

# Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

## Issue 8 - Evidence for February 26, 2003

OTTAWA, Wednesday, February 26, 2003

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-10B, to amend the Criminal Code (cruelty to animals), met this day at 4:08 p.m. to give consideration to the bill.

**Senator George J. Furey** (*Chairman*) in the Chair.

**The Chairman:** This afternoon we have a panel of legal experts to assist us in our continuing examination of the amendment to the Criminal Code proposed by Bill C-10B.

We welcome Seth Weinstein from the Canadian Council of Criminal Defence Lawyers; Ronald Sklar, a law professor from McGill University and Gerald Chipeur, constitutional law practitioner. We will be joined at some time after 4:30 p.m. by Ruth Sullivan, a statutory interpretation expert from the University of Ottawa; and Gary Trotter, a law professor from Queen's University.

The witnesses are invited to make a five-minute presentation, which will be followed by questions from senators.

**Mr. Ronald Sklar, Law Professor, McGill University:** Honourable senators, thank you for allowing me to appear before you today. I consider it a great privilege to address this honourable committee. I am not appearing here as advocate for any particular side of the issues before this committee concerning Bill C-10B.

I am a professor of law at McGill University. As I teach both courses in criminal law and animal law, I hope and believe that I can be of assistance to you today.

However, complete candour requires that I say that as a teacher of animal law, I believe the need to protect animals in Canada from unnecessary pain, suffering and injuring to the greatest extent possible is one of considerable importance and deserving of the attention of this committee and Parliament. I do not believe that any of the many witnesses before this committee disagrees with such a statement.

I have been advised that you particularly would like my views on three questions that have been discussed and debated a great deal before this committee, which as I understand it are as follows.

The first issue is whether the colour of right issue would be included as a defence under Bill C-10B without specific mention therein. The second is regarding the lawful excuse issue and whether an act under provincial legislation, such as the granting of a hunting licence, could constitute a lawful excuse to an otherwise violation of section 182.1. The third issue is the effect of transferring the proposed animal cruelty amendment out of the part of the criminal law dealing with offences against property.

I will take a bit of time on that first issue, which has been the most contentious of these three issues before this committee, but will be relatively brief on the second and third issues.

I will be happy to answer any questions from members of the committee after I conclude regarding the three issues I have just mentioned or any of the other issues of concern to this committee.

As to the first issue, it must be painfully clear to this committee, after listening to the many interventions on the question of whether the defence of colour of right would be available under section 8(3), and, in particular, to the interventions from the Department of Justice and from two

very eminent practitioners of criminal law, Clayton Ruby and Michael Code, that this colour of right issue is contentious and that no clear authority from the Supreme Court or from any provincial Court of Appeal exists relevant to this issue. If there is any doubt on that score, the fact that Mr. Ruby and Mr. Code look at the same authorities and come to completely different opinions on the issue is good proof that the authorities are far from clear.

Having said that, it is my opinion that the stronger argument is that such a defence would be available under section 8(3) without specific mention in section 182.1. I say that for the following reasons:

First, there is no doubt that the defence of colour of right, or as it is called in England, claim of right, is a defence under the common law of crimes. Therefore, it would normally be included within section 8(3). It is so designated as a common law defence in leading English textbooks on the criminal law, namely, Glanville Williams first book, *Criminal Law, The General Part*, and his second book, *The Textbook of Criminal Law* and such treatises as that of Russell on crime. The two works by Glanville Williams are the British criminal law authorities most frequently cited and quoted by the Canadian courts.

Of particular relevance to this committee is the following statement in Williams's textbook of criminal law, and I quote:

At the present day, a claim of right in the sense of a mistaken belief that the civil law confers a legal right to do the act charged may be said to be a defence to a charge of damaging property *even when the statute has made no reference to it.*

Perhaps of equal interest to the committee is the fact that a number of the old claim of right cases referred to in Williams's first book, *Criminal Law; the General Part*, involved malicious injury to animals and charges under game acts. One such case, *Daniel versus Janes*, in 1877, involved the accused's poisoning of the owner's dog, which was in the habit of running into the accused's garden. The accused acted in the mistaken belief that he was justified in using such means, that is poisoning, to protect his premises from trespass. A conviction by the trial court was quashed, even though it was agreed that the killing was malicious under the statute and even though the defence of claim of right was nowhere specified in the statute.

Because of this considerable British authority, because of the clear language of section 8(3) of our Criminal Code and because, in a number of Supreme Court cases, section 8(3) has been accorded a wide scope, I consider it unlikely that the courts of Canada would only allow a colour of right defence if it were specifically mentioned in the statute.

If Professor Don Stuart, in his highly regarded text, *Canadian Criminal Law*, which has been mentioned here a number of times before the committee, meant to say that the colour of right defence has to be specifically mentioned in the statute, and I do not believe that is what he said, then I would respectfully disagree with him. I would be happy to elaborate on my reasons during questions from members of the committee.

I will say briefly that any such requirement would be completely out of line with the way defences are dealt with in the criminal law. For example, must Bill C-10B specifically include the defence of mistake of fact in self-defence to allow these defences to be available to a near-sighted person who killed a cocker spaniel because he mistakenly believed that he was being attacked by a pit bull? No. In Canada, the courts examine the content and elements of the particular offence in question to determine whether the colour of right defence is appropriate for that offence. Sometimes they find that it is not appropriate.

In my opinion, that is exactly what the court did in the case of *R. v. Jones and Pamejawan*, which had been mentioned before this committee a number of times. The court, in that case in my opinion, did not announce a general proposition that a criminal statute must specifically mention the colour of right defence for it to be available to the accused. Rather, it found that the colour of right would not be available to a charge under the gaming laws involving the running of a bingo game.

As I have already indicated, there is no doubt under the English authorities that damage to property, including malicious and cruel infliction of death and injury to animals, throughout common law has been seen as just such an appropriate offence for the application of the defence of colour of right. To make the point even clearer, the common law defences under section 8(3) have been specifically mentioned in section 182.5, an exercise of undue caution, in my opinion. As I have just stated, there is no doubt that colour or claim of right is a defence at the common law.

For the second issue, it is clear that no provincial statute or act under a provincial statute or regulation, such as the granting of a hunting licence, can provide a lawful excuse to cause unnecessarily pain, suffering or injury to an animal or to cause an animal's death. That would be in plain contradiction of the federal statute and the doctrine of pre-emption would apply. As representatives from the Department of Justice have stated, a hunting licence would give the holder the right to kill the animal, as do traditional methods of hunting give such a right to Aboriginal people, but not to kill the animal in a way that would violate section 182.1. To paraphrase Mr. Justice Sopinka's comments in *R. v. Jorgensen*, which, as the committee knows, was an obscenity case in which the accused claimed the videos he sold had been approved by the Ontario Film Review Board, Parliament could not be seen to have intended a conduct that it criminalized in a specific statute to be rendered lawful and the person excused as a result of a provincial statute or the act of a provincial body.

The third issue concerns the removal of the section from the property part of the Criminal Code. As a number of the people presenting before this committee have said, even though some of these same people object to the notion of animals as property, removal of the animal anti-cruelty provision from the part of the code dealing with offences against property will not change the status of animals as property that can be owned, et cetera. That would lead to the bizarre result that one's dog, even a highly prized dog — a best in show — could not be the object of a theft. The removal of the section out of the property part of the code would not increase a person's criminal liability beyond what presently exists under section 446 or change anything in the application of section 182.1. However, it will, and should, emphasize that animals are not things for humans to use or abuse at their whim and pleasure, but they are living creatures entitled to humane treatment without cruelty. It will reinforce the message, which Parliament is sending to sentencing judges when it increases the maximum penalty for such cruelty to five years, that such conduct is deserving of higher penalties than have been imposed in the past, so as to reflect the community's denunciation and condemnation of such conduct.

As the committee knows, denunciation, the expression of society's disapproval of the offender's conduct, is the first purpose and principle of sentencing that is listed in section 718 of the Criminal Code.

**The Chairman:** Thank you. Mr. Weinstein, please proceed.

**Mr. Seth Weinstein, Lawyer, Canadian Council of Criminal Defence Lawyers:** Honourable senators, on behalf of the Canadian Council of Criminal Defence Lawyers, CCCDL, I would like to thank you for the opportunity to address the committee on what we believe are important amendments to the animal cruelty provisions of the Criminal Code. We applaud the objectives of these provisions to protect animals from crimes committed against them and the imposition of penalties to reflect society's denunciation of these offences.

However, it is our submission before the committee that these objectives could be achieved within the existing legislation, which clearly allows for the prosecution of offences that are meant to be caught. The concern that we have with the proposed legislation is, notwithstanding the Department of Justice's assurances that what was lawful will remain lawful, the way in which the legislation is currently drafted. It brings profound changes that expose both animal-dependent communities and those with domestic animals to unfounded charges that they would not otherwise be subjected to under the current legislation.

The CCCDL was first asked to appear before the committee on the issue that was quite thoroughly addressed by Mr. Sklar — the colour of right and whether that defence has been lost. Frankly, having read through all the evidence provided before the committee, our submission is that we agree, with all due respect to Mr. Sklar, with the submissions of Mr. Code. I cannot add anything further than what Mr. Code has already provided, which was a thorough presentation of the position.

The Canadian Council of Criminal Defence Lawyers wishes to present some of the flaws that we think are in the current draft of the proposed legislation. The flaws can be briefly stated as three-fold. First, the definition of "animal" as it exists in the amendment is overly broad. Second, there are unnecessarily vague terms used to describe various offences throughout the amendment. Three, the standards of intent that are now provided for in the amendments — recklessness and negligence — are disproportionate to the gravity of these offences.

First I will give you our position on those three flaws, and I apologize for not providing written

submissions and documents for you, although I would be happy to send them. Simply, the current proposed definition of "animal" significantly expands the availability of potential offences against harming animals. Subjective terms, such as "unnecessary pain" and "killing animals brutally and viciously" are unnecessarily vague in that an individual has no idea what conduct is actually prohibited now.

I have already stated that we agree wholeheartedly with the position of Mr. Code on the colour of right and I will add one comment on that. If it is everyone's intention to allow colour of right to be a defence, and continue to be a defence, to these charges, then there is no downside in our submission of incorporating into subsection 5, not only that section 8(3) applies, but also that section 429(2) applies. It is added language, or maybe five words, that I do not think will clutter the legislation, as it exists right now.

Finally, on the issue of the standards of proof, it is our position that the standards of recklessness and negligence really widen the potential offences and makes everyone vulnerable to more criminal charges than they otherwise would be vulnerable to right now.

Going back to the definition of animal, in our submission, a definition that includes killing or causing injuries to animals that have the capacity to feel pain, is overly broad in that it will unnecessarily complicate trials. You have heard expert evidence on animals' capacity to feel pain, but if the bill is passed with these terms, expert evidence will be the norm in animal cruelty trials. Frankly, it is also unnecessarily and needlessly exposing those individuals in everyday activities to promote trials. I will give a couple of examples. They may seem farfetched right now, but in my submission the way the legislation is drafted it is an opportunity for public interest groups and others who are pursuing a cause to lead charges.

Let us take the homeowner who is so fed up with mice in their house that the homeowner lays a trap rather than trying to catch it and setting it free. The evidence is that if mice have a capacity to feel pain, then all of a sudden they have caused unnecessary pain to the animal and are subject to criminal charges.

Similarly, someone is out fishing and baits their line with a frog rather than using a lure. All of a sudden this frog comes within the definition of animal as it exists now and subjects the fisherman or woman who is out on a recreational activity to criminal charges. In our submission, that is not the intent of this legislation. Its intent is to extend — and rightfully — to more domestic animals and to address what is becoming unfortunately a troubling trend in domestic animals and in unnecessary cruelty thereto. In our submission, that is the purpose for which this legislation is designed. It is not intended to extend to every species that exists.

In our submission the definition should be confined to domestic animals, or something similar to domestic animals, but exempt those that are used for legitimate purposes. Without that, it will be an opportunity for public interest groups to abuse the criminal law. We have seen, with all due respect to some of the evidence that was put before this committee, the attempt of abuse already being used. That was in the evidence of the REAL Women. With all due respect to their presentation, to argue that it extends to an unborn person is, in my submission, outwardly abusive of the criminal law and of this section. That is what we are leading to if the definition stands as it is now.

Dealing with what I submit are the unnecessarily vague terms of the legislation — and I have used "brutal" and "vicious" as the examples — in our submission it will lead to vexatious prosecutions and act as a tool for public interest groups to harass those whose conduct they oppose. Again, let us use examples of the recreational hunter. Those groups who are opposed to hunting and opposed to the sport itself can now say that the killing was brutal and vicious. The hunting itself is cruel and vicious. There is no definition of cruel and vicious. All of a sudden people are exposed potentially to criminal charges, and they have no idea when they will or will not fall into the legislation. The vague terms will cause havoc to those who kill animals for business, recreation or necessity, and they will be exposed to second-guessing of those who have no experience or knowledge of industry practice or customs. Many of these groups do not have that experience and are on the outside looking in. Such vague terms then expose the criminal law to abuse.

To use further examples, the potential abuse is not confined to the terms of vicious and brutal, but also to the amorphous term of "unnecessary pain." Let us take our friends from the North, for example, where dog sledding is a socially accepted sport and practice. A standard practice is to slap the dog to make it go faster. All of a sudden, this sport, which is a socially accepted custom up North, is subject to criminal charges because they are causing unnecessary pain to the dogs.

Again, let us look at the phrase, "what is lawful excuse?" For example, the driver of a car is driving down the street while dialling a number on a cell phone and recklessly goes through a stop sign and hits a racoon. With the recklessness standard, the driver is subject to criminal charges for killing an animal without lawful excuse. We do not know the definition of "lawful excuse."

The use of these subjectively vague terms precludes one from properly assessing their personal liability and does not sufficiently define the offences so that people can understand what conduct is actually prohibited. Without more clarity of these provisions, they will be exposed to challenges that the legislation as it stands now is unconstitutionally vague and the provisions encourage arbitrary and discriminatory enforcement.

I suggest either removing the terms all together or consider refining some of the terms or having exceptions. I adopt on behalf of Canadian Council of Criminal Defence Lawyers the suggestion of the Law Reform Commission of Canada, which states:

No injury or serious physical pain is caused unnecessarily if it is a reasonably necessary means of achieving any of the following purposes: identification, medical treatment, provision of food, hunters, trappers, fishing and other sporting activities conducted in accordance with lawful rules related to them.

Such an exception, I submit, would clarify necessary and unnecessary practices so that the public would better know these offences. I have stated my position on the standards of proof and I will comment further in answer to your questions.

**Mr. Gerald Chipeur, Lawyer, Chipeur Advocates:** Mr. Chairman, honourable senators, first, let me assure you that I have no conflict of interest. I am a vegetarian at home and I am not a hunter. However, I have to oppose this legislation as a constitutional lawyer because it violates the Bill of Rights.

The Bill of Rights guarantees the right to property, and animals right now are property. There may be those who philosophically disagree, but that is the constitutional law in Canada. That is the personal property law of Canada. Any legislation from the Parliament of Canada that impacts the property rights of individuals, in animals, is a violation of the Bill of Rights unless there is a clause in this amendment that says it will apply notwithstanding the Bill of Rights.

I will share with honourable senators a few of the concerns that I have with respect to the issue of property rights and the Constitution. First, as a constitutional lawyer I am also concerned about the freedom of religion concerns that have been raised before you by both the Islamic Council of IMMAMS and the Canadian Jewish Congress. I entirely agree with that. I have practised in the area of freedom of religion my entire career, and I have seen cases in the United States where individuals who have a religious devotion to animals believe that animals deserve almost human-like respect. It is not that animals should not be respected, but the problem is that they raise animals to the same level as humans.

They have used legislation similar to this to harass individuals who have practiced their religion in a particular way for millennia, and animals have been an important part of their ceremonies. This law will be misused by those who disagree for religious reasons with long-held practices of individuals within our society.

It is clear from the Bill of Rights, and I have provided you with a copy of the section 1 (a), that the right of the individual to life, liberty and security of the person and enjoyment of property and the right not to be deprived thereof, except by due process of law, is guaranteed in the Bill of Rights. Unless a form of due process is in place for taking away each individual animal from a person, with compensation, this kind of legislation is inconsistent with the Bill of Rights.

You are free to pass this kind of law as long as you say that you recognize that we are depriving individuals of property rights, and you are changing the way in which this country will deal with property rights.

I can remember first year law school. Property rights were discussed. We were taught that animals could be, in fact were, the actual property of individuals in most cases.

Section or part 5.1 is a taking of all private property in animals in this country. It turns that private property into public property for one important purpose, the Criminal Code. It would be simple to leave the Criminal Code as it is, because there is virtually no difference between these amendments and the current wording of the Criminal Code, except in one or two critical sections.

The most critical section is 182.2(c), which says that a person may not kill an animal without lawful excuse. Killing an animal that one owns is one of the incidents of property. There could be no more clear violation of a property right than saying to someone with respect to his or her piece of property that you may not do what you used to be able to do with it.

We can have a discussion about philosophy and whether we should be able to do it. However, if we are to do that, let us be honest about it. Let us say that we are taking away a property right. We are taking a piece of property that was personal, and we are making it public and treating it accordingly under the legislation.

Let me give you a few examples of how the first three subsections of 182.2 could be, and most certainly will be, misused if this amendment is passed as written.

First of all, fish farmers will be prosecuted. Fish farming and any other enclosed environment will become dangerous. If someone were to ask me for an opinion as a lawyer whether that person could engage in this kind of activity, I would have to say that I do not know. I would have to recommend that the person get out of that business immediately because he would be open daily to prosecution for that farming.

Fly fishing and other forms of fishing where you have catch and release would be at risk. I have the most recent *Fish Magazine*. They encourage all fishers to release. Catch and release is an important part of stewardship and maintaining the environment. If you read these sections, it is clear that if you are fishing for pleasure, and you cause harm to that fish by snagging it with that hook and then throwing the fish back alive, you simply did that for your own pleasure. There is no lawful excuse for doing that, no excuse that would stand up in court.

Say good-bye to the Calgary Stampede, no doubt about it. I came from a program at the Hyatt in Calgary. There was a dog show there. I could not give an opinion to a dog show that they would not be prosecuted for what they would be doing.

There are a number of other sections that create problems. You have my submission. I will not take any more of your time other than to note a most problematic section.

Section 182.31(c) would make a criminal offence of negligently killing the family cat if you went through a stop sign and got into an accident as a result of your negligence. However, if the rest of the family were also killed, — wife and children — it would not be a criminal offence. Not only do we have the elevation of animals to the level of the human, but we also have an elevation above that of the individual human being in our society.

That is a choice that you must make, but if you make that choice, make it consciously and put a clause in that says that this piece of legislation is effective notwithstanding the guarantee of property rights in the Bill of Rights.

**Mr. Gary Trotter, Law Professor, Queen's University:** I am not here on behalf of any group. I have personal views, which are irrelevant. I am here, as a criminal law academic and former prosecutor, to be of assistance on these issues. I have had the benefit of reading much of the previous testimony of witnesses before this committee.

My basic submission is that a number of aspects of this bill lack clarity in important respects. There are some key concepts here that need to be better defined and straightened out before this bill is allowed to go forward.

If they are not, it is my submission that it will lead to confusion. It will lead to frustration and essentially, unnecessary litigation.

Failure to define more of these concepts with better clarity will dump these problems on to the courts in the end. In my submission, there is a chance to do better by avoiding that.

As I understood it, there were two points to this bill that the Department of Justice explained. The first was to increase penalties in response to certain horrendous and publicized events regarding animals. That is a value judgment made by the department. That is fine.

The problems with this legislation are taken up in the Department of Justice's second objective, which is to try to simplify and rationalize these offences. That would seem simple given that there

are only a couple of sections of the Criminal Code with which to tinker. However, it is not simple because the Department of Justice had to negotiate an irony here. We have animal cruelty provisions that operate in an environment where society accepts a certain amount of killing of animals, sometimes even for sport. Killing animals is justified in certain circumstances. We operate in an environment where animals are killed for other types of greater good reasons.

The Department of Justice has not put forward a package that allows a proper negotiation in this environment. People are entitled to know in advance whether their acts will be criminalized. In my respectful submission, this bill is problematic because it does not guarantee that assurance.

You have probably heard enough colour of right argument to last forever. I will not retrace the debate. I read the initial debate between Mr. Mosley and Mr. Code. With great respect, I agree with Mr. Code. He is undoubtedly correct when he says that colour of right is not a recognized general common law defence.

Certainly, colour of right does have a common law aspect to it. However, basically, the definitional level tells us what it is. That is not enough to say that it comes into the Criminal Code through section 8(3).

With respect to the comments of Professor Sklar, it is good to look at what Granville Williams said. However, it does not help us. It is a common law concept in England. The question is whether it has come through the door of section 8(3). The weight of authority suggests that it has not.

I point to Justice Lemire, speaking for himself in the *Jorgensen* case, who seemed to operate on the assumption that colour of right was not a general common law defence. More explicitly, in the case of *Jones*, which you have been referred to, this stands for the proposition that colour of right is not a general common law defence.

The seven-person court said the following: "The appellant cited no authority for the proposition that colour of right is relevant to any crime which has not embraced the concept within its definition."

The Supreme Court of Canada accepted that as a proposition for the resolution of that case. If it were a common law defence, it may well have applied in that case, but it did not. While it is a lotteries case or a gaming case, it has wider ramifications. On that definitional point, the academics, particularly Mr. Stuart, who is my colleague and friend, espouses the position that it is not a common law defence.

If you are tired of that debate, let us move to the more pragmatic aspect. No one seems to debate that colour of right should be part of this legislation or regime. Why not put it in? Probably 50 per cent of your witnesses say that colour of right is in through section 8(3) and 50 per cent say that it will be left up to the courts, unless senators decide positively to put it in and clarify this interesting, maybe not academic, debate. At least we would then know.

Arguments by the Department of Justice that to make such a provision would be untidy are, in my submission, unconvincing. Section 182.5, which makes reference to section 8(3), is untidy. It is the cost of clarification in respect of the issue of lawful excuse.

I am not sure what "lawful excuse" really means and I think a number of academics, if you press them, would say that they are not sure what the boundaries of lawful excuse are. In the context of this proposed legislation, we are not talking about lawful excuse in terms of cruelty. Cruelty is cruelty. There is no excuse for being vicious, cruel or brutal with an animal. However, it comes into play when the issue is killing — certain permissible kinds of killing. In its package, the Department of Justice has decided to load that onto this concept of lawful excuse and lawful authority. In my submission, that is not good enough. People should know ahead of time what kind of conduct is caught by this legislation. This is not new. The Law Reform Commission of Canada, which has set out in the recommendations that were provided to all of us, suggested, a number of years ago, that animal cruelty provisions state what is lawful and what is not lawful.

In my respectful submission, that should be done in this case, as well, because leaving it with lawful excuse or authority is essentially dumping these important problems of value and judgment onto the courts.

**The Chairman:** Thank you.

**Mr. Sklar:** May I have two minutes for rebuttal?

**The Chairman:** Mr. Sklar, you will have a chance to speak further.

**Senator Beaudoin:** This is a real debate.

Mr. Chipeur, section 7 of the Charter does not deal with the economic aspects of property. There is no doubt about that. However, you said that the Bill of Rights does deal with the economic aspect of property and that we should apply it to this proposed legislation. It is true that the Bill of Rights is still in place, even though we now have the Charter. We do not refer to it often, but we still do, on occasion.

Mr. Chipeur and Mr. Sklar, does this include animals as property? The bill, if I understand correctly, does not seem to deal with it that way in the sense that with Bill C-10B, we do not have the question of the right of property, if I am not mistaken. Without Bill C-10B, we have the right of property. I was surprised by the testimony of REAL Women when they said that a fetus is an animal. I would like to know if the question of property would apply, in your reasoning, because it is not contemplated in Bill C-10B. I understand you to say that is why you are against Bill C-10B.

**Mr. Sklar:** I do not know if I will respond directly to your question but I do not agree with the submission made about the application of the Bill of Rights. On a more fundamental ground, that it deprives individuals of private property. Individuals do not have full reign over using their property. This proposed legislation states that you cannot unnecessarily cause pain, suffering, injury or death without lawful excuse. If you burn down your own house in a reckless and dangerous fashion, that is a criminal offence. If you burn down your house in a way that endangers your neighbour, that is a crime — arson. No one has ever claimed that it is an infringement of their use of personal property. Firearms are personal property but they are regulated strictly.

With all due respect to my colleague, I do not see his Bill-of-Rights argument. This is only depriving people of unnecessary cruelty toward their animals. You cannot use a gun freely under the law. That is a crime, even though it is an individual's personal property. I do not see any merit in the argument presented here on that point.

**Senator Beaudoin:** You are against the bill, as it stands, Mr. Chipeur. Mr. Sklar, you suggested that we leave the bill as it is, with no amendment —

**Mr. Sklar:** Yes, I agree with that.

**Senator Beaudoin:** — on this aspect of property.

Colour of right is another aspect and the definition has been well debated. Some have proposed an amendment or are in favour of an amendment. Having heard the scientific explanation, I came to the conclusion that the definition in the bill is not the best, although we may improve on it.

Each of you is taking the opposite stance. Mr. Sklar, you want the bill passed as it stands and Mr. Chipeur, you want us to vote against the bill as it stands.

**Mr. Chipeur:** I will give you an example. If I have a gun that I choose to dismantle properly and melt it down, destroy it and burn it, I have to do that in compliance with the law. However, I am free to do that because it is my gun and so I am free to destroy it. The current law states that I am free to destroy my animals and I do not need an excuse.

You may not like that or think that is good policy. If it is not, then amend the bill as proposed. The fact is, animals are property. Property is really only certain rights that we have with respect to things. As much as people may not believe that animals are things, they are things in law.

Therefore, there is no doubt that if the Criminal Code restricts my ability to burn my gun and destroy it, then that would be an infringement of my property rights in that gun because I am not free to destroy it.

Parliament's job under the Criminal Code and under all legislation is to protect property rights. That has been true for the last thousand years. Parliament has always been expected by the courts and by society to protect property rights. In this case, instead of protecting property rights that are granted and controlled by the provinces, Parliament is turning it around and destroying property rights.

Again, there is nothing wrong if you disagree with me philosophically. However, do it in an obvious way and do it constitutionally by saying that the act is effective notwithstanding the Charter of Rights.

There is no doubt that my ability to deal with my animal is impacted by this. It is impacted in a way that is not obviously related to any public policy purpose.

**Senator Beaudoin:** This protection of property is not in the Charter of Rights. There is a concept of property in the Bill of Rights. I agree with you. Do you have the property of an animal? You base your thesis on this.

**Mr. Chipeur:** It would be possible to say that all animals will have all of the same rights as human beings, from here on in. If Parliament wanted to do that, it could. I am saying that you must do it by saying the Bill of Rights notwithstanding. If you do not do that, you would have to compensate all of the animal owners in this country for taking away their right to deal with their animals as they have for centuries been able to deal with their property rights.

**Mr. Sklar:** The present section 446 of the Criminal Code is also unconstitutional.

**Mr. Chipeur:** That is absolutely not correct because 446 does not include the provision that you may not kill your animals. The main difference between the current provision and the new provision is that previously, the law protected your animals from others. Now, the law protects your animals from you and turns your animals into a public property instead of a private property. That is the proper interpretation of the law.

**Senator Baker:** We have had some great testimony before this committee. We have had a variety of opinions. I want to get to a conflict that we have now between the witnesses concerning colour of right.

It is interesting that the conflict is between two well known authors in the field of law. Of course, we appreciate Mr. Chipeur because we followed him in his cases before the Supreme Court. I imagine most people have supported some of his causes, even his challenges to the Elections Act.

Of course, we also welcome Mr. Weinstein to the committee. He is a brilliant young lawyer who has appeared before the Ontario Court of Appeal on many occasions in the past several years. He won a case three weeks with ago. And he used as the precedent *R. v. Sheppard*, the Newfoundland case. We congratulate you for the wisdom of your choice of precedence. Perhaps when you get a chance, you can explain to us what you intend to do now with the case. It is something like the dog that chases the eighteen-wheeler. What does he do when he catches it. In this case, the case is sent back to the court for trial on two sections of the Criminal Code, which are difficult to argue, being impaired and point zero weight.

Two professors here are in conflict. Professor Trotter is well known in this country, not only for his books on bail that have been used and quoted in the Supreme Court and everywhere else, but also for his other publications that deal not only with bail, but prior to and after bail.

Professor Sklar, is the only academic who was used by any Court of Appeal to wind up a case. Do you remember that in 1978? You wrote something called, "Catch Words and Cart Wheels." You did not know it, but the final words of that judgment by the Court of Appeal quoted you. Your quote regarded the use of evidence and the exclusion of the evidence. You said that if there were such a strong point, the exclusion would be an affront to common sense. The judge said in his final words in the Court of Appeal that the case was an affront to common sense.

Are some of your comments an affront to common sense? You quoted from *R. v. Jorgensen*. You quoted *Sopinka* a moment ago. That is in the main body of the judgment. Justice Lemire did not disagree with the judgment. His opinion was given after Don Stuart's words in the commentary at the beginning. It is like that in Carswell.

Former Chief Justice Lemire was dealing with exceptions to section 19 of the code. He was dealing with officially induced error. He departed briefly, in paragraph 6, and he said that there were already exceptions to ignorance of the law. One exception is where a person did not know that the law had been changed because they had not read it in print. The second exception was in cases of the

codification of colour of right. That seems pretty clear and completely contrary to your opinion concerning the codification of colour of right.

Perhaps you could also comment on *R. v. Watson* from the Newfoundland Court of Appeal in which they say it not only applies to proprietary rights but other rights. In fact, the Courts of Appeal across this country have said unanimously that colour of right also applies to mistakes of law.

Could you comment on these things because as you can see, I tend to agree with your fellow professor.

**Mr Sklar:** Thank you, senator. As to the *Jorgensen* case, it would not be the first time that Justice Lemire and Justice Sopinka disagreed. In fact, Mr. Justice Sopinka in that case said that he did not disagree with the chief judge's comments. At end of his opinion he said that those issues were not argued before the court below so he would not comment on them.

No case in Canada has ever decided that colour of right is not a defence to damage to property, even though it might not be mentioned in a particular statute. I agree, as I said, for example, in the *Jones* case that the courts have sometimes looked to the content of the legislation and to the purpose of the legislation and decided that, given the way the crime was defined, colour of right would not be applicable there. That is not unusual. Often, defences are found to be inapplicable to a particular offence because it is not appropriate for that particular offence.

Statutes do not have to list — and this was a point made by the Department of Justice, with which I agree — all the defences that would apply to that particular conduct. Otherwise statutes would be even longer and more unwieldy than many currently are. What I say is that the *Jones* case never said, and no other case in Canada has ever said categorically, that colour of right is not a defence if it is not specified in the statute. That would go against the English authority.

With all due respect to my colleagues, colour of right has been a common law defence and not needed in a statute for several hundred years in England. We are not subject to the English common law, yet our courts in shaping our own criminal law use the English common law frequently. One perfect example of that 10 years ago was the case of *R. v. Jobidon*, where the Supreme Court of Canada, with Mr. Justice Sopinka dissenting on the point, placed great emphasis on a House of Lords decision, and on the English common law, and on section 8(3), in deciding that consent to a fistfight that caused serious harm was vitiated under the common law. They placed great reliance on a House of Lords decision. The courts of Canada continually refer to British cases on questions of the common law defence.

Section 8(3) is given a wide scope by the Supreme Court of Canada. It has even allowed, as the *Kirzner* case held, to create new defences under the common law. They continually refer to British cases, so to suggest that the British cases are not terribly important in interpreting section 8(3) and the question of common law defences, I would think, would be down right incorrect.

**Senator Baker:** I read where you are going. However, you just mentioned *R. v. Jobidon* as being a good example. That was a case of a consensual fistfight, agreed to by the trier of fact, where someone trained as boxer had gone up to a gentleman in a bar who he suspected had sucker-punched his friend. Do you remember the case?

**Mr. Sklar:** I do not think it is.

**Senator Baker:** Yes, it is. We have Professor Sullivan nodding her head.

**Mr. Sklar:** That was not mentioned in any of the judgments. It is about a fistfight.

**Senator Baker:** When you read the judgments, and some of us have, at trial the judge said that he is acquitted. Why? It is because of the normal defences; that this was a consensual fight. It went to the Court of Appeal, who saw it differently, and then the Supreme Court of Canada agreed with the Court of Appeal. Do you feel comfortable about going so far as to say that it is based on the common law? Yes, you could suggest that there was a suggestion made in English law and the cases going back to the 1600s. Are you comfortable in saying, that is a verification that is present in the common law?

**Mr. Sklar:** I am saying that the court in *R. v. Jobidon* considered many issues, including the authority

that was in conflict in Canada, and policy considerations. The trial court had found, by the way, as a question of fact that the accused had not intended, when the fight started, to cause such serious harm as occurred in that particular case, and he did not know the person had become unconscious when he continued to hit him. That was a finding of fact by the trial court.

The court certainly included in its reasons for judgment a reliance as well on, or at least gave considerable weight to, the decision of the British House of Lords that had held that a consensual fistfight of the same nature as happened in *R. v. Jobidon*, consent to that would be vitiated under common law principles. The court several times cited that decision of the House of Lords.

Justice Gonthier specifically referred to section 8(3) by way of saying that the common law can illuminate concepts in our criminal law, such as the question of consent. It is not as if the court felt bound by the House of Lords decision because we do not have the Privy Council any more in Canada to which we have to take appeals. We are not bound. Certainly though they placed a lot of weight, as they should have. The common law comes to this country from England. It was inherited by Canada.

**Senator Baker:** I have read *R. v. Jobidon*, including the trial judgment, the Court of Appeal judgment and the Supreme Court of Canada judgment. The reference to English law goes back to the early 1600s when, although it was consensual, if you cut off someone's hand because they are a beggar, or if you disable someone so they would not have to go to war, in my humble opinion I would say, that is out of the question.

The next one referred to was boxing, and it was declared an assault. That was your second case.

**Mr. Sklar:** There was a hockey assault also.

**Senator Baker:** I do not know if we are comparing apples and oranges, but you have been doing a great job in your position. You have been quoted almost as much as Professor Sullivan. No one will be quoted as much as Professor Sullivan, and the other professor.

**The Chairman:** We welcome Professor Sullivan and we realize that your teaching duties kept you from joining us a little earlier. We thank you for being here and offer you a couple of minutes to make an introductory statement. Then we go back to our questioning.

**Ms. Ruth Sullivan, Professor, University of Ottawa:** Mr. Chairman, I was invited to address two issues. One is whether moving a provision from one section of the code to another, or one part of the code to another, could have legal significance. The short answer is, definitely. Where you place a provision in a legislative scheme naturally colours its interpretation.

I have a nice precedent from the Supreme Court of Canada. Unfortunately it is from a dissenting judgment, but it is certainly from an eminent justice, Mr. Justice La Forest. The case is *R. v. Finta*.

The issue in that case was the significance of the war crime provisions that had been added to the Criminal Code. One of the points Mr. Justice LaForest made was that this particular provision was in Part I of the Criminal Code, the general part. He relied on that fact strongly to infer that there had been no intention to create offence with those provisions. They were merely dealing with territorial scope of the provisions. He relied heavily on the fact that general provisions of the Code deal, as does section 8, with matters to preserve common law defences. Those are interpretive provisions in the general part of the Code. It would be anomalous to find an offence there.

That is a rather striking example but it makes clear how moving things from one part of the Code to another can make quite a significant difference.

The other question I was asked to address has to do with the colour of right defence. I did a quick search of references to colour of right in the Criminal Code. I found only two at the time. Perhaps you have dealt with this already.

One example is in Part IX, dealing with wilful and forbidden acts in respect of certain property. The relevant provision here is that no person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

The existing sections dealing with cruelty to animals are included within this package. It seems to me that if you remove that section — redraft it and stick it elsewhere in the Code — you will definitely take away the colour of right defence. Anyone looking at that evolution will think that it

was done intentionally.

To avoid that effect, you need to amend section 429(2) to include a reference to the number of the new provision that you are including, if you wish to preserve the defence. There would be a strong possibility that a court looking at that would conclude that Parliament intended to take away the defence.

**The Chairman:** Thank you, Professor Sullivan. I move now to Senator Andreychuk.

**Senator Andreychuk:** Professor Sullivan, that is exactly the point I had planned to address to one of the other witnesses. However, I will put it to you.

The government officials who testified before us said that it was not the government's intent to change the ability to use that defence by moving the clause. They seemed to put not much weight on the point that you are making that if you do move it from one to the other, Parliament should be seen later to have meant to do something, as opposed to not meaning anything. Am I understanding your point correctly?

**Ms. Sullivan:** I am puzzled by that response. If you were creating this for the first time, then I would agree that it is not necessary to spell out a common law defence. There are only two references to this defence in the entire Code.

Initially, I would have said that you do not need it. One of them refers to the very section about which we are talking. It makes a huge difference, and I am puzzled by the lawyers' response to your observation.

**Senator Andreychuk:** Are you relying on your years of teaching or the years of drafting in the Justice Department when you make those statements?

**Ms. Sullivan:** A bit of both.

**Senator Andreychuk:** When the original section was put in, identifying two defences, the department's comment also was that they were not necessary then. It seems to me, and I am wondering if you think it is correct, that we have to give some intent to Parliament. We need to show that they were not simply adding comfort words. I have not been able to find any evidence, in the speeches or anything, that they were comfort words to elaborate the defences. I do not see where the situation was different.

If we simply had common law defences, we would not have to identify those sections. Does that not lead you to say they must have been put in there for some purpose? Removing them and putting them elsewhere must have some purpose? A court might decide that.

**Ms. Sullivan:** They probably have been left in there by mistake. I do not agree with everything you said, senator, because the code used to be full of these common law defences. The drafters have been taking them out over the years.

I found only two references. I can guarantee that in 1954 there would have been 500 references.

This is probably an oversight. This one did not get taken out in the drafting. I do not think that you need to mention common law defences for them to arise. I think they were in there as matters of notice or possibly as matters of comfort. Under today's drafting convention you would not stick them in.

However, I agree with you that, given that we do have them there, what is being proposed could be interpreted by the courts as reflecting a deliberate intent to remove this defence. I am not saying it would be, but it could be.

I do not see why you would not want to fix it up easily if that is not your intent. All you need do is add two words. You have to open up a new section. I am being politically naive. That is the academic part of me coming out.

Nonetheless, it is fixed by simply adding a reference to the new section number in section 429(2) of the Criminal Code.

**Senator Andreychuk:** That clarifies it.

We had witnesses previously saying, including an eminent defence counsel, that no court would interpret that. I do not see anything that would bind any court from taking the interpretations that you are saying to give weight to the movement of that defence.

**Ms. Sullivan:** It is a possibility. It would be surprising, but it is a possibility.

The other thing about these colour of right defences mentioned here deals with property offences. I am not sure that I brought that reference with me.

However, the colour of right language seems to be associated with property. If you are moving this offence to another part of the Code that is not focused on property in particular, that would further lend credence to an argument that the intention was to remove this particular defence.

Probably, in practice, given the way we protect the rights of the defendant, and when in doubt you resolve doubt in favour of the defendant, he is probably right. It is not likely to happen, but as a matter of statutory interpretation there is an argument to be made.

**The Chairman:** Professor Sullivan, before you came in, Professor Sklar indicated to the committee that even though it was taken out of one section, colour of right would have been saved under section 8. Do you agree with that?

**Ms. Sullivan:** No. Section 8 preserves common law defences. Thus, I certainly agree with what he was saying about common law defences being an integral part of the Code. They are expressly saved by section 8. I also agree that we go back to British cases to find out what those common law defences are.

We have an anomaly here. You do not need any reference to colour of right with section 8. We have two. That is an anomaly. It will have to be dealt within some way. Nine times out of 10, it would be dealt with the way the defence counsel was suggesting. My very narrow focus on statutory interpretation suggests that there is a respectable technical argument that could lead one to say that Parliament must have intended to do something different here.

**Senator Joyal:** I have two questions. I want to refer to one of the question that still puzzles some of us around the table. We are removing animals from the property section of the Code. If you have had an opportunity to read through the transcripts of our committee, you will know that there were questions put to the representatives of the department.

We have been told that this bill does not change anything fundamental; it is just increasing the penalties. That is the way the bill has been introduced to us.

Many of us are being "doubting Thomases" about the global answers that were to constitute this bill. When changes to the Criminal Code are made, they are usually meaningful, unless there was an omission when the code was drafted or when it was amended. This bill removes animals from the property section. The bill does not have animals in the section pertaining to people, although some would prefer to assimilate animals with people. Clearly, the bill does not do that.

My colleague Senator Beaudoin will be pleased with what I am about to say. When we were in the law faculty, we were told that properties entailed three benefits for the owner: uses, fructus and abuses. I agree with Mr. Sklar that abuses, in cases of certain kinds of property, have been regulated in the Criminal Code. You cannot burn down your house in such a way that you cause damage to a neighbour or that constitutes a fire hazard, et cetera. I agree with that. In principle, however, you can make your house disappear. You can go to City Hall, get a permit and demolish the house. You have fundamentally changed your property as a result of that action. You have made your house disappear within the framework of either municipal or provincial legislation.

This bill, in respect of section 182.2(b), states that everyone commits an offence who wilfully kills an animal. The way I read this bill is that the owner of an animal is deprived from the third element of the property, which is abuse. Suppose I have a cat and I have a gun for which I have a permit because it is registered. Then, suppose I take my gun and I shoot my cat. There is no pain but there is instant death. According to this bill, I would have committed an offence because I wilfully killed an animal. That is the way in which subparagraph (b) is written.

If I understand the legal concept, we are removing it from the property section because we lose the third element of abuse. There is no regulation. There is no way you can obtain a permit to do it properly. You can no longer do that.

Have we not gone one step further than what Justice Lemire said in the *Ménard* case at the Quebec Court of Appeal? Previous witnesses have told us that this bill encompasses the principles of the Lemire decision in respect of the *Ménard* case. I think all of you are all familiar with the decision on that case.

Am I correct in interpreting the bill that way? Do I understand correctly what it means to remove animals from the property section? We cannot leave it in the property section of this bill because we are abolishing the principle of abuse in respect of animals — the ultimate abuse is to kill the animal. Am I right or am I wrong?

**Mr. Sklar:** The removal of animals from the property section is an attempt to say that animals are a different kind of property, and that they are living creatures and are not the same as a car or a gun. You can melt down your gun and it feels no pain. You can dismantle your car and it feels no pain. If you abandon your car in a used car lot, the car does not feel any loss because the car no longer belongs to you. That is the difference. Animals constitute a different kind of property but they remain property because, realistically, people own their pets. That fact does not change by taking animals out of the property section of the code.

Rather, it is an attempt to modernize our view of certain kinds of conduct. I would not want to analogize this type of proposed legislation to the way in which we have now revised our view of the crime that used to be called "rape." Rape was included under the section of the code called "sexual offences." It was removed from there and added to the section called "offences against persons" to show that it was not a sexual offence but a crime of violence. The law under rape never changed as a result of calling it "sexual assault" and putting it under the "offences against persons" section.

The law has been changed recently with new statutes that take into account "reasonable mistake." The basic definition of "rape" never changed because it was taken from one section and put into another and was called "sexual assault." The same thing applies here. This is a newer view that is supported by the great majority of Canadians who agree that animals are not like cars or guns. This proposed legislation states that you cannot abuse an animal, even if it is your own animal. I find no problem in that, as a matter of policy. I would hope that the committee will feel the same way.

**Mr. Weinstein:** I will go back to your example, senator, of shooting your cat with your gun and losing the right to do that by removing animals from the property section. I do not think you ever had the right to shoot your cat under the current legislation. The current legislation precludes you from killing your domestic pet. I submit that there is no need to remove it from the property section. You could still keep it as property and still maintain the intent of these sections, which is to prevent abuse. That was always the intent, right from the implementation of the legislation. I do not think we ever had the right to kill our domestic pets. The legislation is clear on that.

I do not think that changes but, at the same time, there is no need to remove it from the property section. Domestic pets are still property and they should still be classified. The history of these provisions relates to the fact that these animals are property. They may be different from other kinds of property — cars and guns, et cetera — but they are still in the category of property, rather than the category of offences against the person, which is the only comparison that we could make. Animals can stay in the property section and still preserve all the intentions of this legislation.

**Mr. Chipeur:** Senator, with respect, I disagree with my colleague. I believe that you do have the right to kill your cat, under the current law. You do not have the right to abuse your cat and you do not have the right to torture your cat. However, if you choose to end the life of your cat today, under the Criminal Code you may do so. You may also go to your local pet store and buy a goldfish. If you, under the new legislation, take that goldfish and swallow it as a joke, you have just committed a criminal offence. If you fry it and eat it, maybe that is a lawful excuse. However, if you swallow the fish whole, as a joke, and the fish dies, then you are in flagrant violation of this provision of the code.

We are walking into unknown territory. We do not know where we are going. I am convinced that those who do not have your goodwill in mind will use this to abuse their fellow citizens in an unfortunately misguided effort to try to ensure that there is humanity. We all agree that cruelty to

animals is terrible and the current Criminal Code prohibits such cruelty. That is all you need.

**Senator Joyal:** — on the basis that we are removing animals from the property section of the code.

**Ms Sullivan:** I do not think that you need a tag cut out of the property section to take away a property right. All of those sections limit property rights. The point of having a criminal law of property is that you limit what you can do with property.

That does not, to my mind, explain why we removed it. I think Professor Sklar adequately explained why we removed it, because it is a different kind of property. I do not entirely agree that when you change rape into sexual assault and move it to another section, technically, you do not change the rule, but you might the way it is applied. You might change the attitude towards it. I think of law as being broader than the rules set out in the code. It is also how they are applied and interpreted. You are signalling that attitude by moving it to a new section. You are saying, "We will take a different attitude towards this." Even though the words remain the same, we might interpret it a little more broadly than we did before.

**Mr. Sklar:** I completely agree, Ms. Sullivan.

**The Chairman:** Mr. Weinstein, are you suggesting that, except for domestic animals, all other animals used for lawful purpose should be exempt from this bill?

**Mr. Weinstein:** I think the intent of this legislation is to deal with cruelty. Cruelty usually arises in the context of a domestic pet. Practically speaking, that is where it arises. It does not arise in the context of killing a cow for food.

**The Chairman:** It can arise in commercial practice.

**Mr. Weinstein:** It can, but generally it does not. It is rare that it arises in commercial practice. I submit this is a response to the escalation of violence towards pets. The cases we see are cases where cats are put in a microwave, or dogs are dragged behind cars. That is what we want to prevent and avoid. In my mind, we rarely see commercial enterprises that are being cruel and abusive towards their animals.

**The Chairman:** Certainly, we want to prevent that.

**Senator Joyal:** I am not sure the way you interpret this legislation covers all its intents and potentials. I think this legislation goes much further than protecting and preventing cruelty to domestic animals. It covers not only that, but, as Professor Sklar has said, it gives recognition to evolving standards in relation to animals. We had previous witnesses here, a panel of university people, who explained to us that, in relation to animals, we are dealing with a reality in Canadian society that is evolving. A practice that is not acceptable today may have been acceptable some twenty years ago. Let us think about seal hunting. Twenty years ago, seal hunting was not a major fuss for anybody in Canada. However, since all kinds of initiatives have been taken by all kinds of groups, any time there is a seal being killed for a lawful purpose, to protect the cod, as meat for Aboriginal peoples and so forth, it is wrong, in principle.

Our concern is that this bill has a built-in flexibility over a concept that can be used by some existing and future groups that will use this bill to try to achieve their purposes. That is what we try to evaluate and put our finger on, to be well aware of what we are doing when we are voting this legislation, which we were told was not changing anything.

**Mr. Weinstein:** I do not dispute that the evolution will continue to change things and I should perhaps not have confined it to domestic animals. However, the concerns that arise from the way it is now drafted are as you said. It was presented as not changing anything. However, it is changing everything, because it is flexible but to the extent that we have no idea how far it will be taken. There have to be some guidelines and certainty within the legislation. The problems we have with this as a readable legislation, as Mr. Trotter said in his comments, is that there is no certainty. As a citizen, and if the criminal law requires that a person knows what is an offence, with the way the terminology is now and the way "animal" is defined, we have no certainty or idea how far this legislation can go. I do not dispute that there should be some flexibility to deal with this evolution. Right now, the way it is structured, it is infinite in what it could apply to and has no certainty. It does not send that message and the average person will not know what, in fact, is a criminal offence when

it comes to animals. That is the problem that we see with the legislation.

**Senator Joyal:** We all agree that cruelty should be ruled out and prosecuted. What there is in this bill, with which we are concerned, is that there are lawful activities presently pursued by some groups in Canada, such as researchers, Aboriginal people, some industrial concerns, religions and others, that one day could be seen by some groups in Canada as being unacceptable. Then, this legislation could be used to prevent that. That is why we should know exactly where we are putting the boundaries around this legislation.

**Mr. Weinstein:** That is our concern, as well. It is open to abuse right now by, and I use the term loosely, public interest groups that go beyond legitimate things that should be legislated and criminalized. These are criminal offences we are discussing. There has to be some guidance as to what is, in fact, lawful, so we do not have that abuse. I come back to what I saw when I went through the evidence before this committee. What I found the most abusive, on its face, is the extension of the definition of animal to an unborn child. That is what we want to try to avoid. We want guidance and certainty in the legislation. There should be some flexibility, but right now it is too open. Until we close it down a little bit and have some further guidance, it will be problematic and will subject legitimate practices and customs to potential prosecution. That is what, we submit, should be avoided.

**Senator Cools:** I would like to thank the witnesses for coming before us and for confirming what I have been reading and seeing in this bill. We have Professor Sullivan with us and all of you learned people, and there seems to be a body of expertise here in respect of drafting and understanding drafting principles and drafting practices. In addition to that, we have a full understanding here that placement of any provision within the Criminal Code is an extremely significant matter. Originally, I was going to ask you to comment on the movement from property to wherever else, but I think we are all now satisfied that that decision is not accidental and would have far-reaching, and I would say flexible, consequences. Therefore, we can look at this through the eyes perhaps of the drafters. Perhaps you can help me confirm yet another suspicion and look to the section that the bill proposes to amend, which is section 182 of the Criminal Code. The entire bill is an amendment to section 182 of the Criminal Code. It adds 182.1, 182.2, 182.3, et cetera. Section 182 says "dead body" includes subsection 182(a) and 182(b), and has no relationship whatsoever to the amendment being spliced in. When I first looked at the bill several weeks ago, I could not understand why section 128 was being amended and not section 446, since the subject matter is related. The provisions in 182.1 are not even related to section 182, which it purports to amend.

Since you have expertise in drafting, perhaps you could attempt to look into the minds of whoever did this drafting.

**Ms. Sullivan:** I will add a slight qualification to how you summarized the evidence. I would not want to say it is extremely significant, but rather potentially significant. That is my academic side coming out.

This is actually not an amendment to section 182. It is, rather, inserting a new part into the code that deals exclusively with cruelty to animals, so that now it has its own part. You will notice that section 182 is the final provision in the sexual offence section, and then section 183 begins invasion of privacy.

You are asking me why it is inserted here, and I do not know.

**Senator Cools:** It is not even related to section 182.

**Ms. Sullivan:** It is its own part.

**Senator Cools:** It is more than its own part. It is 182.1 and 182.2.

**Ms. Sullivan:** That is a technical drafting matter. It does not suggest there is a relationship between them. If you are going to insert new sections between existing ones, that is the method you use. It does not matter whether they are related; you have to do it that way. There is no other way to slip it in.

**Mr. Sklar:** When the code is again renumbered, as happens periodically, that will become section

183 or perhaps section 175. It is an act to amend the Criminal Code (cruelty to animals), not an act to amend section 182. I agree that that would be anomalous. They often use ".1" when they have to insert a new statute in the code.

**Senator Cools:** However, they do not bring in totally unrelated subject matters. Many of us around this table have had a fair amount of experience working with drafters. When I first read this amendment, I assumed that it would have been placed somewhere around section 446. I sincerely believe that this is no accident, that these provisions are being moved totally out of the property sections, and it seems to me that they had difficulty finding a place to put them. This is not unusual.

**Mr. Weinstein:** They have also created their own part, and it is not under the part of sexual offence. It is under Part V.1, whereas sexual offences are under Part V. It is creating its own separate part of the Criminal Code. Therefore, it is now a section and a part that deals only with offences of cruelty to animals.

**Senator Cools:** I understand that but I am saying that there was difficulty finding a place to put it, obviously. If they wanted to upgrade the issue of treatment of animals, the proper place to have done it was in those other sections. The mere fact that they are moved has to have great significance. I do not want to sound cynical, but I have sat on this committee and in this place long enough to know that much of this sort of thing goes on.

**Mr. Chipeur:** Senator Cools, I think you are on to something. If I were a judge and wanted to engage in some mischief, I would say that section 182 deals with dead bodies and that, although dead bodies are not property, they are not human beings, and so they have some special status within our society. In placing section 182.1 and following right after section 182, Parliament was intending to create some special status for animals that derogates from their former status as property. I think even Professor Sklar would admit that the intent here is to upgrade the treatment and status of animals within our society.

I am not here to say whether it is a good or a bad thing, but I am here to say that it is a direct intrusion on property rights and if you are going to do it you need to take into account the effect of the bill of rights.

**Mr. Sklar:** Except for the last sentence, I would agree with Mr. Chipeur.

**Senator Cools:** Professor Sklar, you talked about the alteration in placement in the Criminal Code of sexual assault versus the old term "rape." I was always under the impression that sexual offences were offences against people but were treated in that way for an entirely other set of considerations to do with morality, vice and other things that were considered important, but it was always known that those were offences against persons.

**Mr. Sklar:** I would agree. I believe the change they wanted to make is that these are not crimes of excess passion but crimes of violence. I think they achieved that objective.

**Senator Bryden:** Normally, I get involved with drafting, but I would like to pursue a different line of questioning. I come from a mixed farming background. On our farm, we had pets as well as hogs, chickens and horses and we dealt with them in the normal manner in a farming community. I am also a hunter of game and a fisherman, although not a good one.

Many people who have appeared before us, and others who have spoken to me personally, are concerned that this legislation could subject people, who are honestly employed in perfectly acceptable activities, to abuse and harassment by certain persons or interest groups.

It is hard to be specific, but I want to give you a couple of examples. As well, I do not know whether they are valid examples. The proposed section 182.3(1) states:

Every one commits an offence who

(b) being the owner, or the person having the custody or control of an animal, wilfully or recklessly abandons it or negligently fails to provide...shelter and care for it;

We have just had a couple of unfortunate experiences in the farming community where I live where, through the negligence of the owner, a pig barn burned down. It is clear the fire was caused by the negligence of the wiring in the shelter. If the farmer had had adequate inspections, this would not

have happened. As a result, 350 pigs were fried to death. Has this person committed an offence by having negligently failed to provide suitable shelter, meaning one that is not going to catch fire in the middle of the night when it could have been prevented?

**Mr. Sklar:** You have made two points, senator. As has been the trend in recent years, negligence is defined in the proposed section as departing markedly from the standard of care that a reasonable person would use. It is not ordinary negligence; it has to be gross negligence. That is to ensure that we do not confuse the criminal law with the civil law that has an ordinary negligence standard. The criminal law has a different purpose than the civil law in that it can put people in jail instead of making them pay money.

In the example you gave, if it was a wiring problem, then I doubt if any court would find that a marked departure from the standard of care. Nor would a Crown prosecutor decide to prosecute that case. If, under this provision, however, there was an indifference to the animals, if there was a failure to take care that did depart markedly from the standard of care of a reasonable person, then the owner of those pigs might conceivably be charged under this statute.

**Senator Bryden:** In building a barn, or any building, there is a standard of care in terms of the wiring that requires, under building codes, that it be done by qualified electricians and that it be certified. I do not know for sure, but let us assume that was not done in this case. Many people in the country can install their own wiring. Would that qualify as being a negligent act?

**Mr. Sklar:** No, not by itself. There have been cases on this. In one case involving negligence in driving a vehicle, the court of appeal said that the violation of rules of the road does not automatically constitute criminal negligence. The emphasis is always on criminal negligence, which requires a higher degree of care.

Many people have said that the standards for taking care of animals under the Canadian Council of Animal Care would be relevant to the question of whether there was a violation of proposed section 182.3. The standards of care under the appropriate code for electrical wiring would be of relevance in deciding whether there was a criminal act, but they would only be of some relevance. They would not make the act criminal. It would have to be a marked departure from the standard of care.

As I said, the criminal law is different from the civil law in that it puts people in jail; and, in some countries, it puts them to death, although, happily, not in this country.

**Mr. Trotter:** A misconception about this legislation is that negligence somehow waters down unduly the criminal standard. It does not.

My friend gave the example of going through a light and killing your cat and, perhaps, being liable for that, but not being liable for killing your passengers. That is just not the case. It is the same standard of criminal negligence — a substantial and marked departure, something deserving of punishment.

**Mr. Sklar:** Mr. Justice Sopinka held in another case that going through a red light and hitting somebody does not automatically constitute criminal negligence because it was not a marked departure.

**Mr. Weinstein:** As to whether it is an extension of it, here is part of the problem with the drafting of the bill. He may not be criminally negligent, but is he reckless in killing an animal without a lawful excuse? Recklessness can, perhaps, expose your neighbour to criminal charges because of that recklessness.

**Senator Bryden:** I am not sure I agree with that.

**Mr. Sklar:** Recklessness requires an awareness that harm might occur. It is a subjective state of mind. I would say that wilfully and recklessly, which my colleague said is vague, is language used all over the Criminal Code. It is not vague; the courts have been defining it for centuries. They have clear meanings.

**Mr. Trotter:** I agree with Professor Sklar. Recklessness is a completely subjective standard that is comparable to, if not right beside, actual intention. It does not lower the standard at all. On that standard in your example, the person would be completely home free.

An issue that has not been raised yet is that the use of the words wilfully and recklessly is an odd construction because these days we are talking about intentionally and recklessly. Putting wilfully in there is a bit mischievous because there is a binding authority in Ontario that says, wilfully excludes recklessness. I do not know why the drafters put the two of them in this statute. However, they are clear on the fact that it is a subjective standard.

**The Chairman:** Despite conjunctive and disjunctive interpretations, it actually says "or." Does that make any difference to what you are saying?

**Mr. Trotter:** No, I am sorry if I was sloppy with that aspect of my response. We see intentionally or recklessly used interchangeably. I am saying that using the word wilfully, and making it comparable to recklessly, is a bit odd.

**Mr. Chipeur:** Might I give a contrary view, Mr. Chairman? Four responses disagree with you, or they at least answer your question one way. I would like to answer it the other way, and not just because I happen to be a contrarian. I have not grown up on a farm, nor have I lived on a farm. However, it is my view that what you have here, and what you have put your finger on, is people who have no concept of what it is to raise animals, to be on the farm or to be on a ranch. Those individuals have drafted this legislation. To put it bluntly, they do not have a clue. You have highlighted the most important consideration for this committee, that is, if we were to put this group of drafters on a farm for a year, I do not think we would ever see this kind of legislation.

We are being naive to think that your example could never involve criminal charges. We just saw a terrible accident south of the border on the East Coast where there was some marked variation from what is required of a reasonable person. What you have here in this proposed section is that it is now a crime to be stupid. That is not what the Criminal Code was intended to do.

**Senator Bryden:** I presented my example because I think there is some colour of justification for using that type of example.

Rightly or wrongly, people who are involved in husbandry of animals are concerned about groups whose principal interest is making it difficult for people to make the regular use that they would make of their animals.

I will give you an example that I could not believe when I read it. I wish I had cut it out. There is a small jurisdiction, I believe in Europe, where there was a plebiscite. The result of the plebiscite was that adequate care of a pig included that the pig was entitled to have a toy in its pen, preferably a round toy, such as a football or a basketball. Also, either the toy would be changed or the colour would be changed at least once a month. Allegedly, that is somewhere in a law in that particular jurisdiction, or will be.

If a person wilfully fails to provide suitable care for his pig, and did not provide the appropriate toy, would it be in violation of this provision? That is vastly hypothetical and highly unlikely ever to happen in a common-sense country such as Canada. However, it is required in some country in Europe, which believes it has common sense.

It shows that this type of abuse can occur. It is almost a paranoid concern to cattlemen, farmers, hunters and particularly the Inuit and the Aboriginal communities and others. There is a range of people who are concerned that this bill will give people the right to take harassing action under colour of this bill. It can put a real chill on their ability to act and do what is their profession. I would like to have a comment on that.

**Mr. Sklar:** It will change the way in which people are allowed to deal with animals. That is a change that has been coming over the decades.

I will talk about the effect of the legislation on hunting. In the course that I teach on animal law, we look at a case from the State of New Mexico in the United States in which the hunting method used was to snare for deer. When the deer was caught in those snares, they strangled over a period of many, many hours — perhaps over a period of 24 hours — or they died of stress and fatigue from trying to escape the snare. If they were caught by their legs, they would try to chew off a part of their leg to escape. Under the New Mexico statute, that was found not to violate their law with regard to animal cruelty.

Under our statute in Canada, I would hope and pray that it would violate the anti-cruelty provision. I

do not think any hunter or trapper in Canada would use snares that would torture the animal. Those animals were tortured.

In my main presentation, I said that I do not think it affects hunting in Canada or hunting under the traditional Aboriginal ways, except where unnecessary cruelty is involved. It will limit situations of unnecessary cruelty. That will be left to the courts.

I will speak on this question of groups using this legislation for their own purpose. It has always been possible under the criminal law for groups to try to use the criminal law, or the civil law for that matter, to advance political motives. That is a risk. However, we have Crown prosecutors and courts. Not every Crown prosecutor has to prosecute any case because a particular group wants it prosecuted. As many speakers have said, our system of private prosecution is severely restricted, and more restricted by new legislation.

We have always trusted the courts not to give in to groups trying to harass people who are acting within the law. However, if groups — including your pig farmer, senator — do act in a way that imposes unnecessary cruelty, this law might be applied.

Everybody around this table, and witnesses, has said that they are opposed to cruelty to animals. This law does not punish people who are not cruel to animals. It only punishes those who are.

**Senator Bryden:** I wish to make the distinct point that what was not unnecessary cruelty yesterday is unnecessary cruelty today. How many young people who live in the country come in the middle of the winter, where I live, with two rabbits that they have caught in a snare. I have set them. You have to be good to get them. You catch them in a snare, and there is nothing fancy about that snare. It is a piece of copper wire. Senator Baker probably has one in his pocket.

When a rabbit gets caught in that snare, it dies of strangulation, as would a coyote or bobcat. Trappers try to check the snares on a regular basis, sometimes hourly. There is no question that when I was a boy, this was not acting in a cruel manner. This is what boys in the country did in the wintertime.

The boys now do not trap them that way. They have a trap with a front door and a backdoor. The rabbit comes along, and as soon as he touches the door in front of him, the backdoor comes down.

The boys do that because if you snare them, you can get about \$1 apiece for meat. If you catch them live, you can sell them for \$8 to a game farm in the U.S.

**Senator Andreychuk:** There has always been a tension between those who think an activity is legitimate with animals and others who think it is not legitimate. I was going to Mr. Weinstein's point. You could not be a farmer or a researcher and be assured under the present law that you are safe and not violating it, because the norms are not universal. They are changing all the time. Pressure is brought to bear from different sides.

We have a body of law and sections of the Criminal Code, which, over the years, we understood what they meant, or at least we had some reasonable assurance of where they are going and how they will be interpreted.

For example, we have often used the provincial legislation as a backdrop to say, for example, if you are in a slaughterhouse slaughtering hogs, there have been standards set. The courts have always said they reserve the right to look at universal standards and are not bound by provincial regulations.

What concerns me is where are the points in the new law and the new act that will make these groups more vulnerable? That is the real point — not that they are vulnerable, because they are vulnerable now. I have heard that the definition of animal is one place where they are likely to be more vulnerable now. Where else would they be more vulnerable than if we left it? With respect to this debate of whether the hog farm is in or out and they could be charged, I know from my years of prosecuting that it is all a judgment call on the facts of the case. Some groups will always say there is a legitimate charge and others will say, no, this is just good animal husbandry. Where, in this new Criminal Code, is the fear that they will be vulnerable, legitimized by the way it is drafted; not by what the government intended but by the way it is drafted?

**Mr. Weinstein:** Aside from the definition, which I think is where the greatest vulnerability is, it is

with terms like "brutally" and "viciously." For example, when you kill an animal brutally or viciously, everybody will have different standards as to what brutal and vicious is. People on the outside will not know, for example, whether biomedical research and the way it is conducted is brutal or vicious.

You may have to go back to the standards, but the problem now is we are exposing people to more charges than they were exposed to because there are more vague and more subjective terms. I go to those types of terms, the brutal and vicious, to say everyone will have a different view. It is not to say there will be convictions at the end of the day, nor is it to say that one prosecutor may view it differently than another, so it is subjective on the part of the prosecutor as well. It is still exposing to charges, and, often, I will submit, needless or baseless charges, based on subjectivity. It is those types of terms that I think make this section vulnerable to that type of abuse.

**Mr. Chipeur:** Might I give you the single word that I think is the biggest problem for law enforcement? It is the word "unnecessary" in clause 182.3(a). I will refer to Professor Sklar's comment about the deer and their snare. What if we have commercial fisheries, and we have a net and we have the fish caught? Remember, the fish are there. Regardless of whether they feel pain or not, they are in because they are vertebrates. If I say, I will just leave my net out because the price of gas is too high. I do not think there are many fish there. It was an old net any way. I will leave it there, and the fish will die in the gill net over time and I just do not care.

Have I caused pain unnecessarily? My guess is that I have. That is probably an offence under the Fisheries Act or under some other federal legislation with respect to the environment, and it should be. That is a civil wrong. We should punish a civil wrong civilly. To say, however, that leaving that net out in the ocean suddenly becomes a crime, just because I place one property ahead of another, and that is, dollars in my pocket with respect to gas over the fish in my net, we have some grave uncertainty.

**The Chairman:** Mr. Chipeur, "brutally" and "vicious" are certainly new, but *Ménard* defines "unnecessary"; does it not? There is nothing new about that.

**Mr. Chipeur:** If you read the current provisions, they relate either to animals that are not yours or to animals that are yours with respect to the issue of causing, basically, the idea of torture. You are torturing. This section is new.

**Mr. Weinstein:** Unnecessary pain has been there throughout. You are right. We have to look at it in the context of the new definition because this new definition, and I know Senator Andreychuk said aside from that, is relevant. When you look at the expansion of the definition, all of a sudden unnecessary pain has an entirely different meaning and different problems with it.

**Mr. Chipeur:** I was wrong to use the idea of willfulness. It is negligence that is new. If I will leave my net negligently, that is what is new, and that is where the uncertainty is. It is not a willful act. It is willful in the present legislation.

**Senator Adams:** Professor, you say that you are teaching some kids in school. Can you tell me what you are teaching as to how animals survive? You said you have taught all your life about animal law.

**Mr. Sklar:** All my teaching life I have been teaching criminal law, law and psychiatry and advanced criminal law. I have only started this animal law/animal welfare course this term. It is a new course for me. However, it has been an interest of mine for many years. It is a course that is basically divided. In one respect, it looks like an ordinary law course because we look at cases like the New Mexico case with the snares and deer, and we look at statutory language. We analyze it as we would in any course.

We look at issues of owners' liability. For example, in some horrendous cases in both Canada and the United States, individuals in San Francisco were charged with murder because two of their dogs killed one of their neighbours. We talk about animal liability and liability for dangerous animals. We look at international law, the international whaling convention, for example. That is a regular law course. We also look at questions of animal welfare, and we get into philosophical questions of whether animals have moral status or rights. We discuss it along the lines, and that is the newer view. It is a new course of mine. However, it resembles a regular law course, such as Children and the Law or Women and the Law. I guess you can call this Animals and the Law.

**Senator Adams:** About a month ago, we passed Bill C-5, involving species at risk, especially with

regard to those species up north. I am really concerned about Bill C-10B because it does not concern what a mammal feels. We hunt seals, which has been mentioned here. Members of the committee know how we do it and what we do for hunting. We use spears to catch fish. You mentioned nets. I had my nets last year at Rankin Inlet. Sometimes we take perhaps one week to check the nets to see that they are not bothered by ice. Sometimes fish take maybe two days to drown in the net. Two days is not too much. Maybe after a week and a half I can take the fish out and it is rotting in the net. That is what we do where I live. We use a harpoon, especially to chase whales and sometimes seals. We have to do that to ensure that we do not lose it. If we shoot it right away, then it sinks. The water is too deep sometimes, and you cannot get it. In the wintertime it is the seals that do not sink. Sometimes we find out that a seal is fat, and in freshwater he sinks right away. In salt water, it can float. Right now I can go with my friend to the floe edge, as soon as the tide goes out and water is open, the ice starts dripping out from the current and the tide goes out, and sometimes seals pop up. At this time of year with the cold and everything, the seals are fat and do not sink.

The same is true with any type of animal. Sometimes we do not kill them right away. We can find the animals and not shoot them. We know how to use a knife and kill them right away. If I catch a fox, I do not hit him and kill him. We know where they are. You can grab it down the back of its leg and put your feet into its chest, and in five minutes it is dead. Even if you caught a fox today, it is minus 30 degrees outside, and they quickly cannot feel any more. I do not know about seals or whales. They do not die right away. Sometimes we have to let them float, let the whales set for a while, and as soon as they are going down, we shoot them and kill them. The tools we use are not cruel to animals, which is why we are concerned with this legislation.

The same thing happened in 1970 when Greenpeace came to the north. They said we are no longer allowed to use leg-hold traps or even to hunt the seals, and the price of seals went down to \$5 in 1970. Everybody went on welfare and many people do not go out trapping any more. Younger people do not go hunting any more because their fathers do not do it. Our concern is that if this bill is passed, people will be affected. We want to ensure what this Bill C-10B means.

**Mr. Sklar:** Senator Adams, your description of whale and seal hunting comes perfectly in the language where the question is whether it is unnecessary pain, suffering and injury. If the animal were to escape, because the animal is being caught in water, the animal would sink and then the catch would be lost. There has never been a prosecution, to my knowledge, under the present section 446, which uses the same word "unnecessary." That is why the word "unnecessary" is in there. It is to protect traditional methods of hunting and trapping. That would not be unnecessary. Otherwise, as you yourself said, senator, the catch would be lost. This legislation is not aimed at that kind of conduct. I would be astounded if the legislation were applied to that kind of conduct.

As for Greenpeace, they are a militant group. They are not the law. Their claims rarely get into court. There are militant groups out there that will use any legislation, no matter how it is worded, to try to advance their agenda. The function of the courts is to protect individuals who are acting within their rights from militant groups who are trying to advance political agendas. The hunting that you described and that has been going on for centuries would not be affected by this statute.

**Senator Adams:** Right now we have a bylaw officer, and there is a dogcatcher as well. If they have someone's dog for several days and no one claims it, they have to store the dog, according to the municipality. That bill passed. That bylaw officer in the community could lay a charge.

**Mr. Sklar:** The humane societies kill animals that are strays when nobody comes to claim them and, again, if the killing were not done brutally and viciously, it would not come within the law. It is regrettable that so many animals are killed in humane societies. I was on the board of directors of the Montreal SPCA perhaps 12 or 13 years ago. It was a difficult job because many of these associations for the societies for the protection of cruelty to animals wind up as killing societies or killing machines, which is depressing. The people who work there are constantly depressed. That is regrettable, but this law does not change that. This law will not make those kinds of actions crimes.

**The Chairman:** Professor Sklar, if I could follow up on the question of Senator Adams, it has to be done with lawful excuse. I think we heard earlier from Professor Trotter that there is a problem or there can well be a problem, a constitutional problem, if you have a federal crime in the Criminal Code and it is excused by a provincial or a municipal statute or by law. Could that not lead to a problem such as the one alluded to by Senator Adams?

**Mr. Sklar:** It could lead to a problem. The *Jorgensen* case is an example of a provincial board of

review for obscenity approving a film and the person winding up in the criminal courts and being convicted eventually. There are many cases where the question becomes whether the provincial statute is *ultra vires* with respect to the criminal statute.

Again, I am sure the fact that it is authorized under provincial law will be a factor in deciding whether the person has acted unnecessarily. You would not think that provincial law would permit unnecessary pain and suffering. It will be a factor to be considered. However, if the provincial law authorizes something that is in fact prohibited under the federal criminal law, it will be pre-empted.

**Mr. Weinstein:** That is the problem we have with subsection (c). It does not have to be unnecessary at that point, but just killing without lawful excuse. There is no lawful excuse. That is what Justice Sopinka says in the *Jorgensen* case. You cannot rely on that as a lawful excuse. It is not just the definition of unnecessary pain that Professor Sklar is talking about. We are outside of that and into subsection (c), killing without a lawful excuse, and there is none.

**The Chairman:** That is the point Senator Adams was getting to, I think.

**Senator Sparrow:** First, can I have confirmation that all the witnesses today are suggesting that clause 182.1 should be changed? Is that the general consensus? Does anyone disagree with that?

**Mr. Sklar:** I disagree with that.

**Senator Sparrow:** You believe that 182.1 is the same.

**Ms. Sullivan:** I do not even have a view. I do not know the issues well enough to have a view. I had a view about interpretation. I think it is a policy issue. I do not see a fundamental drafting problem here.

**Mr. Weinstein:** It absolutely should be changed. It is overbroad at this point, and it has to be tailored to a more specific definition. Right now, it is overbroad.

**Mr. Chipeur:** I have seen some bad drafting in my life, but I have never seen something that is so wrought with vagueness and so potentially open to abuse as that clause.

**Mr. Trotter:** Are you focussed on the definition of animal? I have no qualms about the definition of animal. My remarks were focused on 182.2.

**Senator Sparrow:** Mr. Sklar, you said that there would be no prosecutions if cruelty was not a factor; correct?

**Mr. Sklar:** There should not be. There are some prosecutions under the existing Criminal Code that turn out to have been arbitrary and frivolous. There is no protection against that. It is something we live with under any Criminal Code. You cannot guarantee there will be no prosecutions that turn out not to have been authorized by the code. That is a problem of life.

**Senator Sparrow:** 182(2)(c) says, "kills an animal without lawful excuse." That could be against the law with no cruelty aspect to that.

**Mr. Sklar:** I would think that killing an animal without lawful excuse would include the notion of killing the animal in a way that is cruel.

**Senator Sparrow:** It does not say that.

**Senator Joyal:** Those are two different concepts, Professor. An unlawful excuse and to kill it with cruelty and brutally are two different things. One is the way you do it, while the other is the pretext under which you do it.

**Mr. Trotter:** In the senator's previous example, the shooting of a cat for no reason in your living room would be a killing without lawful excuse. If my cat gets hit by a car in front of my house, is suffering horribly and I kill it, then that would be a lawful excuse. If there is no reason for it to be recognized, then there was no justification for it. We need to establish what is a lawful excuse.

**Senator Sparrow:** If I may pursue this further, Mr. Weinstein, you suggested on two or three

occasions today that it is not the intent of the bill to do certain things. To have, perhaps, unjust prosecutions are not the intent of the bill. I ask for justification for you saying it is not the intent. How would you know that? Some of us believe there is intent to broaden the net and bring a larger group of people into the net, so that it is broader than just cruelty to animals. It affects the farming aspect and I want to get back to the dog shows and the Calgary Stampede. How are you saying that it is not the intent?

**Mr. Weinstein:** I go back to the opening submissions before this committee of the Minister of Justice and the submissions of the Justice department, who all say, and I am paraphrasing, the intent is to maintain the status quo. It does not make anything unlawful now that was not unlawful before. When I say that was the intent, I rely on the submissions of the Minister of Justice, who declared that the intent is to maintain the status quo, but to respond to the increased cruelty by increasing the penalties and hybridizing the offences to possibly make them indictable. When I speak to the intent, I rely on the Minister of Justice's submissions to this committee that we are maintaining the status quo.

**Senator Sparrow:** The evidence is that it will not necessarily maintain the status quo.

**Mr. Weinstein:** That is why it needs redrafting.

**Senator Sparrow:** We do not know what the intent was.

**Mr. Weinstein:** The way it is drafted now goes outside of what the minister said the intent of the legislation was.

**Senator Sparrow:** On the issue of dog shows and the Calgary Stampede, there have been delegations to my office pertaining to both, concerned about this issue and this bill affecting them. You used the expression "shut down" the Calgary stampede and "shut down" the dog shows. That is a broad statement. Could you zero in and tell us some examples of why this legislation would do that?

**Mr. Chipeur:** The section in question is section 182.3(1)(a). It could not be clearer. Everyone who "negligently causes unnecessary pain to an animal" is guilty of a crime. If I wilfully get on a horse that is cinched up so hard that he wants to buck me off, there is pain there. The question is, is that necessary? In my opinion, a judge will conclude that purely providing pleasure or entertainment for human beings is not necessary. Whether it is cruel or not is another issue. Some societies say it is cruel and should be banned, while others say no. If you would ban it, I suggest you intentionally ban it. Do not pass something when you do not know what it is going to do. I am suggesting that, as worded, you will be banning the Calgary Stampede. That is my interpretation of section 182.3(1)(a).

**The Chairman:** How is that different from section 446 now? It is exactly the same wording. Section 446 says everyone commits an offence that "wilfully causes or, being the owner, wilfully permits to be caused, unnecessary pain, suffering or injury to an animal or a bird." I cannot see how you are making the difference there, Mr. Chipeur.

**Mr. Chipeur:** The section that we are talking about right now is intended to impact on rights of property. It is taken out of the property section and, according to Professor Sklar and contrary to the testimony of the Department of Justice, there is an intention here to place animals on the level of human beings.

It is my opinion that judges, when faced with that question — it may be that the current legislation has some problems with it. I am giving you my opinion with respect to this section placed where it is.

**The Chairman:** This section moved.

**Mr. Chipeur:** If the intention, expressed by many, is to give animals a different status, I believe that will be what the courts say.

I may be wrong, but that is my opinion.

**The Chairman:** I was misinterpreting what you were saying. Your testimony is that, if you take even the wording of the present section and move it, then you will get the result that you are talking about.

**Mr. Chipeur:** I believe you will. Let us be clear about what we are talking about here. We are not speculating. I am not making this up. I did not come here today to just pick up some ideas. That is the intention of those who are pushing these amendments. It is an expressed intention, in the media and in their lobbying. They want to shut these down. Maybe it is good public policy to shut these down. I am not here to say whether it is good public policy or not. I am suggesting that, if you pass this law, then you will be doing that. My question to those who want to amend the law is: Why? Give me one reason why we want to change this law. There is no public policy that says why we have to change the law that I have heard yet.

**Senator Joyal:** My question is on the issue of the stampede, so I do not think Senator Sparrow will mind. Do you know of any European country that has banned the corrida because of the cruelty?

**Mr. Chipeur:** I believe it is banned in many countries. I am not familiar with that. I have not done any research, but I do understand that it is illegal.

**Senator Joyal:** In Europe?

**Mr. Chipeur:** I believe there are some that have. Again, you are asking me if I have any examples. I have none, but I believe it is.

**Senator Sparrow:** Let us return to the intent of the legislation, with which I took some issue. I am not sure of the intent of the legislation, regardless of who may have appeared before this committee as witnesses.

The question that arises is that the person who owns an old horse may wish to do away with the horse humanely. What just cause is there for so doing, unless the animal happens to be sick? If it is a well horse, has the owner not the right to humanely do away with that animal, or a dog or cat, without lawful excuse?

**Mr. Chipeur:** You have highlighted the biggest loophole or problem with this legislation. Either lawful excuse means everything, any pretext whatsoever, or it means getting some official imprimatur from the federal government. It cannot be just whatever we want to make up as we go along. If I am a judge looking at this section and I want to determine what lawful excuse means, I look at the way it has been interpreted in the past. If you look into the law dictionaries — and I have one here — you will see that in these law dictionaries usually it has to do with some kind of official licensing or some official requirement within the law. If you are acting under that lawful excuse, in other words the law specifically says you can do that, then you will be excluded. If that is the case, then this is not a big exception and just about any killing will be illegal.

If we say we were not intending to change the law by bringing in these, as the Department of Justice has said, then lawful excuse now means everything, and there is no killing of an animal that would not fit into subsection (c).

**Mr. Sklar:** I am not the drafter and I have no authority here, but if 182(1)(c) were to be changed to "kills an animal with unnecessary cruelty and without lawful excuse" I would have no trouble with that.

**Senator Joyal:** I would agree with you. That is very important. It would mean that you introduce the notion of cruelty, which we all agree. The problem is, as I tried to put it in my first question, you are changing something on the property aspect of it, which is as Senator Sparrow has tried to identify, with the abuses — the abuses meaning to terminate the existence of. As long as it is "cruelty and" I agree. It is a small nuance but it means a lot in terms of the future.

**Senator Beaudoin:** This is not civil law. Now we are concerned with criminal law and in criminal law you need the *mens rea*, so you may do something according to the civil code but there is still a distinction between the criminal act and abuse that may be only civilian. Do you agree with that?

**Senator Joyal:** Yes, but we are trying to understand the implication on the property of the animals. The common sense understanding of property is its usage. Then I can rent it out and get the profit out of it, and then I have the abuses. I decide I do like the Russians, I throw it over my back and it breaks. According to this bill, when I throw it over my shoulder I have to take into account if I am cruel in doing that and if I have a lawful excuse. I am sorry to use a small image, but that is what we

are trying to understand with the implications of this bill in the abuses of the bill. As long as we use the animal we are not deprived of using the animal, or renting, or taking it to a fair to show how nice it is and whatnot. The day I decide it is my animal to terminate it, then I enter into specific obligations under this code. That is what we have to understand, and I tried to understand by taking it out of the property section to put it in a different property section.

**Mr. Trotter:** I do not think we should necessarily disjoin the notion of lawful excuse and cruelty. If someone shoots their cat in their living room, we criminalize it because it is cruel. The animal was killed for no reason. That is a definition of cruelty in and of itself that is taken up in the idea of lawful excuse, but it is not unrelated to this overriding principle of cruelty that permeates this amended legislation.

**Senator Baker:** I suppose it is left to me to thank the witnesses for being here today. I would like to leave you with two questions.

First, to Professor Sklar, who teaches the subject at the university, my friend Senator Adams was referring to the fact that under the Mammals Act today, in Canada, there is a set of standards for killing seals. The seal must have its skull crushed, it must be shot in the head and so on. That presupposes that the hunt will take place in the early spring when the animals float.

Senator Adams is pointing out that the methods used by some people are obviously against those regulations. Now, in the Fisheries Act, we have colour of right. It is not spelled out as such but it defines colour of right in the legislation; that is section 76.6 of the Fisheries Act. It is a reverse onus. If somebody can prove that they honestly believe in a set of facts that, if true, render their actions innocent, or some wording to that effect if the defence is there.

We have had the Supreme Court of Canada rule on this particular section in the past, that this could be used under the Criminal Code to prosecute animals. Under this definition Senator Adams is worried that perhaps now this will give a choice to a group of people. It will give a choice for what? Not a malicious prosecution. You perhaps have reasons for saying, and probably good reasons, our system protects against malicious prosecution. It does not protect against malicious charging. The distinct role between a Crown prosecutor and the police is, the police investigate, take the complaint, charge, the police officer then tells you to come down on a hybrid offence. There is no protection under the recent rules for hybrid offences but there is for indictable ones. You go down and get fingerprinted and photographed under the Identification of Criminals Act. You are also put on CPIC, under the Identification of Criminals Act.

The concern is not the malicious prosecution because there are recent protections in the law, and of course you discover whether you are being charged under an indictable offence or summarily when you appear before the judge.

**Senator Joyal:** Once your fingerprints are taken, try to enter the United States.

**Senator Baker:** Well, you cannot. Then try to get it taken off CPIC.

That is the first point to which I would like your response because that is the major concern. It is malicious charging.

For the first time I heard Professor Sullivan say, "I am puzzled by the response from the Department of Justice of the government." I have never seen anything in print where Professor Sullivan has ever said before that she is puzzled. She has examined practically every word in the Income Tax Act, and every amendment — it is possible, she has done it — every regulation, and she has recently presented a report card on justices of the Supreme Court. The report card reads like, "excuse number one, excuse number two," and so forth. I believe it is a fascinating account.

You will notice that we do not often argue with Senator Beaudoin. If you noticed, in *R. v. Sharp*, a year and a half ago, the chief justice went to this committee, a hearing like this, to find out just what is the intention of the government. As you have written many times, you take your strict construction of the piece of legislation, then you look at the object of the legislation, then you look at the intention of Parliament.

The chief justice concluded, after quoting you in the standard way that the Supreme Court always quotes you: "Much has been written about the interpretation of legislation, e.g. Ruth Sullivan —." Justice Yakabuchi used the word "encapsulates." The chief justice in *R. v. Sharp* took that out but

did you notice that it was re-introduced by the Supreme Court in their decision on a vessel that was illegally fishing off Newfoundland?

They went back to the original quote from you. Sometimes I wonder whether they are analyzing, or doing an interpretation of, your interpretations.

Regarding the intent of this bill, a judge may wonder about Parliament's intent. The process is complicated and contradictory, in some ways. You said that you are puzzled by the response from the Department of Justice but the courts quote the Department of Justice. The deputy minister in charge of prosecutions cannot come before this committee without espousing the exact policy of the Government of Canada. He cannot say anything differently. Therefore, if at times you see somebody from the Department of Justice saying something that is not logical, in some respect, you can understand that he or she has to promote government policy. In respect of the interpretation, you will have your regulatory impact statements when this legislation is passed or when the regulations are made.

**Ms. Sullivan:** Is there a regulation-making authority here?

**Senator Baker:** There is no regulation authority. Then you have a real problem because the judges would have to go back to look at these committee hearings to know what you said and what the other committee members have said. It was the chief justice in *R. v. Sharp* who quoted Senator Beaudoin's comments in a committee meeting 10 years ago in this room. She quoted an entire paragraph and said that we now know he is right because we now have a problem.

You have done a great deal of analyzing the drafting of this legislation. Could you comment on whether you have ever analyzed this process in arriving at your conclusions on the interpretation of legislation?

**Ms. Sullivan:** I do not actually analyze legislation but I analyze cases. Judges write cases and grab the arguments of the lawyers who come before them. They increasingly rely on these materials and now that they are on line, they will be relied on more than before. I do not personally use it unless I happen to be working up a case for someone. Apart from an instance when I am lawyering, I do not use these materials. I agree that they are important materials for use by other lawyers when trying to interpret these provisions.

**Mr. Weinstein:** I use them.

**Mr. Sklar:** You addressed your first remarks to me. Maliciousness, on the part of people, will never go away. As I said, we generally trust our law enforcement establishment and our courts not to respond to charges that are brought out of malice or maliciousness. I am not a tort professor but I am a criminal law professor. Malicious prosecution is a tort and I believe that it can also be applied to maliciously having a person arrested. That is accomplished within the tort of malicious prosecution.

We have two protections against this kind of maliciousness: One is the good judgment of our law enforcement establishment and courts; and the second is the tort law. You can sue people for maliciously prosecuting you.

**Senator Cools:** On another area where I do much work, divorce, I want you to know, Mr. Sklar that I have personally studied hundreds of cases of men — fathers — in custody cases who have been falsely accused of the most preposterous things by wives. Nothing happens to those people. As a matter of fact, in the last many years, the entire law enforcement system has stood silent in the face of the tyranny from some of these groups who just intimidate and terrorize people. Mr. Alan Gold has spoken to this issue for a long time. These cases are epidemic.

Sitting here listening to the comments this evening, I can now see that in such family cases, not only are the house, custody of the children, spousal support, child abuse, et cetera, issues to deal with but also the family dog is now in the picture.

**Mr. Weinstein:** You have to put it in the context of the person who is falsely accused. It is not only that the person is fingerprinted and photographed and on CPIC, but you are subject to a charge for which you will go to a public courtroom to have your name called out. You are living under the stigma and fear of charges and it may not be cleared up for six months to one year, given the backlog of cases.

**Senator Cools:** Their rights on the job are often affected because most of them are blue-collar workers. When they are arrested, it is terrible.

**The Chairman:** I thank our witnesses this evening.  
The committee adjourned.