

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* D.L.W., 2016 SCC 22, [2016] 1 S.C.R. 402  | **Appeal heard:** November 9, 2015**Judgment rendered:** June 9, 2016**Docket:** 36450 |

Between:

**Her Majesty The Queen**

Appellant

and

**D.L.W.**

Respondent

- and -

**Animal Justice**

Intervener

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ.

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| **Reasons for Judgment:**(paras. 1 to 124)**Dissenting Reasons:**(paras. 125 to 153) | Cromwell J. (McLachlin C.J. and Moldaver, Karakatsanis, Côté and Brown JJ. concurring)Abella J. |

R. *v.* D.L.W., 2016 SCC 22, [2016] 1 S.C.R. 402

Her Majesty The Queen Appellant

v.

D.L.W. Respondent

and

Animal Justice Intervener

**Indexed as:** R. ***v.* D.L.**W.

2016 SCC 22

File No.: 36450.

2015: November 9; 2016: June 9.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ.

on appeal from the court of appeal for british columbia

 *Criminal law — Bestiality — Elements of offence — Interpretation — Accused convicted of bestiality — Accused put peanut butter on complainant’s vagina and had dog lick it off while he videotaped — Whether term “bestiality” has well‑understood legal meaning in common law and if so, whether Parliament intended to depart from that meaning when that term was first introduced in English version of Criminal Code — Whether penetration an essential element of offence of bestiality — Criminal Code, R.S.C. 1985, c. C‑46, s. 160.*

 After a 38‑day trial, D.L.W. was convicted of numerous sexual offences against his two stepdaughters committed over the course of 10 years, including a single count of bestiality. D.L.W. first brought the family dog into the bedroom with the older complainant when she was 15 or 16 years old. He attempted to make the dog have intercourse with her and, when that failed, he spread peanut butter on her vagina and took photographs while the dog licked it off. He later asked her to do this again so he could make a video. At trial, D.L.W. was found to have done all of this for a sexual purpose. The trial judge was of the view that bestiality in the *Code* means touching between a person and an animal for a person’s sexual purpose and he concluded that penetration was not required. The trial judge preferred to interpret the elements of bestiality so that they would reflect the current views on what constitutes prohibited sexual acts. A majority of the Court of Appeal allowed D.L.W.’s appeal against the bestiality conviction and acquitted him of the bestiality count. The majority concluded that the term “bestiality” had a common law meaning that included penetration as one of its essential elements. The dissenting judge found that penetration was not an element of bestiality and he would have dismissed the appeal.

 *Held* (Abella J. dissenting): The appeal should be dismissed.

 *Per* McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ.: Since 1955, criminal offences in Canada (apart from criminal contempt) have been entirely statutory. However, the common law continues to play an important role in defining criminal conduct as defining the elements of statutory offences often requires reference to common law concepts. Applying the principles that guide statutory interpretation leads to the conclusion in this case that the term “bestiality” has a well‑established legal meaning and refers to sexual intercourse between a human and an animal. Penetration has always been understood to be an essential element of bestiality. Parliament adopted that term without adding a definition of it and the legislative history and evolution of the relevant provisions show no intent to depart from the well‑understood legal meaning of the term. Moreover, the courts should not, by development of the common law, broaden the scope of liability for the offence of bestiality. Any expansion of criminal liability for this offence is within Parliament’s exclusive domain.

 When Parliament uses a term with a legal meaning, it generally intends the term to be given that meaning. Words that have a well‑understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise. A further consideration is the related principle of stability in the law which means that absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law. Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear. While these interpretive principles are easy to state, how they apply in particular cases may be controversial. Sometimes, the controversy concerns the state of the common law when Parliament acted: in other words, the debate is about whether the term used had a clearly understood legal meaning when it was incorporated into the statute. In this case, the term “bestiality” did have a clear legal meaning when Parliament used that term without further definition in the English version of the 1955 *Criminal Code*. Bestiality meant buggery with an animal and required penetration. It was clear that to secure a conviction, the prosecution had to prove that penetration of an animal, or, in the case of women, penetration by an animal, had occurred. This was the state of the law when the *Offences Against the Person Act, 1861* was enacted in England. The offence in substantially the same form was carried over into the first English version of the Canadian *Criminal Code* in 1892 and continued to be in force until the offence called bestiality was introduced into the English version of the *Code* in the 1955 revisions.

 In Canada, as in England, the early history of the offence shows that what was commonly called “bestiality” was subsumed under the offences named sodomy or buggery and that penetration was one of its essential elements. The English language version of the Canadian statute simply provided that buggery with an animal was an offence, but did not further define it. However, the French version of “buggery . . . with any other living creature” being “*bestialité*” shows that “buggery with an animal” and “bestiality” were the same thing. There can be no serious dispute that the Canadian offence of buggery with an animal/*la bestialité* in the 1892 *Code*, which continued to be in force until the 1955 revisions, had a widely and generally understood meaning: the offence required sexual penetration between a human and an animal. Parliament, by using that term without further definition, intended to adopt that well‑understood legal meaning.

 Parliament did not explicitly or by necessary implication change the well‑understood legal meaning of the term “bestiality” when it amended the *Criminal Code* in 1955 and in 1988. There is no express statutory provision expanding the scope of the bestiality offence and further, there is nothing in the legislative evolution and history that supports any parliamentary intent to bring about such a change by implication. The required clarity and certainty are entirely lacking. Courts will only conclude that a new crime has been created if the words used to do so are certain and definitive. This approach not only reflects the appropriate respective roles of Parliament and the courts, but the fundamental requirement of the criminal law that people must know what constitutes punishable conduct and what does not, especially when their liberty is at stake. The important questions of penal and social policy involved in broadening the offence of bestiality are matters for Parliament to consider, if it so chooses. Parliament may wish to consider whether the present provisions adequately protect children and animals. But it is for Parliament, not the courts, to expand the scope of criminal liability for this offence. Absent clear parliamentary intent to depart from the clear legal definition of the elements of the offence, it is manifestly not the role of the courts to expand that definition.

 The English version of the *Criminal Code* did not use the term “bestiality” until 1955, but the French version did. In the 1955 revision, the word “bestiality” was first introduced into the English version of the *Code* and the reference to “buggery . . . with any other living creature” was deleted, but with no definition of either the term “buggery” or “bestiality”. The text of the 1955 revision does not suggest that any significant change in the law was intended. This appears to be simply the substitution of a more precise legal term in the English version for the previous more general expression. The absence of a statutory definition of either term is consistent only with the intent to adopt the accepted legal meanings of both terms. Here, there is no evidence that any substantive change was intended. The fact that no substantive change occurred in the French version of the offence leads almost inevitably to the conclusion that the change in terminology in the English version was simply intended to give the offence a clearer, more modern wording which would be more consistent with its French equivalent. There is nothing in this tweak to the English version of the *Code* to support the view that any substantive change to the elements of the offence was intended. The text, read in both of its official versions, the legislative history and evolution, all of the commentators and the applicable principles of statutory interpretation support the view that the 1955 revisions to the *Code* did not expand the elements of bestiality and that penetration between a human and an animal was the essence of the offence.

 A complete overhaul of sexual offences against the person in 1983 was followed by the 1988 revisions which were focused on enhancing the protection of children against sexual abuse. In 1988, among other things, the new legislation repealed the former buggery offence and replaced it with the new offence of anal intercourse and bestiality was given its own section. Through all of the many changes, changes which included fundamental revisions of the definition of several sexual offences and the repeal of others, the *Code* continued to make bestiality an offence without further defining it. The fact that Parliament made no change to the definition of bestiality in the midst of a comprehensive revision of the sexual offences supports only the conclusion that it intended to retain its well‑understood legal meaning. It defies logic to think that Parliament would rename, redefine and create new sexual offences in a virtually complete overhaul of the sexual offence 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 revision, while not changing the definition of the underlying offence, added protections for children in relation to that offence.

 Finally, contrary to the dissent’s view, it does not follow that all sexually exploitative acts with animals that do not involve penetration are perfectly legal. There are other provisions in the *Code* which may serve to protect children and others from sexual activity with an animal that does not necessarily involve penetration.

 *Per* Abella J. (dissenting): The common law origins of the offence of “buggery with mankind or with any animal” were ecclesiastical and emerged from the Church’s hegemonic jurisdiction over sexual offences and its abhorrence for non‑procreative sexual acts, which were condemned as being “unnatural”. The Church’s jurisdiction over sexual offences ended in 1533, but censorious attitudes did not, and death remained the penalty for “the detestable offence of buggery”. The question whether these acts were criminal only when there was penetration is, however, far from clear.

 At no time was “buggery” ever defined by Parliament. Applying the principles of interpretation requires reviewing related *Criminal* *Code* provisions and the context in which the bestiality provision was first introduced. In 1955, for the first time, the offence of “bestiality” was expressly named as such in the English version of the *Code*. It too was never defined. The addition of the offence of “bestiality” must have been intended to mean something different from “buggery” because if the elements of bestiality and buggery were the same, the addition of “bestiality” to the 1955 *Code* was redundant and there was no need to change the provision from one prohibiting buggery, to one prohibiting buggery *and* bestiality.

 Amendments in 1955 were also made to the *Code*’s animal cruelty offence to reflect an increased recognition of the importance of protecting animal welfare by expanding the category of birds and animals from only some, to all of them. It is in this transformed legal environment consisting of more protection for more animals, that the offence of “bestiality” first appeared. Whatever the common law meaning of “buggery” with animals had been, the creation of a distinct offence of bestiality in the same year that the animal cruelty provisions were expanded to protect more animals from exploitative conduct, reflected Parliament’s intention to approach the offence differently. Parliament’s purposes would have been inconsistent if the animal cruelty protection in the *Criminal Code* would now cover *all* birds and animals, but the bestiality provision would be limited to those animals whose anatomy permitted penetration. Requiring penetration for the offence of bestiality, technically leaves as legal all sexually exploitative acts with animals that do *not* involve penetration. This, in turn, completely undermines the concurrent legislative protections for animals from cruelty and abuse.

 If there was any doubt about what Parliament intended in 1955, its intention is even clearer in light of the 1988 Amendments to the *Code*, when buggery and bestiality were divided into two separate provisions. The offence of “bestiality” was extended to include those who compelled its commission or who committed it in the presence of a child. It is difficult to accept that Parliament’s intention was to protect children from seeing or being made to engage in sexual activity with animals *only* if it involved penetration. Parliament must have intended protection for children from witnessing or being forced to participate in *any* sexual activity with animals. This wider protection for children can also be inferred from the other changes to the *Code* in the 1988 Amendments, introducing the offences of sexual interference, sexual exploitation, and invitation to sexual touching, all of which protected minors and none of which required penetration. As a result, by 1988, the language, history, and evolving social landscape of the bestiality provision lead to the conclusion that Parliament intended, or at the very least assumed, that penetration was not a necessary element of the offence.

 The absence of a requirement of penetration does not broaden the scope of bestiality. It is more a reflection of Parliament’s common sense assumption that since penetration is physically impossible with most animals and for half the population, requiring it as an element of the offence eliminates from censure most sexually exploitative conduct with animals. Acts with animals that have a sexual purpose are inherently exploitative whether or not penetration occurs, and the prevention of sexual exploitation is what the 1988 Amendments were all about.

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By Cromwell J.

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By Abella J. (dissenting)

 *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *Henry v. Henry*, [1953] O.J. No. 347 (QL); *R. v. Wishart* (1954), 110 C.C.C. 129; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *Reece v. Edmonton (City)*, 2011 ABCA 238, 513 A.R. 199; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Kelly*, [1992] 2 S.C.R. 170; *Attorney General of Quebec v. Carrières Ste‑Thérèse Ltée*, [1985] 1 S.C.R. 831; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. K.D.H.*, 2012 ABQB 471, 546 A.R. 248; *R. v. J.J.B.B.*, 2007 BCPC 426; *R. v. Black*, 2007 SKPC 46, 296 Sask. R. 289.

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 APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J. and Lowry and Goepel JJ.A.), 2015 BCCA 169, 371 B.C.A.C. 51, 636 W.A.C. 51, 325 C.C.C. (3d) 73, 20 C.R. (7th) 413, [2015] B.C.J. No. 773 (QL), 2015 CarswellBC 1025 (WL Can.), setting aside the conviction for bestiality entered by Romilly J., 2013 BCSC 1327, [2013] B.C.J. No. 1620 (QL), 2013 CarswellBC 2238 (WL Can.). Appeal dismissed, Abella J. dissenting.

 Mark K. Levitz, Q.C., and Laura Drake, for the appellant.

 Eric Purtzki and Garth Barriere, for the respondent.

 Peter Sankoff and Camille Labchuk, for the intervener.

 The judgment of McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

 Cromwell J. —

1. Introduction
2. Sixty years ago, Parliament added an offence called bestiality to the English version of the *Criminal Code*, S.C. 1953-54, c. 51, s. 147 (the “1955 revisions”), but did not define its elements. Through successive ― and substantial ― amendments to the sexual offence provisions of the *Code*, Parliament has retained the offence of bestiality to the present day, but has never defined it. The crime is in fact a very old one which, at various times in its history, has also been referred to as a type of sodomy or buggery. But by whatever name it has been known in its long history, sexual penetration has always been one of its essential elements. Whether that is still the case under our present *Code* is the question that divided the British Columbia courts and now comes to us on appeal.
3. The appellant Crown argues that bestiality no longer requires penetration, and is committed by engaging in any sexual activity with an animal. This submission asks us, in effect, to create a new crime. But that is not our role.
4. In Canada, there can be no liability for common law crimes apart from criminal contempt of court: *Criminal Code*, R.S.C. 1985, c. C-46, s. 9. As a result, changes to the scope of criminal liability must be made by Parliament; judges are not to change the elements of crimes in ways that seem to them to better suit the circumstances of a particular case: D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989), at pp. 124 and 148. To accept the Crown’s invitation to expand the scope of the crime of bestiality would be to turn back the clock and re-enter the period before codification of our criminal law, a period when the courts rather than Parliament could change the elements of criminal offences. My colleague Justice Abella is of the view that accepting the Crown’s position on this appeal would not widen the scope of bestiality. But of course it would. That is the point of the Crown’s position. If the Crown’s proposed changes to the elements of bestiality are to be made, they must be made by Parliament.
5. Like the majority of the Court of Appeal, I conclude that penetration remains, as it has always been, an essential element of the offence of bestiality. I would dismiss the appeal.
6. Outline of the Facts and Judicial History
7. This appeal relates solely to the respondent D.L.W.’s conviction for a single count of bestiality. That conviction was entered after a 38-day trial, at which the respondent was also convicted of numerous other sexual offences against his two stepdaughters committed over the course of 10 years: 2013 BCSC 1327. Both victims testified that the respondent began sexually fondling them by the age of 12 and, by the time they turned 14, he was forcing them to engage in oral sex and sexual intercourse and encouraging them to perform sex acts with each other. He was sentenced to a total of 16 years’ imprisonment. For the bestiality conviction in relation to the older complainant, he received a sentence of two years to run consecutively to sentences totalling 14 years imposed in relation to the other offences: 2014 BCSC 43.
8. The trial judge, Romilly J., found that the respondent first brought the family dog into the bedroom with the complainant when she was 15 or 16 years old. He attempted to make the dog have intercourse with her and, when that failed, he spread peanut butter on her vagina and took photographs while the dog licked it off. He later asked her to do this again so he could make a video. The judge found that the respondent did all of this for a sexual purpose: 2013 BCSC 1327, at paras. 317-18 (CanLII).
9. Bestiality is not defined in the *Criminal Code*, R.S.C. 1985, c. C-46, which provides simply:

160 **(1)** 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.

The issue at trial and both levels of appeal concerns whether penetration is an essential element of the offence. If it is, the respondent must be acquitted as the alleged acts did not involve sexual penetration.

1. The trial judge accepted the Crown’s position that penetration is not required. In his view, bestiality in the *Code* means touching between a person and an animal for a person’s sexual purpose. Relying on *R. v. M.G.*, 2002 CanLII 45200 (C.Q.), the judge rejected the notion that the elements of bestiality were “frozen in time”, preferring instead to interpret the elements of bestiality so that they would “reflect current views on what constitutes prohibited sexual acts”: paras. 314-15. He held that the respondent was a party to this offence because he facilitated the complainant’s participation in bestiality by encouraging her to do so and by using the peanut butter: para. 320. The judge also concluded that the Crown had failed to prove that the respondent had compelled the complainant to commit the offence: para. 326. In other words, the trial judge in effect held that the complainant was the principal (but uncharged) offender and the respondent was a party to the offence which the complainant had committed. The Crown refers to this conclusion as “questionable” but it is relevant to the legal issue we face in this appeal to consider that the Crown’s position, if accepted, could have the effect of turning the victim into an offender.
2. A majority of the Court of Appeal (Goepel J.A. writing for himself and Lowry J.A.) allowed the respondent’s appeal against the bestiality conviction and acquitted the respondent of the bestiality count: 2015 BCCA 169, 371 B.C.A.C. 51. The majority concluded that the term “bestiality” had a common law meaning that included penetration as one of its essential elements. The legislative history of the offence in Canada, the majority decided, did not show any parliamentary intent to depart from that meaning. Bauman C.J.B.C., dissenting, would have dismissed the appeal. He found that penetration was not an element of bestiality under the Canadian offence brought into force in 1955. The Crown appeals to this Court as of right by virtue of that dissent.
3. The only issue is whether the majority of the Court of Appeal was wrong to conclude that penetration is an essential element of the offence of bestiality in s. 160(1) of the *Code*.
4. Analysis
	1. The Parties’ Positions
5. The Crown’s position is, first, that the term “bestiality” does not have a well-established and well-understood meaning in common law. In the early days of Canada’s *Criminal Code*, sexual activity with an animal was criminalized, in the English version, as buggery, an offence which, in the Crown’s submission, related only to anal intercourse, whether between humans or between a human and an animal. Next, the Crown submits that when the term “bestiality” was first used in the English version of the *Code* in the 1955 revisions, Parliament intended to separate it from the common law conception of buggery and give it its own meaning. Further, the argument goes that additional amendments to the *Code* effective in 1988 show that Parliament must have assumed that the term “bestiality” encompassed sexual activity of any kind between a human and an animal.
6. The respondent, on the other hand, submits that when the term “bestiality” was introduced into the English version of the *Code* in 1955, that term had a specific, well-established and well-known legal meaning: vaginal or anal penetration between a human and an animal. Parliament, when it employed the term without further definition, must have intended its normal legal sense. None of the amendments on which the Crown relies affected the definition of the elements of the offence; Parliament simply continued to use the term without statutory definition.
	1. The Analytical Approach
7. The debate in this Court concerns whether the term “bestiality” has a well-understood legal meaning in the common law and, if so, whether Parliament intended to depart from that meaning when it used the word without further definition in the English version of the *Code*. At the root of the issue, therefore, is the question of how the common law and the statutory offences in the *Code* interact. This is an important question of principle that has implications far beyond this particular offence.
8. The common law “forms an important and complex part of the context in which legislation is enacted and operates and in which it must be interpreted”: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §17.1. Nowhere in our law is this observation more apt than in relation to our *Code*.
9. As I mentioned at the outset, criminal offences in Canada since 1955 have been entirely statutory (with the exception of criminal contempt). However, the common law continues to play an important role in defining criminal conduct. Defining the elements of statutory offences often requires reference to common law concepts: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 930. Those concepts continue not only to illuminate the definition of statutory offences but also to give “content to the various principles of criminal responsibility those definitions draw from”: *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 736. Many of the “basic premises” of the criminal law ― the necessary conditions for criminal liability ― are left to the common law: Law Reform Commission of Canada, Report 31, *Report on Recodifying Criminal Law* (1987), at p. 17.
10. To take one obvious example, the mental element of many crimes is not specified in the *Code*.Yet, absent a contrary indication, Parliament is presumed to intend that true crimes have a subjective fault component. This is presumed because Parliament is taken to know that under the common law the act is not guilty unless the mind is guilty (*actus non facit reum nisi mens sit rea*): see, e.g., *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at paras. 20-23. Of course, Parliament can provide otherwise, but where it does not, the common law principle is applied.
11. The question of how the common law interacts with statutory criminal law is not a new one. It is addressed, for example, by several pages of Sir James Fitzjames Stephen’s *A History of the Criminal Law of England* (1883), vol. II, at pp. 187-92. He concluded that there are four main ways in which criminal statutes may relate to the common law. The statute law may simply assume the continuing existence of some general principles and definitions of certain crimes. The statutes, in some instances, provide that some of those offences, aggravated or modified in particular ways, are subject to special punishments. In other instances, the statutes create offences unknown to the common law and, in a few cases, alter the principles and clarify the definitions of the common law. Determining which of these sorts of interactions applies in a particular offence is a matter of statutory interpretation.
12. A number of principles guide statutory interpretation in this sort of case. The three most important are these. First, when Parliament uses a legal term with a well-understood legal meaning, it is presumed that Parliament intended to incorporate that legal meaning into the statute. Second, any departure from that legal meaning must be clear, either by express language or necessary implication from the statute. Finally, apart from criminal contempt, there can be no liability for common law crimes. Creating and defining crimes is for Parliament; the courts must not expand the scope of criminal liability beyond that established by Parliament.
13. As I will explain, applying these principles leads me to the following conclusions. The term “bestiality” has a well-established legal meaning and refers to sexual intercourse between a human and an animal. Penetration has always been understood to be an essential element of bestiality. Parliament adopted that term without adding a definition of it and the legislative history and evolution of the relevant provisions show no intent to depart from the well-understood legal meaning of the term. Moreover, the courts should not, by development of the common law, broaden the scope of liability for this offence, as the trial judge did. Any expansion of criminal liability for this offence is within Parliament’s exclusive domain. In short, this case falls within Stephen’s first category: our *Code* assumes the continuing existence of the common law definition of this crime.
	1. The Accepted Legal Meaning of “Bestiality”
		1. Parliament Intends the Legal Meaning of Legal Terms
14. When Parliament uses a term with a legal meaning, it intends the term to be given that meaning. Words that have a well-understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise. This principle has been applied in a number of cases such as *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915, at paras. 29-30; *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 S.C.R. 315, at para. 9; *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217, at paras. 8-23 and 48-49. Most recently in *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, the Court noted that “Parliament is presumed to know the legal context in which it legislates” and that it is “inconceivable” that Parliament would intend to disturb well-settled law without “explicit language” or by “relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*”: paras. 55-56.
15. There is also the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law: see, generally, Sullivan, at §17.5; P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at paras. 1793 ff. This principle, if applied too strictly, may lead to refusal to give effect to intended legislative change. But it nonetheless reflects the common sense idea that Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear: *Walker v. The King*, [1939] S.C.R. 214, at p. 219; *Nadeau v. Gareau*, [1967] S.C.R. 209, at p. 218; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at p. 764. This principle is reflected in ss. 45(2) and 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provide that the amendment of an enactment does not imply any change in the law and that the repeal of an enactment does not make any statement about the previous state of the law.
16. While these interpretative principles are easy to state, how they apply in particular cases may be controversial. Sometimes, the controversy concerns the state of the common law when Parliament acted: in other words, the debate is about whether the term used had a clearly understood legal meaning when it was incorporated into the statute. For example, that was the source of the disagreement between the majority and minority in *A.Y.S.A.* More often, though, the difficult issue is whether Parliament has indicated an intention to depart from the accepted legal meaning.
17. Both of these types of dispute arise in this case, and so I turn to the first question: Did the term “bestiality” have a clear legal meaning when Parliament used that term without further definition in the English version of the 1955 *Code*?
	* 1. Bestiality Meant Buggery With an Animal and Required Penetration
			1. Introduction
18. The ancient offence of sexual intercourse with an animal was, at various times, referred to as a type of sodomy, a type of buggery and as bestiality. As we shall see, whatever it was called, the offence required penetration.
19. The first Canadian offence of buggery with an animal was taken almost word for word from the English *Offences against the Person Act, 1861*,24 & 25 Vict., c. 100 (“*1861 Act*”), s. 61. The offence in substantially that form was carried over into the first English version of the Canadian *Criminal Code, 1892*, S.C. 1892, c. 29 (“*1892 Code*”), and continued to be in force until the offence called bestiality was introduced into the English version of the *Code* in the 1955 revisions: s. 147. It follows that our starting place in developing an understanding of the Canadian law is the English law from which it derived.
	* + 1. English Offence
20. Although bestiality was often subsumed in terms such as sodomy or buggery, penetration was the essence ― “the defining act” ― of the offence. It was clear that to secure a conviction, the prosecution had to prove that “penetration of an animal, or, in the case of women, penetration by an animal, had occurred”: C. Thomas, “‘Not Having God Before his Eyes’: Bestiality in Early Modern England” (2011), 26 *The Seventeenth Century* 149, at p. 153. This was true from at least the mid-16th century: Thomas,at p. 154; see also A. F. Niemoeller, *Bestiality and the Law: A Resume of the Law and Punishments for Bestiality with Typical Cases from Fifteenth Century to the Present* (1946); and H. Miletski, “A history of bestiality”, in A. M. Beetz and A. L. Podberscek, eds., *Bestiality and Zoophilia: Sexual Relations with Animals* (2005), 1.
21. Originally under the authority of the Church Courts, “buggery comyttid with mankynde or beaste” became a felony in 1533: *An Acte for the punysshement of the vice of Buggerie* (Eng.), 25 Hen. 8, c. 6. It was typically men who were prosecuted for the crime because it was necessary to prove penetration to establish the commission of the offence. Women were therefore “unlikely offenders”: Thomas,at p. 158. There were nevertheless some prosecutions of women for the offence and men were prosecuted for penetrating both male and female animals: Thomas,at p. 158. Edward Coke described buggery as including carnal knowledge (i.e. penetration) between a man or a woman and an animal: *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1797, first published 1644), at p. 59.
22. The statute from Henry’s time was repealed in 1553 but reinstated in 1562 and remained in that form until it was confirmed in 1828: *An Act for consolidating and amending the Statutes in England relative to Offences against the Person* (U.K.), 9 Geo. 4, c. 31 (the “1828 statute”). That statute of 1828 clarified that “actual Emission of Seed” was not an essential element of the offence, and further that “carnal Knowledge” would be “deemed complete upon Proof of Penetration only”: s. 18; see G. Parker, “Is A Duck An Animal? An Exploration of Bestiality as a Crime”, in L. A. Knafla, ed., *Crime, Police and the Courts in British History* (1990), 285, at pp. 292-93.
23. All of the other old sources that I have reviewed confirm that penetration was an essential element of the offence and that buggery with an animal was not restricted to anal intercourse: see, e.g., M. Hale, *Pleas of the Crown: A Methodical Summary* (1678), at p. 117; M. Hale, *Historia Placitorum Coronae* (1736), vol. I, at p. 669; E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. I, at p. 480. (I pause to note that, contrary to Justice Abella’s understanding, there was no uncertainty about whether penetration was required. Neither the Crown nor the dissenting judge in the Court of Appeal thought that there was any lack of clarity about the fact that penetration was required before the 1955 revisions.)
24. This was the state of the law when the English *1861 Act* was enacted. Under the title “Unnatural Offences” and with the marginal note “Sodomy and Bestiality”, the *1861 Act* provided:

 **61.** Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.

The *1861* *Act* in s. 63 also continued the 1828 clarifications that emission of seed was not required but that penetration was.

1. The fifth edition of *Russell on Crime* deals with the s. 61 offence under the heading “sodomy”, making it clear that that term included buggery “with any animal”: W. O. Russell, *A Treatise on Crimes and Misdemeanors* (5th ed. 1877), at p. 879. The author goes on to state that the s. 61 offence “consists in a carnal knowledge committed against the order of nature [i.e. *per anum*] by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast”: *ibid*. (emphasis added). “[C]arnal knowledge” meant penetration: *ibid*., at pp. 879-80. That penetration was required was made explicit in the English 1878 Draft Code: s. 101(*a*). This is also the case in the Draft Code appended to the *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879) (the “1879 Draft Code”), s. 144 (Appendix, at p. 95). That Draft Code tracked the language of the *1861 Act* by providing that “[e]very one shall be guilty of an indictable offence . . . who commits buggery either with a human being or with any other living creature”: *ibid*. The provision went on to specify that the offence was complete upon penetration. In their commentary on the 1879 Draft Code, the Commissioners did not note any change from the previous law with respect to the elements of the offence: pp. 21-22.
2. The requirement for penetration is reflected in Sir James Fitzjames Stephen’s *A Digest of the Criminal Law* *(Crimes and Punishments)* (1878), art. 168, at p. 115. (Remember that since the 1828 statute, it had been clear that the “actual Emission of Seed” was not required and that “carnal Knowledge” would be “deemed complete upon Proof of Penetration only”: s. 18.)
3. The old case law is not abundant, but what there is supports the view that penetration was an essential element of the offence. In *R. v. Cozins* (1834), 6 Car. & P. 351, 172 E.R. 1272, a case of bestiality with a ewe, Park J. directed the jury that if there was penetration, even though there had been no emission, the offence was complete.
4. This understanding of the offence continued in England for many years. Later commentators are almost uniformly of the view that buggery with an animal required penetration. I have already referred to *Russell on Crime*. In 1957, in *Sexual Offences: A Report of the Cambridge Department of Criminal Science*,at p. 345, the director of the department, Leon Radzinowicz, commented on s. 12(1) of the *Sexual Offences Act, 1956* (U.K.), 4 & 5 Eliz. 2, c. 69, which made it a felony for a person to commit buggery with another person or with an animal. This section is virtually identical to the version of the offence found in the *1861 Act* and therefore to the English version of the Canadian offence up until 1955. The report explains that

[t]he crime consists of carnal knowledge, or sexual intercourse, by man with man *per anum*, man with woman *per anum*, or man or woman with beast in any manner. The word ‘sodomy’ is frequently used to indicate the offence when committed with mankind, and ‘bestiality’ when committed with an animal. [p. 345]

1. The 1965 edition of the English criminal law treatise by J. C. Smith and B. Hogan described the elements of buggery at common law as an “intercourse *per anum* by a man with a man or woman; or intercourse *per anum* or *per vaginam* by a man or a woman with an animal”: *Criminal Law* (1965), at p. 321 (footnotes omitted).
2. The later case law is also consistent with this view. In *R. v. Bourne* (1952), 36 Cr. App. R. 125, in upholding convictions of a husband for aiding and abetting his wife to commit buggery with a dog, Lord Chief Justice Goddard stated that “if a woman has connection with a dog, or allows a dog to have connection with her, that is the full offence of buggery”: p. 128. The court noted that the offence was “commonly called bestiality”: p. 127.
	* + 1. Canadian Offence
3. In Canada, as in England, the early history of the offence shows that what was commonly called “bestiality” was subsumed under the offences named sodomy or buggery and that penetration was one of its essential elements.
4. The English *1861 Act* was adopted, almost word for word, by the first English version of the Canadian codification of the offence in 1869: *An Act respecting Offences against the Person*, S.C. 1869, c. 20, s. 63. With the marginal note “[s]odomy and bestiality”, the following offence appears:

 **63.** Whosoever is convicted of the abominable crime of buggery committed either with mankind or with any animal, shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years.

1. The French version of this provision, with the marginal note “*[s]odomie*” reads as follows:

 **63.** Quiconque est convaincu du crime abominable de sodomie, commis soit avec un être humain, soit avec un animal, sera passible de l’incarcération dans le pénitencier pour la vie, ou pour un terme de pas moins de deux ans.

1. In 1874, Henri Elzéar Taschereau (later a judge of this Court) published *The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict. for the Dominion of Canada, with Notes, Commentaries, Precedents of Indictments, &c*. He confirms that the offence of sodomy or buggery with an animal is committed by carnal knowledge by mankind or by womankind with “brute beast” and that “[a]s in the case of rape, penetration alone is sufficient to constitute the offence”: pp. 344-45. He also provides a model indictment for both buggery by a human and for buggery with an animal, referring to the latter as bestiality: p. 345.
2. The 1869 provision, with minor amendments in 1886, was incorporated into the first Canadian *Criminal Code* in 1892: *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157, s. 1; *1892 Code*, s. 174. This version of the offence remained in force until the 1955 revisions: *Criminal Code*, R.S.C. 1906, c. 146, s. 202; *Criminal Code*, R.S.C. 1927, c. 36, s. 202. It is worth noting that while the English version continued to refer to “buggery . . . with any other living creature”, the French version used the word “*bestialité*” to express this part of the English version of the offence. The word “*bestialité*” has been used consistently since the 1886 Act and in all French versions of the *Code* since 1892. The English version read:

 **174.** 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.

1. The French version was as follows:

 **174.** Est coupable d’un acte criminel et passible d’emprisonnement à perpétuité, celui qui commet la sodomie ou la bestialité.

1. As in England, the English language version of the Canadian statutes simply provided that buggery with an animal (i.e. “any other living creature”) was an offence, but did not further define it. However, the French version equivalent of “buggery . . . with any other living creature” being “*bestialité*” shows that buggery with an animal and bestiality were the same thing. Thus, the use of these legal words without statutory definition puts this provision into Stephen’s first category of how the statute and the common law interact: the statute assumes “in the reader a previous knowledge . . . of the common law definitions of certain crimes which the Act punishes but does not define”: J. F. Stephen, *A General View of the Criminal Law of England* (2nd ed. 1890), at p. 109; see also Stephen, *A History of the Criminal Law of England*,at pp.188-91. Professor Sullivan refers to this legislative technique as “incorporation”: a legal term (in this case, buggery with an animal/*la* *bestialité*) is incorporated into the legislation with the legislative intent that it will continue to bear its common law meaning (§17.1).
2. Sources just before and contemporaneous with the *1892* *Code* confirm that this offence required penetration.
3. Before the *1892* *Code*, George Wheelock Burbidge defines the crime of sodomy, in part, as consisting of carnal knowledge (i.e. sexual penetration) of any animal: *A Digest of the Criminal Law of Canada (Crimes and Punishments)* (1890), at p. 161 (art. 213). After the *Code*, H. E. Taschereau’s 1893 annotated *Criminal Code* (i.e., commentaries, annotations and precedents on the *1892* *Code*) states in relation to the buggery with an animal offence found in s. 174 that “[a]s in the case of rape, penetration alone is sufficient to constitute the offence”: *The Criminal Code of the Dominion of Canada as amended in 1893, with Commentaries, Annotations, Precedents of Indictments, &c.* (1893), at p. 117.
4. The pre-1955 case of *Henry v. Henry*, [1953] O.J. No. 347 (QL) (C.A.), is also consistent with the view that penetration was required. The court said that “there was penetration to some extent, and even if the penetration was to a very slight degree, the offence of bestiality would be thereby committed”: para. 2. In *R. v. Wishart* (1954), 110 C.C.C. 129 (B.C.C.A.), the court relied on the English decision of *Bourne*, which I have referred to earlier and which stated that penetration was required.
5. In my view, there can be no serious dispute that the Canadian offence of buggery with an animal/*la bestialité* in the *1892* *Code*, which continued to be in force until the 1955 revisions, had a widely and generally understood meaning: the offence required sexual penetration between a human and an animal. It is also clear, in my view, that the term “bestiality” was understood to mean sodomy or buggery with an animal.
6. The Crown made much of the paucity of case law authoritatively settling the elements of the offence. But respectfully that is beside the point. The question is not whether there was binding authority from the House of Lords or the Judicial Committee of the Privy Council setting out the elements of the offence. The question is whether the offence of buggery with an animal had a well-understood legal meaning when it was used by Parliament without further definition in the *1892* *Code*. The contemporary sources make it overwhelmingly clear that it did. Any lawyer who was asked in 1892 whether the offence of buggery with an animal required penetration would have replied in the affirmative. Parliament, by using that term without further definition, intended to adopt that well-understood legal meaning.
7. The Crown also noted that there may be some room for debate about whether buggery with an animal/*la bestialité* was limited to cases of anal penetration, as discussed by Bauman C.J.B.C. in his dissenting reasons. That view is supported by at least one legal dictionary, P. G. Osborn, *A Concise Law Dictionary* (4th ed. 1954), at p. 61, “buggery”, and by *Kenny’s Outlines of Criminal Law* (19th ed. 1966), at p. 205. However, as I have reviewed earlier, all other commentators, including Stephen himself, the Court of Criminal Appeal in *Bourne* and detailed studies of prosecutions in England from the mid-1500s to the late 1800s support the view that buggery with an animal required penetration, be it vaginal or anal. In any case, the Crown’s position is somewhat beside the point we have to decide here. On any view of the law, the 1892 Canadian offence required penetration of some kind. There is no support ― none ― for the view that penetration of some kind was not required.
	* + 1. Conclusion on the First Question
8. We can conclude that, at least until 1955, the offence of buggery with animals/*la bestialité* continued to have the same elements that it had in the English *1861 Act*, a provision carried forward in virtually identical terms in the Canadian Act of 1869 and into our first *Code* in 1892. Thus, penetration continued to be an element of the offence. We may also conclude that the term “bestiality” was understood to mean buggery with an animal.
9. That brings us to the next step in the analysis, which is to determine whether Parliament explicitly or by necessary implication changed this well-understood legal meaning.
	* 1. There Is No Express or Implied Legislative Intent to Depart From the Legal Meaning of the Term “Bestiality”
			1. The Crown’s Position: The Elements of the Offence Changed in 1955 and This Change Was Confirmed by Amendments in 1988
10. The Crown points to two legislative changes which it submits show a clear intention to expand the offence of sexual intercourse between a human and an animal to an offence proscribing all human-animal sexual activity. The first occurred in 1955 and the intention to make this change was confirmed by amendments in 1988. However, as I see it, the legislative history, on which the Crown relies, in fact supports the respondent’s position that bestiality continued to require penetration as one of its elements.
11. To explain why I have reached this conclusion, I will first turn to the applicable principles of statutory interpretation and then look at the two amendments in more detail.
	* + 1. Principles of Interpretation
				1. Clear Language Is Required to Change the Law, Particularly Where the Change Takes Away Liberty
12. As Professor Sullivan says, “The stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes”: §15.50. Stability and certainty are particularly important values in the criminal law and significant changes to it must be clearly intended. As the Court put it in *T. (V.)*, “it is open to Parliament to change the law in whatever way it sees fit, [but] the legislation in which it chooses to make these alterations known must be drafted in such a way that its intention is in no way in doubt”: p. 764 (emphasis added).
13. A related principle is that enactments which take away the liberty of the subject should be clear and any ambiguity resolved in favour of the subject. “It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. . . . If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication”: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115.
14. There is no express statutory provision expanding the scope of the bestiality offence as the Crown asks us to do. And, as we shall see, there is nothing in the legislative evolution and history that supports any parliamentary intent to bring about such a change by implication. The required “clarity and certainty” are entirely lacking.
	* + - 1. Parliament, Not the Judiciary, May Expand Criminal Liability
15. Parliament, not the judiciary, may expand the scope of criminal liability. As Cartwright J. (as he then was) said in *Frey v. Fedoruk*, [1950] S.C.R. 517:

. . . if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts. [p. 530]

1. This was not a new idea when Cartwright J. wrote these words in 1950. The principle was reflected in the English 1879 Draft Code. Its s. 5 provided that there would be no prosecutions for crimes at common law. The Commissioners noted that the purpose and effect of this provision would be to put an end to the power of judges to create new common law crimes. They added that even if the Draft Code and other statutes overlooked some common law offences, they thought “better to incur the risk of giving a temporary immunity to the offender than to leave any one liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament”: p. 10. The same thinking was explicitly adopted in the 1955 revisions of our *Code*. It provided (in what was then s. 8; now s. 9) that “no person shall be convicted . . . of an offence at common law”, subject to the power of judges to punish for contempt of court. The *Report of Royal Commission on the Revision of Criminal Code* (1954) had proposed a similar provision, observing that all of the offences which should be adopted from the common law were incorporated into the 1878 Draft Code: p. 6.
2. In accordance with this principle, the courts have refrained from developing the common law meanings of legal terms used in the *Code* so as to extend the scope of criminal liability. Courts will only conclude that a new crime has been created if the words used to do so are certain and definitive: *Marcotte*, at p. 115; *R. v. McLaughlin*, [1980] 2 S.C.R. 331, at p. 335; and *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 38-39. This approach not only reflects the appropriate respective roles of Parliament and the courts, but the fundamental requirement of the criminal law that people must know what constitutes punishable conduct and what does not, especially when their liberty is at stake: see, e.g., *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14. As McLachlin J. (as she then was) cautioned:

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, at para. 34)

1. *R. v. McDonnell*, [1997] 1 S.C.R. 948, is an example of this principle at work. The question was whether an appellate court had erred on a sentence appeal by overturning the sentence imposed at first instance in part on the basis of a judicially created category of offences to which were attached starting point sentences. The majority of this Court found that the appellate court had erred. In reaching that conclusion, the Court relied on the principle that it is not for judges to create criminal offences: by creating a category of offence within a statutory offence for the purposes of sentencing, the appellate court had “effectively created an offence” contrary to the spirit if not the letter of that principle (para. 33).
2. The same underlying principle is at work in *Perka v. The Queen*, [1984] 2 S.C.R. 232. The Court had to determine whether the definition of the scientific term “*Cannabis sativa* L.” should refer to its meaning at the time the statute was passed or at the time the infraction was committed. The Court adopted the former approach. The Court noted that not all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted and words in constitutional documents must be capable of growth and development to meet changing circumstances. However, that interpretative approach is most often taken when the statutory language is broad or open-textured. But where Parliament has used “specific scientific or technical” terms, it would “do violence to Parliament’s intent to give a new meaning to that term”: p. 265.
3. I will refer finally to *Gralewicz v. The Queen*, [1980] 2 S.C.R. 493. One of the issues in the case was what constitutes an “unlawful purpose” as an element of the offence of conspiracy to effect an unlawful purpose. The majority of the Court held that to be an unlawful purpose in this context, the purpose must be prohibited by federal or provincial legislation: p. 509. The majority found no clear basis in Canadian law to support the view that the offence extended to other sorts of unlawful purposes. The Court relied on the principle that it is not open to the courts to create new offences or to widen existing offences as to make punishable conduct of a type not previously subject to punishment: p. 508. Chouinard J. for the majority put it this way:

 It is difficult for me to see how the mere enactment of conspiracy as a statutory offence would have the effect of extending its scope beyond what it had been held to extend to at common law by the Canadian courts prior to its becoming a statutory offence while at the same time Parliament enacted s. 8 [now s. 9] to exclude common law offences from the ambit of the criminal law of Canada. [p. 509]

1. These kinds of cases must be distinguished from ones in which Parliament had enacted statutory definitions and the question was how much, if at all, the common law should supplement them. No such question arises here. For example, in *Jobidon* and *Cuerrier*, Parliament had legislated quite extensively in relation to the meaning of “consent” and the issue was whether the statutory provisions were exhaustive or should be supplemented by the common law. However, in the present case, there is not, and has never been in Canada, *any* statutory definition ― exhaustive or otherwise ― of the elements of bestiality.
2. For the sake of completeness, I should note that the courts have taken a less restrictive approach with respect to developing common law defences, excuses and justifications. In this context, the Court has been willing to allow the common law to evolve and develop rather than treating it as having been frozen in time by statutory adoption. The Court has confirmed the availability of, for example, the common law defences of necessity and duress to further develop them: *Perka*, at p. 245; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at paras. 32-34; *Paquette v. The Queen*, [1977] 2 S.C.R. 189; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 56-67. This approach is consistent with what Laskin C.J. said in *Kirzner v. The Queen*, [1978] 2 S.C.R. 487, that the *Code* should not be seen “as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences”: p. 496.
3. However, common law defences, excuses and justifications stand on an entirely different footing under the *Code* than does the definition of offences. While prosecution for common law crimes is explicitly prohibited (s. 9), the *Code* expressly preserves common law defences, excuses and justifications: s. 8(3). The approach to the common law in those areas is thus not relevant to the question of how the courts should approach the definition of elements of offences.
4. The Crown’s position in this case directly implicates the principle that it is for Parliament and not the courts to expand the scope of criminal liability. The Crown invites the Court to develop the common law definition of bestiality so as to expand the scope of criminal liability for that offence. If we accept the Crown’s position, the offence will fundamentally change from one relating to sexual intercourse between a human and an animal to one proscribing and punishing any touching of a sexual nature between a human and an animal. As I will explain, there is no clear statutory mandate to do so. And, to accept that invitation would be to exceed the proper role of the courts in defining criminal liability.
5. The trial judge’s analysis was flawed because it gave no weight to this principle and did not take into consideration that the French version of the offence in the *Code* has remained substantively unchanged from 1892 to 1988. He reasoned that the courts should interpret the elements of the offence of bestiality so that they would “reflect current views on what constitutes prohibited sexual acts”: para. 315. This, respectfully, was a fundamental legal error. Absent clear parliamentary intent to depart from the clear legal definition of the elements of the offence, it is manifestly *not* the role of the courts to expand that definition.
6. We should bear in mind that there are important questions of policy involved in broadening the offence of bestiality as the Crown urges us to do. That change, as we see from the trial judge’s reasons, could turn a person such as the victim in this case into a co-perpetrator. Recall that, if we accept the trial judge’s reasoning (an issue that I need not finally decide here), the complainant is the principal offender and the respondent is liable as having aided and abetted her commission of the offence. In other words, a victim became a co-perpetrator. This, in itself, should make us hesitate. Justice Abella is of the view that the Crown would never charge anyone in the position of this complainant and I hope that she is right. But this faith in prosecutorial discretion misses the point. It does not provide any comfort to those who, like me, are concerned that the trial judge’s approach, if adopted, would mean that in law this complainant would be an uncharged principal offender. That legal conclusion should give us pause.
7. There are also significant policy debates about what the focus of this sort of offence ought to be. Commentators have suggested that the focus should move away from understanding bestiality as an offence against public morals and towards seeing it as a type of animal abuse. Consistent with this view, the Law Reform Commission of Canada recommended in 1978 that the offence be repealed, being of the view that the offence would still be covered by the various laws for the protection of animals enacted by the provinces or contained in the *Code*: Working Paper 10, *Report on Sexual Offences* (1978), at p. 30. And as the intervener, Animal Justice, submitted in this Court, the fundamental values at stake in this debate include the protection of vulnerable animals from the risks posed by improper human conduct and the wrongfulness of sexual conduct involving the exploitation of non-consenting participants.
8. My point is not to take sides in the policy debate. The point, as I see it, is that these are important points of penal and social policy. And they are matters for Parliament to consider, if it so chooses. Parliament may wish to consider whether the present provisions adequately protect children and animals. But it is for Parliament, not the courts, to expand the scope of criminal liability for this ancient offence.
9. With these principles in mind, I turn to examine in more detail the text, legislative evolution and history and contemporary commentary on the 1955 and 1988 revisions.
	* + 1. The 1955 Revisions
10. As discussed, the English version of the *Code* did not use the term “bestiality” until 1955, but the French version did. Immediately before the 1955 revisions, the respective versions provided:

[Buggery]

**202.** 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.

 **202.** Est coupable d’un acte criminel et passible d’emprisonnement à perpétuité, celui qui commet la sodomie ou la bestialité.

(R.S.C. 1927, c. 36)

1. In the 1955 revisions, the word bestiality was first introduced into the English version of the *Code* and the reference to “buggery . . . with any other living creature” was deleted, but with no definition of either the term “buggery” or “bestiality”. The new section read:

[Buggery or bestiality]

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

1. Apart from modifying the sentencing range, the French version of s. 147 in the 1955 *Code* remained the same as before the 1955 revisions. Indeed, the new section read:

 **147.** Est coupable d’un acte criminel et passible d’un emprisonnement de quatorze ans, quiconque commet la sodomie ou bestialité.

1. As in the *1892* *Code*, the elements of the offence are not specified. The Crown says that the introduction of the offence under that name shows a parliamentary intent to differentiate the offence from the old offence of buggery and that the use of the new language was intended to modernize the historical offence of buggery committed with animals. I cannot agree.
	* + - 1. Text, Legislative Evolution and History
2. I turn first to the text and the legislative evolution and history of the 1955 provisions.
3. The text of the 1955 revisions does not suggest that any significant change in the law was intended. In fact, quite the opposite is the case. The word “bestiality” was substituted for the words “buggery . . . with any other living creature” in the English version of the offence, but the French version of the offence remained unchanged. This appears to be simply the substitution of a more precise legal term in the English version for the previous more general expression. The absence of a statutory definition of either term is consistent only with the intent to adopt the accepted legal meanings of both terms. And the absence of change to the French version undermines the Crown’s position that any substantive change was intended by the amendment of the English version. Unlike Justice Abella, I cannot see in this amendment that the two offences were “rendered asunder from each other”. That reasoning cannot be accepted in the face of the fact that the French version of the *Code* had always used different words for the human buggery and the animal buggery offence in this section. The change to the English version in 1955 to more closely match the French cannot bear the interpretative weight that the Crown and Justice Abella attach to it. And the suggestion that this minor change to the English version is somehow linked to amendments to the animal cruelty offence has no foundation in the principles of statutory interpretation or, as we shall see, in the legislative evolution and history.
4. We should note that the term “bestiality” was used in the law before it was introduced into the *Code* in 1955. I have already referred to the use of the word in the marginal note to the *1861* *Act* and to the case of *Bourne* in which Lord Chief Justice Goddard observed that the offence of buggery with an animal was “commonly called bestiality”: p. 127. There is also the use of the term “bestiality” by Taschereau in relation to his model indictment in relation to buggery with an animal: Taschereau (1874), at p. 345; see also Thomas, at p. 154; and A. K. Gigeroff, *Sexual Deviations in the Criminal Law* (1968), at p. 105. And of course there is the use of the French word “*bestialité*” in the *Code* from 1892 on.
5. There is nothing in the text of the 1955 revisions to suggest that any change in the elements of the offence was intended. The absence of revision to the text of the French version makes clear that no substantive change was intended. Contrary to the view expressed by Justice Abella, there is no ambiguity in this provision. It is a simple incorporation of a legal term with a meaning that had been well understood for centuries.
6. If Parliament intended the significant change in the law as the Crown contends, it would surely have been noticed either in parliamentary debates or by commentators. But so far as counsel or I can determine, no notice of the alleged change can be found in either.
7. The legislative evolution and history of the sexual offences in the 1955 revisions are exhaustively reviewed in Gigeroff, at pp. 69 ff. From the initial introduction of the draft bill in the House of Commons and the Senate in 1952, until Royal Assent in June 1954, there was no change in and no discussion of the bestiality section. An explanatory note added by the Senate Standing Committee on Banking and Commerce, to which the initial bill was referred, indicated that the new s. 147 was *a change in form only* from the previous *Code*’s s. 202: Gigeroff, at p. 76. There is thus nothing in the legislative history and evolution of s. 147 to support the Crown’s position that the 1955 revisions brought about a significant change in the elements of the offence. The use of a word with a legal meaning without further definition and the explanatory note that the section was changed in form only support the opposite view that no substantive change was intended. As Gigeroff observes:

 In the narrow field of sex offences, the major effort of the commissioners was to bring all of the sexual offences under one part of the code, but the offences themselves remained virtually unchanged, with the single exception of gross indecency, which was expanded in a way which has been open to much criticism. [Emphasis added; p. 81.]

1. We should not forget that one of the purposes of the 1955 revisions, as I discussed earlier, was to make the *Code* truly exhaustive. The intent was, in a sense, to “freeze” the definition of criminal liability. To read into the use of the English word “bestiality”, used without further statutory definition, something other than its widely accepted meaning would be fundamentally at odds with that purpose. This is doubly so when the French word “*bestialité*” remained unchanged.
2. There is no support for the Crown’s position in the text, legislative history and evolution of the 1955 revisions. These in fact only support the opposite view.
	* + - 1. Commentators
3. The commentators are also uniformly against the Crown’s position.
4. I will start with the work of J. C. Martin. Mr. Martin was the editor of the 1955 *Criminal Code of Canada: With Annotations and Notes* and he served as research counsel to the Royal Commission to Revise the *Criminal Code*, 1947-1952. The Commission’s work resulted in the draft bill that led to the 1955 revisions of the *Code*. There is no sign in his comments on the revised *Code* of 1955 that there was any substantive change to the bestiality offence.
5. In his introduction to the 1955 edition of the *Code*, Mr. Martin lists 52 of the principal changes: Martin, at pp. 9-15. He makes no mention of the bestiality offence, suggesting that he did not view that provision as one of the principal changes worthy of special mention. He adds in the introduction that this list does not refer to all of the changes made and that others are referred to in the notes to the relevant sections. When we look there, it is clear that Mr. Martin saw no substantive change to the offence. Under the amended section (s. 147), the editor states simply that

 [t]his is the former s. 202. It was s. 174 in the Code of 1892 and s. 144 in the E.D.C. [1879 Draft Code] whence it was taken from the *Offences against the Person Act, 1861*. [p. 248]

The only changes noted are that the maximum punishment has been reduced from life to 14 years and that the offence has been listed in s. 661, opening the way to a sentence of preventive detention upon conviction. In other words, the new provision in the 1955 revisions is the same in substance as the English offence in the *1861 Act*.

1. Mr. Martin’s note refers the reader to s. 3(6) which provides that “sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted” and, for the meaning of the terms used, to *R. v. Jacobs* (1817), Russ. & Ry. 331, 168 E.R. 830. That case stands for the proposition that oral sexual activity did not constitute sodomy. All of this, of course, is inconsistent with the Crown’s submission that there had been any substantive change in the law or that penetration was not an element of the offence. Otherwise, the references to s. 3(6) and to *Jacobs* would be irrelevant.
2. I turn to other commentators. In 1957, Irénée Lagarde, in *Nouveau Code Criminel Annoté*, at p. 102, explains that [translation] “[b]estiality is unnatural coitus [i.e. sexual intercourse] between a man or a woman and an animal”.
3. In *Droit pénal canadien* (1962), at p. 34, the same author stated:

[translation] . . . bestiality may occur between a male person (active agent) and a female animal or between a female person (passive agent) and a male animal. Bestiality may be coital or anal. But in each of these cases, there must be “penetration” by the male organ to the degree indicated above. [Emphasis added.]

1. Similarly, the 1959 edition of *Crankshaw’s Criminal Code of Canada* (7th ed.), at p. 208, provides the following definition of buggery:

Buggery, also called sodomy, is the carnal copulation against nature by human beings with each other or with a beast . . . [C]arnal knowledge in any manner by a man or woman with a beast is bestiality. The word “buggery” comprehends both. . . .

. . .

 Carnal knowledge is complete upon penetration to any, even the slightest degree . . . .

1. The 1964 edition of *Tremeear’s Annotated Criminal Code: Canada* (6th ed.) also provides a definition of bestiality under which penetration ― vaginal or anal ― is required:

This offence, also called sodomy, is defined in 1 Bishop, Cr. Law, p. 380, as carnal copulation against nature by human beings with each other or with a beast. Since it is a form of carnal knowledge, there must, under s. 3(6), as well as at common law, be penetration to some degree, and, where the offence is committed between humans, the penetration must be *per anum*; a penetration of the mouth is not sodomy: *R. v. Jacobs* (1817) R. & R. 331, 168 E.R. 830 (C.A.) . . . . [p. 216]

1. This understanding of bestiality was also shared by the Law Reform Commission of Canada in its Working Paper 22, *Criminal Law: Sexual Offences* (1978). Bestiality is said to refer to “sexual intercourse between a human and an animal”: p. 35. Notably, the Commission did not believe that elements of bestiality had been changed in 1955. It also did not recommend to extend these elements. It rather proposed, as I mentioned earlier, that the offence be repealed, with animal cruelty offences and provincial animal welfare legislation addressing any public policy concerns: *Report on Sexual Offences*, at p. 30.
2. To sum up on this point, the work of the commentators on the revised *Code* does not support the Crown’s position. Their comments overwhelmingly support the view that the 1955 revisions did not bring about any substantive change in the elements of the offence.
	* + - 1. The Crown’s Position Is Not Supported by the Principles of Interpretation on Which It Relies
3. The Crown relies on the interpretative principles that Parliament does not speak in vain and that every word in an enactment must be given a meaning. But this reliance is misplaced.
4. The Crown says that the amendment using the word bestiality must be understood as having some purpose. But, as Professor Sullivan points out, the presumption that amendments are purposeful is much less strong in relation to the question of whether they change the substantive law. She notes that making formal improvements to the Canadian statute book is a “minor industry” and that the purpose of amendments may be to clarify the meaning or to correct a mistake rather than to change the law: §23.23. She also notes that s. 45(2) of the *Interpretation Act*, which provides that an amendment should not be taken as a declaration that Parliament considered that the amendment changed the law, should serve as a reminder to the courts that amendments do not necessarily intend to bring about substantive change: §23.24. And, as Doherty J.A. noted in *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, at para. 94, while there is a presumption that when Parliament changes legislation it does so for a purpose, that purpose may be simply to give effect to “benign housekeeping concerns”. Adopting a comment from the 5th edition of *Sullivan on the Construction of Statutes* (2008), at p. 585, he adds that when an older statute is given a major overhaul as the *Code* was in 1955, “it may be clear that even dramatic changes in wording are meant to simplify or otherwise modernize the style rather than to change the substance of the provision”: para. 94.
5. Here, there is no evidence that any substantive change was intended; quite the opposite. The fact that no substantive change occurred in the French version of the offence leads us to conclude almost inevitably that the change in terminology in the English version was simply intended to give the offence a clearer, more modern wording which would be more consistent with its French equivalent.
6. Moreover, after the substitution of the word “bestiality” for the words “buggery . . . with any other living creature” every word in the new enactment has meaning. No words are used in vain. Justice Abella reasons that the addition of the offence of bestiality must have been intended to mean something different from buggery. But the offence of bestiality was not added; the word “bestiality” was substituted for the words “buggery . . . with any other living creature”. And of course, as Justice Abella writes, bestiality meant something different than buggery in the amended provision. Given the simple substitution of the word “bestiality” for the former words “buggery . . . with any other living creature”, buggery in the amended version referred to the offence in relation to human beings. It may be that the amendment made it more clear in the English version that the offence in relation to animals was not limited to anal penetration but included vaginal penetration as well. In any event, there is nothing in this tweak to the English version of the *Code* to support the view that any substantive change to the elements of the offence was intended.
7. The Crown also relies on the reasoning of the dissenting judge in the Court of Appeal that interpreting bestiality as a subset of buggery gives the offence an illogical scope because it would restrict it to anal penetration of or by animals: para. 53. However, for the reasons set out earlier, I reject the factual premise of this argument: bestiality was not restricted to anal penetration with animals but included sexual intercourse between humans and animals.
	* + - 1. Conclusion
8. The text, read in both of its official versions, the legislative history and evolution, all of the commentators and the applicable principles of statutory interpretation provide no support for the Crown’s position. They in fact support the opposite view. I conclude that the 1955 revisions to the *Code* did not expand the elements of the bestiality offence and that penetration between a human and an animal was the essence of the offence.
	* + 1. The 1988 Revisions
9. The Crown also relies on the 1988 revisions to the *Code* as “confirming” Parliament’s intent to change the scope of the bestiality offence in 1955 so that it included all sexual activity between humans and animals. For the reasons that I have just set out at length, I reject the premise of this submission. There is *nothing* in the 1955 revisions to support the view that Parliament intended any change in the scope of the bestiality offence. *All* the indications are to the opposite effect.
10. I will nonetheless examine the 1988 revisions to see if they shed additional light on Parliament’s intention. Although I will refer to these as the 1988 revisions, the legislative history is somewhat more complicated. What is often referred to as Bill C-15 was enacted as *An Act to amend the Criminal Code and the Canada Evidence Act*,S.C. 1987, c. 24, which came into force on January 1, 1988. The sections that are most relevant to this case were renumbered in *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.).
11. Among other things, Bill C-15 repealed the former buggery offence and replaced it with the new offence of anal intercourse: s. 3, rep. & sub. s. 154, *Criminal Code*, R.S.C. 1970, c. C-34, now s. 159. The new anal intercourse offence did not apply to acts in private between husband and wife or between any two people each of whom was 18 years of age or more and who consented to the act: s. 154(2), now s. 159(2). Importantly, the elements of the new offence of anal intercourse were virtually identical to the former offence of buggery with a human: see *R. v. E. (A.W.*), [1993] 3 S.C.R. 155, at pp. 187-88. The use of the word “intercourse” in the offence meant that penetration was an essential element of the renamed anal intercourse offence as it had been with the buggery offence.
12. A second change was that bestiality was given its own section (s. 155, now s. 160) and three new bestiality offences were created: compelling another person to commit bestiality, committing bestiality in the presence of a person under the age of 14 and inciting a person under the age of 14 to commit bestiality (s. 155(2) and (3), now s. 160(2) and (3)). The term “bestiality” was not defined. The s. 160(3) offence (committing bestiality in the presence of a child or inciting a child to commit bestiality) has been amended three times since its initial enactment: by increasing the relevant age from 14 to 16, by imposing mandatory minimum sentences and by increasing the maximum sentence for the offence: see *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 54; *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 15, and *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23, s. 5. No definition of the elements of the offence has ever been enacted. The relevant *Code* provision now reads as follows:

Bestiality

**160. (1)** 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.

**Compelling the commission of bestiality**

**(2)** 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.

**Bestiality in presence of or by child**

**(3)** Despite subsection (1), every person who commits bestiality in the presence of a person under the age of 16 years, or who incites a person under the age of 16 years to commit bestiality,

* + - * 1. is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
				2. is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
1. The Crown submits that the 1988 revisions confirm that not only did Parliament intend, in 1955, to give the term “bestiality” a separate meaning apart from “buggery”, but it also meant to give bestiality a broad interpretation not restricted to penetrative conduct. Otherwise, the Crown argues, the changes brought about by the 1988 revisions, as part of a legislative package to protect children from the harm caused by all forms of sexual abuse, would not give full effect to the underlying purpose of the legislation. I cannot accept these submissions.
	* + - 1. Context
2. It will be helpful to begin the analysis by placing the 1988 revisions in the context of the very significant reform of the sexual offences that unfolded in Canada in the 1980s.
3. There was a virtually complete overhaul of sexual offences against the person in 1983: *Criminal Law Amendment Act*, S.C. 1980-81-82-83, c. 125,in force January 1983 (often referred to as Bill C-127). These changes were followed by the 1988 revisions which were focused on enhancing the protection of children against sexual abuse. Through all of these many changes, changes which included fundamental revision of the definition of several sexual offences and the repeal of others, the *Code* continued to make bestiality an offence without further defining it. The fact that Parliament made no change to the definition of bestiality in the midst of this comprehensive revision of the sexual offences supports only the conclusion that it intended to retain its well-understood legal meaning.
	* + - 1. The 1983 Revisions
4. To return to Bill C-127, one of its main purposes was to make a clear statement that a sexual offence is primarily an act of violence, although it has a sexual component: statement by the Honourable Flora MacDonald during the debates on Bill C-127, *House of Commons Debates*, vol. XVII, 1st Sess., 32nd Parl., August 4, 1982, at p. 20041. As a result, a number of sexual offences were taken out of Part IV of the *Code*, dealing with sexual offences, public morals and disorderly conduct, and new offences were created and added to Part VI, dealing with offences against the person and reputation.
5. Three of the most significant changes made to the structure of sexual offences were these. Penetration was not an element of the new sexual assault offences. Sexual assaults became gender neutral and could be committed by a person of either sex against another person of either sex. Finally, spousal immunity, which had previously protected husbands from being charged with raping their wives, was removed: C. L. M. Boyle, *Sexual Assault* (1984), at pp. 46-47.
6. A number of other changes were also made, such as the repeal of certain sexual offences, including rape and sexual intercourse with the “feeble-minded”, and a number of evidentiary changes, including repeal of the statutory requirement for corroboration for certain offences and abrogation of the rule concerning recent complaint: Boyle, at pp. 49-51.
7. However, a number of the pre-existing sexual offences remained in force after the enactment of Bill C-127: sexual intercourse with females under the age of 14; sexual intercourse with females of previous chaste character; incest; seduction offences; sexual intercourse with children, wards and employees; gross indecency; and, most relevant to our case, buggery and bestiality (see D. Watt, *The New Offences Against the Person* (1984), at pp. 87-91). It is worth noting that although the offence of rape was abolished and the new sexual assault offence provisions did not have penetration as one of their essential elements, the remaining offences, apart from gross indecency, expressly provide that “sexual intercourse” is an element. Sexual intercourse was defined in s. 3(6) as being “complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted”: now s. 4(5); see Watt, at p. 91. This, of course, is the definition of penetration (or “carnal knowledge”) that had been settled for centuries. Thus, the notion remained that penetration was an essential element of several of the retained offences.
8. Also noteworthy is that the offences of buggery and bestiality remained undefined. As Mr. (now Justice) Watt noted in his text, these offences, “also known as sodomy, may be described as carnal copulation against nature by human beings with each other or with a beast. Some degree of penetration is required and, in the event that both participants are human, the penetration must be *per anum*”: pp. 90-91 (footnotes omitted).
9. In short, the move away from penetration as an element of the new sexual assault offences did not signal an end to penetration as an element of several other sexual offences retained by Bill C-127. And there is nothing in that legislation to suggest that the long-settled legal definition of bestiality had in any way changed.
	* + - 1. The 1988 Revisions
10. That brings us to the 1988 revisions. These amendments are found in a larger package of changes to the sexual offences in the *Code* in relation to children. It changed the law of consent in relation to young persons; introduced new, child-specific and gender-neutral offences not dependent on proof of penile penetration: sexual interference, invitation to sexual touching and sexual exploitation; and brought significant change to the rules of evidence applying at trials of sexual offences against children.
11. Although the focus of the 1988 revisions was the protection of children, they also had features and objectives in common with the amendments of 1983. They intended to give equal protection to victims of sexual abuse, without regard to their sex: House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15: An Act to amend the Criminal Code and the Canada Evidence Act*, No. 1, 2nd Sess., 33rd Parl., November 27, 1986, at pp. 18-19 (Hon. Ramon John Hnatyshyn). They further modified the applicable evidentiary rules, so victims could more easily testify in court, by allowing a child to testify in court if he or she could be sworn or if the judge would determine that he or she could be heard on promising to tell the truth. They also created a broader range of sexual abuse offences, adding such offences as sexual interference, invitation to sexual touching and sexual exploitation.
12. What does this legislative activity tell us about whether there was a parliamentary intent to expand the scope of criminal liability for bestiality? Before these amendments, as I have discussed in detail earlier, the offence of bestiality had a legal meaning as requiring penetration. That meaning was well known in 1985, as the commentary following the 1955 revisions shows: *Tremeear’s Annotated Criminal Code: Canada*, at p. 216; Lagarde, *Nouveau Code Criminel Annoté*, at p. 102; Watt, at pp. 90-91. Parliament continued to use the term “bestiality”, without further definition. The element of penetration was explicitly retained in the offence replacing buggery, namely anal intercourse. It is worth noting that with the exception of the offence of sexual intercourse with females under the age of 14, all of the sexual offences that still required penetration following the 1983 revisions and which were not repealed by the 1988 revisions (incest, anal intercourse) continued to require penetration after the 1988 revisions.
13. 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.
14. The Crown relies on testimony in February 1987 by Richard Mosley, then Senior General Counsel, Criminal Law Policy Section before the Legislative Committee studying Bill C-15 which became *An Act to amend the Criminal Code and the Canada Evidence Act* (1987). He was asked a question about the punishment for inciting a young person to commit bestiality if bestiality were not actually committed after having been asked whether the compelling and inciting bestiality provisions were in fact duplicative of the law relating to parties to offences. He responded that inciting was covered and that the compulsion aspect was most likely covered by the party provisions but that there was some doubt. He then added that this doubt, combined with the question of what punishment should apply, were considerations in creating the new bestiality offences. They were not however, the complete reason. He continued:

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 or by a child. The compulsion and sighting [*sic*, read “inciting”] aspect of it was felt to round the application of that offence to any form of conduct involving sex with animals.

(*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15: An Act to amend the Criminal Code and the Canada Evidence Act*, No. 9, 2nd Sess., 33rd Parl., February 17, 1987, at pp. 66-67)

1. According to the Crown, this answer reveals Parliament’s intention to criminalize any type of sexual conduct with an animal, not only sexual acts involving penetration. But this is reading far too much into this isolated comment. The question being answered did not relate to the elements of the offence of bestiality, but was part of a series of questions about why the new compelling and inciting offences were needed at all. The thrust of the answer is that the legislative package was concerned with sexual offences against children and therefore making it an offence to compel or incite children to commit the offence of bestiality was an appropriate addition. There is no hint in any of the parliamentary record that any substantive change to the elements of the offence of bestiality was intended.
2. The Crown suggests that the French version of s. 160 supports a broader interpretation of bestiality because it uses the words “*un acte de bestialité*” for the English word “bestiality”. The Crown submits that this shows an intent to expand the offence beyond requiring penetration. However, this reads too much into the French version of the provision. If bestiality requires penetration, so does “*un acte de bestialité*” just as the English offence of “vagrancy” is not expanded by its French language equivalent “*un acte de vagabondage*”: see s. 179(1) and (2) of the *Code*. There is no difference between the meaning of the French and the English versions of these offences.
3. I also note that authors remain of the view that penetration is an element of bestiality. In *The 2015 Annotated Tremeear’s Criminal Code* (2014), at p. 337, the elements of s. 160(1) are described as follows:

In general, bestiality is committed where D, a human being, carries out intercourse, in any way, with a beast or bird. This form of unnatural sexual indulgence, as well as sodomy, is comprised under the general description “buggery”. [Emphasis deleted.]

1. Similarly, the 2009 edition of *Manning, Mewett & Sankoff: Criminal Law* (4th ed.) repeats the traditional legal definition of bestiality as intercourse *per anum* or *per vaginam* by a man or a woman with an animal: p. 931.
2. The Crown brings our attention to guilty pleas that have been entered in provincial courts on counts of bestiality, when no penetration had been established. This does not affect the above analysis as none of these cases provides any reasoning to support the view that bestiality does not require penetration. The view that penetration *is* required, has also equally been expressed in provincial courts: see *R. v. Ruvinsky*, [1998] O.J. No. 3621 (QL) (C.J.), at paras. 21-40; *R. v. Poirier*, C.Q. Chicoutimi, Nos. 150-01-001993-923 and 150-01-002026-921, February 2, 1993, cited in *M.G.*, at para. 42 (fn. 35). The Crown also cites *M.G.*, a case relied on by the trial judge in this case in support of his view that the courts should interpret the elements of offences to “reflect current views on what constitute prohibited sexual acts”: para. 315. For the reasons which I have set out at length earlier, this conclusion is wrong in law and the *M.G.* case should not be followed on this point.
	1. Conclusion
3. I respectfully agree with the conclusion of the majority of the Court of Appeal: the offence of bestiality under s. 160(1) of the *Code* requires sexual intercourse between a human and an animal.
4. Disposition
5. I would dismiss the appeal.

 The following are the reasons delivered by

1. Abella J. (dissenting) — This case is about statutory interpretation, a fertile field where deductions are routinely harvested from words and intentions planted by legislatures. But when, as in this case, the roots are old, deep, and gnarled, it is much harder to know what was planted.
2. 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*, 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.
3. But I think a good case can also be made that by 1988, Parliament intended, or at the very least assumed, that penetration was irrelevant. This, in my respectful view, is a deduction easily justified by the language, history, and evolving social landscape of the bestiality provision.

Analysis

1. When “buggery” first appeared as a statutorily prohibited act in 1869,[[1]](#footnote-1) the provision stated that anyone convicted of the “abominable crime of buggery committed either with mankind or with any animal”, was liable to be imprisoned for life and for no less than two years.
2. The next iteration was in 1886[[2]](#footnote-2) when a conviction for buggery “either with a human being or with any other living creature”, attracted a penalty of life imprisonment.
3. In 1892, in the first *Criminal Code*, the same language appeared, namely, everyone who committed “buggery, either with a human being or with any other living creature”, was liable to be imprisoned for life. The 1927 *Code* amendments retained this language, and with it the invidious equilateral combining of buggery with a person or with an animal.
4. At no time was the offence of buggery defined, so we are left with the common law definition: *R. v. Summers*, [2014] 1 S.C.R. 575, at para. 55.
5. The common law origins of the offence were ecclesiastical, and emerged in full moral force from the Church’s hegemonic jurisdiction over sexual offences and its abhorrence for non-procreative sexual acts, which were condemned as being “unnatural”.
6. The Church’s jurisdiction over sexual offences ended in 1533, but censorious attitudes did not, and death remained the penalty for “the detestable and abominable vice of Buggery committed with mankind or beast”: John M. Murrin, “‘Things Fearful to Name’: Bestiality in Colonial America” (1998), 65:Supp. *Pennsylvania History* 8, at pp. 8-9; William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (2008), at p. 16; Doron S. Ben-Atar and Richard D. Brown, *Taming Lust: Crimes Against Nature in the Early Republic* (2014), at p. 17.
7. The question whether these acts were criminal only when there was penetration is, however, far from clear: Graham Parker, “Is A Duck An Animal? An Exploration of Bestiality as a Crime”, in Louis A. Knafla, ed., *Crime, Police and the Courts in British History* (1990), 285, at pp. 291-92. There are scarcely any cases dealing with the offence, let alone whether it required penetration. This may be because, as Prof. Parker observed:

 . . . the courts seem remarkably reticent about describing sexual matters with any legal precision. Instead, they prefer to follow the example of James Fitzjames Stephen and decide cases on the basis of moral revulsion. For instance, in a gross indecency case Lord Chief Justice Goddard decided that actual touching did not have to be proved, and any reasonable person would decide that a criminally culpable and grossly indecent exhibition was going on . . . . [Footnotes omitted; p. 297.]

1. It is true that in the only two Canadian appellate cases where the offence was referred to — both involving dogs — penetration was found to have occurred: *Henry v. Henry*, [1953] O.J. No. 347 (QL) (C.A.), and *R. v. Wishart* (1954), 110 C.C.C. 129 (B.C.C.A.). But this begs the question of whether penetration was *required* as an element of the offence. And this is especially pertinent if one considers that these two decisions were decided before the *Code* was amended in 1955.
2. The new provision in the 1955 *Code*, s. 147, marked the beginning of a departure from the earlier offence of “buggery with any animal”. Section 147 was the first time the offence of “bestiality” was expressly named as such in the English version of the *Code*. Notably, unlike in the previous provisions, buggery and bestiality were now designated as two separate offences:

 **147.** 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, c. 51)

Having been rendered asunder from each other, these two offences were now free to consist of different constituent elements that more realistically reflected who or what was involved in the sexual conduct.

1. What then did Parliament intend the constituent elements of bestiality to be in 1955, and did they include penetration?
2. At the outset, it is self-evident that the provision is ambiguous, and that genuine ambiguities in enactments which have an impact on liberty should, where possible, be resolved in favour of the accused: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§15.24 and 15.25. But as this Court said in *R. v. Paré*, [1987] 2 S.C.R. 618, this “does not end the question”: p. 631. An interpretation more favourable to the accused should not be adopted if it is unreasonable “given the scheme and purpose of the legislation”: p. 631. This was explained in *R. v. Jaw*, [2009] 3 S.C.R. 26, by LeBel J. as follows:

 . . . I have reservations about the proposition that any uncertainty in a charge *must*, as a matter of course, be resolved in favour of the accused. This proposition seems to be based on the strict constructionist approach to interpreting penal legislation that developed in the eighteenth century, when criminal law sanctions were especially severe. By the mid-1980s, however, the presumption of a restrictive interpretation of penal statutes had started to wear thin (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 472-74). A restrictive interpretation *may* be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation . . . . [Underlining added; para. 38.]

(See also *R. v. White*, [2011] 1 S.C.R. 433, at paras. 83-84.)

1. Applying those “usual principles of interpretation” requires reviewing related *Code* provisions and the context in which the bestiality provision was first introduced in 1955 (Sullivan, at §§13.6 and 13.7; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 874-75).
2. As the intervener, Animal Justice, pointed out in its factum, 1955 was also the year amendments were made to the *Code*’s animal cruelty offence — s. 387(1)(*a*).[[3]](#footnote-3) Before s. 387(1)(*a*) was amended, the offence applied to “cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity”. It also required proof that the accused caused harm “wantonly, cruelly or unnecessarily”.[[4]](#footnote-4) Parliament broadened the offence by expanding its scope to cover *all* species of birds and animals, and by lowering the threshold of cruelty to apply to anyone who “wilfully causes . . . unnecessary pain, suffering or injury”. These changes reflected an increased recognition of the importance of protecting animal welfare. As Fraser C.J.A. noted in her dissenting reasons in *Reece v. Edmonton (City)* (2011), 513 A.R. 199 (C.A.), we moved “from a highly exploitive era in which humans had the right to do with animals as they saw fit”, to one “where some protection is accorded . . . based on an animal welfare model”: para. 54.
3. It is in this transformed legal environment consisting of more protection for animals, that the offence of “bestiality” first appeared. Whatever the common law meaning of “buggery” with animals had been, the creation of a distinct offence of bestiality in the same year the animal cruelty provisions were expanded to protect more animals from more exploitative conduct reflected, in my respectful view, Parliament’s intention to approach the offence differently.
4. It is hard to attribute to Parliament the inconsistent purpose that animal cruelty protection in the *Code* would now cover *all* birds and animals, but the sexual conduct with animals provision, bestiality, would be limited to those animals whose anatomy permitted penetration. Continuing to impose the penetrative component of buggery on bestiality technically leaves as perfectly legal all sexually exploitative acts with animals that do not involve penetration. And this, in turn, completely undermines the concurrent legislative protections from cruelty and abuse for animals.
5. Moreover, if the elements of bestiality and buggery were the same, the addition of “bestiality” to the language of s. 147was redundant and there was no need to change the provision from one prohibiting buggery, as it had for hundreds of years, to one prohibiting buggery *and* bestiality. No legislative provision should be interpreted “to render it mere surplusage”: *R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 28; see also *R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 188; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838. The addition of the offence of “bestiality”, therefore, must have been intended to mean something different from “buggery”.
6. But if there was any doubt about what Parliament envisioned the scope of bestiality to be in 1955, its intention, it seems to me, is even clearer in light of the 1988 Amendments to the *Code[[5]](#footnote-5)* when buggery and bestiality were fully released from their Janus-like relationship into two separate provisions: ss. 159 and 160. This, to me, confirmed Parliament’s intent to see them as two separate offences.
7. In s. 159, the term buggery was not used, and a new offence was set out:

**Anal intercourse**

 **159.** (1) Every person who engages in an act of anal intercourse 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.

**Exception**

 (2) Subsection (1) does not apply to any act engaged in, in private, between

 (*a*) husband and wife, or

 (*b*) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.

**Idem**

 (3) For the purposes of subsection (2),

 (*a*) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and

 (*b*) a person shall be deemed not to consent to an act

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or

(ii) if the court is satisfied beyond a reasonable doubt that the person could not have consented to the act by reason of mental disability.

1. In s. 160, bestiality was still undefined. Its reach was extended, however, to include those who compelled its commission or who committed it in the presence of a child:

**Bestiality**

 **160.** (1) 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.

**Compelling the commission of bestiality**

 (2) 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.

**Bestiality in presence of or by child**

 (3) 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.

1. 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” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27), surely what Parliament must have intended was protection for children from witnessing or being forced to participate in *any* sexual activity with animals, period.
2. Parliament’s goal of protecting children from sexual conduct with animals in the new bestiality provision can also be inferred from the other changes to the *Code* in the 1988 Amendments. Parliament introduced the offences of sexual interference, sexual exploitation, and invitation to sexual touching, all of which protected minors and none which required penetration. It would be anomalous if no penetration was required for these offences, which focused on protecting children from sexual exploitation generally, but remained an essential element of s. 160(3), which protected children from sexual exploitation with animals.
3. I do not see the absence of a requirement of penetration as broadening the scope of bestiality. I see it more as a reflection of Parliament’s common sense assumption that since penetration is physically impossible with most animals and for half the population, requiring it as an element of the offence eliminates from censure most sexually exploitative conduct with animals. Acts with animals that have a sexual purpose are inherently exploitative whether or not penetration occurs, and the prevention of sexual exploitation is what the 1988 Amendments were all about.
4. In fact, and unsurprisingly, after the 1988 Amendments, the elimination of the requirement of penetration appears to have been accepted: *R. v. K.D.H.* (2012), 546 A.R. 248 (Q.B.); *R. v. J.J.B.B.*, 2007 BCPC 426; and *R. v. Black* (2007), 296 Sask. R. 289 (Prov. Ct.)
5. The majority expressed concerns that an interpretation of “bestiality” that does not require penetration could mean that the stepdaughter, who was not charged, was the principal offender and D.L.W. was a party to the offence. With respect, the fact that the trial judge was not satisfied beyond a reasonable doubt that D.L.W. had “compelled” bestiality, does not mean that interpreting the offence as including conduct that has a sexual purpose, regardless of whether there is penetration, leads to charges against a victim like the stepdaughter.
6. She testified that these events began when she was only 15 or 16 years old, that she did not want to participate in sexual conduct with the dog or with her stepfather, and that there were reprisals whenever she refused or hesitated to engage in sexual activity with her stepfather. Her younger sister testified to receiving beatings with a two-by-four after refusing to participate in sexual acts with D.L.W. The trial judge found both sisters credible. Given these circumstances, it is inconceivable that bestiality charges would ever be laid against someone in D.L.W.’s stepdaughter’s circumstances.
7. I would allow the appeal, set aside the decision of the Court of Appeal, and restore the conviction.

 *Appeal dismissed,* Abella J. *dissenting.*

 Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

 Solicitors for the respondent: Eric Purtzki, Vancouver; Garth Barriere, Vancouver.

 Solicitor for the intervener: Animal Justice, Toronto.

1. Section 63 of *An Act respecting Offences against the Person*, S.C. 1869, c. 20. [↑](#footnote-ref-1)
2. *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157, s. 1. [↑](#footnote-ref-2)
3. Now s. 445.1(1)(a). [↑](#footnote-ref-3)
4. 1927 *Criminal Code*, s. 542(*a*). [↑](#footnote-ref-4)
5. *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.), s. 3; *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, s. 3. [↑](#footnote-ref-5)