioning.¹¹⁶ This approach identified prospective types of harms as actual physical or psychological harms to persons involved in indecency or obscenity, and affronts to liberty and harms to society through a predisposition to antisocial conduct.¹¹⁷ In effect, only when these harms were so severe that they interfered with the 'proper functioning of society' would the sanction of criminality be established.

However, a harm-based approach based on obscenity/indecency principles faces some real legal limits and it is easy to see why the majority of the SCC would not have been interested in using a similar analytical approach. The harms-based test in *Labaye*¹¹⁸ was developed as the Court tried to interpret the meaning of the community standards test that was the long-time arbiter of criminality in obscenity and indecency law. This opaque test required judicial clarification as the courts tried to give the judicial analysis contour and boundaries. In contrast, the bestiality prohibitions do not have a long-term judicial history of being queried using such parameters. As the judicial history of *DLW*¹¹⁹ makes clear, very few cases have struggled with the meaning of bestiality, and most of the non-penetrative convictions have occurred in the context of plea agreements. Thus the use of the *Labaye*¹²⁰ calculus as a measure of bestiality seems tortured given the different interpretive histories of indecency/obscenity and bestiality. Secondly, the harms articulated by the *Labaye*¹²¹ Court only contemplate harms to humans, harms of which are reflected in the constitutional order of Canada: protections of human liberty, equality, dignity, and security of the person. Without formal constitutional or otherwise legislated

¹¹⁴ *Labaye*, *supra* note 16 at paras 60-61.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at para 23.

¹¹⁷ Jochelson & Kramar, 2011, *supra* note 106 at 296.

¹¹⁸ *Labaye*, *supra* note 16 at para 20.

¹¹⁹ SCC, *supra* note 9.

¹²⁰ *Labaye*, *supra* note 16 at para 19.

¹²¹ *Ibid.*

recognition for the sentience of animals, understanding similar harms for animals would be a major philosophical leap for a Court.

Nevertheless, there still exist means of linking the *Labaye*¹²² harm-based style of reasoning to the interpretation of bestiality prohibitions. Without a definition of bestiality in the *Code*¹²³, it could have been open to the SCC to consider that bestiality refers to sexual harms against an animal. Such a definition would link with the moral history of the prohibition. If obscenity and indecency originated in Victorian morality and its prevention of corruption of morals, and is now interpreted as a prohibition of harms that interfere with the proper functioning of society, would it not be appropriate to make similar claims about bestiality? Bestiality originated in Victorian prohibitions against immoral sex – sexual activities that would corrupt the lower classes, men, and children.¹²⁴

Might it be that the current bestiality prohibition could be similarly aimed at sexual conduct with animals that interferes with “the proper functioning of [human] society”? The SCC has already argued that disruption with the proper functioning of society equates with a disturbance of political fundamentals that underscore a Canadian democratic system. Sexual conduct with animals would trouble Canadian political values, such as interference with vulnerable populations, the obtainment of sexual fulfillment with a being that cannot consent, and the prohibition of activities that would have profound harms not just for non-human victims, but for vulnerable humans that were made complicit in the behaviour (children and other victims of forced bestiality). In order to make such an argument work, it would certainly require that a fundamental value of Canadian society have to be the prevention of animal suffering and the support of animal agency. These underlying values would be difficult for any level of court to assert, as the commodification of animals is directly linked to the Canadian economy and the food and agricultural industry.¹²⁵ The argument would also require that a test for indecency and obscenity be directly imported into the bestiality prohibitions, and given that the former relate to performance and expression-based offences, and that the latter relates to an offence directly against an animal, the importation may be

¹²² *Ibid.*

¹²³ *Code*, *supra* note 15.

¹²⁴ Jochelson & Kramar, 2011 *supra* note 106 at 291.

¹²⁵ Sorenson, *supra* note 1.

difficult for a court to accept. It is unsurprising that no member of the SCC elected to rely on obscenity and indecency law for guidance.

Other offences that occur directly and are rooted in Victorian sensibilities have also undergone seismic shifts in Canadian society. Prohibitions against rape have been modernized as sexual assault law, and Parliament has deliberately removed the penetrative aspects of sexual assault as constitutive of the crime. Sexual assault law has also undergone tremendous evolution, in part due to lobbying of activist Canadian feminist communities. As Jochelson and Kramar indicate, "the development of the consent provisions in Canada and the development of *Code* provisions [were] designed to ameliorate the disadvantages faced by complainants in sexual assault cases".¹²⁶ Sexual assault law slowly reformed since the 1980s as courts struggled to bring the provisions into alignment with constitutional values. Sexual assault law became organized as a series of graduated offences, and laws were passed that helped shutter the requirements of evidence that traumatized and disadvantaged victims of these crimes. Limits included the restriction of bringing a complainant's sexual history into a trial, and Parliament acted to create more fairness at trial for victims, and tailored and refined the meaning of consent.¹²⁷

Therefore, absent law reform and activism that changes the nature of evidence and consent in the context of bestiality provisions, similar changes in respect of animal sexual offences do not seem promising. While it is clear that the reform of sexual assault law was rooted in feminist activism, we must remember that at the core of the reform was a longstanding problem of human inequality (that, unfortunately, still persists today). The legal system disadvantaged women in the sexual assault context, and routinely re-victimized complainants through the process of sexual assault adjudication. The reforms sought to bring equality, dignity, and agency to all humans in the process. An apposite argument in the context of animals and the law could not be accomplished unless animals were given legal recognition as sentient, deliberative, worthy of agency, and capable of dignity on a scale of human equality, liberty, and security. While such recognition may indeed be worthy, this recognition would essentially amount to a revolution in our

¹²⁶ Richard Jochelson & Kirsten Kramar, "Essentialism Makes for Strange Bedmates: The Supreme Court Case of *J.A.* and the Intervention of *L.E.A.F.*" (2012) 30:1 Windsor YB Access Just 77 at 88 [Jochelson & Kramar, 2012].

¹²⁷ *Ibid.*

understanding of organic existence and the legal protection of human and non-human life. This is a matter which simply could not be completed in one adjudication.

Absent a large scale and Parliamentary response to calls for reform in the context of animal protection law, it could still be the case that bestiality could benefit from the law of sexual assault interpretation. It was open to the SCC to define bestiality as a relatively simple, but not necessarily penetrative act with an animal. This type of reasoning would take advantage of the relative lack of Parliamentary clarity in the development of the separate bestiality prohibition. In that void, and given the dearth of judicial interpretations, it was open for a judge to say, as Justice Abella in her dissent noted, that a law should be interpreted in the context of the modern version of its original purpose. In *Butler*,¹²⁸ the majority noted that while the law of obscenity once targeted moral corruption, its modern purpose, which linked with its moral corruptibility heritage, was the prevention of harm to the vulnerable.¹²⁹ Similarly, the bestiality prohibition, once linked to moral corruptibility by criminalizing immoral sex, could today be said to be linked to the prevention of harm to vulnerable, unwitting human participants and animal recipients of sexual touching. On this reading of the bestiality provisions, the offence could essentially be defined as the application of intentional sexual force to an animal without a legitimate medical or otherwise necessary purpose. The issue of consent would be avoided in this approach, and the issue of sentience of the animal could be avoided entirely. All that would be required is for a Crown to establish beyond a reasonable doubt that an accused intentionally touched an animal for a sexual purpose (without legitimate veterinary based reasons). The definition of 'sexual purpose' could be borrowed from the sexual assault jurisprudence. Sexual touching would be that which is viewed as sexual in all the circumstances of the accused as determined by a reasonable person.¹³⁰ As the *Chase*¹³¹ Court wrote:

The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: 'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable

¹²⁸ *Butler*, *supra* note 108.

¹²⁹ *Ibid.*

¹³⁰ *R v Chase*, [1987] 2 SCR 293 at 302, 45 DLR (4th) 98 [*Chase*].

¹³¹ *Ibid.*

observer' ... The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant.¹³²

However, each of these options advances the protection of animals further than the Appellate and Supreme Court majority decision. One may query which of these calculi best interdigitates with conceptions of animal sentience? Bentham famously insisted, "The question is not, [c]an they *reason?* nor, [c]an they *talk?* but, [c]an they *suffer?*"¹³³ In his view, to ignore the suffering of sentient non-humans was to exhibit a bias akin to racial prejudice. While a true debate concerning sentience and animal rights are beyond our scope, we maintain Taylor's argument that to be sentient "is to have the power of perception by means of the senses."¹³⁴ Sentience is being subjectively aware, or entails consciousness. Typically, it connotes the capacity for positive or negative conscious experiences, including the capacity to feel pain. Sentience marks an important threshold, as we may decide that certain sentient entities are morally considerable, in which case within human deliberations we may decide that we are "morally obligated" to consider the interests of all those deemed legally sentient.¹³⁵

Legislative reform recognizing this sentience is possible, but scholars have noted that the Canadian context is an unlikely candidate for these reforms in the near future.¹³⁶ Sankoff argues that "although Canada has a long-held reputation for being progressive on social issues...the country is no haven for animals".¹³⁷ Noting that the legislative protections in Canada are "among the worst in the Western World", he nonetheless presciently pointed towards hopeful outcomes in countries such as New Zealand.¹³⁸ Indeed, in 2015, the sentience of animals was legislated in New Zealand.

¹³² *Ibid.*

¹³³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone Press, 1970) at 283 [Bentham].

¹³⁴ Angus Taylor, *Philosophy and the Case for Animals* in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc, 2015) at 13 [Taylor].

¹³⁵ *Ibid* at 14.

¹³⁶ Sankoff, *supra* note 1 at 281.

¹³⁷ *Ibid* at 294.

¹³⁸ *Ibid.*

New Zealand's animal welfare legislation¹³⁹ already established baseline protection for animal protection, but the 2015 amendments expanded the breadth of animal protections ensuring, among many other things, that in the course of animal testing that an assessment of the suitability of using non-sentient beings or non-living materials in lieu of sentient non-human animals be considered.¹⁴⁰ The long title of New Zealand's legislation will now read that it is an Act:

- (i) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,—
to recognise that animals are sentient:
- (ii) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:
- (iii) to specify conduct that is or is not permissible in relation to any animal or class of animals:
- (iv) to provide a process for approving the use of animals in research, testing, and teaching:
- (v) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee:
- (vi) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct¹⁴¹

In effect, the New Zealand legislation effectively sets minimum standards for engagement with animals across a variety of activities and industries. Its declaration of sentience creates a type of constitutional era rights-based baseline recognition for animals.

The SCC's decision in *DLW*¹⁴² illustrates the stark contrast between these approaches and renders Canada's approach devastatingly feckless. Had Justice Abella's decision carried the day, the Court would have given content to bestiality that might set the stage for legal recognition of animals as sentient; this in turn might found some obligation to provide protection to animals on the basis of emerging morality. The narrow and strict constructionist approach of the Court of Appeal and SCC majority in

¹³⁹ For a summary of the amendments see <http://www.loc.gov/law/foreign-news/article/new-zealand-animal-welfare-legislation-recognizes-animals-as-sentient-bans-cosmetic-testing/> accessed May 9, 2017.

¹⁴⁰ *Animal Welfare Amendment Act (No 2) (NZ)*, 2015/49, s 4 [*Animal Welfare Amendment*].

¹⁴¹ *Ibid.*

¹⁴² SCC, *supra* note 9.

DLW¹⁴³, regrettably creates a decision for animal rights activists that is animal rights equivalent of the infamous *Dred Scott v Sandford* decision.¹⁴⁴

Even a narrow interpretation that would have avoided the strict constructionism and original intent statutory ethics of the SCC would have at least marked a turning point in our societal understandings of animals as creatures deserving of the measured consideration and protection of law. Using either a harm-based discourse like the law of obscenity and indecency, or developing a reasonable person standard for the assessment of sexual touching of animals, would have been an opening salvo towards the social construction of animals-as-sentient and as deserving of legal entitlements. While the case itself might do little to create vast protections for animals apprised of dignity, agency, actualization or other rights discourses, the decision could have marked a discussion in the direction towards progress. This kind of incrementalism could then have contributed to our societal conceptions of animal rights and entitlements that could pave the way for more sweeping legislative reforms in the future.

VI. CONCLUSION: (RE)IMAGINING HUMAN-ANIMAL RELATIONS

Animals are conceptually imprisoned in the legal system, and while some laws appear to protect animal interests, any meaningful effort to bring that protection to fruition “quickly collides with their entrenched status as things”.¹⁴⁵ We tend to overlook the fact that our present relationships with animals are a social construction, not a natural or historical constant.¹⁴⁶ In effect, property is a word embodying a particular legal relationship that humans have chosen to enforce—a choice that has the potential to render (and indeed has already rendered) animals vulnerable to greater exploitation, sexual or otherwise.

Until sweeping legislative reforms occur,¹⁴⁷ in terms of human-animal relations, there is a higher probability that, given the history of Canadian criminal cases dealing with sex(uality) and settled definitions of meaning

¹⁴³ *Ibid.*

¹⁴⁴ *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

¹⁴⁵ Bisguold, *supra* note 2 at 162.

¹⁴⁶ Sorenson, *supra* note 1.

¹⁴⁷ Recent attempts to modernize animal protection law in Canada were defeated on October, 5 2016.

interpreted by judges, future judicial determinations will continue to deny animal welfarism, and only begrudgingly focus on the ancillary harms to humans that occur in the face of animal exploitations (for example, the child forced to comply in coerced acts of bestiality). When a court recognizes harm as experienced by animals in the context of sexual touching, it will be a moment of discursive shift. The moment will represent the first time that a Canadian court recognizes agency on behalf of animals beyond the physical pain and suffering that animals endure in animal cruelty cases. This is a possibility that seems foreclosed absent legislative action in Canada's Parliament due to the SCC majority's decision that bestiality is a penetrative offence.

Certainly, the arguments of *Animal Justice*¹⁴⁸ indicate the need to protect vulnerable animals from the risks posed by improper human conduct has never been more of a concern for animal rights in modern Canadian society. However, even the internalization into the bestiality prohibitions of the progressive logics of the harm-based calculus of *Butler*¹⁴⁹ and *Labaye*¹⁵⁰ analysis should be met with a degree of skepticism. Harm-based calculi such as these, as we have demonstrated, represent modern iterations of moral corruptibility fears, and in the context of animal regulation, unlike indecency and obscenity, there are no constitutional tethering points to adhere to in the case of animal regulation. Indeed, the "proper functioning of society"¹⁵¹ can be guarded when a court imagines it is protecting human dignity, equality or liberty, but could a court so tether societal functioning to the same values in the context of animals? Canada's adjudicative and legislative approach has fallen far short of approaches such as New Zealand's legislative recognition of sentience. It may be many years before Canada legally recognizes animals as something more than mere property, let alone 'sentient beings'.

¹⁴⁸ Intervener, *supra* note 12 at 5.

¹⁴⁹ *Butler*, *supra* note 108.

¹⁵⁰ *Labaye*, *supra* note 16.

¹⁵¹ Sorenson, *supra* note 1.