

**Court File No.: 36450**

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**- AND -**

**D.L.W.**

**Respondent**

**- AND -**

**ANIMAL JUSTICE**

**Applicant  
(Proposed Intervener)**

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE  
BY ANIMAL JUSTICE**

*(pursuant to Rules 47, 55-59 of the Rules of the Supreme Court of Canada)*

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**- AND -**

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**RESPONDENT**

**- AND -**

**ANIMAL JUSTICE**

**APPLICANT  
(Proposed Intervener)**

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE  
BY ANIMAL JUSTICE**  
(pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

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**TAKE NOTICE** that Animal Justice, a national animal law organization, hereby applies to a Judge of this Honourable Court, at a date to be fixed by the Registrar, pursuant to Rules 47, 55, and 56 of the *Rules of the Supreme Court of Canada* for:

1. An Order granting Animal Justice leave to intervene in this appeal, on a without costs basis;
2. An Order granting Animal Justice leave to file a factum of not more than 10 pages (or such other length as the said Judge may deem appropriate);

3. An order granting Animal Justice leave to present oral argument at the hearing of the appeal of not more than 10 minutes (or such other duration as the said Judge may deem appropriate); and

4. Such further or other Order that the said Judge may deem appropriate.

**AND FURTHER TAKE NOTICE** that the following documents will be referred to in support of such a motion:

5. The Affidavit of Nicholas dePencier Wright, Executive Director of Animal Justice, affirmed on September 4<sup>th</sup>, 2015; and

6. Such further and other material as counsel may advise and may be permitted.

**AND FURTHER TAKE NOTICE** that the said motion shall be made on the following grounds:

7. As evidenced in the Affidavit of Nicholas dePencier Wright, Animal Justice has a genuine and substantial interest in this appeal, which falls squarely within Animal Justice's mandate and expertise. Animal Justice is specifically mandated to deal with legal issues affecting the interests of animals in Canada.

8. Animal Justice possesses not only an expertise in the relevant legal principles at stake in this appeal, but also a distinct awareness of how these principles fit within the broader penumbra of animal protections in our legal system.

9. Animal Justice will make submissions that are different from those of the other parties in the proceeding.

10. Rules 47, 55, and 56 of the *Rules of the Supreme Court of Canada*.

11. And such further and other grounds as counsel may advise and may be permitted.

DATED at the City of Cambridge, in the State of Massachusetts, in the United States of America, this 4th day of September, 2015.

---

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**NOTICE TO THE RESPONDENT TO THE MOTION:** A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.



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**AFFIDAVIT OF NICHOLAS dePENCIER WRIGHT**

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**I, NICHOLAS dePENCIER WRIGHT**, of the City of Toronto, in the Province of Ontario, **SOLEMNLY AFFIRM:**

1. I am Executive Director at Animal Justice. I have personal knowledge of the matters to which I herein depose or have received the information from others, in which case I verily believe it to be true.
2. I affirm this Affidavit in support of Animal Justice's motion for leave to intervene in *R. v. D.L.W.*, SCC File No. 36450.

## A. Overview

3. This Honourable Court is addressing the meaning of s. 160 of the *Criminal Code*,<sup>1</sup> the prohibition against bestiality, for the very first time. To the best of Animal Justice's knowledge, it also the first time that this Court has considered *any* legislation in which a non-human animal's interest in being free from harmful conduct is potentially at stake.

4. Though the Crown/Appellant has proposed an approach to the bestiality provision that ultimately reaches a result consistent with that suggested by Animal Justice, it does so by taking an unnecessarily narrow approach to the question at hand. In its submissions, the Appellant has partially misidentified Parliament's intention in enacting a separate bestiality provision and ignored important contextual information, including the increasing societal and legislative focus on animal abuse in Canada and the real harms that animals face as victims of sexual violence and exploitation by humans. It follows that this Court would benefit from an additional perspective to ensure that the interest of animals in being free from abuse – in Animal Justice's view, a legitimate secondary aim of s. 160 – is not ignored by the parties.

5. If granted leave to intervene, Animal Justice will provide valuable context regarding Parliament's focus on animal welfare issues and the broader treatment of animal interests in law, suggesting that these provide *additional* reason to reject the result reached by a majority of the British Columbia Court of Appeal ("Court of Appeal"). In short, Animal Justice wishes to advance and develop the interpretive approach taken by the trial judge in this case – which would otherwise be ignored by the parties. The

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<sup>1</sup> R.S.C. c. C-46.

Applicant suggests that Romilly J. was correct in recognizing that a broad interpretation of the bestiality provision is necessary because "members of our society have a responsibility to treat animals humanely". Moreover, as he noted, "the purpose of the bestiality provisions is to enunciate social mores. Those mores include deterring non-consensual sexual acts and animal abuse."<sup>2</sup>

## **B. Animal Justice**

6. Animal Justice is uniquely positioned to provide assistance on this appeal, as it is the only national animal law organization in Canada, comprised of both a charitable wing (Animal Justice Canada), and a non-profit wing (Animal Justice Canada Legislative Fund). Collectively, Animal Justice Canada and Animal Justice Canada Legislative Fund operate as "Animal Justice."

7. Animal Justice Canada was incorporated pursuant to the federal *Canada Not-for-profit Corporations Act*<sup>3</sup> on April 8, 2008, and received charitable status on May 19, 2009 pursuant to the federal *Income Tax Act*,<sup>4</sup> with its registered office at 100 King Street West, Suite 5700, Toronto, Ontario. The objects of Animal Justice Canada include the prevention of cruelty to animals through the enforcement of existing laws, and the education of the public on animal practices.

8. Animal Justice Canada Legislative Fund is a non-profit organization incorporated on February 14, 2012 pursuant to the federal *Not-for-profit Corporations Act*, with its registered office at 100 King Street West, Suite 5700, Toronto, Ontario. The objects of

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<sup>2</sup> *R. v. D.L.W.*, 2013 BCSC 1327 at para. 310.

<sup>3</sup> S.C. 2009, c. 23.

<sup>4</sup> R.S.C., 1985, c. 1 (5th Supp.).

Animal Justice Canada Legislative Fund include advocating for the humane treatment of animals.

9. Animal Justice has approximately 13,000 supporters, members, and donors from communities across Canada. Animal Justice has a dedicated board of directors that directs Animal Justice's policies and agenda, including an Executive Director, a Director of Operations, a Director of Legal Advocacy, and a Director of Farmed Animal Advocacy. This committed team is also responsible for carrying out the work of the organization, and draws upon the assistance of a full-time student-at-law, summer students, a strong group of advisors and volunteers, and *pro bono* legal assistance from a wide array of members of the Canadian legal community.

10. Animal Justice's work has been supported by grants from a number of well-established Canadian charitable foundations, including the Law Foundation of Ontario, the Animal Welfare Foundation of Canada, and the Donner Foundation.

11. Animal Justice is distinguished by having a committed volunteer board of advisors that lends valuable expertise and energy to the organization, providing assistance and guidance in carrying out Animal Justice's advocacy work. The advisors comprise a wide range of leading academics, experts in animal law, animal law practitioners, professionals, and laypersons with significant experience in animal protection work. Many of the lawyer members of Animal Justice's board of advisors devote significant *pro bono* hours to assist Animal Justice in fulfilling our mandate. Animal Justice has collective expertise in considering the often-complex issues that arise when considering the myriad of ways in which animals' interests intersect with Canadian law. For example,

three professors who are members of our board of advisors – Peter Sankoff, Vaughan Black, and Katie Sykes – recently published a book on animal law, entitled *Canadian Perspectives on Animals and the Law* (Irwin Law: Toronto, 2015).

12. Professor Peter Sankoff of the University of Alberta, one of our advisors who would be counsel in the event that this Court grants Animal Justice leave to intervene, is a leading expert on the issues at the core of this appeal: the interpretation of criminal statutes and the relationship between animals and the law.

13. Animal Justice has demonstrated a long-standing, genuine, and continuing concern with ensuring that animals are protected from harm, suffering, and killing to the maximum extent possible under Canadian law. In various fora, we speak out on the means by which the law considers animals' interests, including their interests in being free from pain and suffering, and the legal protections they are entitled to under federal criminal law and other statutes.

14. Animal Justice works in furtherance of its objectives in a variety of ways:

(a) ***Public Education***: Animal Justice engages in public education, by commenting on current animal protection and animal rights issues in domestic and international news media; by participating in conferences and other public events at which legal protections for animals and animal rights are discussed; by affiliating with animal law clubs at law schools to provide students with volunteer opportunities and assist future lawyers in understanding issues pertaining to animals and the law; by publishing newsletters and producing reports and other publications on legal protections for animals that are

available to the general public; by maintaining a website containing our reports, position statements, and other public documents; and, by maintaining Canada's most comprehensive searchable database of academic articles, case law, and statutes pertaining to animals;

(b) **Position Papers and Submissions**: Animal Justice prepares position papers and makes submissions to various governmental bodies concerning the advancement of legal protections for animals, and the implication for animals and their welfare of proposed legislative or policy initiatives and also advises elected officials regarding these matters at the federal, provincial, and municipal levels;

(c) **Legal Advice and Assistance**: Animal Justice provides assistance in situations where animals and their wellbeing or lives are threatened, including providing advice to individuals and other organizations, and assistance in pursuing administrative or informal remedies; and

(d) **Legal Action**: Animal Justice takes action in its own right when it perceives violations of laws directly or protecting animals or pertaining to animals, either by launching complaints with the government and other administrative agencies, or by appearing in court and before tribunals as a party or proposed intervener in legal matters that engage animals' interests.

### C. Specific Expertise in Animal Law Related Issues

15. Animal Justice has a long-standing interest in protections afforded to animals under the criminal law, and has engaged in considerable public advocacy in support of using the criminal law to protect animals from unnecessary death, harm, and suffering.

16. Since its inception, Animal Justice has maintained a strong focus on making submissions to governments and courts with respect to laws affecting animals and their protections. Some examples of these submissions include:

(a) 2015: Oral and written submissions to the Social Policy Committee of the Ontario Legislature concerning proposed amendments to provincial animal protection laws pertaining to marine mammals that would ban the keeping of orca whales in captivity;

(b) 2015: Participating in *Toronto (City) v. Pallas* (2015), Ontario Municipal Board Case No. PL140916, an appeal before the Ontario Municipal Board concerning the issuance of a minor variance that would permit the operation of a traveling exotic animal zoo in the City of Toronto;

(c) 2015: Written submissions to the Ontario government concerning proposed amendments to wildlife protection regulations that would permit the hunting of moose calves;

(d) 2012 - 2015 Multiple written submissions to the Prince Edward Island government and legislators concerning proposed amendments to its provincial

animal protection laws. Legislators have accepted one of our proposed amendments;

(e) 2014: Written submissions to the Ontario government concerning proposed amendments to wildlife protection regulations that would reopen the Ontario spring bear hunt;

(f) 2013: Authored an extensive report analyzing the benefits and drawbacks of Ontario's provincial animal welfare legislation, entitled *OSPICA Act: A Better Way Forward*;

(g) 2012: Sought intervener status in *Eng v. Toronto (City)*, 2013 ONSC 6818, concerning the constitutionality of a municipal bylaw outlawing the possession and sale of shark fin products;

(h) 2011: Provided legal opinion and testimony on the constitutionality of a proposed bylaw banning shark fin products in Toronto informing the legislative process and assisting elected officials in understanding the legal issues associated with the proposal;

(i) 2012 - 2015: Submit multiple complaints to the Competition Bureau of Canada regarding alleged false advertising activities by companies selling animal products, including Burnbrae Farms, Canada Goose, and Maple Lodge Farms;

(j) 2012 – 2015: Submitted multiple complaints to provincial law enforcement officials, including the Ontario Society for the Prevention of Cruelty to Animals



and Calgary Humane Society, requesting enforcement of existing animal protection laws in relation to animal spectacles, including circus and rodeo events.

(k) 2014: Advised Members of Parliament on proposed legislation to amend the animal cruelty provisions of the Criminal Code.

(l) 2014: Submitted recommendations to the National Farmed Animal Care Council regarding proposed updates to the Code of Practice for the Care and Handling of Pigs;

(m) 2014: Created a joint program with Community Legal Information Association in Prince Edward Island to increase public understanding of legal issues pertaining to animals in that province.

(n) 2011: Prepared legal opinion detailing Air Canada's legal authority to stop accepting primates destined for research as air cargo;

#### **D. Animal Justice's Proposed Submissions**

17. Animal Justice is seeking leave to intervene in this appeal because it is important for this Court to hear why the protection of an animal's interest in being free from the harm that comes from being sexually exploited by a human being should be regarded as a key objective of the bestiality offence. Though the trial judge was cognizant of this purpose, the Court of Appeal and the parties to this case have shown the willingness (in the case of the Appellant) or are likely (in the case of the Respondent) to minimize this crucial aspect of bestiality. Animal Justice hopes to develop this point through three specific submissions.

**i. Parliament's Intention**

18. First, the Appellant is incorrect in suggesting, at paras. 67 and 69 of its factum, that "there are [only] two underlying purposes for criminalizing bestiality ... to criminalize ... activity deemed abhorrent by the community [and] to protect children from the harm of sexual abuse." While Animal Justice agrees that these were core legislative objectives in separating bestiality from buggery in 1955, and through the 1988 reforms, Parliament also intended to enhance the protection of vulnerable animals by making it illegal to use these animals for human sexual gratification in any way.

19. As the Appellant suggests, the 1954 amendment dividing the offences of buggery and bestiality was a significant moment for the development of this offence, as it made clear that Parliament wanted bestiality to have a separate meaning apart from buggery. But in deciphering what that meaning was intended to be, and to understand Parliament's objectives, it is critical to look at the entire context of the 1954 reforms to the *Criminal Code* - and not simply the amendment to s. 160.<sup>5</sup>

20. In contrast to the Appellant's description of events, the 1954 rewording of the *Criminal Code* did not only alter the bestiality provision. It is significant that the new *Criminal Code* also contained the most significant reform to the anti-cruelty provision governing the treatment of animals – then s. 387, now s. 445.1(1)(a) of the *Code* – in modern times. Signalling a new intention to place greater importance on the reduction of unnecessary suffering endured by animals, the law removed archaic and troublesome

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<sup>5</sup> Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin, 2007) at 131, notes that "What one looks for when considering an Act in its entirety is (1) provisions that are in some way related to the provision to be interpreted..."

language referring to the need to cause "ill-treatment", replacing it with the current wording that safeguards animals against "unnecessary pain, suffering and injury". More importantly, recognizing that *all* species of animals are vulnerable to mistreatment, Parliament removed limitations that restricted the protection of the *Criminal Code* to cattle and other agricultural animals, by extending the anti-cruelty provision to any "animal or bird". While at the Quebec Court of Appeal, Lamer J.A. (as he then was), considered the significance of these amendments and noted that "I dare to believe that we were given in 1953-4 a norm which was intended to be more sensitive to the lot which we reserve alas all too often to animals."<sup>6</sup>

21. It follows that there is good reason to believe that Parliament *was* thinking about animal welfare when it altered the predecessor to s. 160 at the same time as it was enacting constructive changes to s. 387 [now s. 446.1(a)].

## **ii. The Bestiality Provision: Protecting Animals from Real and Apprehended Harms**

22. Parliament's simultaneous reform of the anti-cruelty protection and the prohibition against bestiality clause are further linked in a thematic sense: both are designed to protect vulnerable beings from harm and exploitation. The Applicant strongly disagrees with the Appellant's suggestion, at para. 92 of its factum, that preventing harm to animals would be "a possible justification for restricting bestiality to penetrative sex alone". On the contrary, the very real risks of harm that animals face through acts of bestiality

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<sup>6</sup> *R v Menard* (1978), 43 C.C.C. (2d) 458 at 464 (Que CA).

provide *additional* justification for reading the clause to include any type of contact with an animal engaged in for a sexual purpose.

23. As this case demonstrates,<sup>7</sup> animals have no wish to engage in sexual acts with humans, and they will almost invariably suffer from this type of contact. Contrary to the Appellant's suggestion, physical penetration of an animal's sexual organs with the penis is not the only way to cause harm to animals through sexual conduct. Without even considering the potential for distress or emotional suffering, animals can be injured by digital penetration,<sup>8</sup> by the use of sexual implements, and by having to be restrained so that an offender can perform the sexual acts in question.<sup>9</sup> This list is hardly exhaustive.

24. The anti-cruelty sections of the *Code* are an insufficient way of addressing the harms faced by animals forced to participate in sexual acts with humans, and the existence of these provisions is not a reason for adopting a narrower interpretation to s. 160. Nor should it ever be necessary to charge under those sections to rectify improper sexual contact with an animal.

25. To begin with, animal cruelty prosecutions are rarely initiated in Canada. Surveys in the academic literature suggest that prosecutors are reluctant to lay charges of this nature because of difficulties with certain elements of the offence.<sup>10</sup> In order to convict

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<sup>7</sup> Appellant's Factum, para. 34.

<sup>8</sup> *R. v. Ruvinsky*, [1998] O.J. No. 3621 at para. 38 (Prov. Div.) (veterinary evidence describing impact of digital penetration).

<sup>9</sup> See, for example, *R. v. J.J.B.B.*, 2007 BCPC 426 at para. 19 ("One dog continually walked away and [the accused] grabbed its snout to force it into contact with her genitals".)

<sup>10</sup> Sophie Gaillard and Peter Sankoff, "Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian Animal Protection Legislation" in Peter Sankoff, Vaughan Black and Katie Sykes, eds., *Canadian Perspectives on Animals and the Law* (Irwin: Toronto, 2015) 307 at 307-309; Lesli Bisgould, *Animals and the Law* (Irwin: Toronto, 2011) at 86.

under s. 446.1(a), the Crown must prove that the animal "suffered", which usually necessitates evidence from a veterinarian or other expert.<sup>11</sup>

26. The Appellant's approach assumes that harm caused to an animal during the course of bestiality - even where such harm occurred - will be capable of proof to the required criminal threshold. This would not provide animals with the protection from sexual exploitation that is required. Animals cannot testify, and instances of bestiality are often not discovered until well after the event, as this case and others exemplify.<sup>12</sup> It follows that historical injuries or suffering caused through penetrative or non-penetrative acts will be exceptionally difficult to prove. It is difficult to imagine many police investigators or Crown prosecutors making the effort required to initiate an animal cruelty charge along with a bestiality charge except in the most egregious of cases.<sup>13</sup> Relying on the anti-cruelty provisions alone will not provide animals with the protection that the 1954 amendments were designed to provide.

27. As the trial judge implicitly recognized, while not every animal forced to engage in an act of non-penetrative sexual conduct with a human will be harmed, *every* animal capable of being compelled to engage in such conduct will be at a much greater risk of harm if a narrow approach to bestiality is adopted. The broader approach to the bestiality provision suggested by the trial judge is consistent with the *Criminal Code's* overall protection of vulnerable beings and desire to end the sexual exploitation of those who cannot consent.

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<sup>11</sup> *R. v. McRae*, [2002] O.J. No. 4987 (S.C.J.) (evidence that animal yelped repeatedly after being struck by drainpipe insufficient to require finding that animal "suffered").

<sup>12</sup> See also *R. v. DeJaeger*, 2014 NUCJ 21 (animal dead long before charges laid).

<sup>13</sup> See for example *R. v. Pye*, 2005 BCPC 355 (evidence that animal may have suffered through bestiality; no animal cruelty charges laid).

iii. **Fundamental Social Values of the Community Include an Increased Concern for the Well-being of Animals**

28. The Appellant, at para. 12 of its factum, correctly notes that the *Criminal Code* "prohibits sexual activity between a human and animal because such activities offend fundamental social values of the community". But the abhorrent character of this conduct is not simply restricted to its distasteful or immoral nature. On the contrary, part of what makes this sort of sexual conduct so vexing is that it involves a vulnerable sentient being that must be exploited, against its will, for the conduct to occur. As the trial judge noted, at para. 311 of his reasons, "current social values abhor all forms of touching for sexual purposes on those who do not consent to it".

29. Concern for animal well-being is an important Canadian social value, one that is increasing in significance with each passing year. No longer are animals regarded as pieces of property to be used or abused as humans see fit. This is reflected in the *Criminal Code* amendments discussed above, by increased media coverage concerning cases of animal mistreatment, and also by a host of legislative initiatives at the municipal, provincial and federal levels that are too numerous to list here.<sup>14</sup> The need to treat animals with compassion and prevent their unnecessary suffering is a value that *should*

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<sup>14</sup> In the last ten years alone, notable provincial enactments designed to revamp and strengthen legislation relating to the protection of animals includes initiatives by Ontario, *Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, as amended 2008, c. 16, s. 1 and 2015, c. 10, s. 1-8; *Nova Scotia, Animal Protection Act 2008*, c. 33, s. 1 and British Columbia, *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 (significantly amended in 2008). Major legislative alterations to Prince Edward Island's *Animal Health and Protection Act*, R.S.P.E.I. 1988, c. A-11.1 and Quebec's law are in progress. See Bill 54, *An Act to Improve the Legal Situation of Animals*, 1st sess., 41st Leg., Quebec, 2015, which proposes to amend the *Civil Code of Quebec* "to explicitly provide that animals are sentient beings and not property".

be reflected in the way in which we interpret legislation that affects these very same animals.

30. Recent debate in the House of Commons shows the increasing importance of these issues for all Canadians. In 2008, the *Criminal Code* was amended to increase the penalties available for those who cause unnecessary suffering to animals. In his opening remarks sponsoring the original Bill in the House, the Hon. Charles Hubbard (Miramachi, Lib.) noted that:<sup>15</sup>

Recently in this House and in the media the issue of animal cruelty has been getting more attention, but let us question what the issue really is. Our laws need to be improved. Penalties need to be increased. It is very important that the animals within our society receive proper care, proper protection and proper concern by our legislators.

#### **E. Assistance to Be Provided by Animal Justice**

31. Although Animal Justice will generally support the position advanced by the Appellant, it arrives at this position by a much different route and it does not adopt all of the Appellant's arguments as a consequence.

32. The Appellant regards the animal that is a required component of the bestiality offence as an inanimate object, whose interests and potential to be harmed have no bearing whatsoever upon the interpretation of this offence. The majority of the Court of Appeal, whose approach will likely be adopted by the Respondent, takes an even narrower approach, diminishing the victim of this offence to an object capable of being penetrated. Only Animal Justice is capable of bringing an important perspective to this

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<sup>15</sup> *House of Commons Debates*, 39th Parl., 1st Sess., No. 118 (26 February 2007) at 1110 (Hon. Charles Hubbard)[Emphasis added]. This speech was made for Bill S-213, the predecessor of an identical Bill that was ultimately enacted (Bill S-203) after S-213 died when Parliament was dissolved for a federal election.

appeal, by highlighting the fact that bestiality, by definition, involves sentient, vulnerable beings whose interests deserve protection through this important offence.

33. This is the first time in which this Court is considering a criminal prohibition that affects the interests of non-human animals. The Appellant and Respondent seem likely to ignore this fact altogether. Simply by not hearing any arguments on this point, this Court could set a negative precedent about the value of protecting animals from exploitation, and set back important steps being taken to enhance that protection across the legislative and jurisprudential spectrum.

34. If granted leave to intervene, Animal Justice would work with counsel for the Appellant and counsel for the other intervenors (if any) to ensure that our submissions are not duplicative.

35. Animal Justice does not seek leave to file any new evidence and would rely entirely on the record as it has been created by the parties. Animal Justice would seek no costs and would ask that no costs be awarded against it.

36. Animal Justice therefore respectfully requests that it be granted leave to intervene in this appeal, with the right to file a factum and present oral argument.

**AFFIRMED BEFORE ME** at the City )  
of Toronto in the Province of )  
Ontario this 4th day of September, 2015. )  
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\_\_\_\_\_ )  
 )  
A Commissioner, etc. )

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Nicholas dePencier Wright