**Brief on Bill C-10B, An Act to Amend the Criminal Code**
**(cruelty to animals)**

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By

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**TABLE OF CONTENTS**

1. Criminal Code and Expansion of the offences of Cruelty to Animals……..

2. Definition of Animals in Bill C-10B and the Unborn Child
   LeMay and Sullivan
   Daigle and Tremblay
   Winnipeg Child and Family Services
   Martin v. Mineral Springs Hospital

3. Capacity of the Unborn Child to Feel Pain

4. The Development of Vertebrae in Unborn Children.....

5. Unborn Child Included in the Definition of Animals in Bill C-10B

6. Summary

7. Conclusion

Brief on Bill C-10B

Presented to the House of Commons Standing Committee on Justice and Human Rights

REAL Women of Canada is a national women's organization that was federally incorporated in 1983.

Our organization supports and promotes the equality of women. We support and promote the family as mother, father and children as the foundation of society. REAL Women is a pro-family and pro-

life organization which also believes that everyone, whether unborn, adolescent, aged or disabled, must be treated with equal respect, with dignity and must be protected from harm.

Our organization has taken an interest in Bill C-10B, because we wish to protect animals, as well as human beings, from unnecessary pain and suffering caused and inflicted by the cruelty or indifference of people.

In this regard, there are two aspects of Bill C-10B with which we have a particular interest and which we would like to bring to your attention.

## 1. Criminal Code and Expansion of the Offences of Cruelty to Animals

One should note that the offences of cruelty to animals as set out in clauses 182.2 and 182.3, includes the expressions, "causes … unnecessary pain, suffering or injury to an animal", "kills an animal … brutally or viciously", "negligently causes unnecessary pain, suffering or injury", and "wilfully or recklessly abandons … or negligently fails to provide suitable and adequate food, water, air, shelter and care … ", etc.

The determination of whether any of these violations has occurred is dependent on the facts of each included case. Therein lies the problem. These words can, and will, serve as a double-edged sword.

According to the testimony given before this Senate Committee by Richard G. Mosley, Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice (Committee Proceedings, December 5, 2002, p.4:10 to p.4:11), Bill C-10B will not increase or affect in any way the potential liability of industry from prosecution. This is a surprising conclusion in view of the fact that Bill C-10B, in addition to the increased sentences, has expanded substantially the offences of cruelty to animals. For example, in clauses 182.2 and 182.3(d), the word "recklessly" has been added which is quite different in meaning from the word "wilfully", which is included in both the present and new version of the legislation. Another example includes the additional offence set out in clause 182.3, of "negligently cause[ing] unnecessary pain, suffering or injury to an animal." No such offence is currently included in the Criminal Code.

Although these additional provisions may provide greater protection for animals, they may, in fact, make persons in industry more vulnerable to prosecution than under the current Criminal Code. For example, clause 182.3(b) defines "negligently" as meaning "departing markedly from the standard of care that a reasonable person would use." This definition could pose a problem because it is agreed that industry must be "humane" in its practices. (See Mr. Mosley's testimony, p.4:12 or 4:13, December 5 and testimony of Joanne Klineberg, Counsel, Criminal Law Policy Selection, Department of Justice, 4:15, December 5.)

The problem is that the standard of care that is the standard of being "humane", may not conform to the customary and accepted practices of an industry, whose procedures a court may subsequently determine cause "unnecessary pain." In fact, a judge may determine, under Bill C-10B's provisions that the customary practices in any industry are not acceptable because cruelty to animals includes not only "wilful" acts, but also includes "reckless" acts. An example is the situation arising in the egg producing industry. In this industry, laying hens spend their entire productive lives permanently restrained in stacked cages, housed in heat and light controlled long sheds without an opportunity to move outside their small cages at any time. Subsequently, a judge may determine this process of

egg production to be unreasonable and recklessly causes unnecessary pain and suffering, which a "reasonable" person would find to be an unacceptable standard of care, that is to be inhumane.

Moreover, what exactly does "brutal and vicious" mean in clause 182.2(b) of Bill C-10B? This latter provision may have an adverse impact on the traditional hunting and fishing methods of our Aboriginal people as well as on hunt farms. We must note that leg traps were acceptable in trapping at one time, but no longer. Standards of "reasonableness" can, and do, change..

Last year's amendment to the Criminal Code by Bill C-15A made private prosecution more difficult by giving the attorneys-general of the provinces a supervisory role over private prosecutions. However, peace officers, crown attorneys, representatives of some humane societies, are exempt from the restrictions imposed by Bill 15A. Moreover, animal rights activists have stated their intention to use the expanded offences created by Bill C-10B to their advantage. For example, the Animal Alliance newsletter, Winter 2000 issue stated:

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

Notwithstanding the common law defences encompassed by S.8(3) of the Criminal Code, the amendments and expansions to the animal cruelty protection are very worrisome.

## 2. Definition of Animal in Bill C-10B and the Unborn Child

Clause 182.1 in Bill C-10B provides as follows:

In this part, "animal" means a vertebrate, other than a human being, and any other animal that has the capacity to feel pain.

This definition creates protection for unborn human life as well as for animals. This conclusion is based on the following law which I shall summarize beginning with the Criminal Code, S.223(1) which provides as follows:

A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not

*(a) it has breathed,*

*(b) it has an independent circulation, or*

*(c) the navel string is severed.*

In short, the Criminal Code provides that an unborn child becomes a human being only after it has been born alive and has been completely separated from its mother.

The Supreme Court of Canada in **Lemay and Sullivan** (1991) 1 S.C.R. 489, applied S.223 of the Criminal Code when it determined that a child, while partly emerged from the mother's body, was not a human being. In that case, two women without any formal medical training had assisted at a home birth. During the course of birth, only the baby's head emerged from the birth canal, while the rest of the baby's body remained stuck in the birth canal. After long labour, lasting over 24 hours, Emergency Services were called and the mother was transported to the hospital. Within two minutes of arrival at the hospital, an intern delivered the baby using, what the trial judge characterized as, "a basic delivery technique." The Supreme Court of Canada held that the two women assisting at this birth were not guilty of causing criminal negligence to a person (S.221 of the Criminal Code), because the unborn child was not a "person" or a "human being", which the Court held were synonymous terms, in accordance with S.223 of the Criminal Code. Thus, for criminal law purposes an unborn child cannot be regarded as a "human being."

**Daigle and Tremblay**

In **Daigle v. Tremblay** (1989), 2.S.C.R. (3d) 530, an interlocutory injunction was brought by the father of the unborn child preventing his pregnant girlfriend from having an abortion. The Supreme Court of Canada held that the unborn child was a part of the mother's body and not a human being in civil law, and the injunction against the woman was declared invalid.

**Winnipeg Child and Family Services**

In **Supreme Court of Canada v. Winnipeg Child and Family Services v. DFG** (1997), 3 S.C.R. 925, the Supreme Court of Canada held that a woman who was addicted to glue-sniffing, which resulted in two of her children being born with symptoms of drug withdrawal and abnormalities. These children, as well as the woman's first born child, were removed from her care by child care services and by court orders of guardianship obtained by the province, because the children were at risk to the mother's unresolved addiction problem. When the same woman became pregnant with the fourth child while continuing with her glue-sniffing addiction, the child welfare services obtained another court order to place the woman in a treatment centre so that her withdrawal from solvents could be safely monitored. However, in appeal the court held, that an unborn child has no legal status until it is born alive and viable and, therefore, the mother could not be held in the treatment centre without her consent.

**Martin v. Mineral Springs Hospital**

In **Martin v. Mineral Springs Hospital** (2001), A.B.Q.B. 58, p.3, the mother of a child that died during her labour because of the admitted negligence of the attending physician, sought compensation for the loss of her unborn child as "a part of her body" as the courts had so determined in previous cases. The mother argued that she was entitled to damages for the loss of a part of her body, i.e. the unborn child, in a personal injury action, to the same extent as she would receive in return for damages for the loss of other parts of her body, such as an eye or a limb. The court, however, denied this claim on the grounds that if compensation for loss of the unborn child were awarded as a loss of a body part, this would be a conflict with the principles of tort law, according to which there is no cause of action against a tortfeasor who has caused the death of an already born family member, for example, the death of a born child. Madam Justice Pat Rowbotham quoted Robins J. A. in **Mason v. Peters** (1982), 139 D.L.R. (3d) 104 (Ontario.C.A.) at 111, concluding that the death of a family member does not constitute a monetary loss because it is not a loss measurable in pecuniary terms. Robins J. A. had stated:

*… scrupulous adherence to the pecuniary loss requirements would make it difficult, if not impossible, save in rare cases, to find any actual or prospective economic loss flowing from a child's death. Given the realities of modern family life, the probable cost of raising and educating a son or daughter today exceeds by far the probably pecuniary value of any … financial contributions they may make in the future to parents or relatives. Whatever the situation may have been in earlier times when children were regarded as an economic asset, in this day and age, the death of a child does not often constitute a monetary loss or one measurable in pecuniary terms.*

Consequently, damages for the loss of an unborn child were denied on the same grounds as the loss of a born child.

However, recent developments in the use of DNA preclude the unborn child from being regarded as a part of the mother's body. Rather, the unborn child is a separate and distinct entity since the DNA of an unborn child is different from that of the mother. Mr. Justice Matheson in Saskatoon Queen's Bench decision, **Borowski v. Attorney General for Canada**, 8, C.C.C. 3d. 392 at p.404, stated that modern embryological and genetic studies have verified that the child before birth is genetically a separate entity from the time of conception or shortly thereafter. The **Borowski** case was subsequently overturned by the Supreme Court of Canada on other grounds, but the findings of fact by the trial judge remain undisputed and have not been overturned.

Accordingly, in Canada, the unborn child is not a human being either at criminal law (**Lemay and Sullivan**) or civil law (**Daigle v. Tremblay**), and **Winnipeg Child and Family Welfare.** Further, since an unborn child's mother cannot be compensated for the loss of her child as a part of her body, the unborn child must be regarded as a separate entity, particularly because its DNA is distinct from that of its mother.

### 3. Capacity of the Unborn Child to Feel Pain

As stated by other witnesses before this Senate Committee on Bill C-10B, there is no direct or objective method to assess pain in any subject, animal or human adult, or unborn child. Conclusions about the experience of pain must be based on that which is considered to be "reasonable" from the available evidence. For example, conscious adults may cry out, give elaborate descriptions of their pain, or rate its intensity. In the unborn child, indirect evidence from a variety of sources is used to address the question of pain. This approach is similar to that used with animals. Animals too cannot express what they feel: a study of their behaviour, anatomy and physiology needs to be used. In regard to unborn children, the evidence is that the first pain receptors are formed and in place at nine weeks after conception, and that by the 17$^{th}$ – 18$^{th}$ week, nerve connections become completely established between the cortex and the thalamus in the brain! Moreover, it is now known that pre-term infants experience more pain than more mature infants and adults. Further, the pain of pre-term neonates is also more intense and lasts longer.[1]

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[1] A-Pinard N. *Anatomical Route of Pain in Premature Newborn Infants*, Arch. Pediatr. 1996:3(10) 1006-1021: Anand K. *Clinical Importance of Pain and Stress in Preterm Neonates*, Biol Neonate, 1998:73(1)1-9.

[2] Sadler, T.W., *Medical Embryology Central Nervous System*, p. 353. Williams & Wilkins, 1990. Afifi, Adel K. MD and Bergman, Ronald A. Ph.D, *The Fetal and Young Child Nervous System*, 1991, *Fetal Diagnosis: Finding Defects Before Birth*.

[3] Jones, Andre and Rutman, Leonard, *In the Children's Aid J. J. Kelso and Child Welfare in Ontario*, University of Toronto Press, 1981.

[4] Van Stolk, Mary, *The Battered Child in Canada*, McClelland and Stewart Limited, 1972, reprinted 1979, p. 126.

## 4. The Development of Vertebrae in Unborn Children

The spinal cord and its associated nerves are present throughout the length of the embryo at eight weeks after conception.[2]

## 5. Unborn Child Included in the Definition of Animals in Bill C-10B

The unborn child clearly is not a jellyfish, a cephalopod nor a tuber (vegetable). Under criminal law or civil law, the unborn child is not a human being. But the unborn child has a vertebra and can experience pain. Therefore, the unborn child must be an "animal", and, therefore, it falls within the definition of animal as set out in S.182.1 of Bill C-10B. Accordingly, the provisions of clauses 182.2 and 182.3 of Bill C-10B apply to the unborn child.

## 6. Summary

The wording of Bill C-10B provides a persuasive argument that the definition of "animal" defined therein applies not just to animals but also to unborn children in Canada. Consequently, it would be an offence to wilfully cause unnecessary pain, suffering or injury or to kill the unborn child "brutally or viciously" (clause 182.2). Further, according to clause 182.3, it will be an offence to "negligently" cause unnecessary pain, suffering, injury or death to the unborn child. This provision may be significant in regard to children born with fetal abnormalities due to the mother's addictions during pregnancy.

If the status and protection of animals is increased by way of Bill C-10B, then these protections must reasonably also extend to unborn human life. The language of this Bill indicates an intent to raise the status of animals to what the animal rights groups call "personhood" in order to eventually give animals some sort of legal standing in court. Given the Canadian courts' definition of the unborn, it would be implausible not to extend these same rights to unborn human life as well.

It is not surprising that the protection of animals should also include the protection of human life, given that the development of Children's Aid Societies in Ontario and elsewhere was part of the impetus to protect animals from cruelty. For example, in February 1887, the Toronto Humane Society was established with broad humanitarian aims with special concern not only for horses which worked long hours on the Toronto Streetcar System, but also for neglected and abandoned children.[3] In New York City in 1874, in the famous case of an adoptive child, Mary Ellen, when the police and District Attorney's office refused to assist this seriously malnourished and neglected child in New York City, the American Society for the Prevention of Cruelty to Animals brought a successful action for protection on grounds that the child was being treated as an animal and was a member of the animal kingdom.[4]

Approximately 110,000 abortions were performed in Canada last year. As a result, more Canadians were killed by abortion in Canada in one year alone, than were killed in all the wars in which Canada

participated in the twentieth century.  Bill C-10B may provide the means to put a stop to the pain, suffering and death of unborn human beings, who are, in current Canadian law, relegated to a lower status than animals.

## 7. Conclusion

The definition of animals, as set out in clause 182 in Bill C-10B, providing protections to animals, quite clearly also extends to the unborn human child.