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# On the *DLW* Decision and the Meaning of Modernity

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**Case Commented On:** *R v DLW,* 2016 SCC 22

Despite our common law system, statute law remains a key source of law in Canada. Its importance cannot be underestimated as lawmakers rely on legislation to implement policy on various social and economic issues. In many ways, legislation is reflective of who we are as a society and serves to reinforce our collective values. No other piece of legislation in Canada exemplifies this more than our *Criminal Code*, RSC 1985, c C-46. Contained in this piece of legislation is conduct we deem as a society to be so abhorrent, so contrary to who we are, that we will punish those who commit these prohibited acts, often through a loss of liberty. Although the concept of codification relieves us from speculating on the substance of criminal behaviour, it carries with it the mystique of interpreting or discerning Parliamentary intent in creating those crimes. As a result, statutory interpretation is often the main issue in criminal cases as judges wrestle with words, meanings, and intentions. This process is vital in criminal law, where a turn of phrase can mean the difference between guilt or innocence. The difficulty lies in dealing with crimes that carry centuries of established meaning, such as murder, assault, and theft. Yet, the crimes so interpreted must remain relevant. In this blog post, I will explore certain aspects of the *DLW* judgment, 2016 SCC 22, the most recent Supreme Court of Canada decision employing statutory interpretation principles, on the crime of bestiality (section 160 of the *Criminal Code*). Here, the Court enters into an age old process of interpretation yet does so, seemingly, in the name of modernity. This case highlights the inherent problems in discerning or interpreting value-laden legislation as it then was and then, ultimately, as it needs to be.

Before we delve into *DLW*, we must set our general legislative expectations. As mentioned earlier, legislation is based upon sound public policy. Seen in this light, legislation should provide a narrative displaying the objectives and goals the rules contained within their sections. It should provide clarity of purpose with which we can identify. Legislation should be accessible to all, not just in a physical sense, but also intellectually. Moreover, legislation, as a delivery platform, should be flexible and responsive to the societal values it is meant to emulate. However, these expectations seem to dissolve as soon as the ink dries on the paper. In the context of a written document, legislation seems to lose its dynamic quality. Indeed, as suggested by Lord Esher in *Sharpe v Wakefield* (1888), 22 Q.B.D. 239, at p. 242, "The words of a statute must be construed as they would have been the day after the statute was passed," meaning that the words have a frozen quality as they encapsulate a moment in time. The key is in knowing what that moment reveals, which is crucial for the proper implementation and application of the legislation.

Although, the courts have entered into the legislative fray since time immemorial, or at least since 1235 when the first Act of the English Parliament was passed (see for example, Statute of Merton, *Attorneys in County Court Act, 1235*), it is still far from clear how the courts perform this interpretive function. To be sure rules have been fashioned such as the "Plain Meaning Rule," also known as the "Literal Rule," or the "Mischief Rule" or even the "Golden Rule." Just

to clarify, that is the *other* Golden Rule, not the biblical one. In any event, sprinkled liberally between these over-arching rules are specific rules and maxims, usually proposed in Latin, making the whole exercise very structured, formalistic, and confusing. Thankfully, this conundrum was noted by Elmer Driedger, long-time Solicitor for the Attorney-General of Canada and author of the seminal work in the area. In the *Construction of Statutes* 2nd ed., Toronto, Butterworths, 1983, at 87, Driedger summed up all of the disparate rules into one sentence:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Within the year, in *Stubart Investments Ltd v The Queen* decision, [1984] 1 SCR 536, the Supreme Court of Canada endorsed this "modern rule." By 1985, the principle was deemed "oft-quoted" in *Vachon v Canada Employment and Immigration Commission*, [1985] 2 SCR 417 (at para 48). Despite the Court's quick embracement of the "modern rule" or "modern principles," decades later, it is still unclear what this rule encompasses and how "modern" it truly is. This topic is thoroughly canvassed in the fascinating article on the development and use of the "modern principle" authored by Stéphane Beaulac and Pierre-André Côté, entitled "Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimization" ((2006) 40 R.J.T. 131. In the paper, Beaulac and Côté persuasively argue that the principle is far from modern, even at the time of its reception by the Court. They posit the principle, as articulated by Driedger in 1983, was simply a rough summary of the main statutory principles in use at the time. Certainly by 2006, the principle was far from "modern" having been in use for years. As an aside, some of these principles can be traced to the thirteen rules of Talmudic textual interpretation, particularly rule twelve, which suggests a contextual interpretation. In any event, the Supreme Court of Canada still confers the moniker, "modern," to the approach (see *R v Borowiec*, 2016 SCC 11 at para 18). Its modernity, therefore, appears to be in question.

However, in the spirit of Driedger let us first do a little interpretation on the term "modern." In the *DLW* case, "modern" appears to mean "new" as opposed to "old." Looking at the "grammatical and ordinary sense" of the word "modern," the Oxford Dictionary, the go-to text for the Supreme Court of Canada (CanLII search found 147 SCC cases referencing the Oxford Dictionary as opposed to a paltry 11 cases for Merriam-Webster), the definition is "relating to the present or recent times as opposed to the remote past" or "characterized by or using the most up-to-date techniques, ideas, or equipment." Indeed, in Justice Abella's dissent in *DLW*, she frames the issue as the new against the old with her newer more "modern" interpretation of the crime as opposed to the majority, written by Justice Cromwell, an old hand at statutory interpretation cases, as the purveyor of the old fashioned, decidedly out of sync with today's realities.

Abella J accomplishes this new/old dichotomy through her deft use of metaphor directed at the majority decision. The opening paragraph of her dissent utilizes agricultural metaphors of abundance (at para 125) describing the "fertile field" of statutory interpretation with the "routine harvest" of "words and intentions" as "planted" by the lawmakers. This metaphor brings to mind not only quantity but also the longevity of the interpretative technique as she then extends her position that the crime of bestiality must receive a modern interpretation despite the fact it is a "centuries old" crime (at para 126) whose "roots" are "old, deep, and gnarled" (at para 125). Thus an interpretation of the crime, based on tradition as per the majority under Cromwell J, is

not a living tree but an ancient inaccessible relic of the past. Cleverly, Abella J's opening of the issue is an effective foil to Justice Cromwell's majority where he characterizes bestiality as a "very old" crime in his opening paragraph (at para 1) but one which cannot be made "new" without clear Parliamentary intention and certainly not through judicial intervention. In paragraph 13, Justice Cromwell hands Justice Abella her thematic metaphor by setting out the "root" of the issue as an interplay between common law and statutory intention. A similar technique was used by Justice Karakatsanis, with Justice Abella concurring, in the dissent in the *Fearon* case, [2014] 3 SCR 621, 2014 SCC 77 (CanLII), wherein Justice Cromwell too authored the majority decision. There, through the deliberate choice of word use, the dissent of Karakatsanis J breathes modernity in stark contrast to Cromwell J's reliance on traditional legalistic nomenclature (for further discussion on this see, as published on my website, my previous blog entitled *A Fresh Look At Fearon: How Language Informs The Law*).

In fact, Justice Abella is right: the issue in *DLW* is very much bound up with the old and the new as the court is faced with the task of defining the meaning of "bestiality" as it relates to a disturbing child sexual abuse case where a family pet was used to molest a child. The "old" or "traditional" view of bestiality, undefined in the *Criminal Code* but as gleaned through common law, has the requirement for penetration. This definition fails to not only capture the conduct in *DLW* but also fails, according to Justice Abella's dissent, on a cultural, social, and public policy level as well. The irony, in the context of interpreting our codified criminal law, is the reliance on the common law conception of the crime. Since its inception in 1892, the *Criminal Code* has been the only source, with one limited exception, for identifying which conduct should be considered criminal. If conduct is not proscribed in our *Code* as a crime, then it is not one. In other words, the common law, or those unwritten rules which have developed over time, cannot create a crime. The only exception being the common law offence of contempt of court pursuant to s. 9 of the *Criminal Code*. Otherwise, only our Parliament under s. 91(27) of the *Constitution Act, 1867* has the authority to create criminal law. Nevertheless, the common law is not ignored in the interpretative process. For the majority, the common law remains unchanged by codification and therefore can be equated with Parliamentary intention. To go any further, in the view of the majority, the courts would be creating a "new" crime, which is not within the judicial function. Conversely, for Justice Abella, the common law conception of bestiality reinforces the present need to move beyond it.

In this sense "modern" can also denote more than a chronological time. It can also, according to the Oxford Dictionary, refer to a "current or recent style or trend in art, architecture, or other cultural activity marked by a significant departure from traditional styles and values." In this definition, looking at legislation as a "cultural activity" in the broadest sense, Justice Abella's reading of the term proposes a departure from the traditional "modern principles" through the lens of current societal interests as reflected in the present policy decisions behind the creation of crimes. However, in the realm of traditional statutory interpretation, although Parliamentary intention -through the scheme and objectives of the legislation- lends context to the statutory interpretation process, such context does not necessarily include a deep dive into the policy behind the legislation. Certainly, Driedger's principles do not directly make reference to it. This lack of clarity, according to Beaulac and Côté in their article, has resulted in uneven judicial treatment of policy in statutory interpretation. For instance, in *Canadian Broadcasting Corp v SODRAC 2003 Inc*, [2015] 3 SCR 615, at paragraph 55 the majority decision written by Justice Rothstein (Cromwell J, among others, concurring) effectively cautions against the dissent's use of policy considerations in textual interpretation. In that case, Justice Abella, yet again, writes the main dissenting position. The *DLW* decision, therefore, is just another example of this interpretive tension. However, considering traditional statutory interpretation in discerning

Parliamentary intention was reluctant to go beyond the four corners of the document, the now ubiquitous use of Hansard to elucidate on such intention shows how far the court has and can move from tradition towards modernity. This will definitely be a continuing dialogue within the court to watch for in future cases.

So what of the modernity of the principle in use in the *DLW* case? It has already been established that this principle has been in use for years and, according to Beaulac and Cote, may even be a mere reiteration of what had been in use prior to 1983. However, as Beaulac and Cote also recognize, Driedger's principle is both a "method of interpretation" and a "framework for justification." It is that dual nature, which provides an inherent flexibility to the principle, permitting it to discern or interpret even the most profound words found in our rules of law. Its application, as seen through the discourse in the *DLW* case, cannot be confined by the four corners of a piece of legislation but must permit a deeper analysis involving societal values and purpose to remain meaningful. In short, it requires, a touch of modernity.