File No. 36450

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

AND:

D.L.W.

Respondent
(Appellant)

ANIMAL JUSTICE

Intervener

FACTUM OF THE RESPONDENT
(Rule 42 of the *Rules of the Supreme Court of Canada*)

REDACTED FOR POSTING ON THE WEB

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PART I - OVERVIEW AND STATEMENT OF FACTS

Overview

1. When Parliament introduced the term “bestiality” into the *Criminal Code* in 1954, that term had a specific, well established and well known meaning in both the English and Canadian common law – vaginal or anal penetration with an animal. Parliament is deemed to know the legal context in which is legislates and is deemed to act deliberately. Parliament would not have deliberately used that term, without qualification, if it intended a different and broader meaning for that term. Parliament again acted deliberately in 1985 when it carried forward that term, without qualification.

2. As for all issues of statutory interpretation, the basic question is what Parliament intended. That intention is discovered by looking at the words of the provision, informed by its history, context and purpose. That exercise in this case demonstrates Parliament intended penetration to be an essential element of the offence in s.160(1) of the *Criminal Code,* R.S.C. 1985, c. C-46. As there was no evidence of penetration in this case, the majority of the Court of Appeal correctly acquitted the Respondent on that count. The Crown’s appeal to this Court should be dismissed.

3. The appellant’s argument is really a complaint that Parliament made a poor choice in intending penetration to be an essential element of the offence of bestiality. The exercise of statutory interpretation cannot repair that poor choice, if it was a poor choice. The appellant is free to make that complaint in the appropriate forum - to Parliament. Parliament can then carefully weigh all the social, political and legal issues and make a deliberate decision whether the offence should be broadened as suggested by the appellant, or in some other way.

Statement of Facts

4. The respondent was tried in a judge-alone trial on a 14-count Indictment with offences alleged to have occurred over a ten year period between November 1, 2000 and November 30, 2010. All of those offences concerned sexual offences committed involving two complainants, K.W. and V.W. The complainants were sisters. The respondent was their stepfather.

B.C. Supreme Court Decision, ("BCSC Decision"), Appellant's Record ("A.R.") Vol.I, p.6

5. Based primarily on the credibility findings that he made, the trial judge found the respondent guilty of 10 sexual offences against both complainants. Those offences included sexual assault, sexual interference, invitation to sexual touching, and sexual exploitation. The trial judge stayed the two sexual assault counts and convicted on the other eight counts.

6. The trial judge also convicted the respondent of one count each of making child pornography and possessing child pornography. Those offences related to videos made and possessed by the respondent which depicted the complainants' engaged in various sex acts.

BCSC Decision, A.R. Vol.I, pp.87-88

7. The remaining two counts on the Indictment involved the bestiality offences.

8. The subject matter of this appeal concerns Count 13 of the Indictment which alleged that the respondent committed an act of bestiality with K.W contrary to s. 160(1) of the *Code*. This alleged act of bestiality consisted of the respondent applying peanut butter to K.W.'s vagina and having family dog lick it off. Count 14 of the Indictment further alleged that the respondent committed the further offence of compelling K.W. to commit the act of bestiality contrary to s. 160(2) of the *Code*.

BCSC Decision, A.R., Vol.I p.94, at para.326

9. K.W. testified that when she was 15 or 16 years' old, the respondent brought the dog into the bedroom so that the dog could have intercourse with her. That, however, did not happen. Later, when K.W. was over the age of 18, the respondent put peanut butter on K.W.'s vagina, and the dog licked it off. This incident was captured on video. On that occasion, after the dog licked the peanut butter off of K.W.'s vagina. K.W and respondent then proceeded to have vaginal intercourse.

BCSC Decision, A.R., Vol.I p.93, at paras.316-318

10. The issue for the trial judge on the bestiality count was whether the oral sex act committed by K.W. constituted an act of bestiality under s. 160(1) of the *Code*, even though there was no penetration. On Count 14, the question was whether the respondent's actions amounted to compelling K.W. to commit the act of bestiality under s. 160(2).

11. At trial, the Crown submitted that the respondent was guilty as party to the offence of bestiality by bringing the dog into the bedroom, putting peanut butter on K.W.'s vagina and videotaping it. Crown counsel submitted that K.W. was engaged in an act of bestiality when the dog licked her vagina. K.W. was, however, never herself charged with committing an act of bestiality.

12. In her submissions to the trial judge, Crown counsel recognized that, at one time, penetration *was* a required element of the offence of bestiality. Crown counsel referred to this as the "old law of bestiality".

Transcript, A.R. Vol. IV, p.56, at lines 38-44

13. However, Crown counsel submitted penetration should no longer be a required element of the offence. This led Crown counsel to suggest that in a "modern context" any sexual contact (including oral contact, as here) between a

human and an animal should now constitute criminal conduct punishable under the offence of bestiality.

Transcript, A.R. Vol. IV, p.56, at line 44

14. In so doing, the Crown submitted that such a state of the law was more consistent with a "modern conception of sexual offences", which was primarily exemplified by the amendment from the old offence of rape to the broader contemporary offence of sexual assault. It was also pointed out that many criminal statutes in other jurisdictions had made it a criminal offence to have any sexual contact between humans and animal. Based on this more modern conception, the Crown submitted that the respondent should be convicted of the bestiality offences.

Transcript, A.R. Vol. IV, p. 56, lines 44-47; pp. 61, 73-76

15. For its part, defence counsel submitted that the essential elements of bestiality had not changed. Bestiality always, and still, required proof of actual penetration as an essential element of the offence. Defence counsel submitted that bestiality was not the type of open-textured offence which was based on "community standards". Because there was no evidence of penetration, or any possibility of penetration (the dog was neutered), defence counsel submitted that the respondent could not be held liable as a part to the offence.

16. The trial judge, however, convicted the respondent as party to the offence of bestiality. He found that actual penetration was, at one time, but no longer is a required element of the offence of bestiality. The trial judge found that bestiality should be the same as other sexual offences in the *Criminal Code* (i.e. sexual assault), which did not require full penetrative acts. The trial judge held that the offence of bestiality had to be viewed in a "modern context" and based on "current views" which reflected a need to treat animals humanely.

BCSC Decision, Vol.I, pp.91-92, at paras.310-315

17. This led the trial judge to find that bestiality in the *Criminal Code* should now criminalize any touching of an animal for a sexual purpose. He found that the *mens rea* for the offence was the "accused intentionally committing the *actus reas* for their own sexual purpose".

BCSC Decision, A.R., Vol.I, p.92, at para.312

18. The trial judge acquitted [redacted] of compelling K.W. to commit the offence of bestiality.

BCSC Decision, A.R. Vol.I, p. 95, at para.326

19. The trial judge later sentenced [redacted] to a global sentence of 16 years' imprisonment. He imposed a consecutive sentence of two years' imprisonment on the bestiality count.

Reasons for Sentence, A.R. Vol.I, p.147

On Appeal to the Court of Appeal for British Columbia

20. The respondent appealed only his bestiality conviction to the Court of Appeal for British Columbia. On appeal, he submitted that Parliament had never intended to broaden the offence of bestiality in s. 160(1) of the *Code* to capture non-penetrative conduct as an element of the offence. As there was no penetration, the respondent submitted that he should be acquitted of the offence.

21. The majority of the Court of Appeal (*per* Lowry, Goepel JJ.A.) agreed. Writing for the majority, Goepel J.A. determined that penetration remained an element of the offence of bestiality. In so doing, Goepel J.A. reviewed the common law as well as the legislative history of the offence. He determined that bestiality was a historically understood common law term and that there was "no question" that at common law penetration was always an essential element of bestiality.

BCCA Decision, A.R., Vol.I, p.159, at para.21

22. The 1954 amendment to the *Criminal Code* reworded the offence as "buggery" or "bestiality". As a result, "buggery" became one form of criminal conduct and "bestiality" became another. Given the well understood meaning of bestiality as requiring proof of penetration by that that time, Goepel J.A. found that that the 1954 legislative amendment did not signal Parliament's intent to transform the traditionally understood elements of the offence. He found that the change in the wording of the 1954 amendment was merely recognition of the fact that buggery with an animal was commonly referred to as bestiality. On that other hand, buggery remained an offence for prohibited forms of penetrative conduct between humans.

BCCA Decision, A.R., Vol.I, p.159, at para.21

23. Goepel J.A. was also not persuaded that the 1985 amendment to the *Criminal Code* changed the elements of the offence of bestiality. He held that the simple reference to "bestiality" in the 1985 amendment could not be interpreted as a modification of the common law concept of bestiality. Rather, he held, bestiality was itself a common law term and it had always required proof of penetration.

BCCA Decision, A.R., Vol.I, p.161, at para.28

24. Goepel J.A. found that bestiality itself had a "long understood meaning in Canadian criminal law". If Parliament had intended either in 1954 or in 1985 to sever the term from its historical foundation, which was that penetrative conduct was required, "one would have expected it to do so directly using clear and specific language". While finding the respondent's conduct in this case to be "obviously most disturbing", Goepel J.A. found that if Parliament wished to criminalize new forms of criminal conduct by expanding the offence of bestiality to include any sexual activity, it must do so by explicitly by legislative amendment.

BCCA Decision, A.R., Vol.I, p.164, at paras.38-39

25. Bauman C.J.B.C. dissented. For him, the 1954 legislative amendment to separate the terms “buggery” and “bestiality” was a watershed moment because it signaled Parliament’s intent to modernize the offence of bestiality. By doing so, Bauman C.J.B.C. found that Parliament intended to broaden the offence of bestiality to encompass all forms of sexual contact between humans and animals under the offence of bestiality, and not just penetration. He determined that by creating the offence of “bestiality” in 1954 Parliament “must have had some reason by doing so” and the use of that use of the term “bestiality” must be given meaning. Bauman C.J.B.C. determined that this legislative change meant that Parliament intended to broaden the offence of bestiality to include any sexual activity and was no longer limited to penetration. Otherwise, he determined, Parliament would have legislated in vain.

BCCA Decision, A.R., Vo.I, p.167, at para.46

26. Bauman C.J.B.C. further found that 1985 amendment confirmed Parliament’s intent to broaden the scope the offence of bestiality to include any sexual contact. With reference to ss. 160(2) and (3) of the *Code*, Bauman C.J.B.C. noted that if bestiality in s.160(1) were limited to penetrative conduct alone, then there would be an “unfortunate *lacuna*” in the legislative scheme.

BCCA Decision, A.R., Vol. I, p. 168, at para. 54; p.170, at para. 59

27. While Bauman C.J.B.C. upheld the trial judge’s decision to convict the respondent of the bestiality offence, he determined that the trial judge was wrong to find that the offence of bestiality in s.160(1) was a specific intent offence. Rather, he determined that bestiality was a general intent offence encompassed “any sexual activity of any kind between a person and an animal”.

BCCA Decision, A.R., Vol. I, p.171, at para.68

PART II - RESPONDENT'S POSITION ON QUESTION IN ISSUE

28. The respondent's position is that the *actus reus* of the offence of bestiality in s.160(1) of the *Criminal Code* requires proof of penetration.

PART III – STATEMENT OF ARGUMENT

The exercise of statutory interpretation: basic principles

29. The exercise of statutory interpretation is not conducted for its own sake. The exercise entirely serves the purpose of identifying the legislature's intent for the words and phrases used.

30. Similarly, the modern approach to statutory interpretation is simply *the method* to discern the legislature's intent. The focus can never veer from discerning legislative intent. As this Court said in *R. v. Mabior*:

> As for all issues of statutory interpretation, the basic question is what Parliament intended. That intention is discovered by looking at the words of the provision, informed by its history, context and purpose.
>
> *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 at para.20 [Respondent's BOA, Tab 9

31. It is also a fundamental principle that the scope of a statutory provision does not change unless there is a clear indication that the legislature intended to change its scope. Two values are supported by that principle.

32. First, the principle gives fair notice to persons of what is the law. That is particular important in the context of the criminal law, where the accused's reputation and liberty are in jeopardy. As this Court said in *R. v. Mabior*:

> It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done: Lord Bingham, *The Rule of Law* (2010).

> Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s. 7 of the *Canadian Charter of Rights and Freedoms* and has no place in the Canadian legal system.
>
> *R. v. Mabior*, *supra* at para.14. [Respondent's BOA, Tab 9]

33. As demonstrated below, in *both* 1954 and 1985 Parliament deliberately chose the term "bestiality", which Parliament *knew* meant penetration with an animal. If Parliament had intended to broaden the scope of the offence, as suggested by the Appellant, Parliament would not have deliberately chosen that term, without qualification. No notice was given that Parliament intended to broaden the scope of the offence from what it *knew* it meant.

34. Second, the separation of powers between the legislative and judicial branches of government also supports the principle that the scope of a statutory provision does not change unless there is a clear indication that the legislature intended to change its scope. Again, that is especially true in the context of criminal offences. While courts may apply *the intended scope* of an offence to modern circumstances, it exceeds their institutional role to broaden the scope of an offence and thus make the difficult choices reserved for the legislative branch of government.

35. In *R. v. Zundel*, this Court recognized that impermissibly shifting the purpose of an offence to account for modern views can have the effect of impermissibly redefining the very nature of the activity prohibited.

> *R. v. Zundel*, [1992] 2 S.C.R. 731, 1992 CarswellOnt 109 at para.45 [Respondent's BOA, Tab 14]
>
> *See also: R. v. Perka*, [1984] 2 S.C.R. 232 at 264-265. [Appellant's BOA, Tab 20].

36. In *R. v. Cuerrier*, McLachlin J. cautioned as follows:

> I approach the matter from the conviction that the criminalization of conduct is a serious matter. 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. [emphasis added]
>
> *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 1998 CarswellBC 1773 at para.34, [Respondent's BOA, Tab 6]

37. A consequence of the application of the principles of statutory interpretation is that the legislative scheme may appear to be deficient to a party, intervener or the judiciary, especially with the passage of time and subsequent changes in society. That may be especially so in the context of historical criminal offences. Nevertheless, the exercise of statutory interpretation plays no role in repairing those deficiencies or providing a more modern scheme then intended by the legislature when the legislation was passed. This Court has repeatedly insisted that it is the legislature's role to repair any alleged deficiencies.

> *Peel (Regional Municipality) v. Viking Houses,* [1979] 2 S.C.R. 1134, 1979 CarswellOnt 707 at para.7 [Respondent's BOA, Tab 2]
>
> *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 at para.54. [Appellant's BOA at Tab 9]

38. With those basic principles firmly in mind, the Respondent addresses the interpretation of the term "bestiality" in s.160(1), by examining that term, informed by its history, its context and purpose.

> *R. v. Mabior, supra* at para.20. [Respondent's BOA, Tab 9]

The term "bestiality", as informed by its history

39. The term "bestiality" did not arise out of thin air when introduced by Parliament in 1954 and carried forward in 1985, divorced from any history and meaning. As demonstrated below, the term and its meaning was already well established and well known in both the English and Canadian common law, to describe buggery that was penetration with an animal. Parliament is deemed to

know the legal context in which it legislates and is deemed to act deliberately. As demonstrated below, in choosing that term without any qualification, Parliament intended "bestiality" to carry the same meaning as it had in the English and Canadian common law.

40. The genesis of the secular, statutory offence of buggery was in the Church's attitude that any form of sexual behaviour that did not allow the male seed to be deposited in its "natural" receptacle or "fit vessel" – the human vagina - was considered sinful and wrong. It is therefore not surprising that the single English statutory offence of "buggery" included both (1) anal penetration between humans and (2) vaginal and anal penetration between humans and animals.

> Graham Parker, "Is a Duck An Animal? An Exploration of Bestiality as a Crime (1986) 7 *Criminal Justice History* 95 at 99-103 [hereinafter "Parker"]. [Respondent's BOA, Tab 18]

41. Oral sex was insufficient to constitute buggery.

> *R. v. Jacobs* (1817), Russ. & Ry. 332, 168 E.R. 830. [Respondent's BOA, Tab 8]

42. In 1828, the statutory law made express the element of penetration and at the same time removed the requirement to prove "emission of seed":

> XV. And be it enacted, That every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with an Animal, shall suffer Death as a Felon.
>
> XVIII. And Whereas upon Trials for the Crimes of Buggery … Offenders frequently escape by reason of the Difficulty of the Proof which has been required of the Completion of those several Crimes; for Remedy thereof be it enacted, That it shall not be necessary, in any of those Cases, to prove the actual Emission of Seed in order to constitute a carnal Knowledge, but that carnal Knowledge shall be deemed complete upon Proof of Penetration only.
>
> *An Act for consolidating and amending the Statutes in England relative to Offences Against the Person* (UK) (1828), 9 Geo. IV, c.31, ss.XV and XVIII. [Respondent's BOA, Tab 29]

43. Despite being a single offence of "buggery", the human/human and human/animal types of penetration covered by the offence were distinguished

through language. The leading cases addressing anal penetration between humans all referred to that offence as "sodomy".

R. v. Jacobs, supra. [Respondent's BOA, Tab 8]

R. v. Reekspear (1832), 1 Mood. 341, 168 E.R. 1296. [Respondent's BOA, Tab 11]

R. v. Barron, [1914] K.B. 570. [Respondent's BOA, Tab 3]

44. It appears the term "bestiality" for penetration with an animal was in use prior to the first English statutory offences. In any case, the early offences referred to "Buggery committed with mankind *or beast*" and it is at least from that wording that the modern term "bestiality" derives, to describe that type of buggery. The term "animal" was later substituted for "beast" and in *R. v. Brown* the Court found that domestic fowls were animals for the purpose of that offence.

Parker, *supra* at 101-102. [Respondent's BOA, Tab 18]

R. v. Brown, [1914] K.B. 570. [Respondent's BOA, Tab 3]

45. In 1834, the headnote to the report in *R. v. Cozins* refers to the offence of buggery with an ewe as "bestiality". In 1952, the judgment of the Court in *R. v. Bourne* referred to buggery with a dog as "the offence commonly called bestiality." In all the texts listed below, penetration with an animal was referred to as "bestiality".

R. v. Cozins (1834), 6 Car. & P. 350, 172 E.R. 1272. [Respondent's BOA, Tab 5]

R. v. Bourne (1952), 36 Cr.App.R. 125. [Appellant's BOA at Tab 5]

O. Russell, *A Treatise on Crimes and Misdemeanors*, 5th ed. (London: Stevens, 1877), Vol.1 at 863-864, 879-882. [Respondent's BOA, Tab 20]

I. Radzinowicz, LL.D. (Preface by), *Sexual Offences: A Report of the Cambridge Department of Criminal Science* (London: MacMillan & Co. Ltd., 1957) at 345. [Respondent's BOA, Tab 19]

Halsbury's Statutes of England (3rd Ed.) (London: Butterworths, 1969), Vol.8 at 423-424. [Respondent's BOA, Tab 24]

46. Chief Justice Bauman in dissent found, and the Crown in their Factum before this Court suggests, that all buggery, whether with a human or an animal,

was limited to anal penetration. That is incorrect. *None* of the English or Canadian buggery statutes, or the cases cited above, limited buggery with an animal to anal penetration. In *R. v. Bourne* the act was one of vaginal penetration. *All* the legal texts cited above indicated that buggery with an animal included both vaginal and anal penetration, as did the Home Office's *Wolfenden Report*. Against the volume of those legal texts, Bauman C.J.B.C. and the Crown cite one legal dictionary. Chief Justice Bauman and the appellant do not give any reason why penetration with an animal would be limited to anal penetration.

Appellant's Record, Volume 1 at 167-169 (paras.48-55)

Appellant's Factum at para.8, 56-57, 59

Home Department, *The Wolfenden Report* (Authorized American Edition) (New York: Stein and Day, 1963) at 55-56. [Respondent's BOA, Tab 25]

For what constitutes buggery with an animal, see also: J.C. Smith and B. Hogan, *Criminal Law*, 7th ed. (London: Butterworths, 1992), pp.476-479. [Respondent's BOA, Tab 21]

47. When Canada imported and later passed its own buggery offence, the term "bestiality" to refer to penetration with an animal came along with it. First, the English buggery offence applied in British North America prior to the passing of any colonial laws or the first Canadian statutory offence in 1869. The English terms "sodomy" and "bestiality" would have formed part of the legal landscape of that applied offence.

G. Burbridge, *Criminal Law of Canada (Crimes and Punishments)* (Toronto: Carswell, 1890) at 9-13, 161, 248. [Respondent's BOA, Tab 16]

48. In England, the 1828 offence was continued in 1861 by the *Offences against the Person Act 1861*, where the marginal note for the new provision read "Sodomy and Bestiality".

Offences against the Person Act 1861, 24 & 25 Vict., c.100, s.61. [Respondent's BOA, Tab 30]

49. In 1869, the Canadian Parliament assimilated, amended and consolidated the statute laws of several Provinces related to "offences against the person",

which included a “buggery” offence. There is no indication Parliament intended a different meaning for “buggery” than in the English common law. Parliament intended to codify the English common law (*R. v. Pappajohn*). As it was with the 1861 English provision, the marginal note for that buggery provision read “Sodomy and bestiality”. The well-established terms “sodomy” and “bestiality” formed part of Canadian legal landscape of “buggery” during Canada’s time with a single, statutory offence of buggery.

> *An Act Respecting Offences against the Person*, 32-33 Vict., c.20 (1869), s.63. [Respondent’s BOA at Tab 32]
>
> *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 1980 CarswellBC 546 at paras.14-16. [Respondent’s BOA, Tab 10]
>
> For reference to codifying the common law, see: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 577. [Respondent’s BOA, Tab 22]
>
> For reference to the use of headings and marginal notes in statutory interpretation, see: R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at 460-468. [Respondent’s BOA, Tab 23]

50. If any further proof is necessary that the term “bestiality” meant penetration with an animal in the Canadian common law prior to its codification in 1954, there is the 1953 decision of the Ontario Court of Appeal in *Henry v. Henry*, where the Court found the “offence of bestiality” required penetration, although the smallest degree of penetration was sufficient. At the time, there was only an offence of “buggery”, which all agree required penetration.

> *Henry v. Henry*, [1953] O.J. No.347 (Q.L.) (Ont. S.C. – Appeal Division). [Respondent’s BOA, Tab 1]

51. This brings us to the contexts of the 1954 amendments, which introduced the unqualified term “bestiality” into legislation and the 1985 amendments, where Parliament deliberately chose to carry forward that very term.

The context of the 1954 and 1985 amendments

52. In 1954, the offence of buggery was reworded as follows:

> Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.
>
> *Criminal Code*, 1953-54, c.51, s.147. [Respondent's BOA at Tab 34]

53. As demonstrated above, by the time of the 1954 amendments, "bestiality" had a specific, well established and well known legal meaning *in both the English and Canadian common law* – penetration with an animal.

54. Parliament is deemed to know the legal context in which it legislates and therefore knew the legal meaning given to the term in both England and Canada. Parliament is also deemed to act deliberately. There is no indication whatsoever Parliament intended to give "bestiality" in s.147 a different and broader meaning that it had in the English and Canadian common law. Parliament did not qualify that term in any way when it codified the term. Parliament would not have chosen a term with such a well established and well known meaning if it intended a very different meaning, and thus a much broader scope to the offence. If Parliament had intended to greatly increase the scope of that offence, with its maximum sentence of 14 years' imprisonment, Parliament would have indicated its intention.

> *R. v. Summers*, 2014 SCC 26 at para.55 [Respondent's BOA, Tab 13]
>
> *R. v. Clark*, *supra* at para.53. [Appellant's BOA at Tab 9]
>
> Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 205. [Respondent's BOA, Tab 22]

55. It is therefore unsurprising that, in 1978, the Law Reform Commission of Canada had no problem whatsoever finding that bestiality was an offence of penetration.

> Law Reform Commission of Canada, *Working Paper 22, Criminal Law: Sexual Offences* (Law Reform Commission of Canada, 1978) at 35. [Respondent's BOA, Tab 26]

Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 618-620. [Respondent's BOA, Tab 21]

56. The appellant suggests that Parliament legislated in vain in 1954 if the introduction of the term "bestiality" in the phrase "buggery or bestiality" was meant to be just that sub-set of buggery under the common law that was anal intercourse with animals (the Appellant being incorrect that the common law limited buggery with animals to just anal intercourse).

Appellant's Factum, at paras.58-64

57. The appellant misconstrues the 1954 amendments. The provision that existed just prior to the 1954 amendment reads 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.
>
> *Criminal Code*, R.S.C. 1927, c.36, s.202. [Respondent's BOA, Tab 33]

58. The 1954 amendment reads as follows:

> Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.
>
> *Criminal Code*, S.C. 1953-54, s.147. [Respondent's BOA, Tab 34]

59. Parliament did not just introduce the term "bestiality" in 1954; Parliament also removed the phrase "either with a human being or with any other living creature". By removing that phrase and introducing the term "bestiality", Parliament was simply codifying the distinction between penetration with humans and penetration with animals that had already been established in the common law. The fact that Parliament chose the terms "buggery" and "bestiality" instead of "sodomy" and "bestiality" is of no assistance to the appellant. While "buggery" in both English and Canadian law applied to both human and animal penetration, the offence was generally associated with anal penetration among humans as there were few prosecutions for the bestiality-type offence. Just like the common law that preceded it, the 1954 amendment sought to distinguish between anal

penetration with other humans, now known as “buggery” in Canada (*R. v. Ross*), and penetration with animals, known as “bestiality”.

Parker, supra at 105. [Respondent’s BOA, Tab 18]

R. v. Ross, 1986 CarswellNWT 5 (N.T.S.C.), [Respondent’s BOA, Tab 12]

60. Goepel J.A. for the majority of the Court of Appeal, correctly found as follows regarding Parliament’s intent for the 1954 amendment:

> There is no question that, at common law, penetration was an element of the offence of bestiality. I do not accept the proposition that penetration ceased to be an element of the offence as a result of the 1954 Amendment. In my respectful opinion, the 1954 Amendment did not signal a change in the elements of the offence. The inclusion of the term “bestiality” and the removal of the phrase “either with a human being or with any other living creature” was a simple recognition of the fact that buggery with an animal was commonly referred to as bestiality. If the 1954 Amendment intended to reformulate the historical offence of buggery with non-humans, surely Parliament would not have left the offences in the same section of the *Code*.
>
> Appellant’s Record, Volume 1 at 159 (para.21).

61. The legislative record also supports the conclusion Parliament did not intend a substantive change to the scope of the offence of bestiality in 1954. Following the tabling of the *Royal Commission on the Revision of Criminal Code* in both Houses of Parliament, Bill H-8 was introduced in the Senate on May 13, 1952. The Minister of Justice, the Honourable Stuart Garson, reminded the Senators that the terms of reference of the Commission was not to effect broad changes, but was to limited to:

> …evolve as simple a Code as possible by the elimination of unnecessary or obsolete provisions, the correction of errors and the removal of inconsistencies, and to effect such consolidation and rearrangement as was deemed necessary to facilitate reference.

62. The Bill was referred to the Standing Committee on Banking and Commerce of the Senate. The Standing Committee considered a report of its own subcommittee, which reported that “the lack of satisfactory explanatory notes appended to the bill made the task of the subcommittee tedious and difficult and delayed the Committee’s progress”. Some explanatory memorandum

was received from the Department of Justice, and appendices to the subcommittee's report denoting changes or no changes were prepared by the subcommittee. In those appendices, the subcommittee noted substantive changes, in particular the "[widening]" of the offence of gross indecency to be irrespective of sex. For the offence in section 147, the subcommittee noted "a change in form only" from the previous Code.

63. Bill H-8 was not passed at that session. However, during the subsequent legislative history that led to the coming into force of s.147 in 1954, there was no further consideration of the effect of the amendment or anything to undermine the subcommittee's conclusion that the amendment was "a change in form only".

A.K. Giferoff, *Sexual Deviations in the Criminal Law* (Toronto: University of Toronto Press, 1968) at 69-80. [Respondent's BOA, Tab 17]

64. In 1985, separate offences were created for anal intercourse (s.159) and bestiality (s.160). In *R. v. E. (A.W.)*, this Court found the offences of buggery and anal intercourse to be the same.

R. v. E. (A.W.), [1993] 3 S.C.R. 155, 1993 CarswellAlta 77 at paras.84-88. [Respondent's BOA, Tab 7]

65. Again, Parliament is deemed to know the legal context in which it legislates and to act deliberately. Parliament knew the well established meaning of "bestiality" in the English and Canadian common law, including the 1953 decision of the Ontario Court of Appeal in *Henry v. Henry*, where the Court found the "offence of bestiality" required penetration.

66. Parliament also knew that in 1978 the Law Reform Commission of Canada not only found that bestiality was an offence of penetration, but, as noted by Goepel J.A. for the majority, also recommended that the offence be repealed, with animal cruelty offences and provincial animal welfare legislation addressing any public policy concerns.

Appellant's Record at 160 (paras.24-25).

> Law Reform Commission of Canada, *Working Paper 22, Criminal Law: Sexual Offences* (Law Reform Commission of Canada, 1978) at 35. [Respondent's BOA, Tab 26]
>
> Law Reform Commission of Canada, *Report on Sexual Offences* (Law Reform Commission of Canada, 1978) at 30. [Respondent's BOA, Tab 27]

67. With that knowledge, Parliament would not have deliberately chosen to carry forward the term "bestiality" in 1985, unqualified, if it intended a very different and broader meaning for that term. At the very least, Parliament would have indicated that the term "bestiality" no longer had the meaning that was well established and well known, as recognized by its own Law Reform Commission, giving proper notice of its broadened scope.

> *Criminal Code*, R.S.C. 1985, c.19 (3rd Supp.), s.3. [Respondent's BOA, Tab 35]
>
> *R. v. Mabior*, *supra* at para.14. [Respondent's BOA, Tab 9]

68. Furthermore, the fact that Parliament has in recent times amended the words used to describe most sexual offences, but has *not* amended the word chosen for this offence further supports the conclusion Parliament did not intend the offence to have a broader scope that it had at common law and under the 1954 amendment. For instance, the sweeping changes to sexual offences in 1983 were based on *Parliament's response* to public dissatisfaction with law of indecent assault and rape. No such record or legislative response is present here.

> *R. v. Cuerrier, supra* at paras.3-4. [Respondent's BOA, Tab 6]

69. As Goepel J.A. stated for the majority in this case:

> The 1985 Amendment did not change the wording of the substantive offence. This is to be contrasted with the manner in which Parliament amended the *Criminal Code* in relation to other sexual offences: S.C. 1980-81-82-83, c. 125. In those amendments, Parliament replaced the previous offences of rape, attempted rape, sexual intercourse with the feeble-minded, and indecent assault on a female or male with the new offence of sexual assault. The elements of the new offence clearly differed from the elements of the offences it replaced.
>
> *BCCA Decision,* A.R. Vol.I, p. 161, at para.29

70. The legislative record does not support the appellant's argument concerning the effect of the 1985 amendments. The Appellant's cites a passage from the House of Commons Standing Committee on Justice. The appellant suggests the witness Mr. Richard Mosley "stated that bestiality encompasses any form of sexual conduct with animals" (Appellant's factum, at para. 83). That is incorrect and also does not pay attention to the context of the passage. Member of Parliament Robinson was asking the witness why an offence of *compelling* bestiality was necessary when a person compelling would be guilty as a party to the offence of bestiality. Mr. Mosley said that was not without doubt and, that if the offence was only one of counselling or attempt, the penalty would be lesser. It was in response to the issue of why it was necessary to *add an offence of compelling* that the following was said:

> Mr. Robinson: So is that the reason for –
>
> Mr. Mosley: That was a consideration. I would not suggest it was the complete reason. The reason had more to do with modifying the offence of bestiality to conform more closely to the approach of the bill. It was concerned more with offences against children, primarily to bring in the notion of the offence of bestiality in the presence of a child. The compulsion and sighting aspect of it was felt to round the application of that offence to any form of conduct involving sex with animals.
>
> Minutes of the House of Commons Standing Committee on Justice, 33rd Parl, 2nd Sess, No. 9 (17 Feb 1987) at 66-67.[Appellant's BOA at Tab 33]

71. The "form of conduct" referred to are the acts of compelling bestiality and committing bestiality in the presence of a child. Mr. Mosley does not say, as suggested by the appellant, that "bestiality encompasses any form of sexual conduct with animals".

72. Goepel J.A. for the majority addressed the argument that the 1985 amendments indicated a new interpretation to the term "bestiality", in part as follows:

> The separation of the bestiality and anal intercourse provisions in the 1985 Amendment is also unhelpful in determining Parliament's intent. When the legislation that led to the 1985 Amendment was introduced s.159

continued to use the term “buggery”. In the committee hearings that term was removed and replaced by the term “anal intercourse”. In the course of the hearing Mr. Mosley was asked why the proposed legislation used the term “buggery” rather than “anal intercourse” and whether there was any difference between the terms. He responded in part (at 51-52):

> It is a time-honoured term, which originated in ecclesiastical concepts, was adopted by the common law and by the Criminal Code when it was brought into effect, and is recognized in all of the dictionaries as applying to the conduct in question.
>
> …
>
> The only difference - and I am not sure whether this is still applicable - is that at common law buggery had a broader meaning than just anal intercourse between humans; it included other unnatural acts - bestiality, for example. But in view of the fact there are specific provisions in the code dealing with bestiality, it probably would be restricted to the same meaning as anal intercourse.

There is nothing in the Parliamentary record to suggest that the offences were separated because of any change in the elements of the offence. The reasons the offences were separated in the 1985 Amendment most likely was to accommodate the specific limitations on the offence of anal intercourse found in s. 159(2) and (3), which do not apply to the bestiality offence, and the addition of the related bestiality offences found in ss. 160(2) and (3). Given those changes it was no longer practical to keep the offences in the same section.

While the offence of bestiality has undergone several revisions since it was first codified in 1869, those revisions are of two distinct kinds. The first kind of revision concerns modernizing the language of the provision (from “Whosoever shall commit the abominable offence…” to the modern “Every person who commits…”). The change in language, while making the criminal law more accessible, is not legally significant. The second kind of revision concerns the removal of buggery from the provision, which following the 1954 Amendment became a separate offence from bestiality (though set out in the same provision). The manner in which Parliament dealt with the separate offence of buggery does not provide an expression of intent with regard to the element of bestiality.

Even if, as the Crown contends, comments of a civil servant to a Parliamentary committee can be considered in determining the intention of Parliament, a proposition upon which I express no opinion, Mr. Mosley’s comments are not of assistance. They were made in the course of answering questions raised by members of Parliament in committee. Mr. Mosley says that the amendments were intended “primarily to bring in the notion of the offence of bestiality in the presence of or by a child.” Mr. Mosley does not anywhere suggest that the new legislation intended to change the elements of the bestiality offence. It is clear from his

comments quoted at para. 35 above, that he was aware of the historical relationship between buggery and bestiality.

BCCA Decision, A.R. Vol.I, at pp. 163-164 (paras.34-37).

73. The appellant relies on the definition of "bestiality" offences in other jurisdictions, especially the United States. Those statutory provisions are of no assistance to the appellant. The early twentieth century saw a period of decriminalization of the offence in the United States. By 1990, no state had a law specifically opposing "bestiality". The statutes prohibiting "bestiality" are more recent and are of no assistance in interpreting the Canadian offence, which has existed uninterrupted since before confederation and under the term "bestiality" since 1954.

Piers Beirne, "Peter Singer's "Heavy Petting" and the Politics of Animal Sexual Assault (2001) 10 *Critical Criminology* 43 at 51-52 [hereinafter "Beirne"]. [Respondent's BOA, Tab 15]

74. The context of the 1954 and 1985 amendments demonstrates Parliament intended penetration to be an element of the offence of bestiality.

The purpose of the bestiality offence in s.160(1) of the Criminal Code

75. This Court had the opportunity to consider the purpose of bestiality *simpliciter* in s.160(1) in *R. v. Malmo-Levine* and found as follows:

Several instances of crimes that do not cause harm to others are found in the *Criminal Code*, R.S.C. 1985, c. C-46. Cannibalism is an offence (s. 182) that does not harm another sentient being, but that is nevertheless prohibited on the basis of fundamental social and ethical considerations. Bestiality (s. 160) and cruelty to animals (s. 446) are examples of crimes that rest on their offensiveness to deeply held social values rather than on Mill's "harm principle".

R. v. Malmo-Levine, 2003 SCC 74, [2003] 3 S.C.R. 571 at para.117. [Appellant's BOA at Tab 19]

76. The offence of bestiality *simplicter* is addressed to the *moral* hygiene of persons and the community and not on any purported harm to other persons or even the animals involved in the conduct.

Parker, *supra*. [Respondent's BOA, Tab 18]

77. The appellant does not appear to accept this Court's finding in *Malmo-Levine* that the offence of bestiality is *not* harm-based. The appellant seeks to have this Court impermissibly shift the purpose of the offence of bestiality *simpliciter* in s.160(1) to one of preventing harm to children, and from that new, impermissible purpose to argue that the offence must be of broader scope than at common law and, possibly, under the 1954 amendments. The appellant seeks that impermissible shift in purpose by reference to the *new* offences introduced in 1985, of compelling a person to engage in bestiality in s.160(2) and bestiality in the presence of a child in s.160(3). The appellant asks this Court to infer *backwards* from those new offences, which have *additional* elements, a different purpose for bestiality *simpliciter* in s.160(1) than found by this Court in *R. v. Malmo-Levine*.

Appellant's Factum at paras.10, 12, 67-76, 82.

78. The first problem with that argument is that this Court in 2003 decided the purpose of the bestiality *simpliciter* offence in s.160(1) was *not* harm-based *after* those new offences were introduced in 1985.

79. The second and more obvious problem with that argument is the offence in s.160(1) requires no involvement of children at all and therefore its purpose cannot be to prevent harm to children. The appellant's argument on this point is also directly contradicted by Parliament's own actions. Only the new offences under s.160(2) and (3) are listed offence for the purpose of a prohibition order under s.161(1) of the *Criminal Code*, whose purpose is to prevent harm to children from certain sexual offenders. Parliament's deliberate decision to omit the offence under s.160(1) from s.161 indicates that Parliament's purpose for the s.160(1) offence is *not* to protect children from harm; if it had been, s.161(1) prohibition orders would have applied to s.160(1) offences.

80. In re-establishing the offence of bestiality *simpliciter* and creating those new offences in 1985, Parliament deliberately chose to bring forward and use term bestiality from the common law and the 1954 amendments with its well established and well known meaning. As Goepel J.A. correctly found for the majority, there is no indication that Parliament intended the term bestiality in those sub-sections to have any broader purpose or meaning. Adequate notice of a new and broader meaning – and thus an enlarged legal jeopardy- would have required more.

BCCA Decision, A.R. Vol.I, pp.160-164

81. The appellant complains limiting bestiality to penetrative acts results in absurd results. The appellant confuses absurdity with the appellant's dissatisfaction with the scope of the offence. Just because an interpretation does not give the provision the scope that a party would like does not make it "absurd". To be absurd, the consequence of a party's suggested interpretation must be *incompatible* with the object of the legislative enactment, in the sense of defeating the purpose of the statute by rendering it *pointless or futile*.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para.27. [Appellant's BOA at Tab 3]

82. Prohibiting persons from compelling persons to commit penetration with an animal does not defeat the purpose of the provision. Quite the opposite, it protects persons from being compelled to engage in that kind of intrusive act with an animal. That offence appears to have been a codification of particular behaviour found to have occurred in *R. v. Bourne*, where a husband coerced his wife to have vaginal intercourse with a dog (and where he was convicted of aiding and abetting her to commit that act of buggery).

R. v. Bourne, supra. [Appellant's BOA at Tab 5]

83. Similarly, prohibiting persons from penetrating animals in the presence of persons under 14 (the age limit in the provision at the time of the offence, now 16) or inciting such young persons to commit that act *does* protect those

persons. The interpretation reached by the majority of the Court of Appeal does not render those provisions pointless or futile.

84. The appellant is of course free to complain that Parliament made a *poor* choice in defining the new offences, or even the offence of bestiality *simpliciter*, by reference to bestiality as Parliament knew and intended it to mean – penetration with animals. However, Parliament's deliberate choice must be respected by the courts, even if it appears to be have been a poor choice to a party or the court. A poor choice is still a deliberate one.

85. The exercise of statutory interpretation is not a legitimate means to solve alleged deficient legislation or correct Parliament's alleged poor choices. Even Chief Justice Bauman's finding, in dissent, of an "unfortunate *lacuna*" in the legislation (if the majority's interpretation is correct) cannot be a justification for disregarding Parliament's choice.

> *Peel (Regional Municipality) v. Viking Houses, supra.* [Respondent's BOA, Tab 2]
>
> *BCCA Decision,* A.R. Vol.I, p.170, at para.59

86. The purpose of s.160(1) does not support an inference that Parliament intended a new and expanded meaning for that offence.

The appellant's suggested interpretation raises policy issues that must be left to Parliament

87. The criminalization of any conduct is a serious matter that can only be accomplished after a deliberate and careful weighing of all the different social, political, economic and legal issues. That is no less true in this context.

88. The following policy issues raised by the appellant's suggested interpretation demonstrate that any broadening of the offence must be accomplished by Parliament, who singularly has the resources, expertise, wisdom and democratic legitimacy to do so.

The criminal prohibition on sexual activity with animals has and continues to vary considerably from jurisdiction to jurisdiction, from no prohibition, to prohibition of penetration for moral reasons and, more recently, to prohibition of a wider range of sexual acts for moral and/or harm-based reasons.

89. A legislative body must carefully consider whether an offence or broadening the offence is necessary or in the best interests of the society. As noted earlier, the Law Reform Commission of Canada recommended the abolition of the Canadian offence of bestiality, which it understood to mean penetration with an animal. Bestiality was effectively decriminalized for a period in the United States and remains free from prohibition in some States. As demonstrated in the statutes from other jurisdictions relied on by the Appellant, the scope of existing offences varies.

> Law Reform Commission of Canada, *Report on Sexual Offences* (Law Reform Commission of Canada, 1978) at 30 [Respondent's BOA, Tab 26]
>
> Beirne, *supra* at 51-52 [Respondent's BOA, Tab 15]

90. A legislative body must also carefully consider any harms that may flow from criminalizing or increasing the criminalization of such conduct. Professor Piers Beirne of the University of Southern Maine testified before the Maine state legislature in favour of a bill to criminalize animal sexual assault, but said:

> I did so with decidedly mixed feelings, because in advancing a notion that bestiality must always be considered animal sexual assault, I do not wish to contribute to the creation of yet another category of marginalized human beings.
>
> Beirne, *supra* at 44. [Respondent's BOA, Tab 15]

91. Consideration must also be given to whether different standards should apply in different contexts. To give one example, the offence of bestiality itself in England remains an offence of penetration with an animal. However, separate offences which aim to protect children from sexual harm include any sexual acts.

> *Sexual Offence Act 2003*, 2003, c.42, ss.11-12, 69, 79. [Respondent's BOA, Tab 30] Note: While the offence in s.69 does not refer to the offence

> as “bestiality”, the report presented to Parliament on the proposed legislation did: Home Department, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences* (London: Home Department, 2002) at para.79. [Respondent’s BOA, Tab 27]

92. Similarly, Parliament could decide to leave the offence of bestiality *simpliciter* as one of penetration, so as not to criminalize young persons who briefly engage in less-intrusive sexual activity with animals (or exempt young persons from prosecution under a broadened offence). But Parliament could broaden the conduct that would apply to the offences of compelling others and committing in the presence of children. Only Parliament has the wisdom and authority to make those policy choices.

93. The controversy in this case over the elements of the purported broadened offence also demonstrates that the crafting of a broadened offence must be left to Parliament. The *actus reus* of buggery with an animal is penetration with an animal and the *mens rea* is the general intent to do that act.

> *R. v. Barron, supra*. [Respondent’s BOA, Tab 3]

94. The trial judge’s interpretation of the offence completely modified the *actus reus* and the *mens rea* for the offence. As he found:

> In my view, "bestiality" means touching between a person and an animal <u>for a person's sexual purpose</u>. …
>
> The *mens rea* requirement for s. 160(1) is that the accused intentionally committed the *actus reus* <u>for their own sexual purpose</u>. Since the act must be "for a person's sexual purpose", situations such as a farmer expelling bull semen for a business purpose, or a pet owner touching a pet in its genital region for a hygienic purpose, are excluded. (emphasis added)
>
> *BCSC Decision,* A.R. Vol.I, p. 92, at paras. 312-313

95. Bauman C.J.B.C., in dissent, agreed with the Crown that the elements were something different:

> In my view, applying traditional principles of statutory interpretation allows us to conclude, as the Crown urges, that s. 160(1) creates a general intent offence which encompasses sexual activity of any kind between a person and an animal. To the extent that the trial judge might be taken to suggest that it is an offence requiring specific intent, I disagree.
>
> *BCCA Decision,* A.R. Vol. I, p. 17, at para. 171

96. But what is "sexual activity"? Is that element to be determined like sexual assault under section 271(1) of the *Criminal Code*, where the activity becomes sexual if it *objectively violates sexual integrity*, without proof of the offender's motive for sexual gratification?

> *R. v. Chase*, [1987] 2 S.C.R. 293 at 302-303 [Appellant's BOA at Tab 8]

97. If so, then the offence would criminalize a number of present-day animal husbandry practices. As Professor Beirne asks:

> Some difficulties seem to resist a clear answer – for example, is electronically-induced ejaculation for insemination a form of animal sexual assault and, if so, is it an instance of commodification or of aggravated cruelty or both?
>
> Beirne, *supra* at 49. [Respondent's BOA, Tab 15]

98. Were Parliament to construct a broadened offence in that manner, Parliament could then, if it saw fit, provide a justification or excuse for some activities that do violate the sexual integrity of animals, similar to the way in which Parliament has provided a justification and excuse for animal cruelty offences.

> *Criminal Code*, ss.429(2), 444, 445, 445.1, 446 [Respondent's BOA, Tab 36]

99. Or does the element of "sexual activity" really mean "sexual gratification" of the offender, so as to insulate from prosecution violations of sexual integrity during mere animal husbandry? That is an element of some of the American statutes cited by the Appellant. If so, then we are back to the trial judge's "for

their own sexual purpose", which mirrors the structure of offences such as sexual interference in s.151 of the *Criminal Code*.

100. Both the legal structures of sexual assault in s.271, with a reasonable excuse defence *only Parliament can provide*, and sexual interference, with its sexual purpose, are available to Parliament. The controversy over the elements of a broadened offence demonstrates that any broadening must be left to Parliament, with its resources, expertise, wisdom and democratic legitimacy in criminalizing conduct and crafting its elements.

101. Parliament may also wish to consider whether the offence of bestiality in s.160(1) of the *Code* should be broadened at all. The traditional and current offence of bestiality as requiring proof of penetration is simple and clear. There is no legitimate reason why a person would penetrate or be penetrated by an animal. This offence does not encounter the vexing issues that inevitably arise in how to frame a broadened offence of bestiality in a way that distinguishes between "legitimate" human contact with animals and "illegitimate" contact. As noted above, the enactment of any broadened offence is interlaced with significant social, political, scientific and economic choices and ramifications.

102. In *R. v. Clark*, this Court reviewed the history of the offence of indecent act and found Parliament had not chosen to include indecent acts committed in the home but visible to others, unless intended to insult or offend, despite having many years and opportunities to amend the provision. That was so even though the *less* serious offence of nudity is committed when exposed to public view while on private property. As Fish J. succinctly stated in that case:

> I think it inappropriate for this Court to do now what Parliament declined to do then and remains free in its wisdom to do still.
>
> *R. v. Clark, supra* at para.54. [Appellant's BOA at Tab 9]

103. Significantly, since this Court's decision in *R. v. Clark*, Parliament has not broadened the offence of indecent act (or narrowed the offence of nudity). This

highlights the importance of leaving such important policy decisions to the wisdom of Parliament. The same must apply to the offence of bestiality. As Goepel J.A. said in this case:

> The conduct in this case is obviously most disturbing. If Parliament wishes to criminalize such conduct, it can easily do so by way of an express amendment modifying the definition of bestiality or the essential elements thereof.
>
> *BCCA Decision,* A.R. Vol. I, p. 164, at para.39

104. Should Parliament take on that task following this Court's decision, it is to be expected that persons engaged in animal husbandry, medical and scientific research, criminology, activism to protect animals, civil libertarians and others will have a lot to say about the proper scope of any broadened offence and any defences, issues that are properly the subject of political debate and decision-making.

Conclusion

105. The majority of the Court of Appeal for British Columbia was correct in finding penetration was a required element of the offence in s.160(1) of the *Criminal Code*. As there was no evidence of penetration in this case, the majority correctly allowed the appeal and entered an acquittal on that count.

PART IV - SUBMISSIONS CONCERNING COSTS

106. There should be no order as to costs.

PART V - NATURE OF ORDER SOUGHT

107. The respondent seeks an order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Eric Purtzki
Garth Barriere
Counsel for the respondent

September 30th, 2015
Vancouver, B.C.

PART VI – LIST OF AUTHORITIES

Para(s).

Jurisprudence

Secondary Materials

English Legislation

Canadian Legislation

PART VII - STATUTORY PROVISIONS

***Criminal Code*, R.S.C. 1985, c. C-46, s.160 [as it read at the time of the offence: *Criminal Code*, R.S.C. 1985, c.19 (3rd Supp.), s.3].**	
(1) Bestiality — Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. (2) Compelling the commission of bestiality — Every person who compels another to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. (3) Bestiality in presence of or by child — Notwithstanding subsection (1), every person who, in the presence of a person under the age of fourteen years, commits bestiality or who incites a person under the age of fourteen years to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.	160(1) Bestialité Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, quiconque commet un acte de bestialité. 160(2) Usage de la force Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, toute personne qui en force une autre à commettre un acte de bestialité. 160(3) Bestialité en présence d'un enfant ou incitation de celui-ci Par derogation au paragraphe (1), est coupable soit d'un acte criminal et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, toute personne qui commet un acte de bestialité en présence d'une enfant âgé de moins de quatorze ans ou qui l'incite à en commettre un.