

Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

Issue 6 - Evidence

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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 3:50 p.m. to give consideration to the bill.

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

The Chairman: I would like to welcome everyone back. Today we continue our consideration of Bill C-10B, regarding proposed amendments to the cruelty to animals provisions of the Criminal Code. We have one panel this evening comprised of four different groups. They are the Canadian Jewish Congress, the Fédération québécoise de la faune, the Poultry Welfare Coalition and the Ontario Federation of Anglers and Hunters.

Senator Beaudoin: On a point of order, I want to say at the beginning, because it was raised the other day, that strictly speaking, it is a study of Bill C-10B. We call it Bill C-10B, but it is a study until it is divided by the House of Commons. I just want to say that at the beginning, so that the point need not be raised anyway.

The Chairman: Thank you, Senator Beaudoin.

Speaking on behalf of the Canadian Jewish Congress are Manuel Prutschi and Rabbi Bulka. From the Fédération québécoise de la faune, we welcome Gaétan Roy. The Poultry Welfare Coalition is represented by Mahmud Jamal and Bill Uruski. From the Ontario Federation of Anglers and Hunters, we have Greg Farrant and Janice Oliver.

I remind the witnesses that each organization has five minutes to make a presentation. Once all groups have spoken, we will open the floor to questions from the senators. We thank all the witnesses for taking time to assist us today. Perhaps we can proceed with the Canadian Jewish Congress.

Rabbi Reuven Bulka, Chair, Religious and Interreligious Affairs Committee, Canadian Jewish Congress: I am here with Manuel Prutschi on behalf of the Canadian Jewish Congress, which represents 360,000 people, the Jewish community of Canada. We are an organization with a long history of being in the forefront of human rights. We incorporate the community concerns.

On this issue, we also have a letter of support from the Islamic Council of Imams, which stands four-square with us in our concerns.

A letter of endorsement has been sent to you stating that they are with us in our presentation and our concerns.

The Jewish attitude to animals is basically codified in the Bible itself. The Bible has more law concerning kindness to animals than the observance of the Sabbath. The hallmark of a Rabbi is whether he knows the rules of preparing an animal for eating. All Rabbi scholars must go through intensive preparation in school before being given such licence.

The Canadian Jewish Congress has been involved in the proposed legislation before us for the past three years, and we are 100 per cent behind the intent, that is, protection of animals. Part of Jewish tradition is to protect animals. We are convinced that there is no intent whatsoever to negatively impact on the ability of the Jewish community to continue with its method of shechita, which is the Hebrew term for "ritual preparation," or with halal in the Islamic tradition.

However, we are concerned with a possibility that the proposed legislation, as it reads now, may leave the door open for malicious, frivolous or private prosecutions that would place the community on the defensive in terms of shechita, which is a codified, time-honoured tradition based on the idea of not imposing even the slightest amount of unnecessary pain on the animal. We are also concerned that it would bring about unfair, negative publicity.

We are here today in appreciation of the proposed legislation, but we also hope that the exemption for ritual preparation for both the Jewish and Islamic communities can be made more explicit to make it impossible for anyone to bring lawsuits that would put the Jewish community in an uncomfortable position.

We thank you for the opportunity to address you, and at the end of the other presentations, we will be happy to answer any questions concerning this.

The Chairman: Thank you very much. We will now hear from Mr. Bill Uruski from the Poultry Welfare Coalition.

Mr. Bill Uruski, Poultry Welfare Coalition: The Poultry Welfare Coalition is comprised of the Canadian Egg Marketing Agency, the Canadian Turkey Marketing Agency, Chicken Farmers of Canada and the Canadian Broiler Hatching Egg Marketing Agency. The coalition represents 4,800 farmers across Canada in all four commodities. I would like to thank you for giving us an opportunity to appear here.

Our farmers have serious reservations about the proposed legislative changes within Bill C-10B. As a turkey farmer, a former Minister of Agriculture for Manitoba and a legislator for two decades, I am extremely concerned about this bill. The coalition appeared before the House of Commons Committee on Justice and Human Rights in October 2001 to outline our concerns.

Farmers still have reservations about the removal of animal cruelty offences from Part 11 of the Criminal Code, which deals with property offences, and the new definition of "animal." However, our most serious concern is the removal of the defences of legal justification or excuse and colour of right.

I would like to turn the presentation over to the coalition's legal counsel, Mr. Mahmud Jamal, who is a partner in the Toronto litigation department of Osler, Hoskin and Harcourt, and chair of the firm's public law and constitutional litigation group. Mr. Jamal has litigated before courts across Canada, including the Supreme Court of Canada, the Federal Court of Appeal, and the courts of appeal of Ontario, British Columbia and New Brunswick. Mr. Jamal is also a past sessional lecturer in constitutional law at McGill and is co-author of the two-volume loose-leaf service, *The Charter of Rights in Litigation*. Mr. Jamal will now explain the legal implications of removing section 429(2) of the Criminal Code for animal cruelty offences.

Mr. Mahmud Jamal, Legal Counsel, Poultry Welfare Coalition: We understand that the government's working assumption has been that the defences currently available under the Criminal Code for animal cruelty offences would continue to be available under this Bill C-10B. As former Minister of Justice McLellan put it, that which is unlawful today will remain unlawful under the bill. The coalition agrees with the wisdom of this working assumption but believes it has not been fully implemented in one highly significant respect, namely, that the bill will eliminate the statutory colour of right defence currently available for animal cruelty offences. As a result, in some instances, what is lawful today will no longer be lawful under this bill. Eliminating the colour of right defence will open this bill to constitutional challenge. The coalition proposes that the colour of right defence be retained, and I will suggest a simple amendment that will accomplish this.

The statutory colour of right defence for animal cruelty offences currently appears in section 429(2) of the Criminal Code and states:

No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

"Colour of right," as you know, means an honest belief in a statement of facts, which, if it existed, would be a legal justification or excuse. The courts have interpreted this statutory defence as covering errors of fact and errors of civil law, including errors as to the statutory or common law of the relevant province. Section 429(2) has been regarded as a limited statutory exception to section 19 of the Criminal Code, which provides that ignorance of the law is not an excuse. Therefore, as the law currently stands, a person cannot not be convicted of an animal cruelty offence if he establishes that he had an honest but mistaken belief in facts or in civil law.

The defence of mistake of civil law is particularly significant for animal cruelty offences because many provincial and territorial laws across Canada permit or even require persons to kill animals, to treat or tend to them or breed them for the purpose of conducting research on them.

Let me give you two examples from Ontario. The Ontario Dead Animal Disposal Act deals with the circumstances in which the owner of a "fallen animal," which is defined in the act as a horse, goat, sheep, swine or head of cattle that has been disabled by disease, emaciation or other condition likely to cause death, is required by law to kill it in a humane manner.

Similarly, the Health Protection and Promotion Act deals with the circumstances in which the owner or person in charge of an animal may be ordered by a provincial medical officer of health or a public health inspector to destroy that animal if it poses a health hazard.

There are many similar statutes in Ontario and across Canada, such as the Ontario Society for the Prevention of Cruelty to Animals Act, the Livestock Poultry and Honeybee Protection Act, the Meat Inspection Act, the Pesticides Act, the Conservation Authorities Act, the Fish and Wildlife Conservation Act, the Animals for Research Act and the Veterinarians Act.

As the law currently stands, a person is entitled to invoke the defence of colour of right with respect to an honest and mistaken belief as to the meaning or scope of any of these provincial laws. That defence will no longer be available under this bill.

Some groups have asserted that the colour of right defence will continue to apply as a result of section 8(3) of the Criminal Code, which preserves common law justifications or excuses that are not otherwise inconsistent with the Criminal Code or with other federal legislation. As you know, section 8(3) will continue to apply to animal cruelty offences by virtue of clause 182.5 of the bill.

I disagree with those who assert that the colour of right defence will continue to apply. Under Canadian law, the defence applies only where a statute says it applies. Professor Don Stuart of the Faculty of Law at Queen's University clearly states the following in the fourth edition of his text, *Canadian Criminal Law*:

Our courts have confined their recognition of colour of right defences to *Criminal Code* offences which expressly allow such a defence.

In my view, the law could not be clearer. Colour of right applies only if the statute states that it applies. Section 8(3) does not expressly say that colour of right applies, so it simply will not apply under this bill. In my view, the elimination of colour of right defence will also leave this bill vulnerable to constitutional challenge. I say this for two reasons: First, there is a reasonably arguable case that the elimination of this defence will violate section 7 of the Charter. This argument is based on the recent decision of the Supreme Court of Canada in *Ruzic* that held that statutory restrictions on the defence of duress in section 19 of the Criminal Code violated section 7 of the Charter. The Supreme Court has thus accepted that limiting statutory defences can violate the Charter and, in my view, similar arguments could reasonably be made about removing the colour of right defence in this bill.

Second, the negligence offences under this bill are more vulnerable constitutionally than is necessary. This is because it is currently unclear, under Canadian law, when subjective *mens rea* is constitutionally required under section 7 of the Charter and when

a merely objective fault standard will suffice. The Supreme Court could well find that the lack of subjective *mens rea* in these negligence offences violates the Charter.

I do not have time today to elaborate on these two constitutional arguments, but I think they are legitimate and merit the serious consideration of this committee. They are spelled out in greater detail in the opinion that I filed with the clerk of the committee.

There is a simple way to address all these concerns: namely, retain section 429(2) for animal cruelty offences. Doing so would leave all the offences in the bill less vulnerable to a Charter challenge. The bill would also be brought into line with the government's stated purpose of maintaining defences that are currently available under the Criminal Code. The Poultry Welfare Coalition, PWC, therefore, proposes a minor amendment to clause 182.5 of the bill. The amended clause would read as follows:

Subsections 8(3) and 429(2) apply in respect of proceedings for an offence under this Part.

This amendment will ensure that the colour of right defence remains available under Canadian law for animal cruelty defences. It will also make the bill less vulnerable to constitutional attack. On behalf of the Poultry Welfare Coalition, thank you for this opportunity to address the committee.

Mr. Gaétan Roy, Biologist, Fédération québécoise de la faune: It is a pleasure for me to be here today and I thank you on behalf of the anglers and hunters of Quebec. Our federation represents nearly 150,000 individual members and 220 corporate members. It is speaking for 715,000 hunters and nearly 3 million anglers throughout the province of Quebec. These people are Canadians and Quebecers who consider wildlife the most important resource in the country because of its impact on their way of life and customs of all Canadians since the first day that human beings set foot on this continent.

Thus, since 1946, our federation has been a major player in wildlife conservation, public education and promotion of the sustainable development of wildlife-related activities. In our submission, you will read that our federation is pleased with Bill C-10B because it introduces a true sense of responsibility into our society for the protection of animals. However, our members, along with the entire hunting and fishing community, felt that the bill as it stands can and will be used for purposes other than those at which it was originally aimed.

All of you know that today, throughout North America, there are groups and individuals who will do anything to eliminate hunting and angling activities from our society. Bill C-10B will become another tool for their strategies. These groups or individuals use the terms "unnecessary, kill brutally, viciously," or even "lawful excuse," as used in the bill, differently from most people. Even with the general comprehension that hunting and angling are lawful excuses, it is more than likely that, once this bill is adopted, our community will face a number of new accusations and constraints in the legitimate practice of hunting and fishing.

It is a fact that the bill will be used to create senseless accusations and unnecessary trials aimed at nothing but jeopardizing the social acceptance of hunting, fishing and

their associated activities and methods. It is obviously not the original goal of this bill but, without modification, it will become a threat to our traditional wildlife activities. We emphasized that problem many times. In fact, we insisted that a provision to protect normal wildlife-related activities should be included in the bill.

Two years ago, our concerns were recognized in the first legislative summary, following the original review of Bill C- 17. After our comments, those of many more organizations throughout the country were issued. The commentary stated that the concern of these groups such as ours could be alleviated if the proposed legislation were to set out as exceptions certain acts that would not be considered criminal. For example, the Law Reform Commission of Canada, in its report on re-codifying criminal law, set out the following exceptions to the cruelty to animal offences. It proposed necessary measures for the purpose of the bill:

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

There is a list that ends with the disciplining or training of an animal.

From our point of view, that same proposition, with the words "among others" added before the words "any of the following purposes" would definitely resolve all of the concerns of the hunters and anglers. Today, we believe that Bill C-10B will be adopted without any modifications to include clear exclusions for normal hunting and angling activities. We wrote to the Minister of Justice and repeatedly called for him to explain why our concern was not recognized in Bill C-10B because we represented this position and the Quebecois community positions from the outset. Today, those letters and phone calls remain unanswered.

That is why we appeal to you on this matter. In Canada, a number of new obstacles and constraints are placed against the hunting and angling community. Many are caused by the pressure of activists, or "anti-activists," as we call them, whose specific ethics are different. These pressures have limited and even diminished our traditional activities to the point that their survival is at stake. Thus, we appeal to you so that a great initiative like Bill C-10B does not become just another tool to remove traditional wildlife-related activities from the Canadian identity.

Mr. Greg Farrant, Manager, Government Relations, Ontario Federation of Anglers and Hunters: On behalf of the 29 organizations listed on our submission and the more than 2 million Canadians that these groups represent, we thank you for affording us the opportunity to present our concerns to you today on Bill C-10B. Ms Oliver and I will be brief so that our legal counsel, Mr. Michael Code of Sack Goldblatt Mitchell, and the former Assistant Deputy Minister of Criminal Law for the Province of Ontario, may speak on our behalf as well. Also attending with us today are my colleagues Ms Leslie Ballentine, Public Affairs Director of the Ontario Farm Animal Council, and Mr. Bill Stewart, Co-Chair of the Environment and Animal Care Committee of the Canadian Cattlemen's Association.

Bill C-10B proposes to upgrade the status of animals in the Criminal Code from mere chattel to creatures deserving protection in their own right because of their capacity to feel pain. In part, this will be accomplished by increasing fines and penalties associated with animal abuse — a change that has brought support. However, some of the other proposed changes in the bill cause all of us in the animal-dependent community grave concern. In fact, in our view, the stakes for legitimate animal owners and users have never been higher, despite repeated assurances that everything that was lawful before will still be lawful after the bill is passed. Concerns over the language and definitions in the bill have caused us to seek legal advice.

Without being overly dramatic, the advice we received and the comments that have been made by animal rights activists and some parliamentarians confirmed our belief that parts of this proposed legislation may seriously impact upon the animal user community and even threaten some with insolvency.

We believe that the goal of enhancing and broadening the penalty provisions, the creation of indictable offences and increasing penalties up to five years for acts of animal cruelty are beyond reproach. In fact, last fall the Ontario Federation of Anglers and Hunters, the Ontario Farm Animal Council and the OSPCA worked together to pass a private members bill in the legislature that will assist the OSPCA to charge and shut down puppy and kitten mill operators who are found to be engaged in animal abuse.

If, however, the intention of this proposed legislation is to provide more effective penalties and fines against those who commit well-publicized acts of abuse, mostly against domestic animals, this could have been achieved without wholesale legislative overhaul. For instance, the State of Tennessee recently adopted a felony animal cruelty law that applies to dogs, cats and other domestic animals without impacting negatively on the animal-dependent community and exempting wild animals from the legislation, a concern raised by one of your colleagues in the Senate. As an aside, Spain recently passed a similar law.

We strongly believe that there can be no justification for diminishing existing longstanding protections for those who deal with animals on a daily basis related to their livelihood, place of residence, culture, traditions or legal regulated pursuits. If anything, Parliament ought to be reinforcing and providing greater means of protection to legitimate animal users in the face of well-documented threats by animal rights groups that have promised to use this proposed legislation to advance their cause, irrespective of the costs or consequences.

Rather than suggesting that the bill be scrapped, however, we would like to work with the members of this committee to improve the bill and to provide legitimate animal users with a level of comfort that they currently enjoy without diminishing the purported intention of the proposed legislation. There are three interrelated aspects of Bill C- 10B that are deserving of your attention. We have submitted proposed amendments to address all three.

The first proposed amendment concerns removing the animal cruelty provisions from Part XI of the Criminal Code and putting them into Part B1. The second is inclusion of

amorphous definitions for "animal" and "unnecessary pain." The third, and most alarming, is the loss of the current upfront legal protections and the removal of wording regarding legal justification or excuse and colour of right, which apply by virtue of section 429(2).

Ms. Janice Oliver, Executive Director, Canadian Association of Fairs and Exhibitions:

I want to begin by thanking the members of the committee for allowing us to appear before you today. While I concur with the presentation given by my colleague, I want to add some comments to give you some of the context in which fairs and exhibitions are concerned about this proposed legislation. The Canadian Association of Fairs and Exhibitions, or CAFE as we are called, represents Canada's agricultural fairs and urban exhibitions as well as those who provide services to agriculture societies.

Since before Confederation, these organizations have played important roles in their community by bringing people together to celebrate excellence, to market and teach about agriculture and to bring entertainment to hundreds of cities and rural communities across Canada.

Fairs have been, and continue to be, integral to the fabric of Canadian life. Animals play a large role in many of the activities of Canada's over 700 agriculture societies. At the local fair, livestock is used in educational displays and is judged and sold. Horses are an integral part of racing. Bulls, oxen and other working animals are involved in displays of traditional agriculture methods such as ploughing matches and rodeos.

One of the primary activities of Canada's fairs and exhibitions is to use entertainment to educate by stealth. This is an education method used not only by fairs, but also by museums and schools all across the country.

The fair experience is an interactive one, and kids, in particular, respond well to the interactive learning opportunities that we provide. At the fair, the "alligator wrestling show" is a catchy title used to bring kids' attention to a demonstration teaching them about an alligator's habitat, diet and other important information. This education helps to teach kids about the importance of preserving habitats for endangered species, for example, and about the important roles we all play as stewards of animals. It is safe to say that these kinds of activities go a long way to encouraging Canadians to protect animals in the wild.

The Canadian Association of Fairs and Exhibitions is concerned about Bill C-10B, which attempts to deal with one problem while it creates many more. While we applaud the Department of Justice objectives of punishing those who commit heinous crimes that have been described by various animal welfare groups, we are concerned that while trying to do this we will bring many other activities into question.

We are concerned that this proposed legislation makes it more difficult for fairs to use animals in entertainment and education, that it will make those who bring their animals to the fair more vulnerable to criminal action, and will put a chill on the transport of livestock to the fair where young and old, rural and urban, can come together to learn. The existing urban-rural divide can only increase if fairs cannot show animals because of

fear of harassment by animal rights activists and their lawyers.

Mr. Michael Code, Legal Counsel, Sack Goldblatt Mitchell: I will provide the legal opinion to which Mr. Farrant was referring. I will be quite brief.

I am not a member of the Ontario Federation of Anglers or Hunters. I am not a hunter or a fisher. I have no connection with any of the organizations here. I was brought in simply to provide a neutral legal opinion because they were receiving conflicting legal advice. The Department of Justice and the minister's office were telling them that the law was not being changed and all defences were preserved. Other lawyers were providing contrary opinions that the law was being changed and that defences were being taken away, such as the opinion Mr. Jamal has given you.

I tried to approach this from a neutral perspective to give fair and honest legal advice. The conclusion that I came to is set out in the opinion with which you have been provided. I have done some further legal research since providing that opinion, and it confirms the conclusions.

The conclusion is that this proposed legislation does change the law. If it was the minister's intention not to change the law and not to take away substantive defences, I am afraid that the intention has not been achieved. They have taken away the defence of colour of right, in my respectful opinion.

I have read the testimony of the Department of Justice lawyers before you on December 4, 2002, in which they repeatedly and expressly state the opposite of what I am saying. They claim that they have not taken away any defences, that they are all preserved under section 8(3).

I have the greatest respect for the Department of Justice's legal opinion, but they are simply wrong in this case. I am quite confident of that.

The difficulty we have is that they have not disclosed their opinion to us. We do not see the legal work, only the conclusion. I do not know the reasoning or the analysis of the case law that led to that conclusion.

I will state two simple points on which they must be wrong because there is Supreme Court of Canada authority against them. The leading Canadian scholar, Professor Stuart, is against them on both points.

First, they state that colour of right is a common law defence that is included in section 8(3), and, therefore, it is preserved. That is contrary to what the Supreme Court of Canada said in *Jones and Pamajewon*, in which the court in a unanimous decision said what Mr. Jamal said to you just a few moments ago. Unless Parliament expressly legislates the defence in relation to a particular offence, it does not exist in Canadian law. For the Department of Justice to come here and assert that it is a broad-based defence that applies to every single offence in the Criminal Code when Parliament is silent on the matter is contrary to the unanimous decision of the Supreme Court of

Canada. Professor Stuart says the same thing in his leading text. Chief Justice Lamer said the same thing in his judgment in *Jorgensen*.

It was Senator Baker who drew that decision to my attention when I read one of his comments. I had missed it. I read it last night. Chief Justice Lamer says that colour of right is an offence-specific defence. In other words, it must be legislated by Parliament. The assertion that colour of right is a common law defence that is broadly available throughout the Criminal Code as a result of section 8(3) is wrong in law, in my respectful opinion.

The second point that is wrong is that section 429(2) is redundant and always has been redundant.

That is the legislated defence where Parliament expressly put the colour of right defence into this part of the Criminal Code. The legal opinion of the Department of Justice is that that is redundant and was never necessary because the defence was already there in section 8(3). That position, however, is also contrary to the Supreme Court of Canada jurisprudence. In *The Holmes* and *Brownridge* decisions, Justice Laskin and Justice McIntyre said that you do not interpret Criminal Code offences where Parliament expressly legislates them as simply being duplicative or surplusage of existing defences. You interpret them as adding something new, and I believe it was Senator Andreychuk and perhaps Senator Bryden who was making this point as I was reading the questions you put. You are right with respect to the premise of the questions. The view of the Supreme Court is that Parliament should not be taken to be legislating for no purpose at all and simply passing redundant legislation. When you put a defence in, it is for a purpose, namely, to add something that is not there.

Without having seen their legal work and legal reasoning, it is difficult to criticize them, but I can tell you that their conclusions as stated in their testimony are contrary to clear, binding authority from the Supreme Court of Canada and to Professor Stuart's leading work on the subject in his text, *Canadian Criminal Law*.

That leaves you in a difficult position. I should say that Mr. Jamal and I had no contact with each other when we wrote our opinions. I did not know he was retained, he did not know I was retained and we wrote them at different times without having seen each other's work. We were quite comforted a month ago when we exchanged our opinions and found we arrived at the same conclusion. However, you have one set of experts saying the law is being changed and a defence is being taken away, and, therefore, the scope of liability is being expanded. You have another set of legal experts telling you the opposite; that nothing has been changed and the defence is preserved in section 8(3).

If you pass the proposed legislation without the amendment Mr. Jamal has suggested, that state of uncertainty where you have conflicting opinions will land in the courts, and the courts will decide who is right. The courts may say Mr. Jamal and I are right, that the law has changed, or they may say Mr. Mosley and Mr. Ruby are right, that it has not been changed. You will be washing your hands of the dispute and leaving it up to the courts to resolve this messy problem.

My respectful suggestion is that would not be a responsible thing to do. You should be deciding as a matter of policy whether colour of right belongs in the Criminal Code in relation to this offence or not. If as a matter of legislative policy you conclude that the existing law, which the Minister of Justice has said they are supporting, should remain and there is sound legal opinion for retaining colour of right — you have heard many illustrations today as to why it might be sound legal policy to do so — then you should say so and not leave the state of uncertainty for the courts to fumble around with. Mr. Buffet, the lawyer from Newfoundland, made it clear that he wants this issue left in the hands of the court because he said, quite correctly, that the court can change the common law. If the court decides that that defence should or should not be there, it can develop the common law. The court can take it away or give it. He is right about that.

The point I make to you is that Parliament has never done that in this area in 100 years. You have always legislated and said whether that defence should or should not be there. Mr. Buffet's approach of saying this should become a judge-made area of the law, a matter where the courts will set the policy in this area, would be a change.

You may decide after debating the matter that it is an unwise defence and take it away. That is your prerogative. You will be doing it advisedly and for policy reasons because you think the defence is unwise, rather than because the Department of Justice has assured you that the defence is still there when there is a significant legal dispute about that. Those are my respectful submissions.

The Chairman: Thank you, Mr. Code.

Senator Cools: I think we had better bring the Minister of Justice back, Mr. Chairman.

The Chairman: We will move to questions.

Senator Beaudoin: My question is addressed to Mr. Uruski, Mr. Jamal and perhaps the last two who spoke.

You say that eliminating the colour of right is wrong and that we should keep it. You continue to say that this is probably unconstitutional because there is no *mens rea*, and it is against section 7 of the Charter. Is that your argument? I would like to know more about it because that is what I understood.

Mr. Jamal: I think I attempted to say that the *mens rea* in the negligence offences is an objective standard, and by retaining colour of right, the *mens rea* would be elevated to a higher standard of subjective moral blameworthiness. That would be more constitutionally robust as a result and less likely to attract a successful constitutional attack.

As I mentioned, two years ago the Supreme Court in *Ruzic* struck down section 17 of the Criminal Code that had the statutory defence of duress because they found it was under-inclusive. It did not respect the principle of fundamental justice that the Supreme Court

of Canada articulated, the concept of moral involuntariness. Therefore, I said for that reason as well, maintaining colour of right would make this provision more constitutionally robust.

I do not say the proposed legislation would be necessarily struck down. I do not say it is unconstitutional. I say that, as legislators, you have a policy choice to make, and that by retaining colour of right, if your goal is to have legislation that is more constitutionally robust rather than less so, you will accomplish that.

Senator Beaudoin: With respect to section 7 of the Charter, the most important case is probably that concerning the B.C. Motor Vehicle Act, when the Supreme Court quite rightly said that this Charter is not only procedural, it is also substantial. I agree with you. It is your argument that as far as the *mens rea* is concerned, we had better keep the colour of right.

Rabbi Bulka, in your conclusion, you state that the Canadian Jewish Congress respectfully submits either one of the following two remedies: Explicitly exempt Jewish and Islamic ritual slaughter, or in the alternative, mandate the requirement of the Attorney General's consent for any prosecution.

In our system of law, the prosecution is always undertaken either by the Attorney General or the people coming under his jurisdiction. I do not understand what you mean exactly by this. It is always in the hands of the Crown attorney or the Attorney General. What do you have in mind exactly?

Rabbi Bulka: I will let Mr. Prutschi comment on that. In my own presentation, I accentuated the first alternative, which is to write explicitly into the proposed legislation an exemption for the ritual preparations done by the Jewish and Islamic communities. The other is a secondary thing in case that would not be possible. Stating that it cannot proceed unless there is the agreement of the Attorney General is designed to prevent frivolous prosecutions.

Senator Beaudoin: It is a total exemption. Is that what you have in mind?

Rabbi Bulka: Yes, an exemption for anything done under the rubric of Judaic or Islamic ritual preparation of the meat.

Senator Beaudoin: I still do not understand.

Mr. Manuel Prutschi, Director of Community Relations, Canadian Jewish Congress: We considered that a private prosecution could proceed without the Attorney General, who can intervene and choose to stay the proceedings, or to take part in the proceedings without staying them. However, an example in terms of the anti-hate law would be to put an additional check on frivolous prosecutions. Before a prosecution is launched, it actually requires the consent of the Attorney General to proceed. In any case where a prosecution is sought, it requires the *imprimatur* of the Attorney General in a particular province.

As Rabbi Bulka indicated, our preference is to remain unobtrusive in the overall proposed legislation. If one could explicitly exempt Judaic and Islamic ritual slaughter from the proposed legislation, it would be the most amenable situation for us.

Senator Beaudoin: It is still A or B.

Mr. Prutschi: It would be A rather than B.

Senator Beaudoin: I want to know exactly what you mean by A and B. Whether we would select A or B is another point.

Senator Baker: I would like to direct my questions primarily to Mr. Code and Mr. Jamal, who have looked at the case law and come to certain conclusions concerning colour of right. I must say that I completely agree with your analysis. The Department of Justice, of course, does not agree, as you pointed out. I want to ask you about an impression that the justice department left with the committee, that colour of right is not used in a defence in Canada. There was one case, they claimed. I do not know of anywhere else to look for evidence concerning that fact. Normally, one would look at Quicklaw or eCarswell. I guess you would use one of those. Most senators have access to both of these sources and a check there shows that, if you use the spelling c-o-l-o-u-r in a colour of right search, you come up with about 37 or 39 hits on eCarswell, similar to a search on Quicklaw. If you were to use the spelling c-o-l-o-r, you would come up with four or five hits. Perhaps the Department of Justice is not spelling the word correctly when doing their investigation.

I am more interested in a statement made by another member of this committee during our deliberations who has experience as a judge. She made an interesting point and I would like to you comment on it. When you pass judgment on whether a defence has been used in Canada, you would really have to have some way of finding out what happens at the magistrates court, or, as we call them in Newfoundland, the provincial court. Of course, I am used to checking Quicklaw and I noticed it was "magistrates court" in your province.

I do not know of any study that has ever been done. One would have to do a complete check with all provincial court judges or with all defence lawyers in Canada to find out how many times this defence has been used. Do you agree with that? Surely, when the Department of Justice claims it has only been used in one defence in Canada, they would not be able to find that out unless they did a survey of judges and lawyers throughout the country. The vast majority of those cases are not reported under Quicklaw or under eCarswell. Do you agree with that?

Mr. Code: The premise being advanced is that an absence of reported authority equates to an absence of practical utility to the defence. That is a false premise and I will suggest four reasons for that.

First, we are talking only about reported cases. The vast majority of decisions in this country are decided at the provincial court level and are never reported. In Ontario, 98 per cent of criminal cases are now resolved in the provincial courts and a tiny number of those cases ever get reported. Provincial court judges have dockets of 20 or 30 cases and

they must move quickly, so their judgments are given quickly and spontaneously. Thus, the first problem with the premise is that it applies from the perspective of the higher court authority, where judges have a small docket of 90 cases per year and they are all reported. That does not reflect the broad picture of justice across the country.

Second, looking at reported cases, you will find that it is not just one case, if you look at page 5 of my opinion. In the two days that I had to do the initial work on this, I was able to find four cases; so it is a bit more than that. Those four were all trial court decisions, which are rarely reported.

The third, and perhaps the most important, point I will make, is that the effect of a positive defence is often that the case never even proceeds to the laying of a charge, because you get a sensible police officer and sensible Crown Attorney who look at the matter and the law and decide that there is no case. They will not prosecute someone who was acting under an honest belief that they were acting lawfully under civil law. The case may never reach the courts because of the existence of the defence.

The fourth point is in terms of policy debate, of whether it would be practical and wise to have such a defence. If you consider Mr. Jamal's opinion, where he illustrates that this area of activity is highly regulated and covered with a plethora of provincial law, you will find the kind of situation in which colour of right may operate. It is an honest mistake and belief about the civil law and not a mistake about the criminal law, because you are not allowed to make a mistake about criminal law. A mistake about provincial regulatory law would give rise to a colour of right defence.

We are dealing with people engaged in regulated activities. I believe it was Senator Nolin who commented on what a heavily regulated society we have become. That is apt in this area. Mr. Ruby gave the examples of delinquent people throwing cats off balconies, throwing cats in microwave ovens and torturing animals gratuitously. Obviously, those people have not engaged in regulated businesses or activities. Colour of right is of no use in those offences, which are what we are aiming at in this bill.

In respect of the kinds of parties who are appearing before you that are engaged in highly regulated, lawful activities, colour of right may well be of great practical importance to them because of the maze of regulations under which they operate.

Senator Baker: Mr. Jamal's opinion concerning the states of fact and law is borne out not only by the Ontario Court of Appeal, but also by the Newfoundland Court of Appeal. I have a comment regarding colour of right. There is a recently added provision in the Fisheries Act that does not cover colour of right. If you clicked into Quicklaw or eCarswell, you would not get "colour of right," but you would get the words you just repeated.

If people can show that they operated with due diligence and if they believed in a set of facts which, if they were true, would render their actions innocent, that is a defence. You are absolutely correct.

I want to ask a question on something that we have been dealing with in our committee on making amendments to the Criminal Code, regarding reverse onus. I would like your opinion concerning this question, and it has been put forward.

If you are entering a defence under the Charter, you have to prove first that your rights were violated. It is then up to the Crown to take it from there. If you want to prove a search warrant is invalid, then you prove that it is wrong and then the Crown will say, perhaps, that the evidence could have been obtained through other means. However, the onus is on the defence to prove it.

What is your opinion of this provision, of having the defence have to prove themselves, placing, with those words, what some people regard as a reverse onus on someone? I have already given you my opinion. Practically everything could be considered a reverse onus.

What is your opinion on that, as far as including the words that you suggested or reinstating the same section, section 429(2), or some other words? Also, please comment about this perhaps being in the area of reverse onus.

Mr. Jamal: The provision was challenged in the *Gamey* case. There was the suggestion that it violated subsection 11(d), presumption of innocence, because it could lead to the conviction of someone who is effectively morally innocent.

In the recent *Watson* case, to which you referred, the court summarized the applicable law as to reverse onus. Effectively, the way they set out the law suggests that the onus remains on the Crown to prove, as an element of the offence, that the accused acted without legal justification or colour of right.

The way the courts were applying section 429(2) gives us great comfort. They are seeing the provisions as potentially being constitutionally suspect and effectively read it down to impose the onus on the Crown. The Crown must prove it as part of its case.

Mr. Code: I agree. This is a complex area of law. Some reverse onuses have been upheld, some have been struck down and some have been read down, as Mr. Jamal is suggesting. Some have been held to be supra-evidentiary onuses and some have been held to be onuses of proof. It is only the latter that are constitutionally suspect. It is a maze of complex constitutional jurisprudence.

However, this one does not appear to have caused difficulty because the most recent authority on it, the Newfoundland Court of Appeal case of *Watson*, clearly says at this point in our history, we have reached the agreement that this is not constitutionally infirm, you just read it down and place the onus on the Crown to negative colour of right. I do not think it is an issue for us any more as a result of the development of the jurisprudence.

Senator Cools: I will let the lawyers have their field day today. I would just like to make the point that perhaps we should be looking in a very serious way at having the Minister of Justice return.

The Minister of Justice was here at our initial meeting, and we were not in any real state to put questions to him. In fact, no questions were put to him. Since he appeared, substantial questions have arisen, because the testimony of these gentlemen is in sharp contrast to the testimony of the Department of Justice and also in contrast to other testimony that we have heard.

I sincerely think, Mr. Chairman, that in the interests of us taking a righteous and judicious decision, we should look at bringing the minister back before we proceed much further, so that the minister can be allowed the privilege of responding to the points made by these gentlemen.

The Chairman: Thank you, Senator Cools, we can discuss this matter in our session tomorrow.

Senator Cools: These witnesses have given us excellent testimony.

Senator Joyal: I would like to welcome the invitation from Mr. Code and Mr. Jamal about the policy debate. I share your opinion that this bill is not only what I call an overhaul of the present Criminal Code section dealing with cruelty to animals. It was presented to us in that way at the beginning, but my colleagues and I realized, as we were trying to understand the implications, we were becoming more concerned about the profound changes that it brings to our existing legislation and the Criminal Code. My first question is in relation to the decision to remove the animals from the property section and create a new section in the code, based, as you said, on the fact that the animal, according to the definition of this proposed study bill, is a being that can suffer and can feel pain. Therefore, it must have an existence of its own under the code.

There are certain consequences that are drawn from that definition — identification in the code, a new classification and the defence that you have discussed with my colleagues around the table.

According to the reading that you make of the bill, what is your opinion of the acceptability of the removal of the animals from the property section to a new class of subject in the code? Does it, in fact, entail a movement to recognize a wider status under the code?

This is an important issue, because as one of our previous witnesses has said, we are in a domain where standards are evolving. I do not know if you have read the testimony of some of the witnesses whom we have heard from here. I think that it was Senator Andreychuk who first raised the question that we are in a domain in which the general public opinion on and interest in the status of animals is widening.

If we are to do something in this code that is not neutral, we should be well aware of what we are doing. Did you pay attention to that aspect of the proposed legislation?

Mr. Code: I did not do any particular research on it, senator. However, I do recall when reading the prior testimony, one of the Department of Justice lawyers, I believe, took the position, and I think it is a correct position in law, that in interpreting a statute, you do

give some weight to the overall heading of the part or the section. The headings have some interpretive value. They are not determinative in any way; they are simply one factor. I do not think that we can say it is of no consequence. It will be a factor in interpreting a legislative package.

However, I think that you would be hard pressed to say it is the most important factor. I did not do any research on this.

Mr. Jamal: I have not done research, but our focus has been the preservation of the colour of right defence and retaining section 429(2). We have a very specific concern at this point.

Senator Joyal: My other question is in relation to some of the comments and the proposal put forward by the Canadian Jewish Congress and the Islamic Council. You propose one of two improvements to the bill. The first is an exemption.

I was concerned by the recommendation that the Law Reform Commission made in 1987. The recommendation of the Law Reform Commission report of 1987, report 31, proposed exemptions based more on objective pursuit than on classes of industries or activities. I would be more concerned about expressing an exemption on the basis of the objective pursuit, according to the normal practices followed, than by a formal statement in relation to, for instance, the case of slaughtering or the case of a particular fate. I would be more concerned about the receivability of the objective pursuit than the type of activities.

In other words, it could give you the opportunity to get the protection you are seeking, that other farmers and hunters, for instance, are requesting from us, rather than trying to list a number of identifiable groups. That seems to me to be a much more profitable way to protect what you have in mind than what you suggest.

Rabbi Bulka: I hear what you are saying. It is interesting that, unless I am totally mistaken, the only two groups across Canada that have specific codes with regard to how meat is prepared are the Jewish and the Islamic communities. If it were something so general that you could not pinpoint who does and does not, that would be one thing. However, since it is clear, it would seem to me that not doing so would send a message that we do not consider it to be unique.

The fact is that the Jewish way of ritual preparation, even according to some cases that were tried in Nova Scotia, I believe, in the early part of the 20th century, was judged to be as humane a way of doing things as is possible. It would be very important to ensure it is singled out and to say that these are humane approaches to the preparation of meat. We govern this strictly within the Jewish community. It is strictly governed by Kashrut commissions everywhere and the rules are very exacting. It would make more sense to us to say that by virtue of the fact that attention is given to the process, it should be mentioned specifically.

Senator Joyal: We have heard from a representative of the research community, who put to us that research that uses animals is ruled by a code. This code is recognized by

all universities and research centres in Canada. They are bound by that code, which is developed through the community, and it is preoccupied with treating animals in a proper manner. We can understand that when an objective that is accepted by society, in this case, the common good drawn from research, supersedes the pain you can inflict on an animal. Then we can accept that there is no offence. The bill should provide a clear exemption in that context; otherwise, we can say, instead of not making it an offence, we could make it a defence. We can decide that everyone who kills an animal will be charged unless the person can make a defence, or we can say everyone who kills an animal is guilty of a crime, but somebody who does research on that basis and respects the proper code is not guilty of a crime.

On the other hand, it could be someone who does the slaughtering on reasonable grounds that are recognized by society. Everyone will recognize that for centuries, the Islamic faith and the Jewish faith have had a special approach to the slaughtering of animals according to ritual that is accepted in society.

I am trying to understand how, when we deal with this bill, we will phrase the exemption that we feel should be clearly included, and not create something different over the years to come.

We had the same situation with our colleagues, the Aboriginal senators, who have a preoccupation with their traditional practices of hunting and trapping in the territory recognized by the Constitution as being theirs. It is not the same if they hunt somewhere else, but when they are practising fishing, hunting and harvesting in their traditional ways on their territory, we recognize it as acceptable.

Would it be better to recognize the exemption or to state it as a means of defence in the bill?

Rabbi Bulka: In my original remarks, I think I mentioned that this was covered in other legislation to which this bill relates, and we are not concerned that the intent of this bill would in any way compromise the ability of the Jewish or Islamic community to prepare their meat. We are concerned about bringing this to court for frivolous or even malicious reasons and putting either the Islamic or Jewish communities on the defensive. Our view is that if it is explicitly stated, it pre-empts the ability of anyone to bring this to court and therefore is better protection for the community.

Senator Joyal: Are there any other comments from other witnesses with respect to the religious purpose, the research purpose or harvesting purpose of the Aboriginal people, or the farmers, who are in the same position? Mr. Jamal is in exactly the same position in relation to poultry as others would be with cattle or other animals in Canada.

Mr. Prutschi: If I may add a bit to what Rabbi Bulka was saying in answer to your question, I think we understand what you are saying. If somehow one could phrase legislation that would achieve the purposes that we or others intend, for example, people who do research and so on, without getting into the specifics, and still be protected, that would be an ideal solution. However, we think the chances of doing that are not

particularly good.

It did occur to us, of course, that you do open yourself up, in effect, to having to consider a whole variety of exemptions that would have to be included, and that is where we propose the alternative about requiring the Attorney General's consent. In other words, leave it in some ways to the judgment of the Attorney General to determine whether one should proceed with prosecution in a variety of these cases.

In terms of having a defence available, it concerns us, and this was mentioned by Mr. Roy, that there are certain groups whose purpose, in specific areas, is to make a public relations case out of a particular situation. Simply by lodging a charge, even though it may not proceed beyond the first instance of the judge or the justice of the peace, the opportunity would exist. There would naturally follow many press releases and other kinds of publicity. The whole issue of the question of humane activity would be raised. People would ask why we could not do it this way and it would put the two communities on the defensive. We are trying to avoid that situation. These two communities, as a result of a millenary tradition, if you like, have been undertaking such practices and they should not be put in a position of having to defend them. Those practices have been instituted specifically for the purpose of not being cruel to animals. I am not sure if I was clear on that.

Mr. Code: The only point I would make to supplement those responses is that the existing statutory defence in section 429(2) is relevant to the whole discussion that Senator Joyal raised. As I understand it, statutory provisions regulate ritual slaughter in provincial and federal laws that expressly permit this activity. The section 429(2) defence, an honest belief that you are acting in accordance with legal justification and excuse pursuant to civil law — the provincial regulatory regime — would be very relevant to the issue that is being raised. Colour of right is most important when a butcher or a rabbi or whoever, governed by the regulatory regime, makes a slight mistake and the activity is not done exactly in accordance with the regulations. They thought they were doing it in accordance with the regulations; they were honestly trying to do their job in accordance with the provincial regulatory regime and they slipped up and did it differently on one occasion. They do not face the full weight of the criminal law for that mistake provided they were operating in the belief that they were acting in accordance with the legal regime.

Mr. Jamal: Senator, if you are interested, the regulation in Ontario is section 63(3) of the regulations under the Meat Inspection Act, which provides for the manner of killing in accordance with ritual practices, and defines, with some precision, the manner of ritual slaughter and the restraints to be imposed on animals.

I fully endorse Mr. Code's comment that the notion of retaining colour of right would also be very relevant for a defence in respect of ritual slaughter. This is not in the body of the act. It could be that the Ontario regulations are amended to change the manner of permitted ritual slaughter. It could be that somebody is not aware of that change and continues to engage in the ritual slaughter according to the usual practices. Suddenly, that becomes an offence. With the colour of right defence, that person's honest and

mistaken belief as to the state of the law would be a defence if you retain colour of right. However, it would not be a defence if you do not retain colour of right.

Mr. Roy: For the past few minutes, I have been hearing a great deal of legal talk in English. I want to check my understanding of your question. We propose to include definite exclusions to the law. I refer to the words you used: "certain objectives." In the hunting community, it presents a problem right now that hunting and fishing are probably the most regulated activities in this country. The book of rules for hunting in Quebec is thick and it changes each year. It is well regulated. The problem is that the objective of hunting is being questioned by these groups that we are talking about. If we go by our objectives, we will miss our goal. The aim of our proposition is to make hunting, fishing and social and religious issues things that have already been proven to be legal.

For example, if I understand the comments of my colleagues, the defence of colour of right must proceed in a court. For hunters, that poses a problem. If you have been planning a hunting trip for one full year and finally you are sitting in that tree on a beautiful Saturday morning — ready to shoot — and someone appears out of nowhere to end that trip, it may cost you \$2,000 in losing that hunting trip and going to court to defend something that is not illegal. That is why we want clear exclusion of activities that have already been proven legal and are regulated in the law.

The Chairman: Mr. Code, I have a follow-up question. I understand that, if section 429 retains colour of right specifically, a provincial statute could be used as an excuse. How does that sit with Justice John Sopinka in *R. v. Jorgensen*, who indicated quite clearly that a provincial statute could not be used as an excuse for breach of a federal statute?

Mr. Code: My recollection of the *Jorgensen* case is that there was no lawful excuse, legal justification or colour of right defence available to obscenity crimes. This again illustrates why the opinion of the Department of Justice is wrong. *Jorgensen* did not have a colour of right defence available to him because it is not legislated for that class of offences. Parliament, in its wisdom, has decided that obscenity is an offence that ought not to have that defence. It is not a regulated activity, where there is good pornography and bad pornography; all of it is bad if it is contrary to the law. Justice Sopinka was simply saying that, assuming he was dealing with a piece of prohibited pornography, such that it exploits violence or degrades women or involves children and is clearly contrary to the criminal law, the fact that a provincial film classification system has approved the film cannot exempt you from the law.

We are talking about a part of the Criminal Code about which Parliament, for 100 years, has said: lawful excuse, legal justification and colour of right is a defence. The courts have interpreted that decision by Parliament to permit that defence as including reference to provincial legislation. If you look at Mr. Jamal's opinion, he has a helpful footnote because he deals with the issue more directly than I do. I believe it is at the bottom of page 4 and the top of page 5. There is a sub-heading, (e), and the last sentence at the bottom of page 4 says: "With respect to errors of criminal law, the alleged "colour of right" is generally determined in accordance with the common or statutory law of the

relevant province." Footnote 9 cites *R. v. Nelson*, a recent decision of our Court of Appeal in Ontario, and Justice Ewaschuk's text. It is an example of Parliament having included a defence that opens up reference to provincial regulations as justifying the conduct.

The Chairman: You do not see a jurisdictional problem if an Ontario hunter with a provincial licence uses that as an excuse?

Mr. Code: Absolutely not. Again, my colleague from Quebec, Mr. Roy, is right that hunting is a highly regulated activity. There is a complete code of conduct on appropriate and inappropriate hunting techniques.

If a hunter is acting pursuant to licensed activity, which it is, in accordance with a provincially legislated code of conduct, or, assuming he makes a mistake because the regulations were changed, as happens every year, as long as that hunter is acting honestly, in good faith and in accordance with his belief that his actions were within the provincial code of conduct, that provides a perfectly proper basis for legal justification or colour of right.

Senator Andreychuk: I think that Senator Joyal was starting to touch on some of the points that I wanted to raise.

There was inference, if not the exact statement, made by previous witnesses, and perhaps department witnesses, that you needed colour of right in these defences when animals were perceived to be property. We moved them out of the property sections, and consequently, one should then look at the common law and the common law defences differently from when they were in the property sections. Does either of the lawyers give weight to that kind of inference?

Mr. Code: It has been cleared up. I know Senator Baker pinned one of the lawyers down when he told him that the suggestion that this is a defence related to property is contrary to the most recent authority on this point, which is the *Watson* decision. The Newfoundland Court of Appeal said that it is not limited to property and the accused, *Watson*, was clearly not committing an offence in relation to property. It has been raised in contexts not limited to property.

Mr. Ruby, very fairly, conceded that when he testified. He said that it is clear that the defence is not limited to property rights at all.

Senator Andreychuk: You confirm that.

Mr. Code: Yes, that is certainly my reading of the law. Its greatest use has been in property-related offences. No question about it. However, the *Jones* case, where the defence failed at the Supreme Court of Canada, was a gaming case. It was a native casino in Parry Sound. They were arguing that gaming was an Aboriginal right. If they were wrong about that, their honest belief that they were not subject to the Criminal Code because it was in accordance with Aboriginal rights was a colour of right defence. It has been raised in non-property law contexts. I do not think that is a legitimate issue

any more.

Mr. Jamal: The Court of Appeal of Newfoundland said in *Watson* in 1999 the following:

While the matter is clearer in the context of cases of theft, I hasten to add that a colour of right defence need not be confined to a claim of ownership or propriety rights. It may be a mere belief that the conduct was lawful.

It clearly has moved beyond its origins in the law of property to be a general defence that relates to any honest but mistaken belief as to facts or civil law. I concur with what Mr. Code said.

Senator Andreychuk: The comment made to me was that hopefully the Supreme Court would continue to confirm that.

The other point was a clarification and some information from Rabbi Bulka. You want an exemption for Jewish and Islamic ritual slaughter. It has been indicated that this is regulated according to religious custom and codes and also provincially. I am not aware of all of the details.

Are there different methods and variations of the slaughter or has it, over the centuries, become so clear that there are no distinctions? For example, in my Orthodox faith, there are differences of opinion on issues and on certain practices and procedures. Is this one where there are varied practices and procedures, or is it rather uniform throughout the Islamic and Jewish faiths?

Rabbi Bulka: I can better answer on the Jewish side. Those people who are custodians of this custom are invariably kosher granting agencies in Canada. They would be the COR in Toronto and the MK in Montreal. Those are the main groups that actually sanction the preparation and have abattoirs under their supervision.

The rules are pretty tight and uniform. Nuance differences are minor, if any. It is one of those areas where there is a commonality, because the rules are that the knife that is used must be nick free, and there is no compromise on that. This is one of those very strict regulations.

The people doing it must be experts, and they are not sanctioned to do it unless they pass a rigorous test beforehand. This is common to all. You touched on one of those areas where there are very few differences.

Senator Andreychuk: It is a universal standard.

Rabbi Bulka: Yes, it is.

Senator Sparrow: Is there any cruelty to animals in that process?

Rabbi Bulka: The knife must be nick free because if it has even the slightest nick, it means you are subjecting the animal to a yank, which is much more painful than a

smooth slice. The entire set of rules is geared to make sure that the animal does not suffer any pain in the process.

Jewish law, as I mentioned in my original presentation, is replete with regulations concerning not subjecting animals to pain. Biblically, we have laws concerning not threshing with a donkey and ox together and not muzzling an animal when it does the threshing.

The sensitivity of our tradition to the subjecting of animals to any pain is centuries old. It is a hallowed concept within Judaism. The regulations for the way in which we prepare the animal are consistent with that.

Senator Sparrow: Does that mean little or no pain?

Rabbi Bulka: I have never been on the other side of the knife, so I do not know. I would suggest to you that there is no methodology that I know of that would stand the test of absolutely no pain. Even the process of rendering the animal unconscious has a certainly element of pain to it.

The regulation that was placed upon us is to make sure that in this action, which is basically a smooth cut of the animal, the carotid arteries and the jugular veins are immediately severed. That is the quickest way that we know to prepare the animal for eating.

It would be presumptuous of me to say that there is absolutely no pain, but on the other hand, any other method that has been devised has a certain element of discomfort for the animal in the process. We would argue vociferously that our method stands up against any other.

Senator Bryden: Mr. Code, you handled it very well. You hit Senator Baker, me, and the honourable senator on the other side, and we are often the thorns in the side of witnesses who appear. Flattery does get you somewhere.

I have a great deal of respect for Mr. Mosley. He has appeared before committees on which I have served a number of times. He has always been very thorough, fair and well prepared. All of you may have read the transcripts of his evidence.

It concerns me that the department is taking a position that is so counter to the position that you and your colleague are taking here. It may be that one of you is right and one of you is wrong. At some point, it is going to be determined. However, from the point of view of the credibility and the thoroughness of the presentations that have been made, both have been very persuasive when they were given here.

I did examine Mr. Mosley somewhat on the issue of section 429 and the colour of right. I was thinking of the questions that were asked about the onus of proof and the reverse onus. I would have to go back and reread the evidence, but it seemed to me that the position that the Department of Justice and Mr. Mosley were taking is that the way this statute is drafted and the way the Criminal Code will apply to it is that the first element

of defence is whether there is an offence or not. That is, does the Crown in fact have an offence with which to proceed?

I think, Mr. Code, it was you who indicated that first of all, the police and the prosecutor are going to look at the situation, and if all of the parts of an offence under this act are not there, they will decide that they cannot lay the charge in the first place. Also, the first thing a defence lawyer attacks is whether or not the offence has been made out. Whether in fact it qualifies. There is no colour of right here. It is part of the definition of the offence itself. It is not really a matter of the defendant then having to come and search a statute or a part of a statute and present a statutory defence under colour of right.

I believe the way that it was traced is that if you look at section 8(3) of the Criminal Code, it says:

Every rule and principle of the common law that renders any circumstances a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

It has always been the position, and certainly was the position, I believe, of Mr. Mosley and the Department of Justice that the common law continues, and the things that make up what constitutes an offence at common law, if not covered explicitly, and what constitutes a legitimate defence at common law is continued by this provision.

There is nothing in this bill that would exempt any offence under it from the operation of any common law defences. Not only that, they have to actually be able to prove the elements of the offence, including is there *mens rea*, is there a lawful excuse, is there a colour of right, because it came from common law before it was put in the statute, in the Criminal Code.

When I was talking to Mr. Mosley, the point was being made about if you needed the section that is in the Criminal Code now, because under the part where animals appear now, I think it is Part XI, both section 8(3) is referred to in there, as required and as a defence, and section 429(2) as a defence. The only one that is carried over in the new part is section 8(3).

The point I tried to make was if it was necessary in the prior section to have section 429(2), then it must necessary here. I believe Mr. Mosley's position was that he believes what is contained in section 429(2) is redundant in both places, and I think I made the point that we were not writing poetry here, but trying to get an act through Parliament.

That was his position. He is saying all of the defences that were there under common law, the fact that the prosecution has to make out its case, all of that is carried forward under section 8(3), and, indeed, section 429(2) not only is unnecessary in the new section, but it was redundant in the section it was in before.

I wonder if you would comment on that.

Mr. Code: First of all, I was not trying to flatter you. You can look at the notes I made while I was reading this. There are tick marks and "good questions" beside all the questions you were reviewing. I simply thought you were asking the right questions and did not really need me, anyway.

The second point I want to make is that I have the greatest respect for Rick Mosley. I worked with him in government, he was a close colleague, and my experience with him is identical to yours. I do not want to suggest any kind of criticism of him at all. We are all human and make mistakes, and he is an extremely busy man. He is only as good as the advice he gets. I cannot comment on how he arrives at this conclusion because I have not seen the underlying legal work.

The way we work this out in court when we have a legal dispute is we get to see each other's opinions in writing, and then we respond to each other. That has not happened here. He has my opinion. However, in his testimony he did not respond to it. He did not deal with the issues I raised. I do not have his opinion, so I cannot take it apart and unpack it for you. All I can tell you is that somehow, they have arrived at conclusions that, in my opinion, are wrong in law.

Turning to the substantive question you are asking, there is no question that section 8(3), the common law defences, still applies, and it will apply if the proposed legislation passes without amendment. I agree with Mr. Ruby and Mr. Mosley on that. There is no question that all common law defences will apply.

The issue that they do not address is whether colour of right is a common law defence in Canada. There is no doubt your assumption is right, that originally in England in the 19th century, before they statutorily codified the Larceny Act in 1916, there was a common law basis. It was called "claim of right at common law." You can find old common law cases about claim of right. Then the Larceny Act is passed in 1916 and it is statutorily codified, all the English law becomes statutory law and there does not appear to be any modern development of colour of right or claim of right in England in the common law.

However, we never adopted it as a common law defence in this country. Just because it was a common law defence in England, does not mean it becomes a common law defence in Canada. The Canadian judges have to say that this is part of the common law of Canada, and they have never said that, with the one exception of this decision of Justice Huband in the *Gamey* case in the Manitoba Court of Appeal. There is no authority I can find where a Canadian judge said colour of right is part of the common law of Canada.

Regardless of what any lower courts have said, the Supreme Court of Canada, in *Jones and Pamajewon*, expressly said in a unanimous decision that it is not a defence to "this" crime. They referred to the fact that all colour of right cases are cases where the defence is found within the definition of the crime itself. In other words, *Jones and Pamajewon* implicitly said it is not a broad defence that applies at common law to all offences in the Criminal Code; it is offence specific and needs to be legislated.

Then in the *Jorgenson* decision, which comes five years later, Chief Justice Lamer says exactly the same thing. He says it is an exception to the principle that mistake of law is not a defence in relation to a certain number of our Criminal Code offences. In other words, it is only specific to certain offences where it is legislated, and then Professor Stuart says the same thing in his leading text. Therefore, we have these three authorities, *Jones*, *Jorgenson*, and Professor Stuart, who are all unanimous on this point that colour of right is simply not a common law defence that is available through section 8(3) to all offences in the Criminal Code; it is offence specific and must be legislated.

Probably the reason the Canadian judges took that approach is because of section 19, which says mistake of law is not a defence in Canada. What the judges must have concluded is that although colour of right was a defence at common law in England, in 1892 we legislated section 19 and said mistake of law is not a defence in this country, which arguably abolishes the English common law on that point. However, Parliament said they would legislate it as an offence-specific defence in certain appropriate areas. They decided obscenity was not one of those areas. They did not want people having an honest belief that some obscenity was okay, that some laws might justify it, so they did not legislate it in that area. They have not legislated it in relation to crimes of violence. You cannot have an honest belief in a colour of right in relation to a crime of violence. There are certain very specific parts of the Criminal Code — Professor Stuart lists them all, about a dozen of them, in his text — where it has been historically a legislated defence.

Mr. Jamal: I agree with everything Mr. Code said. My review of the law has been consistent with Mr. Code's, including that this is, in Canada at any rate, a statutory defence and including the cases Mr. Code has referred to, but I will read to you again the one sentence that makes this plain. This is one of Canada's leading criminal law scholars, in the fourth edition of his book in 2001, and he says, on reviewing all the cases:

Our courts have confined their recognition of colour of right defences to Criminal Code offences which expressly allow such a defence.

Therefore it is not a common law defence, in Canada at any rate. You have to expressly allow for it, and if you do not expressly allow for it you are out of luck.

Senator Baker: I believe former Justice Lamer also talked about, in *Jorgenson*, in examining the exceptions to section 19, where he went through officially induced error, and he went through the cases where the law was not published and therefore did not apply, certain cases where colour of right has been codified.

Mr. Code: You are exactly right and that is consistent with the theory that the judges have taken section 19 as abolishing the English common law in this country and putting the ball in Parliament's court, to legislate it where Parliament thinks it should be a defence.

Senator Baker: The reason being that our world has become so complex, over-regulated,

and subject to so many laws, that these exceptions to section 19 are coming into play in our courts, and here we are, faced with a piece of proposed legislation in which we are going in the reverse direction.

Mr. Code: It is not appropriate, however, to crimes of violence or where we are not in an over-regulated society, it is simply prohibited per se.

Senator Baker: It is in fish and game, and it is in the fishery.

Senator Cools: I want to say thank you to the witnesses for being here, and welcome. I also want to say especially to the two lawyers that you need not be mystified or worried if you find yourself in the situation where you see that Mr. Mosley or the department has come to a conclusion and you cannot obtain or grasp or understand the underlying reasoning. We are in this position all the time, so you need not be concerned.

Senator Bryden: Speak for yourself, Senator Cools. I have no difficulty in understanding. Is this a royal "we" you are using?

Senator Cools: I read a fair amount of Supreme Court judgments and I see a lot of conclusions and I cannot see the reasoning and I do not understand how some of the judges arrive at the conclusions. I also do not understand how the minister arrived at a lot of the conclusions in this bill, which is the particular question that is before us. However, there are a couple of points that have been bothering me for quite some time and I share the concerns the witnesses have raised here that have to do with the alteration and the elevation of the position of animals in the Criminal Code. I believe we are all agreed that animals should be well treated, and I think most of us are probably owners of pets. I come from a family of animal lovers, particularly horses, and we can all say, I believe, that it is a humane and human thing that animals should not be ill treated.

One of the concerns I have had for quite some time is that contained in Bill C-10, the alleged Bill C-10B, because it was a split bill I call it the "alleged," which posture Mr. Mosley adopted, but I am of the opinion that there is a creeping, sometimes galloping movement toward the humanizing of animals, which gives me great cause for pause, and sometimes you find this in the language of the bill itself. I will ask you if I am right on this or not.

If you look at the alleged Bill C-10B and clause 2, which is found on page 3, it would be amending section 182.3 of the Criminal Code. If you go to section 182.3(1)(b), you see it says:

being the owner, or the person having the custody or control of an animal...

"Custody" and control" are the language of human beings. If you go back to the old judgments, when child welfare law was being made in the 1900s, you will find these terms. There was also "care and maintenance," and "care and control." I may be wrong, but it seems that same drafting technique is repeated over on page 4, in the same clause that is amending the Criminal Code, clause 182.4(1), and if you go to subsection (a), it

says again:

make an order prohibiting the accused from owning, or having the custody or control of...

It causes me a bit of concern. That concern was fuelled when I recently looked at a newsletter from an organization that appeared before us, and I did not have this with me that day, called the Animal Alliance of Canada, in which it says the following:

More than half of all Canadians share their home with a dog or cat. I know these people would never permit their companion to be used in an experiment.

I must make it quite clear for this record that I admire people who keep animals and pets and so on, but this language bothers me a bit.

If I drop down a paragraph of the same newsletter, it says:

On another front — and again thanks to your support and determination — the federal government is about to pass a bill, C-15B, that will forever change the way animals are viewed in law.

Bill C-15B, which makes changes to the animal cruelty section of the Criminal Code, recognizes for the first time that animals are not just "property," but rather beings in their own right who feel pain and are therefore deserving of legal protections.

I can't overstate the importance of this change. This elevation of animals in our moral and legal view is precedent setting and will have far, far reaching effects. We'll make sure of that.

Then the next headline is:

After decades of struggle, our laws are beginning to recognize that animals deserve rights.

Having said that, as I have said before, I am very sympathetic, and I sincerely believe that the upgrading of our animal cruelty sections was long overdue in any event. I just wonder whether you have any comment about these remarks in respect of the alteration of the position in the Criminal Code of these new provisions. It is very significant, and I do not believe that any of these changes are just technical or insignificant. Every word in a statute is extremely significant. In respect of that and in respect of this human-sounding type language that seems to recur in the bill — I am not the only person around this table who is struggling with this — do you have any comments?

Chairman, there are other statements in this newsletter that belong on the record and that I will put on this record at a later stage, in particular, peculiar comments made about the then Minister of Justice, Anne McLellan. I wonder if you have had any thoughts on that. I bring this question forward in the face of what I think has been very stunning testimony this evening.

Mr. Jamal: I would reiterate what Mr. Uruski said at the beginning. We still have concerns about the removal of animal cruelty offences from Part XI of the Criminal Code, and we would support the proposal made by the Federation of Anglers and Hunters that the title be changed to "Cruelty to Animals, Private and Public Property." We would support that. I did not want that comment to dilute our focus today, but we do have these larger concerns as well.

Mr. Code: This is beyond the scope of the work I did and enters into an area of policy as opposed to a legal question. I do not think I am in a fair position to comment on the matter.

Senator Cools: Is there any possibility you could reflect on it and get in touch with the committee? I am speaking about the moral underpinnings and principles that under-gird this particular piece of proposed legislation. I am a little familiar with some of the developments happening in respect of so-called "animal rights." I read a document just a while ago where a particular individual was talking about the personal relationship between him and his dog. That is a whole other, vast area, but I do not have to deal with all of these issues. I just have to be satisfied that this bill says what it means and means what it says.

Ms. Leslie Ballentine, Public Affairs Director, Ontario Farm Animal Council: I am with the Ontario Farm Animal Council and I can address some of your concerns by putting it into a larger framework. There is a movement afoot — how organized it is is open to debate — to elevate the status of animals, and that is an international movement, not simply in Canada.

For example, in the United States, a campaign is going on now where they are trying to make changes at the municipal level, to change the terminology that is used in municipal bylaws from "owners" to "guardians." It is an orchestrated campaign. As of now, seven cities and one state have passed these ordinances. It is conscious and systematic.

Last summer, the German constitution was changed to include animals. I always thought that constitutions had to do with people, but nevertheless, animals have been included.

In Florida in November, pigs were included in their constitution.

This development is happening worldwide. I cannot say that the wording used in Bill C-10B is part and parcel of that, but I can tell you that in the larger context, that certainly is occurring. As to whether the one has something to do with the other, perhaps the Department of Justice could answer that question.

I have plenty of examples that I would be happy to leave with the committee.

Senator Cools: I would be happy to receive them. Mr. Chairman and colleagues, we will have to be extremely diligent in seeing that this bill does not end up doing something that we do not intend. I am very much in favour of looking after animals and protecting them from pure cruelty, but I could not be a party to voting for anything that becomes the foundation for converting animals into something close to human beings. I would have a terrible problem with that.

In respect of the issues that the last witness, Ms. Ballentine, just raised, I have no doubt there are people who want to do that sort of thing. However, I think, Chairman, so far we have heard from the department lawyers, and now we are hearing from lawyers for witnesses — maybe we should hear from other lawyers who may have objective opinions. I cannot say "more" objective because these gentlemen were objective.

Mr. Chairman, we had better proceed carefully on this matter. Again, we should bring the Minister of Justice back before us forthwith. Our own debate here is coming to a stall. Mr. Code was very careful in saying that some of these questions were beyond his scope — I did not mean to go beyond his scope, but I am a reader — so perhaps we should try to answer my questions and have someone who can deal with that scope.

I was very impressed that Ms. Ballentine also said that the language of guardianship is involved because, again, it is like a lot of the old language from the 19th century courts, when some protection was beginning to be given to children. Children were beginning to be treated as separate and distinct humans with separate feelings.

I do not know where we go from here, but I would love to get these questions answered.

The Chairman: I would like to thank the panelists on behalf of the committee for taking the time to be here with us today, for your very learned presentations and also for the discourse and exchange of ideas, which have been very helpful to all of us.

Mr. Bill Stewart, Co-Chair, Environment and Animal Care Committee, Canadian Cattlemen's Association: If I might say something, Senator Furey, I represent the Canadian Cattlemen's Association. I am a farmer from Hairy Hill, Alberta. As they say, I am a long ways from the farm, and if I had come all the way to Ottawa, leaving my wife at home doing chores and looking after the cows that are about to start calving, then went home and said I did not say one word here — I want to thank you for allowing us to give our presentation.

The committee adjourned.