

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

## Issue 8 - Evidence for February 27, 2003

OTTAWA, Thursday, February 27, 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 10:55 a.m. to give consideration to the bill.

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

**The Chairman:** Honourable senators, today, there are two matters on the agenda: the continuation of the examination of Bill C-10 and the legislative budget for committee. I would propose that we hear from our panel of witnesses from the Department of Justice and, bearing in mind the Senate sits at 1:30 today, we will try to conclude at 1:15 and, time permitting, take the last 10 to 15 minutes of the committee *in camera* to discuss the budget.

We will proceed to consideration of the amendments to the animal cruelty provisions of the Criminal Code.

Our witnesses have appeared previously and given introductory remarks. However, I will offer them an opportunity, because I know the Department of Justice has been following these hearings, for five to 10 minutes for introductory remarks, if they wish. We have Ms. Klineberg, and Mr. Mosley. Would you like to make a statement, or do you want to go right to questions?

**Mr. Richard G. Mosley, Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada:** Mr. Chairman, we will go directly to questions. We do not have a prepared statement this morning.

**Senator Beaudoin:** My question is about the colour of right. The way I understand it, it is a rule of interpretation, and the Department of Justice has not suggested any amendment. Yesterday, Professor Sklar suggested no amendment, but what do you think of the possibility of mentioning it because it would be an advantage. What is the reason you did it the way you did for the colour of right? I understand there was a choice.

**Mr. Mosley:** As I said on our last appearance here, the position of the department is that it is unnecessary to have a specific reference to colour of right with regard to these provisions, as it is available in common law.

**Senator Beaudoin:** Unnecessary?

**Mr. Mosley:** It is unnecessary. Through the kindness of your staff, we were provided with transcript of yesterday's proceedings. Although I was not here, I did have an opportunity to read through the transcript, and Professor Ruth Sullivan, referring generally to common law defences. In response to a question from Senator Andreychuk she said, "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 taken them out over the years." She goes on to say that in 1954, there would have been many more references. I do not think that is accurate, but I agree with her general point that the drafters have been making every effort to tidy up the code to remove references that might be described as "comfort clauses," in an effort to respond to concerns that have been advanced by groups over the years. She goes on to say:

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.

I agree with that. That is what the Department of Justice, in drafting statutes today, is attempting to achieve, especially with the Criminal Code. There are many things in there that have been added over the years. I doubt that there has been a single session of Parliament since the code was enacted in 1892 that has not resulted in amendments. When you go back to the historical record, it is not entirely clear why many of them were put in there. On other occasions, you could find representations made by interest groups that wanted some comfort with regard to their own activities. I suggest that is what you have been seeing over the course of the past weeks, with respect to this particular issue.

I was surprised at the position taken by my old colleague, Mr. Code, who is a criminal lawyer of considerable renown and someone I have worked with over the years and for whom I have the greatest respect. Our views on this issue are diametrically opposed and we would agree almost entirely with the views expressed yesterday by Professor Sklar.

I was struck by one thing Mr. Michael Code said when I read his evidence. I think he was operating under a misapprehension. We did not receive his opinion and it is not, I gather, the practice of this committee to routinely share opinions that are submitted to the committee to the department for its consideration. I have therefore not read his written opinion, or those of several of the other witnesses. In some instances, the witnesses themselves provided us with a copy of their opinion.

Mr. Code refers to the fact that what is part of the English common law is not necessarily part of the Canadian common law. At first impression, he is absolutely correct because the common law has continued to evolve, and it has evolved differently in Canada and the other countries of the common law tradition from that in the United Kingdom. There are differences in our criminal law today, at common law that are significant.

It struck me as odd that a criminal lawyer would be taking that position, in part because it is contrary to the interests of the criminal bar. To argue that not having an expressed reference to a defence means that it is not there, will certainly put the next counsel at a disadvantage who attempts to contend before the Supreme Court of Canada that the defence does apply to the particular offence and the circumstances in which it is found. Certainly, in the other place, the representatives of the Canadian Bar Association, National Criminal Justice Section, the Ontario Criminal Lawyers Association, and Mr. Ruby, took the opposite point of view.

Last night, Senator Beaudoin and I had occasion to refer back to Taschereau because it is useful to return to the sources of our criminal law, particularly when an issue of this nature arises. Is it or is it not part of the common law? Taschereau, writing prior to the adoption of the 1892 code and subsequent to the 1892 code coming into effect, clearly accepted that colour of right was part of the common law of Canada. He refers to it in terms formerly known as the "concept of felonious intent." He describes how felonious intent in itself captures the notion of claim of right or a colour of right.

The 1955 Martin's is, for many of us, the bible of the development of the criminal law in Canada over the course of the past century. You recall that the Martin Commission worked for some four years in revising, updating and cleaning up the code as it was as of 1948. The commission reported to Parliament in 1952. Over the subsequent years, Parliament enacted a series of bills that resulted in the 1955 code. It was the last comprehensive revision of the statute.

Martin refers back to Bentham for explaining the notion that the basic rule, "Thou shalt not steal" makes no sense in the practical application in the criminal courts. It has to be read in the context of rights and property interests and everything that goes with it. It is not simply: "Thou shalt not steal." It is: "Thou shalt not steal if you have no right to that property..."

With the greatest of respect to those who hold a contrary view, I find that it is too narrow to simply refer to the code as it is in February 2003 and how it has been drafted over the course of the past century and a bit.

The drafters, beginning with the English draft code in the 1870s, were trying to produce a statute that would be more useful for the non-legally-trained reader. That was also one of the objectives of the drafters of the 1892 code in Canada. Virtually all of the magistrates who made use of the code for those years and later on, were not legally trained. The effort was to spell out what was the law at the

time of the enactment of the code. However, it did not displace the common law. In fact, the code expressly stated that it does not do away with common law defences.

With the greatest of respect to my colleagues at the criminal bar who are of that opinion, it is our position, and it has been from the outset of these proceedings, that common law was part of the English common law. It was adopted in Canada prior to enactment of the Criminal Code, and it continues to be part of the Canadian common law.

That is a long-winded response to your question, but I thank you for giving me an opportunity to put that on the record.

**Senator Beaudoin:** Thank you for the answer. It is very interesting.

Yesterday, Mr. Chipeur referred to the Bill of Rights of 1960. We know that the Charter of Rights and Freedom of 1982 does not protect property, as such. However, the Bill of Rights of 1960, which is not enshrined in the Constitution, does refer to the right of property. With Bill C-10, we do not have the right of property, if I understand the bill correctly. However, without Bill C-10, we have a right of property.

What do you think of the argument to invoke the Bill of Rights of 1960? Mr. Chipeur is against the bill, as you know.

**Mr. Mosley:** I read that with considerable interest. It is a novel argument, and one that I do not believe has been hitherto raised. I do not get the impression from reading the proceedings from yesterday that the other witnesses before you associated themselves with that argument.

The Bill of Rights continues to be in force and effect. The Department of Justice continues to have a statutory obligation under the Bill of Rights, as the Minister of Justice does for the Charter. He is obliged to certify bills as being in conformity with both the Bill of Rights and the Charter. We would not proceed with a piece of legislation that we thought was in any way in conflict with the Bill of Rights.

I believe our view was expressed yesterday by several other witnesses. This proposed legislation does not alter the property interests in animals. If you own an animal today, you will continue to own that animal the day after the legislation comes into effect. It takes nothing away from you in that regard. You cannot kill the animal brutally, viciously or unnecessarily, but you continue to own it, and you have all your other property rights. For many years in this country, those who have owned animals could not do with them as they wished.

That was the basic premise of Mr. Chipeur's evidence. He believed that you could do with an animal that which you wished because it was an ordinary form of property. Professor Sklar addressed that as well by arguing that it is not an ordinary form of property and has not been recognized as such at least for the past 50 years in our criminal law.

Therefore, we do not agree with the proposition that this is somehow in conflict with the Bill of Rights.

**Senator Beaudoin:** You are right that he was isolated on this. Professor Sklar was of exactly the opposite opinion yesterday.

**Senator Baker:** Yesterday, Mr. Mosley, we were talking about the references by the Supreme Court and our courts to proceedings of this committee — specifically reference to statements that you make in official documents.

Senator Beaudoin and I were talking briefly about *R. v. Sharpe*. This was a decision of the Supreme Court of Canada in 2001. In paragraph 127, the chief justice references the proceedings of the Standing Senate Committee on Legal and Constitutional Affairs and the statement that Senator Beaudoin made. The chief justice, on behalf of the court, paid respect to Senator Beaudoin when he said, "As Senator Beaudoin predicted..." and then continued by quoting Senator Beaudoin's statement to the committee.

In looking at the statements that you give before standing committees, and their use by the courts, I have also included *R. v. Durham*, with just the statement that you were quoted as making on behalf of the government. In *R. v. Durham*, the judge in the Ontario Court of Justice ruled that section 86(2) of the Criminal Code was of no force or effect because of the statement that you made before the

committee on behalf of the government, as the government's intention. The Court of Appeal of Ontario overruled struck that down, allowed an appeal by the Crown, and struck down that decision.

There are many more such instances. Do the courts often turn to statements by senators before the committees, when determining the intent of the legislation? We talked about the intent of the bill yesterday. Do you find that more and more the courts are referring to your statements made, or to the minister's statements made at second reading or at committee as being the intention of the government in passing a particular bill or instituting regulations?

**Mr. Mosley:** Certainly, the courts will admit what they describe as "extraneous evidence," where it may be of some value in determining the meaning of an enactment. However, they have made it quite clear, and I would point to the example of the interpretation of section 7 of the Charter. When section 7 was being developed and during the parliamentary proceedings with respect to the Charter, the Department of Justice officials, including my predecessor Mr. Eugene Ewaschuk, described what they understood to be the scope of section 7. In effect, they said that this is meant to be a guarantee of procedural fairness — due process, in effect. It has no substantive content. Notwithstanding that, the Supreme Court of Canada, just a few years later in a case called *R. v. B.C. Motor Vehicle Act*, a leading decision relating to the scope and intent of section 7, said that, notwithstanding the statements made by the government at the time and its officials, it does indeed have substantive intent. The statements that we make in committee or elsewhere are of some value to the courts but are by no means determinative of, what they conclude from the language of the enactment — its intent.

For the record, the reference in *R. v. Durham*, to which Senator Baker has kindly directed my intention, was to a communiqué.

**Senator Baker:** They were your words in the communiqué.

**Mr. Mosley:** I do not think so. Most of them have, at the bottom, a reference to someone in the Department of Justice who can be contacted for further information. In that particular case, my name and phone number were there.

The quote was actually attributed to the then Minister of Justice, the Right Hon. Kim Campbell. Certainly, I have been quoted in a number of instances in the courts. In the *Sharpe* decision, it was not a direct quote. They simply referred to the information that I provided to committees at the time that the 1983 legislation was enacted about the nature and extent of child pornography in Canada. Therefore, it was a statement about the social problem as opposed to any particular comments that I may have made.

I have been quoted, however, in decisions. Again, it is simply of some assistance to the court, but no more than that.

**Senator Baker:** You are absolutely right. In *Durham*, it says, "Although released under the name of Richard Mosley, Department of Justice, the communiqué makes it clear that the proposed legislation ... has been approved by the Minister of Justice." It still uses a quote and your name was used.

Let us move on to the substantive part of your previous argument with the previous questioner. The witnesses gave you great credit in their testimony. Michael Code, as I recall, praised you. He used the word "puzzling" to describe the position put forward — not that you had put forward that position, but in reference to the actual substance of the position. I did not detect any great attack on anything that you had said. Do you have any comment? There are two cases in front of you, *R. v. Watson*, the Court of Appeal, and *R. v. Jorgensen*, Supreme Court of Canada. In *R. v. Watson*, paragraph 16, it states, "while it has been the subject of some debate, the weight of the authority and logic suggest that colour of right is not limited to errors of fact, but extends to errors of law." Do you have any comment on that or do you want me to move on to the Supreme Court?

**Mr. Mosley:** My comment is that this is a case about what is the content of the defence colour of right. It does not go to the question of whether there is a defence at common law.

**Senator Baker:** In *Jorgensen*, paragraph 6, Chief Justice Lamer discusses the rule of ignorance of the law:

Despite the importance of this rule, some exceptions to it are already well-established in our law. An accused is excused when the law she was charged under was impossible to gain knowledge of because it had not been

published. In addition, a certain number of our Criminal Code offences provide an excuse for an accused who acted with colour of right. The existence of these exceptions demonstrates that *ignorantia juris* rule is not to be applied when it would render a conviction manifestly unjust.

Do you have a comment on that?

**Mr. Mosley:** Chief Justice Lamer, who was speaking for himself, not for the court, thought it necessary to refer to the existence of the exceptions to the basic rule that ignorance of the law is not a defence — the section 19 provision in the code. He does not go beyond that. He does not comment on whether the defence exists at common law or not. He does not describe the history of the matter or the existence of the defence. He does not speak at all about its application to other parts of the criminal law.

The main reason for that is that the issue simply was not argued before the court. That is clear from the judgment of the court Justice Sopinka's reasons in which he says:

The issue of officially induced error of law as an excuse has not been considered in this appeal because the matter was not raised either here or in the courts below. It would be preferable to address the issue in a case in which it is properly raised and argued.

Jorgensen can be taken for no more than a statement of opinion by the chief justice in passing.

**Senator Baker:** I want to refer to you *Ward v. Canada* at Supreme Court of Canada just a couple of months ago. This case dealt with whether the federal government had constitutional jurisdiction over the sale of seal pelts within a province. In decision of *Ward v. Canada*, they dealt with section 27 of the Marine Mammal Regulations under the Fisheries Act, which spells out how people are supposed to kill seals. It spells out that the sale of blueback seal pelts is illegal. It is not illegal to kill the seal, but it is illegal to sell the pelt.

There is an exclusion to some of these penalties under these regulations. What are called "beneficiaries" are excluded. Beneficiaries are people who are covered under the James Bay Agreement and other agreements. There is a protection within the regulations for a violation of the Fisheries Act. If you look at the Fisheries Act, you will find that in 1991 we put an amendment in the Fisheries Act, which I provided to you here. The amendment was section 78.6. This section of the Fisheries Act says if the person "...honestly believed in a set of facts that, if true, would render the person's conduct innocent." It was put into the Fisheries Act in 1991, recently. Some people would say that that is colour of right, or it goes a long way to meet that definition.

The sealers and people about whom Senator Adams and Senator Joyal were concerned are protected under the Fisheries Act. There is a defence given to them. They are protected in the regulations because a great many people are beneficiaries.

We are passing a new law that covers seals and the killing of seals without the protections that they have in the Fisheries Act and the regulations. The police officer lays the charge. He has a choice regarding which act he will lay the charge under. It is the same as in a situation where you want to issue a search warrant; the warrant has more power under controlled drugs than it does under section 478 of the Criminal Code.

A decision is made by the police officer. Under this bill, that will now cover seals, there is no protection. Senator Adams has a legitimate point. You might say this is not a concern because they will be charged under the Fisheries Act. This is why I am citing *R. v. Ward*. That case contains a unanimous decision of the Supreme Court of Canada. Tucked away in that case at paragraph 53, it says:

Second, if so, then is the impugned legislation directed to this purpose? The *Criminal Code*, R.S.C. 1985, c. C-46, contains prohibitions against cruelty to animals, and I am prepared to assume without deciding that the federal criminal law powers could extend to prohibitions on the killing and manner of killing of animals like seals as a matter of public peace, order security or morality.

Therefore, we are faced with, as a committee, considering amendments, is the point by Senator Adams that this bill opens up an entire new territory without the colour of right defence that we brought in 1991. You may argue that is not a complete colour of right defence. However, the words are close to it. You must admit that if the words are in the legislation, it helps. It may be covered under common law or it may not be, but it helps if it is in the legislation under which you are being charged.

Therefore, whereas the protections are there under the regulations of the Fisheries Act, they are not

here under this legislation. This is Senator Adams' point and I would like you to address this point. Tell us the intentions of the government as far as this is concerned.

**Mr. Mosley:** Let me deal with *Ward v. Canada*. Section B of this has to do with whether the legislation in question might also be valid under the criminal law power. That is set out in paragraph 50. The court had already concluded that it was valid legislation under the federal fisheries power but chose to go on to discuss, not to decide, whether criminal law power would apply in these circumstances. In the middle of paragraph 53, the court says, "I am prepared to assume without deciding that the federal criminal law powers could extend to prohibitions on the killing and manner of killing of animals like seals..." Again, the court need not decide the matter. This is simply thrown in for good measure.

With regard to the 1991 regulation to which you refer, section 78.6 of the Fisheries Act, which covers both due diligence and, in subsection (b), includes the phrase "reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent." You are correct; it is not a complete colour of right defence to begin with. Moreover, it limits the application of the defence.

The colour of right defence would apply if the accused honestly believed in the stated facts. The makers of the legislation added the word "reasonably," which therefore imports an objective test. In effect, what they are doing by codifying the application of an excuse defence, they are at the same time limiting its scope. Parliament can say the common law defence no longer applies to this conduct. Parliament can say that the common law defence is limited in these circumstances.

Let me give you an illustration of that. Some years ago, Parliament decided that a mistaken belief in consent should not suffice to get a person who had committed a sexual assault off the hook. It limited and structured the defence, by linking it to a number of specific criteria. Clearly, that is within the ambit of Parliament in dealing with common law defences. That is what was done in 1991, through the adoption of these regulations under the Fisheries Act.

**Senator Baker:** I have one further comment. When that was put in 1991, did you notice what was removed? It was legal justification. This section of the Fisheries Act is used more than any other section that I know of in defences in Canada. It is used successfully. It is used in extraordinary circumstances. It is a reverse onus, where somebody broke the law but they honestly did not know they were breaking the law. I can give you endless examples of where what is in this act has been used successfully.

You have not, however, addressed the fact that the police will now have a choice on a complaint being made to either charge under the Criminal Code, under this section, or charge under the Fisheries Act. Under the Fisheries Act there are protections. There are protections for beneficiaries; there are exclusions that apply that were built in and negotiated over the years. There is nothing at all in this legislation that gives beneficiaries any exclusion. There is nothing in this legislation that gives them any hope of putting their finger on something like 78.6 and saying, "This is there for me to use as a defence." It is not unusual to provide a police officer with a choice of legislation under which to press a charge. Do you have any comment on the fact that it now provides a choice?

**Ms. Joanne Klineberg, Counsel, Criminal Law Policy, Department of Justice Canada:** Honourable senators, there is nothing in the way the Criminal Code offences on cruelty to animals are currently structured that prevents the police from having an option as to which way to lay charges.

**Senator Baker:** Do you mean now? This is a new offence, a hybrid offence that is indictable.

**Senator Joyal:** It is a hybrid offence we are creating here. It is a serious one.

**Ms. Klineberg:** Of course it is serious. We understand that. The point is that there are multiple offences under federal jurisdiction in a number of areas. The police will have the opportunity to consider which will be the appropriate way to go. I do not think that there is anything in Bill C-10B that creates a new opportunity that may not necessarily be there today.

**Senator Baker:** That is not our point. The protections are there in the other legislation, but there are none in this one.

**Ms. Klineberg:** That is the second point where we would disagree. The same protections as are in the Criminal Code today will be in the code subsequent to the passage of Bill C-10B, including colour of right.

**Senator Baker:** Is that excluding beneficiaries? No.

**Ms. Klineberg:** The protections that are in the Criminal Code today will still exist.

**Senator Baker:** We are not only talking about that. All those people who live up there in those northern areas are beneficiaries under the Fisheries Act, under the regulations. They are not under the Criminal Code. This is our problem. I know you probably do not want to get into it too deeply.

**The Chairman:** If I may, before we go to Senator Joyal, I have two quick questions for Mr. Mosley.

They arise from what Senator Baker has said. Is it your evidence that if the bill were to be amended and colour of right were to be put back in, then it would make no difference to the legislation and would in fact be redundant; is that what you are saying, Mr. Mosley?

**Mr. Mosley:** At best, it would be redundant. What concerns us, however, is that by specifying the application of a defence to specific provisions of the code, you are lending support to the argument that it does not apply elsewhere where it may be an appropriate defence. This whole debate is between the argument that you should spell out precisely what defences apply for each crime, and the argument that you put in a general provision and it applies where it makes sense to apply. When it comes to determining whether colour of right works, that is ultimately what the courts are trying to do. Does it make sense to apply this defence in this context?

With regard to beneficiaries, with the greatest of respect, Senator Baker, we are not by any means conversant in the law relating to fisheries. I say that with some regret, because I am sure it is an area of the law that is of enormous interest. If you want to explore that further, I would suggest that colleagues who provide legal advice to the Department of Fisheries and Oceans be invited to attend.

As I read the prohibition part of these regulations — again, bear with me as I am not familiar with this area of the law — the reference to a beneficiary appears to only permit the sale, trade or barter of a whitecoat or blueback. It is for that reason that a specific exemption was built into these regulations, to ensure that those who were bound by the terms of the James Bay and Northern Quebec Agreement and the Inuvialuit agreement were able to do that. I do not think it pertains to what we were discussing earlier.

**Senator Baker:** *R. v. Ward*, the decision of the Supreme Court, led to the charging of 108 sealers the next day. However, it did not lead to the charging of any sealers who were declared beneficiaries, because beneficiaries are excluded under the regulations. It is simple. Beneficiaries are excluded from regulations that govern the sale, barter and trade thereof and the method of killing. However, they are excluded as beneficiaries, negotiated with these people in separate agreements and put into the regulations on mammals. Under the Criminal Code, there is no such protection. That is our problem.

**Mr. Mosley:** I do not find the exemption for the manner of killing.

**Senator Baker:** Did you look at definition of beneficiaries?

**Mr. Mosley:** Yes.

**Senator Baker:** These are only sections. Beneficiaries are described as such and such. Look at the exclusion.

I can assure you that beneficiaries are excluded, which is why it was defined. They are excluded from various sections of the regulations on the methods. They can kill, for example, for food. They can kill any seal they want for food, whereas normal people cannot.

**Mr. Mosley:** I suggest that is more likely a consequence of the application of section 35 of the Constitution to their treaty and Aboriginal rights. Under the text of these regulations, the prohibitions in part IV say, "no person other than a beneficiary shall sell, trade or barter a whitecoat or blueback." That is clear. However, it goes on to say, in section 28, "no person," without reference to beneficiary. It describes how you fish for seals and which means that you employ. That would

appear to include those who are otherwise characterized as beneficiaries.

In section 29, again, it says simply "no person shall commence." It does not say, no person other than a beneficiary. Therefore, it appears that the exemption for beneficiaries does not apply to sections 28, 29 or 30.

**Senator Baker:** It applies to some but not to others, is that correct?

**Mr. Mosley:** Yes.

**Senator Baker:** The point is that there are 108 sealers charged today. Not one of them is a beneficiary because that beneficiary is excluded there. That was a protection in the regulations.

What we are saying is that there is a further protection in the act that governs the regulations. You claim that 78.6 is not as good as if it were not there. Senator Adams and I are saying that this has been used consistently in our courts since it has been put there. If it were not there, it would not be used. It sure helps to have it there. Therefore, that further protection is there.

In this legislation, there is nothing for beneficiaries, nothing to protect those 108 sealers. There is nothing there, as well, for any defences under the Criminal Code, except what you claim is the common law defence. However, you must admit that the exclusion of beneficiaries from certain sections of this act — and penalties under this act — is not available under the Criminal Code.

**Mr. Mosley:** The exclusion of beneficiaries under the material you have provided here today, senator, only applies to the sale, trade or barter of seals. It does not apply to the means by which they are fished.

**Senator Baker:** Have you read the rest of the regulations?

**Mr. Mosley:** No, I have not.

**Senator Baker:** We will have to get them and go over them.

**The Chairman:** The second point that I refer to, Mr. Mosley, arises from Senator Baker's reference to *Jorgensen*. Clause 182.2(1)(c) of the bill creates the offence of wilfully killing an animal, which can be permitted with lawful excuse. My question is, in light of *Jorgensen*, are you convinced that a provincial regime such as a provincial hunting licence would be a lawful excuse?

**Ms. Klineberg:** The fact that there is a provincial hunting licence is not, in and of itself, the lawful excuse. The provincial governments cannot enact legislation that excuses the commission of criminal offences. That would be ultra vires the provincial legislative jurisdiction.

However, that does not mean that the fact that an activity was carried out in accordance with a provincial hunting licence is not a lawful excuse. The *Ménard* case, for example, lists a number of purposes for which animals can be used, even if pain is caused. What the *Ménard* case and Chief Justice Lamer set out in that case is essentially the way we analyze these offences. First we ask: Is there a lawful purpose for using the animal? If there is, we move on to the question of whether or not unnecessary pain, suffering or injury was caused.

**The Chairman:** Excuse me, Ms. Klineberg, that is not what section 182.2(1)(c) says.

**Ms. Klineberg:** I will start with that and move on to the killing without a lawful excuse. If you can have a lawful purpose to use an animal and cause it pain so long as the pain you cause is reasonably necessary in furtherance of that objective, then surely the same purpose can justify the killing. For instance, you are engaging in medical research and a reasonable amount of pain is caused in furtherance of gathering the scientific data. At the end of that, you will euthanize that animal; so the same lawful purpose, which is part of our analysis of whether or not the pain you are causing is unnecessary, will also justify killing. These are found in the common law. Judge Lamer lists many in the *Ménard* case. The phrase "without lawful excuse" is broad. The court has interpreted it broadly. It is context-sensitive as well. You look at what it means in the context of the specific offence where it appears. It is not limited in any way. Essentially, any purpose that is recognized by the common law, recognized by society as one for which we can kill animals, would fall within that definition.

**Senator Joyal:** I concur with you that the intention of a piece of legislation, once passed by Parliament, is not only defined by the government's intention at the time of the tabling of the legislation. As you have quoted yourself — and I know those cases very well, having been involved in some of them — when the Supreme Court of Canada has to interpret the Charter, they will look into the testimony of the Justice Department and the expression of intention that the government had at the time of the adoption of the Charter. However, they recognize that the Charter has a life unto itself. As the court has clearly said, this is a purported legislation; it is legislation with an objective. The objective is to redress and protect minorities as long as society goes through evolution.

The problem we have with this legislation is that we were told by government spokespersons, when it was tabled in the Senate after having been adopted by the other place, that this legislation was not changing anything. It was a readjustment of the penalties, to respond to a perception in society that Canadians are more sensitive to cruelty against animals. Therefore, the people who are found guilty of that should be seen as incurring a broader range of penalties. That is what we were told.

We were also told that, in doing so, we were helping Canadian society, because there was a link between cruelty to animals and the propensity of some people to crime. That has not been proved thus far. We have heard many witnesses but none of them was able to prove that.

Today, as legislators, we listen to you very carefully, and to the Department of Justice, interpreting proposed legislation that will affect the rights of some Canadians — singularly, Aboriginal people — in a way that raises questions as to how they will be able to defend themselves. We are creating additional offences in the bill, as the proposed section 182.2(1)(c) sets out. We are putting them under the onus to come forward in court to try to defend themselves, when they are exercising their constitutional rights to fish, hunt and harvest. Senator Baker has concentrated on the protection of some beneficiaries, but only in relation to fishing. It does not cover hunting or harvesting.

Our concern is that as much as we want to address the issues of cruelty, we do not want to shift the responsibility onto the shoulders of Aboriginal people in relation to their traditional practice of fishing, hunting and harvesting, especially on their own territory where they have, as you said quite clearly, constitutional rights. In other words, we do not want to place on the Aboriginal people of Canada an additional responsibility to come back to the court. Senator Adams described yesterday, the way that some Aboriginal people in some areas in Canada fish and hunt would be seen as cruel by other people's standards.

We have not been reassured that the bill is drafted to protect them in terms of its definition and its changes, such as removing the animals from property to a new category within the code.

Yesterday we had Professor Sklar, who now specializes in teaching animal rights. I have a reservation, in principle, with the issue of the legal concept of animal rights. When we are looking at such a legislation, the intention of the department is important. It may be the best intention in the world. The day that this legislation receives Royal Assent, you are no longer the only one to instruct the court how to interpret it. This bill has a life of its own. It opens the issue of animal protection and gives it to the courts. The first group that would be probably targeted are the Aboriginal people. We know it; the seal hunters were the first ones to be targeted.

Therefore, we do not want to do something at this point without being reassured that the objectives of the bill, as much as we understand them, are sound and that we concur with them. However, we have closed our eyes to our fiduciary responsibility to the Aboriginal people. As you said, properly, the Fisheries Act recognized that indirectly through the James Bay and Northern Quebec Agreement. However, there are many other Aboriginal peoples in Canada who are not covered under that convention, but who nonetheless have territorial rights to fish, hunt and harvest.

We are not really convinced that this bill protects Aboriginal people and their traditional rights. We are putting them now in the hands of future interpretations of what is cruel by the courts. Which groups in Canada or around the world will target them in future and bring them to the plight of public opinion? That is certainly not something we will want to do as Parliament and especially as a House of Parliament that has a responsibility for minorities in Canada.

How can we ensure that this bill protects Aboriginal people in a dynamic way? The dynamics included in this bill do not preserve the constitutional rights of the Aboriginal people.

**Mr. Mosley:** From the outset — and by "outset" I am referring back to December of 1999 when the

original bill, Bill C-17, was tabled in the House of Commons — the objective the government has stated for the legislation has been twofold. First, it is to consolidate and simplify the existing law on animal cruelty by organizing the offences in a more rational way and removing outdated distinctions and expressions. The second objective is to enhance the penalty provisions by increasing the current sentences, such as terms of imprisonment, fine and orders providing a new order to make offenders repay costs, et cetera.

In any of the remarks that we have prepared for the Minister of Justice or for anyone else who requested our assistance, we have at no time suggested that the legislation will not change anything. Clearly, it is intended to have an impact on how cruelty toward animals in Canadian society is dealt with through the criminal justice system.

In doing that, our position has been that these proposals do not change the substantive law in the profound way that some would suggest in their representations to this committee. Moreover, you must read this bill in the context of the legal and constitutional framework of Canada. That framework includes well-established, entrenched recognition of the rights of Aboriginals to hunt and fish.

With the greatest respect, because I do respect the view that you have stated and the concern that motivates it, senator, those who would cause mischief for a particular agenda could attempt to do so under the existing provisions of the Criminal Code. They have not done so, to our knowledge. They would not be aided in that by these changes to the Criminal Code.

If a group, for example, wanted to challenge the practices of a particular First Nation or other Aboriginal community in hunting and fishing, they would have to go against that well-entrenched legal and constitutional framework. That is not to say that no one will do that. If this bill does not pass, with the evolution of concerns about the treatment of animals in our society, inevitably, some group will try to do that. They will not be aided in doing that by this proposed legislation. They could attempt it under the existing legislation. They will be met with sound arguments founded upon the respect accorded Aboriginal rights in our system.

I think that is all I can say in response to your concerns, senator. My colleague may have some additional remarks.

**Ms. Klineberg:** No, I do not.

**Senator St. Germain:** Sir, with due respect, our look at the Aboriginal aspect was the same under Bill C-68. You said that their rights would not be violated and that they would have all the protections under section 35 of the Constitution. Yet the entire area of Nunavut has filed suit against the government.

It is fine for people in the Justice Department to say that Aboriginals are fully protected under section 35, but it leads to costly legal scenarios. I have worked on Aboriginal files over the years and am part Aboriginal myself. The last thing these people need is more legal costs. I have heard nothing in these committees that would say that this is not going to be a replay of that situation. We were given all the guarantees in the world; yet I believe that an injunction has been granted in respect of that application. How do you comment on that, sir?

**Mr. Mosley:** The filing of a lawsuit or the granting of a temporary injunction does not speak to the merits of the argument.

Clearly, with any piece of legislation that touches on the interests of any part of society, challenges can be brought and they are, inevitably. We spend a great deal of time in courtrooms of the land defending against challenges predicated on the Charter and on other bases. The fact that someone may file is not an answer to the fundamental question of how this alters the status quo with regard to those rights? With the greatest of respect — I return the favour, honourable senator — I have yet to hear anyone argue or present a persuasive case as to how that will happen.

We have phantoms, in effect, because we cannot trace them. I cannot prove a negative through my remarks here today.

**Senator St. Germain:** That is why, with all due respect, I use the analogy of Bill C-68. I do not know whether you were part of this, but I was there through the whole process. If there is one thing that

we put forward, it was the Aboriginal scenario. Thank you for the answer.

**Senator Joyal:** I politely disagree with you. As you said, there are groups that have some concerns, and we all know that. Those groups will use the words, or the concept, in this bill that are subject to interpretation — an evolutionary interpretation. Allow me to give you one: The definition of "negligently." "Negligently" is defined as "departing markedly from the standard of care that a reasonable person would use." There is no mention of time and no mention of location.

Where will the standards be? Are they the standards of the non-Aboriginal people or the standards of the Aboriginal people? We will be interpreting that concept in the context of the territorial traditional practice of Aboriginal people in one part of Canada or in another. This word is what I would call a "password" in the legislation. It is a word in the code that is subject to interpretation, according to different periods of time. The Criminal Code contains a certain number of such concepts that permit the court the capacity to appreciate the evolutionary nature or reaction of society to some kind of behaviour.

You said that there is no worry because this is defined and the courts will look at it. However, we are putting the Aboriginal people into the hands of an evolutionary concept that the court will, in future, interpret at different times and in different places. This bill contains those evolutionary concepts.

I am not against those evolutionary concepts in this bill for non-Aboriginal people. As you said, the bill reflects Canadian public opinion at this time. However, Aboriginals have traditional, ancestral rights to fish, hunt and harvest in the same way that they have always done. We do not want to submit them to a court interpretation that would depart from that original position. That is why we have some concern with the bill.

The intention, as you stated, from the beginning was that government wanted to readjust the long-standing and out-dated provisions of the Criminal Code that no longer reflected the reaction of Canadian society to cruelty. Too many people can be guilty of cruelty and get away from the courts with only a minimum penalty. As much as we favour that, we do not want to put Aboriginal peoples in the hands of interpretive concepts that will be interpreted by the court in a setting different from that of Aboriginal people.

Our point is relevant to the Young Offenders Act. You will recall the discussions we have had on the issue of the Criminal Code and its reference to Aboriginal people. It took the Supreme Court of Canada to strike down the interpretation of the penalty clause of the Supreme Court in recognizing the particular plight of the Aboriginal people in sentencing.

This is part of the conceptual framework of the Criminal Code. With this bill, we are preparing to make changes that will add a greater burden to someone who may be accused in the criminal system. We do not have the assurance that we will protect those people, especially in consideration of what I call the "evolutionary concept" of this bill.

This bill has a life of its own. As you said, quite properly, and I fully agree with you, once it is legislated by Parliament, it is out of our hands. There are evolutionary concepts in the bill that the court will adapt, as long as Canadian society changes. Those people have a right to stay where they are. That is the determining line between what we are requested to do and how we have to protect them.

**Mr. Mosley:** I agree with much of what you have said, honourable senator. Where I part company with your comments is in the application to this particular provision in clause 182.3 subclause (1)(a). The notion of criminal negligence is well established in the criminal law and the standard that would be applied will be the standard that the courts have applied to the notion or concept of criminal negligence over the years. It does evolve.

Certainly, our understanding of what may be a wanton and reckless disregard for the lives and safety of others does change.

To use the example that has already been raised about firearms, I do not want to get into the debate over licensing and registration, which is at the heart of the issue in Nunavut. In the context of negligence, the Criminal Code is a law of general application. It applies uniformly across the country to all in Canada and has other extra-territorial applications, in some circumstances. It does apply to Aboriginal persons. For example, someone who was criminally negligent in the use of a firearm is subject to the same law that would apply to a non-Aboriginal person who was similarly demonstrating wanton or reckless disregard for the lives or the safety of others. For example, if someone in a community loads a rifle and starts blasting away, and there is a high risk of harm to

another person in that community, it does not matter whether you are Aboriginal or non-Aboriginal, the same law applies.

Therefore, with the greatest respect, subsection 182.3 (1)(a), does not interfere with Aboriginal hunting or fishing rights or the means by which they carry out those rights. It does say, however, that you cannot do so in a way that is negligent and causes unnecessary pain, suffering or injury to an animal. It is a reasonable standard to apply to anyone, whatever their cultural origin or background. It is, in effect, largely the state of the law at present.

I have some difficulty when you extrapolate from this provision to the issue of rights. It does not interfere with rights. It simply refers to how those rights are exercised. A person may be a non-Aboriginal who has a valid hunting licence and is out on a trip elsewhere in the country. If that individual exercises his or her rights in such a way that causes that animal unnecessary pain or suffering, then you are liable to this provision of the code.

**Senator Joyal:** I would like to quote your words: "The standards are the standards of everyone, not the standards as defined for a group." That is how the court will understand the standards. That is precisely my point. The standards of behaviour of Aboriginal people in relation to fishing and hunting and causing pain is different than it is for other Canadians. They have a constitutional right to do so.

Suppose that the Canadian Parliament decided one day to ban hunting. We reach a point in evolution whereby in Canada hunting is a forbidden activity. I submit we would have to make an exception for the Aboriginal people because their rights are protected in section 35, or we would have to amend section 35.

The "standards of care that a reasonable person would use" might be different in the context of Aboriginal society. We agree that the crime of killing somebody is prohibited. However, we are not discussing that. We are discussing the standards of care that a reasonable person in a particular context would follow. We do not have the assurance that when an Aboriginal person is brought into a court, that the judge will say that the standards of care a reasonable person would use, in an Aboriginal context, are the same as those standards applied of hundreds of years earlier. We do not have that assurance. As you said, it will be the common standard. It will be the non-Aboriginal standards.

That causes a concern. We agree that Aboriginal people of Canada are subject to the Criminal Code in general, but when you introduce a concept of evolutionary standards, we do not want to submit the Aboriginal people to standards different from their standards within their traditional practices of fishing and hunting. That is constitutionally protected.

**Mr. Mosley:** Surely, you would not want to see added to the Criminal Code a statement that Aboriginal persons were not subject to the provisions of the law. By implication, the result would be that someone is entitled to negligently cause unnecessary pain, suffering or injury to an animal. That is, in effect, the implication of your argument.

**Senator Joyal:** Not at all. I am personally considering how to do what the Law Reform Commission said in 1987. The Law Reform Commission proposed to exempt certain type of activities not only for Aboriginal people but also for research in universities and industry. We have been given some hints of how to address that question. We would not exclude the Aboriginal people from the application of the act. That is not what we have in mind.

If an Aboriginal person is wilfully cruel to an animal, beyond his traditional fishing, hunting and harvesting, he is subject to the Criminal Code. I have no problem with that. However, when an Aboriginal person is exercising his constitutional right to fishing, hunting and harvesting in the traditional manner observed for the past century, that Aboriginal person is exempted from the application of this bill. We are talking about legitimate fishing and hunting according to their traditional practice on their territory.

That is the limited scope on which we are concentrating. The Law Reform Commission advised us on how to approach that issue 16 years ago. You would need to convince us that this bill is better than the protection that they would otherwise have.

**Mr. Mosley:** I would suggest that the bill actually achieves what the Law Reform Commission sought to do. I will read the recommendation. It describes the general offence of "everyone commits a crime who unnecessarily causes injury or serious physical pain to an animal..." It then goes on to list exceptions and necessary measures. It says, "For the purpose of clause 27 (1), no injury or serious

physical pain is caused unnecessarily if it is a reasonably necessary means of achieving the following purposes..." and a list follows. In effect, they are spelling out what they, at the time, regarded as necessary purposes. One of the difficulties with that approach is that the code is always speaking forward.

You cannot have an exhaustive list. If you do not go with the Law Reform Commission's list, what list do you put in? Do you put in a general basket clause that leaves open the same issue that you have of interpretation? What does this cover?

We have tried to avoid that problem by making the reference to unnecessary pain, suffering or injury to an animal. It leaves it to the court to determine what is necessary or unnecessary in those circumstances. I do not think that Parliament can anticipate all of the possible applications. The commission's list is helpful and would no doubt be referred to by a court looking at what constitutes unnecessary pain.

**Senator St. Germain:** Fortunately, or unfortunately, I do not happen to be a lawyer. My question relates to a statement that was made yesterday in committee by Mr. Weinstein. He made the statement that, in theory, the reading that "everyone commits an offence who, wilfully or recklessly kills an animal without lawful excuse," would inhibit one from killing his cat. If you have a cat or a dog that is biting, and you decide to dispose of it, in theory, you would be subject to charges under this proposed legislation. Could you comment on that?

**Ms. Klineberg:** I can answer that. I do not think that that is an accurate interpretation of the law. Killing without lawful excuse, as I mentioned earlier, is broad. It is open-ended and will be interpreted in accordance with the purpose of the legislation. It is also part of section 445 of the current law, which reads, "Everyone who wilfully and without lawful excuse kills, maims, wounds, poisons or injures ... animals that are not cattle and are kept for a lawful purpose ..." Therefore, subsection 182.2(1)(c) is essentially the same offence as —

**The Chairman:** It is not the same because it creates a new offence. That is the point that Senator St. Germain was making. What about wild animals? Subsection 182.2(1)(c) is a new offence. It is not the same as killing an animal kept for a lawful purpose.

**Ms. Klineberg:** I was responding to the question about someone killing his or her own cat, which is an animal that is kept for a lawful purpose. We can move on to the expansion. A lawful purpose would include euthanasia of your own pet or destruction of your own property. In a case that has been discussed often, a person accidentally shot a dog, had intended to miss but did not, then shot the dog again to put it out of its misery. The courts accept that euthanasia of a suffering animal is a lawful purpose for killing an animal. Veterinarians do it every day in Canada and the human societies do it every day in this country.

Likewise, there is nothing in the law that requires you to have any purpose beyond destruction of your own property. Therefore, euthanasia of a sick animal is a lawful purpose and the attitude that "it is my property and I do not want it any more." is also a lawful purpose. The law only requires, in such circumstances, that you not cause unnecessary pain.

**Senator Andreychuk:** Now I am totally confused. I was with you until you went through that part.

It was my understanding from your first presentation that you specifically removed the definitions of animals, and what we can and cannot do out, of the property section so that it became irrelevant who owned the animal. Now you are saying that it does not matter because, if you are the owner, you will be in the same position under the new as you were under the old system.

With respect, it does not help to quote cases that are more relevant to the old law and not at all relevant to the proposed new legislation.

**Ms. Klineberg:** It is irrelevant whether the animal is owned. That does not determine whether the law applies. Whether a particular person charged with an offence owns an animal will, of course, set some limits and give some permission to what the person can do with their own animal. I cannot shoot my neighbour's dog because it is not my property. However, an owner of an animal can dispose of that animal as they see fit. This happens every day in Canada.

People who no longer want to keep their animals will bring them to the vet and have them

ethanized. There is nothing in that respect that will change.

**Senator Andreychuk:** From an animal protection point of view, I can buy any animal now and it can be in the best of health but if I simply decide that I do not want it, I can dispose of it in any way I wish?

**Ms. Klineberg:** That is the state of the law. You cannot cause unnecessary pain to the animal in killing it. There is no other qualification. There are also the added descriptions of "brutally or viciously." If you kill your animal in a humane manner, you have that right. Nothing in the criminal law could prevent that.

**The Chairman:** I have a problem, Ms. Klineberg, with what you are saying. Where in proposed section 182.2(1)(c) does it say that you can kill an animal if you see fit. It says you can only kill an animal with a lawful excuse. Do you think that seeing fit to dispose of a pet is a lawful excuse?

**Ms. Klineberg:** I would disagree somewhat that it is a proposed new section because under the current section 445, if an animal is kept for a lawful purpose, you cannot wilfully and without lawful excuse kill that animal.

**The Chairman:** This is a proposed new section with a new definition of "animal." An "animal" as defined here in the bill, is completely different. It is a proposed new section and it says that you cannot kill an animal without lawful excuse.

**Ms. Klineberg:** I am not sure that the definition is completely different. We have codified the definition whereas under the current law, there is none.

**The Chairman:** Now we have a definition of "animal." The proposed section in the bill says that we cannot kill an animal without lawful excuse. That is the point that Senator Andreychuk is making. Yet, you are telling us that, in your opinion, if you have a domestic pet that you see fit to get rid of, seeing fit to get rid of it is considered a lawful excuse.

**Ms. Klineberg:** Yes.

**Senator Andreychuk:** We bring in many kinds of exotic birds that we may buy legally somewhere. Can we simply dispose of them?

**Ms. Klineberg:** Yes, you can, provided it is not done cruelly.

**Senator St. Germain:** Mr. Mosley, when you talked about negligence, you mentioned people going out with guns and shooting wildly. That would be deemed negligence. No one will argue that.

Yet, the interpretation of "negligence" in our Aboriginal communities is so different. For instance, if you put a gun outside your door in downtown Ottawa and left it loaded, that would be deemed negligent. Yet, if you are on the land it is not unusual to have loaded guns right outside the doors. Up at Shingle Point, their guns were loaded and outside the doors and their children were running around playing. The reason they kept their guns loaded and outside was in defence against grizzly bears that were coming right into the camp.

I think that Senator Joyal and Senator Baker and others are concerned about the fact that this legislation does not consider the realities that exist for the Aboriginal peoples. I know this is argumentative but I have to put it forward because it is part of the reason those people are in court today on the firearms issue. They will most likely end up in court on something like this.

Do you not think this will activate every special interest group that sees anything other than looking at animals as a vehicle for them to go to the extremes in furthering their causes?

**Mr. Mosley:** I should confess that I would not be surprised at anything. However, I am surprised at the State of Florida that now has a constitutional amendment to protect pigs. As it turns out, it was easier to amend their Constitution than to amend their statutes dealing with the care and custody of animals.

Your example is a good one because it does point to the distinction between what is commonly understood to be negligence and what is criminal negligence. Yes, leaving a gun lying around in any community loaded or with the ammunition nearby, might be considered criminal negligence

particular circumstances. It has happened that a tragedy has resulted in such a circumstance. There were a number of cases recently, in Alberta, where children were killed under such circumstances. However, it may well not be criminal negligence and it would not be interpreted as such, if you were in a hunt camp or if you were facing the risk of a wild predator in the vicinity.

Criminal negligence is a different standard. It is not what is commonly understood to be negligent behaviour. It is a high standard and it goes to wanton or reckless disregard of the life or safety of others. It is a standard that, I am sure, Senator Andreychuk applied when she was a judge. It is not the same standard as being careless. We have a distinction in our law between what is "dangerous driving" under the Criminal Code and "careless driving" under provincial highway traffic acts.

Over the years, the courts have pointed to the distinction between the behaviours. One is a form of negligence, but of a much lower standard; and the other is criminal in nature because the risk of harm was reasonably foreseeable. It has been a while since I looked at that case law, but that is what my memory is on the subject.

In this context, we are not talking about ordinary negligence; we are talking about criminal negligence. There is a real difference. This is the Criminal Code; it is not a statute governing the care and comfort of animals, domestic or otherwise.

I must confess, I have some acres out in Lanark County, and I have dispatched many a mouse and the odd beaver destroying my property. For the life of me, I do not understand how this legislation would put me in any greater jeopardy in the future.

**The Chairman:** To be fair to Ms. Klineberg, that is the point that you were making when we talked about disposing of a domestic pet, as long as it was done humanely and without causing unnecessary pain. There may be some disagreement around the table about that, but I think that was the point — not just putting down an animal, but doing it humanely.

**Ms. Klineberg:** The offence of causing unnecessary pain applies to the domestically owned animal. Every owner of that animal, including every other person, is under the obligation not to cause unnecessary pain to his or her animals or any other one. However, an owner has a right to dispose of his or her property. It is a right that people have, and nothing in the criminal law prevents that.

**Senator Bryden:** There are a number of things that are troublesome. One comes out of what was just said — that is, there is nothing in this amendment that changes the rights of what you could have done with animals before.

I would classify myself as a minimalist when it comes to creating new penalties or new rights. If what we have been led to believe is correct, this is an attempt to increase the penalties as they relate to cruelty to animals. It is not intended to create new rights for animals. However, it is interesting to me that there appears to be quite an industry in animal rights. Indeed, we now have a law course being taught at McGill University on animal rights, according to Professor Sklar who appeared before us yesterday.

My concern is why did we not just leave the section where it was and do what has been proposed, that is, increase the penalties? Why did we need a whole new rewrite? There must have been some reason to do all this. I believe the courts will ask the same question.

Second, Mr. Mosley referred to Professor Sullivan, I think, with approval of the things she said. However, she said a few other things in addition to what you quoted. One of them related to her answer to why the section was being moved from where it was to where it is in the Criminal Code, and the implications of that for the courts. As a draftsman, I believe she said it could raise a question in the mind of the court regarding what was intended as the improvement to the law that necessitated the movement and the creation of a whole new part of the Criminal Code.

She also made the same comment in relation to the famous section 429(2). She did say exactly what you quoted, that is, they tried to clean them up and I thought they had gotten them all. However, they had not, obviously, because there are at least two of these redundant holdovers from poorer drafting that they have tried to clean up. She went on to say it would open the question to a court to ask: Why now, and why was it not done before? If it is out of this and still somewhere else, then what caused section 429(2) to be removed? Does it, in fact, remove something that was required to be there? Is that the reason it was left in before?

I think it is a legitimate concern because, if such redundancies are corrected as part of one of these housekeeping bills that we use to clean up all sorts of stuff, that is one thing. However, if it is to be done as part of a substantive piece of legislation, that raises another question.

In the interpretation of what the intention of legislation is, I have always understood that the intention of the legislation is always taken first from the plain meaning of the words used. That is where you start. It is only when the plain meaning does not allow you to make a reasonable decision, or it is blatantly not effective, that you use the probative value of somebody's opinion at the time it was being drafted.

Once this is launched as a piece of legislation, the words used here will determine how it is applied. That is one of the points of concern to us. One of the specific ones is the definition of "animal." This committee has heard a lot of evidence about the definition of animal. I do not think there is anyone on this committee who is not concerned, even from the point of view of the English language. In this part, "animal" means a vertebrate, other than a human being..." and includes another animal. I have a great deal of difficulty in using the term that you are defining in the definition. If we leave out the first part, what this says is "animal" means an animal that has a capacity to feel pain. I refer to the proposed section 182.1.

We had evidence from scientific experts that indicated we were on very shaky ground including the last part of this. The first part is quite clear — animal means a vertebrate other than a human being. If you stopped there, it is pretty easy to define what constitutes an animal. We may not like extending it to fish, frogs or whatever, but at least there is a clear definition. When we moved on to "and any other animal that has the capacity to feel pain," that is when we started to get into the problem of the fetus. A fetus fits the definition, because the courts have decided that a fetus is not a human being. Therefore, if you say, "animal means a vertebrate," a fetus at a certain stage is vertebrate and has an ability to feel pain. However, it is not a human being.

Are they in this position? They were candid with us and said if that someone could bring an action that says we do not protect the fetus from abortion or pain or any of those things, because it is not a human being. Under this definition, it is an animal. Therefore, one can take action under this definition. As I indicated, the evidence from the scientists who appeared before us said that the definition of animal as "a vertebrate other than a human being" is satisfactory from their position. Once we go beyond that, we are in a never-never land of what is an animal that has a capacity to feel pain.

I want to have a reaction because we will have to come to some conclusions at some point.

**Mr. Mosley:** I will let my colleague deal with the question of the definition of animal. Perhaps I might comment on your earlier questions, senator.

Why a considerable rewrite? One of the objectives was to try to rationalize and modernize the language in the code. It had not been rewritten since 1955. That 1955 code made changes in the statute from what had been the law, dating back to 1892. As I mentioned earlier, the 1892 code imported concepts of harm to animals, which were almost entirely related to property interests in those animals. They took existing English and Canadian statutory models and incorporated them into the code. The 1955 code expanded that to capture this notion of unnecessary cruelty to animals.

Why it ended up in the property part of the code is a historical artefact. The Law Reform Commission, to which we have referred, in its descriptive text at the outset of the chapter that deals with crimes against animals, said that one of their aims was to avoid mingling cruelty to animals with property offences. We agree that is a valid objective. It was a good part of the rewrite and why they were moved out of that part of code. This issue is really not a question of property rights; it is an issue of how animals are treated.

I do not know if that answers your question, senator, but it was a deliberate policy choice made by the government, based on precedents over the last 50 years, to get away from the 19th-century view of how animals should be dealt with under criminal law, exclusively in the context of property interests.

**Ms. Klineberg:** The policy choice made in this regard was to clarify the scope of the provisions, rather than to add uncertainty. The existing animal cruelty offences in the code contain the word

“animal,” but there is no definition of the word. It is certainly open to debate under the current law: Which animals are in and which are out? Is a lobster or an octopus an animal? We sought to answer these questions by providing a definition.

In respect of vertebrates, where the scientists have testified before you, it is generally believed scientifically they have the capacity to feel pain. They would, *prima facie*, be in. The government also made the policy choice that instead of arbitrarily limiting the definition they would opt for greater flexibility. In future cases, if science can demonstrate that other classes of animals may have the capacity to feel pain and the Crown wants to undertake the burden of proving that beyond a reasonable doubt in an appropriate case, the law would already be in place to allow for that development.

The definition brings greater clarity than the law has today. It is not unlimited. In respect of invertebrates, there is this burden on the Crown that does not exist under the law today. Our view, therefore, is that the definition narrows the scope of the law rather than expands it.

It also bears noting that some foreign jurisdictions, in their animal cruelty statutes, have broad and expansive definitions. There is precedent for this kind of definition as well. Arkansas, in their Criminal Code, defines animal to include “every living creature.” Vermont, which has recently rewritten its animal cruelty laws, defines animal to mean “all living sentient creatures,” but not human beings. Minnesota, animal means “every living creature, except members of the human race.”

There are also some fairly broad definitions of animal in provincial animal welfare statutes. For instance, Alberta's definition includes “does not include a human being.” The Manitoba and New Brunswick statutes, which are fairly new, I believe they were revamped in the 1990s at some point, define animal to be “a non-human living being with a developed nervous system.”

There is precedent in animal welfare legislation and criminal animal cruelty legislation that is starting to adopt broader definitions to allow for greater flexibility. That was the policy choice made by the government.

**Senator Beaudoin:** I have become convinced, since the scientists came before us, that we will have to amend the definition of “animal” as it appears in this bill and perhaps the last line may not be necessary.

I was impressed by the testimony of REAL Women, who came before us recently. I think that they concluded that the fetus may be an animal. I do not think so. Legally speaking, the problem is settled in law; we know what it is in law. If we turn to the scientific point of view, I do not think that you may conclude it is an animal. It is certainly not that.

However, I have come to the conclusion that we may very well have to define “animal” differently. I am closer to the scientists than to the definition that we have before us in the bill.

**The Chairman:** Would you care to comment, Ms. Klineberg?

**Ms. Klineberg:** The only thing I would add to that is in regard to my reading of the testimony of those scientists. They recognized that cephalopods are invertebrates and so therefore not the animals that we capture with the expression “vertebrates.” This group includes octopus, cuttlefish and squid. Scientists are unsure whether or not these animals have the capacity to feel pain. There is a growing scientific consensus that perhaps they do. That is one of the reasons the Canadian Council on Animal Care in their guidelines on animal research have a separate set of guidelines for cephalopods.

If we limit the definition strictly to vertebrates, we exclude that class of animals that scientists are increasingly coming to believe may have the capacity to feel pain because of the size of their brains and their developed nervous systems.

The definition right now allows for these kinds of evolutions in science to be brought into the law, whereas if we simply cut off the definition after all nonhuman vertebrates, we foreclose the possibility of including this group of animals that may well have the capacity to feel pain.

**Senator Beaudoin:** I would like their opinion on this question of the definition.

**Senator Bryden:** You gave the definitions used in Arkansas, et cetera. It is not in their constitutions; it is just in their legislation?

**Ms. Klineberg:** That is right. I have Florida here if you like.

**Senator Cools:** Was it in their Criminal Codes? What we are talking about here is not a piece of legislation about the environment. This is the Criminal Code. When Ms. Klineberg was giving definitions, it was not clear to me if those were Criminal Code definitions.

**Ms. Klineberg:** Yes. Florida defines "animal" in its Criminal Code as "every living dumb creature," but I believe the definition is quite old.

**Senator Bryden:** I do not know that Canada is always in the best of company when it follows blindly what happens south of us. You say that the expanded definition of "animal," which includes, "has the capacity to feel pain," allows for the expansion. I suggest that it encourages the expansion. If we get to the point where it is quite clear that somebody other than a vertebrate feels pain, we can address the question of saying vertebrates or whatever. Parliament meets regularly. We do not have to turn it over to interest groups to bring before the courts, to have judges call and hear an endless number of experts saying that a lobster does or does not feel pain.

That is a view. If the intention is not to create new rights for animals, but mostly to provide increased penalties because of the significance we want to bring to bear on cruelty to them, we do not want to encourage an industry. Until it was brought to my attention, I was not aware that there are at least 700 lawyers in the United States who specialize solely in animal rights. It is a large business there. We obviously are starting to train the lawyers here.

**Senator Sparrow:** I am not so sure that I particularly understand witnesses from departments of government coming before committees. We have heard a number of witnesses who have suggested that there should be changes or amendments to this legislation. Are you today in your evidence and prior suggesting that this legislation is in fact good the way it is, and that it is not necessary to amend it, even though we have had so many witnesses and members of the committee suggesting there should be amendments made to it? Are you clearly today telling us that this is good legislation and you see no justification for any amendments to it?

**Mr. Mosley:** It would be presumptuous of us to comment one way or the other on that, Senator Sparrow. We are here to answer questions about the interpretation of the bill that is before you. It is a matter of the government's policy. I do not think I can add anything further. It is not for us to say whether you should or should not amend this bill.

**Senator Sparrow:** You have no recommendations as to how to handle this bill in committee?

I have trouble with the proposed 182.2(1)(c), "kills an animal without lawful excuse." We have had other witnesses who appear to have trouble with it as well. It is to determine what a lawful excuse is. Is it to kill an animal because it is a nuisance or that you do not want it around? Is that the purpose? Is it a lawful excuse to kill it for enjoyment? Is it a lawful excuse if you are out hunting and killing an animal just for the joy, so to speak, of hunting? What happens to the lawful excuse for people who kill gophers in a farming operation, where the community as a whole drowns out gophers? How can you justify that as a lawful excuse? Are those people subject to possible charges under this bill because they did not have a lawful excuse? If you were to shoot a coyote travelling across someone's land, which is effectually legitimate, is that a lawful excuse just because it was there and you would kill that animal?

It is too difficult for me to determine what lawful excuses are. I believe that the police have no greater judgment than I have as far as pressing charges in cases such as those.

**Mr. Mosley:** I think the gopher example is a fairly easy one because they do destroy farmland. They are a nuisance. They put other animals at risk of breaking their legs, et cetera. In my youth, I shot a lot of gophers and that was at the invitation of the farmers who owned the land because they wanted to get rid of them. They were a nuisance. That is a simple answer to your concern.

It is more complicated is with other forms of hunting. I am reasonably confident that the associations representing hunters in this country would never for a moment suggest that the hunting is done for the joy of killing. Hunting is done for a whole range of other reasons. Yes, we believe that is a lawful excuse in the terms of the clause to which you have referred, senator. The fact that you do not need to hunt for sustenance is irrelevant to that question. If you are entitled to hunt, then, yes, it is a lawful excuse.

**Ms. Klineberg:** I can add that the phrase "without lawful excuse" is one that is not unfamiliar in the Criminal Code. It is in a number of separate offences. There has been some judicial interpretation of what it means, although perhaps not a significant amount but certainly. For instance, in 1980, the Ontario Court of Appeal said the use of the expression "without lawful excuse" in offence creation provisions has long been a common one. No standard or comprehensive meaning can be ascribed to it. In the absence of a special definition, the meaning has to be determined from the object of the legislation in which it appears and the subject matter of its immediate context. In another case, by the Supreme Court actually, the court said it would be unwise to attempt to define comprehensively what constitutes lawful excuse within the section 205 of the Customs Act. The purchase of goods in good faith by the accused without knowledge of their unlawful importation has been held to be a lawful excuse. In our view, the term also includes any honest and reasonable belief in a state of the facts, which if true would have made his act innocent, which is interesting.

Our answer to that would be there is the option of listing everything, but then we arrive at a situation where what is in, what is out and what if the list is incomplete. The phrase "without lawful excuse" is one that courts have been readily interpreting in a number of different offences for quite some time, and it is quite broad and unlimited and context specific. In the past, some animal cruelty provisions that contain that phrase have been interpreted and the courts have had no difficulty in figuring out what are those lawful purposes. Some of these lawful purposes were mentioned by Judge Lamer in the *Ménard* case, where he actually says at some point that it will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and, to this end, to tame them with all the painful consequences this may entail, and if they are too old, or too numerous, or abandoned, to kill them.

There is common law authority for a variety of different lawful purposes for killing animals. Pest control would be another one that has been recognized by the common law.

**Senator Adams:** I want to follow up on Senator St. Germain's comments, especially because we already have experience with Bill C-68. At the time of dealing with that legislation we tried to tell Allan Rock what should be recognized under Bill C-68. We were told that everyone who has a gun must keep that gun locked up in a case. We explained to the minister that we have our guns at home. If I want to go out hunting, I would not leave it in the house. It might be 70 degrees in the house and if I took the gun outside to my sled in order to go out on the land, where there are polar bears and grizzly bears, on a day like today in Rankin the temperature might be minus 41. That gun would not fire; it would freeze up. It has happened that some people have been charged because they left their gun in a sled instead of bringing it inside again. If you go out caribou hunting, you need to find a Coleman stove in order to be able to heat the gun up and make it fire again. Sometimes it is very difficult.

Regarding Bill C-10B, it does not explain anything about the type of animals. I think of the example that I mentioned yesterday when, around 1970, Green Peace lobbied against leg-hold traps and it affected everyone in the northern communities. That resulted in a situation where price for pelts brought into the Co-op or Hudson Bay dropped from \$60 down to \$5 per pelt. The people who used skidoos, which cost \$10,000 to buy and \$1 a litre to fill with gas, could not afford it any more. Hudson Bay finally refused to buy at all and pulled out of the community. We have no more Hudson Bay in Nunavut.

We have had animal rights activists on the Clyde River studying humpback whales for the last three years. We have been allowed to kill one every year and now the animal rights activists are proposing that Inuit people not be allowed to kill any more humpback whales. According to the Government of Canada, every year we are allowed to kill one. It was not too long ago that we could hunt quite a few beluga whales, polar bear, and barren land caribou but then, because of the risks to animals, every year the quotas on hunting these animals are reduced.

If this bill concerning cruelty to animals is passed, I wonder if we will be allowed to hunt animals at all in the future. You say we are protected by section 35 of the Constitution. I do not know how much a court case will cost to challenge the legislation, especially with living in the North, where the fare to go home costs me over \$3,000. People living on the land, and fishing and hunting on that land, should be taken into consideration under that bill.

**Mr. Mosley:** As I understand the question, you are asking whether we would have difficulty with the notion of exclusion for Aboriginal persons. Yes, as I explained earlier in the exchange with Senator

Joyal, these provisions relate not to the hunting and fishing rights but to how animals are treated, and that is a matter of concern for Canadian society as a whole. It is in the Criminal Code now. The amendments are proposed to the Criminal Code, and they would be of general application to every person in Canada. By the same token, I do not believe that this will interfere with your traditional hunting and fishing practices.

**Senator Adams:** Let us say that I now have a beneficial card under the Nunavut land claims. If I shot at an animal and was charged for doing so, if I pulled out my beneficial card, would I be protected because we had settled land claims?

**Mr. Mosley:** You are protected with regard to restrictions on hunting and fishing by reason of your Aboriginal status and rights. That is not directly pertinent to the question of how animals are treated in the process of hunting and fishing. I believe you will continue to be protected with regard to, for example, laws that relate to seasons, laws relating to the protection of certain species and limitations on the right to hunt those species. That is not what this law is about. This law is not regulating hunting.

**Senator Adams:** The bill says anything that can feel pain. Anything we shoot will feel pain.

**Mr. Mosley:** I would imagine that virtually everything that you would want to hunt would probably fall within the definition of animal in this bill. By the same token, that does not mean you will be unable to continue to hunt by reason of this legislation.

**Senator Adams:** I explained yesterday the same thing. Sometimes we go out seal or whale hunting. We have to use a harpoon before we shoot the seal or whale. Is that cruelty to an animal?

**Mr. Mosley:** That is necessary in order to hunt the seal. As you explained on the last occasion, if you simply shot the seal it could well submerge and you would be unable to recover. Harpooning initially to ensure that you can hold on to the seal is a necessary part of your traditional practice of seal hunting. I see no difficulty with that.

**Senator Adams:** If I do not check my nets for a couple of days, and the fish drown, is that cruelty to animals?

**Mr. Mosley:** No, that is the way that you fish.

**Senator Smith:** Are there any aspects of the current wording with which you are uncomfortable as a result of any evidence or arguments that you have heard before the committee?

**Mr. Mosley:** I am not. I have consulted my colleague, and she has been following the evidence closely. I do not believe so, senator.

**Senator Smith:** With regard to the colour of right argument, I think you are saying that a common law defence available and remains available. It is unnecessary to articulate it. Some members of the committee are saying that out of an abundance of caution why do we not we articulate it to ensure it is there? If we do that, is there anything that we are prejudicing? I think that you are saying that we might unwittingly prejudice situations where colour of right should apply across the board as a common law defence because there may be a trend of courts to start interpreting whether it is available in instances only where it is articulated. Is that what you are saying? Do you think that is a slippery slope?

**Mr. Mosley:** It would be an undesirable consequence of putting a comfort clause into the bill — a clause that we do not believe to be necessary. I can understand why you might want to do that based on the evidence you have heard. It is an odd situation to have a representative of the Attorney General arguing in favour of a broader, more expansive interpretation of a clause providing defences to the accused.

However, it is equally odd for representatives of the criminal bar to say, "No, if it is not expressly in there then it is not available." I think that they are wrong. The unfortunate consequence of their argument in the future would be for someone to advance the argument that the common law defence applies to another provision of the Criminal Code, where there is not an express reference to it as there is currently in section 429, their case would be weakened.

**Senator Smith:** We heard that before, but they will still went after those seal hunters. What do you

say that we give comfort to them that that path will not be followed again?

**Mr. Mosley:** I must confess that I am not familiar enough with the law pertaining to the seal hunt or the particular example to which Senator Baker referred.

From a reading of the regulation, it is clear that the method of hunting seals was spelled out in the regulation. There was a specific provision provided for a due diligence defence. It says that, "no person shall be convicted of an offence under this act if they reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent."

They have to fit themselves within the description earlier in this regulation as to marine mammal regulations on how you hunt seals. If you hunt them in some other way, then you can argue that you thought that you were entitled to hunt them in this other way. If that view is not reasonably and honestly believed, you do not get the benefit of that argument.

**Senator Smith:** You may want to have a look at that and reply in writing.

**Senator Andreychuk:** Interestingly, Mr. Mosley has said that if this comfort clause were added, it would somehow prejudice the common law defence. With respect, my understanding is that you cannot rely on common law defences per se. You have to look at the state of play, and whether they have been extinguished, and the vibrancy of common law defences.

We have had specific defences in this particular section and elsewhere in the Criminal Code. Can you give me any instance where, by putting it in, we have limited a common law defence somewhere else in the Criminal Code? How does isolating it in this section of the Criminal Code limit a defence of common law? Otherwise, you are saying that somehow or other this proposed section would do it where others have not. Could you reply to that?

I would still like clarification of your comments that this entire piece of proposed legislation is simply a reordering of the existing legislation with an increase in and a highlighting of the penalties, so that it is educational as well as substantial. Thus, if you commit cruelty to animals, you will pay the consequences more heavily.

If that is all we are doing, then we have simply re-jigged everything that was in the current act. People feel threatened. There is a tension between animal rights lovers, who are pushing the envelope, and people who want to maintain a way of life that they have had. Even in the current Criminal Code, there is enough discomfort for farmers and for Aboriginals wondering if what they did yesterday is it still acceptable today. We are moving forward in society and telling them that they are out of date.

However, they are not out of date. We have to respect the fact that the Criminal Code will not be abided if we do not have a collective consensus to support it, particularly from those people who will be directly affected. We learned that from Bill C-68.

**Mr. Mosley:** I would like to speak to the question on defence. If the principle that colour of right is not part of the common law becomes entrenched, then that weakens the argument of any other counsel who is trying to advance the proposition that in another part of the code that does include an express reference, it is not available. They would be just out of luck. I think that is wrong. I do believe that it is part of the common law.

In respect of the other point about comfort clauses, I think we can understand why people feel threatened by developments. I would suggest that most of those developments have nothing to do with the criminal law but rather to do with changing societal attitudes as society moves forward. We do not believe that the proposed changes are causing the discomfort. By the way, it is not just a reordering of the existing code; that is not the language I used. I said that the objective was to modernize and rationalize the provisions relating to animal cruelty.

We would not have had much debate if it were simply a matter of reordering the sections.

**Ms. Klineberg:** There is a sense that if the colour of right is lost, then activities that are currently lawful will become unlawful. There is a sense that people would like to see the words in place to give them comfort so that they will not have to rely on section 8.

One thing that has not been discussed is that colour of right is a defence of mistake. It is not a defence of lawful purpose and it is not a defence of protection, such that someone in a profit-earning

business has a right to protections. It is defence of mistake of fact or mistake of law.

Colour of right is completely irrelevant to the position of the average farmer, hunter or person engaged in animal research who understands the law and is fully familiar with all the facts surrounding what they are doing. Putting it in and stressing that it is a comfort clause is misleading to the degree that it suggests that this defence provides something that the average person involved in lawful activities involving animals needs or makes use of on a daily basis, which is legally incorrect. This defence is of extremely limited application. There is some merit to the question that even in defences with extremely limited application we would still like to see the words for comfort. It is not a broad application but rather it is a limited application — it is a mistake.

Therefore, whether it is there or not does not make a difference between lawful and unlawful in law.

**The Chairman:** I thank our witnesses for their patience and time this morning. There are some troubling questions, as you have witnessed from the questions of various senators.

**Senator Baker:** For the record, I did not mean that Mr. Mosley was wrong in fact. He was simply wrong in the assumption he was making.

The committee adjourned.