Bill C-84: A Step in the Right Direction by J Lantin

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Bill C-84[1] was introduced by the Liberal government in 2018. Aside from expanding the scope of animal fighting offences, it also sought to finally define bestiality statutorily. As of June 2019, the proposed definition was codified in section 160(7) of the *Criminal Code*.[2] To adequately grasp the impact of Bill C-84, regard must be had to the history of bestiality in Canada.

Evolution of Bestiality Laws in Canada

In 1869, Buggery was codified as an offence in Canada in *An Act Respecting Offences against the Person*.[3] Its definition was adopted from the English offence of buggery and was interpreted to include human-animal relations.[4] In 1892, bestiality was codified into the *Criminal Code*.[5] Its definition was fundamentally equivalent to that of the English definition of buggery. It was not until 1954 that bestiality and buggery were separately named in the *Criminal Code*.[6] Confusion arose and there was debate as to whether the explicit separation of the two meant that Parliament intended for bestiality to have a different definition than buggery.[7] The offence of buggery historically required penetration and the 1954 amendments caused uncertainty as to whether the offence of bestiality also required penetration. This ambiguity continued to pervade after 1988 when amendments to the *Criminal Code* made anal intercourse and bestiality separate offences.[8]

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[1] Bill C-84, *An Act to Amend the Criminal Code (Bestiality and Animal Fighting),* 1st Sess, 42nd Parl, 64-65-66-67-68 Elizabeth II, 2015-2016-2017-2018-2019 (as passed by the House of Commons 21 June 2019) [*Bill C-84*].
[2] *Criminal Code,* RSC 1985, c C-46, s 160(7).
[3] Richard Jochelson & James Gacek, eds., *Sexual Regulation and the Law: A Canadian Perspective* (Bradford: Demeter Press, 2019) at 219 [*Sexual Regulation and the Law*].
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid* at 220.
[8] *Ibid*.

Courts' Interpretation of Bestiality Prior to Bill C-84's Enactment

Section 160 of the *Criminal Code* initially gave rise to three separate offences – (1) bestiality, (2) compelling another person to commit bestiality and (3) committing bestiality in the presence of someone under sixteen or compelling someone under sixteen to commit bestiality.[9] Up until the passing of Bill C-84, the *Criminal Code* did not define bestiality. As such, courts were left to their own devices to determine what constituted prohibited bestial conduct.

In nearly all bestiality cases adjudicated between the 1988 *Criminal Code* amendment and the 2016 *DLW*[10] case, courts required penetration to make out the offence. Penetration here refers exclusively to contact between a penis and anus or a penis and vagina. In *Ruvinsky,* the accused was suspected of digitally penetrating the anus of his male dog and letting his other dog lick his genitals.[11] A veterinarian examined the accused's dogs for sexual abuse and mistreatment, but found no evidence of digital or penal penetration.[12] It was acknowledged that evidence of penetration would be unlikely given the time gap between the witness report and the examination of the dogs.[13] Proof of harm to animals often proved "difficult to establish without the presence of an obvious injury or an expert examination of the animal close in time to the alleged act".[14] Ultimately, Justice Omatsu held that bestiality is exclusively anal or vaginal intercourse with an animal.[15] She came to this conclusion after analyzing the very limited case law on bestiality along with various definitions of the term in dictionaries and *Criminal Code* commentaries.[16] Justice Omatsu opined that it was not her role, but rather the Parliament's responsibility, to expand the definition of bestiality to include genital touching or licking.[17] In *KDH*, bestiality was not analyzed

[9] *Criminal Code, supra* note 3 , s 160.
[10] *R v D.L.W.,* 2016 SCC 2, [2016] 1 SCR 402 [*DLW*].
[11] *R v Ruvinksy,* 1998 ON No 3621 at para 3 [*Ruvinsky*].
[12] *Ibid* at para 15.
[13] *Ibid*.
[14] *Sexual Regulation and the Law, supra* note 3 at 229.
[15] *Ibid* at para 36.
[16] *Ibid*.
[17] *Ibid*.

because the accused pled guilty.[18] In this case, the bestiality charge stemmed from the accused's act of compelling a minor to engage in bestiality. In *DeJaeger*, the bestiality charge stemmed from the accused's act of committing anal intercourse with a dog in the presence of a minor.[19] In other bestiality cases, courts spent minimal time analyzing the elements of the offence. In cases where the bestiality charge was accompanied by other sexual offences, courts seemed reluctant to even discuss the bestiality charge.[20]

In the seminal case of *DLW,* the majority of the Supreme Court ruled that penetration is an essential element of bestiality.[21] In this case, the accused attempted to make the family dog have intercourse with the underaged complainant.[22] When he failed to do so, he spread peanut butter on her vagina and took photographs while the dog licked it off.[23] The majority held that "bestiality has a well-established legal meaning and refers to sexual intercourse between a human and an animal".[24] Looking at the legislative history of the offence and the evolution of bestiality laws in Canada, it is evident that penetration has always been understood to be an essential element of the offence.[25] Absent an express or implied intent to depart from the established legal meaning of a term, courts should not broaden the scope of liability by developing the common law.[26] Such an expansion is within Parliament's exclusive domain.[27] There is no evidence that Parliament intended to depart from the established definition of bestiality and so there must be penetration in order for the offence to be made out.[28] Justice Abella dissented and was of the opinion that the absence of a requirement of penetration does not broaden the scope of liability for bestiality, but rather reflects Parliament's assumption that such a requirement eliminates most sexually exploitative conduct with animals.[29] She suggests that the 1988 amendments to the *Criminal Code*

[18] *R v KDH,* 2012 ABQB 471, [2012] AJ No 816.
[19] *R v DeJaeger,* 2015 NUCJ 2, [2015] NuJ No 6.
[20] See e.g. *R v LMR*, 2010 ABCA 286, [2010] AJ No 1100.
[21] *DLW, supra* note 11 at para 19.
[22] *Ibid* at para 6.
[23] *Ibid.*
[24] *Ibid* at para 19.
[25] *Ibid.*
[26] *Ibid* at para 67.
[27] *Ibid* at para 19.
[28] *Ibid* at para 116.
[29] *Ibid* at para 149.

illustrate that Parliament intended, or at least assumed, that penetration was not a necessary element of the offence.[30]

Bill C-84 Promotes Animal Welfare in the Law

The *DLW* case is significant not only because the majority of the Supreme Court ruled that penetration is an essential element of bestiality, but also because both the majority and dissent agreed that protecting animals is important.[31] The consensus on the importance of animal protection, along with the majority's direction that Parliament can act, set the groundwork for Bill C-84. As previously stated, Bill C-84 was introduced in 2018 and passed in 2019. By eliminating the penetration requirement and broadening the scope of bestiality to "any contact by a person, for a sexual purpose, with an animal"[32], Bill C-84 rightfully addresses the need to protect animals from improper human conduct. With the broader definition in place, cases like *DLW*[33] and *Ruvinsky*[34] would no longer result in acquittals on the bestiality charge. The new definition also effectively acknowledges the wrongfulness of sexual conduct involving the exploitation of non-consenting participants. In the grand scheme of things, this is a small but meaningful step towards legal recognition of animal sentience and the end of society's view of animals as mere property.

[30] *Ibid* at para 127.
[31] *Ibid* at paras 69, 140.
[32] *Bill C-84, supra* note 1.
[33] *DLW, supra* note 11.
[34] *Ruvinsky, supra* note 12.