

LEGAL ANALYSIS OF Bill C-246 – PMB by Liberal MP Nathaniel Erskine-Smith

Current Law:

The *Criminal Code of Canada* sub-part “Cruelty to Animals” already has comprehensive provisions that criminalize various kinds of cruelty and neglect to animals.

In addition, there are provincial animal protection statutes that also create offences relating to cruelty to animals and set up Societies for the Prevention of Cruelty to Animals to investigate and enforce these statutes.

These offences are in PART XI of the *Criminal Code* titled “Wilful and Forbidden Acts in Respect of Certain Property”

Section 445.1 (1) states “Every one commits an offence who

- (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;

Other subsections of s.445.1 are more specific dealing with prohibiting animal and bird fights, poisoning animals “without reasonable excuse”, and live animal trap shooting and allowing use of a premises for these prohibited activities.

Section 445 prohibits anyone “Wilfully and without lawful excuse”... “kills, maims, wounds, poisons or injures” domestic dogs birds and animals.

Section 446 “Causing Damage or Injury” makes it an offence who

- (a) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed; or
- (b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

Sections 444 and 445 of the *Criminal Code* deal with killing, injuring or endangering cattle.

In 1998 the Department of Justice was considering revisions to the *Criminal Code* provisions relating to cruelty to animals. The Department of Justice issued a consultative paper that reviewed the legislative and judicial history of these sections to assist in determining the federal purpose of these sections and noted:

“It is therefore essential to note that the offence of cruelty to animals is not intended to forbid conduct that is socially acceptable or authorized by law. The current provisions do not restrict or otherwise interfere with normal and regulated activities involving animals, such as hunting, fishing and slaughter for food, and the same would be true of a reformed law. Criminal prohibitions are directed at conduct that falls outside of normally accepted behavior.”

(Canada, Department of Justice, *Crimes against Animals: A Consultation Paper* (Ottawa: Justice Canada, 1998) at 5)

This quote is frequently used by Courts in describing the purpose of the Animal Cruelty sections. These provisions have been in the *Criminal Code* for decades and have been consistently interpreted by Courts across the country in the manner described above.

For example, in the *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, 2014 ONSC 2826 there was an attempt to argue by animal activist counsel that the proposed re-institution of the Ontario Spring Bear hunt violated s.445.1 because hunters could fail to properly determine whether a bear was a lactating female and “Causing or permitting” the cubs to die. The Ontario Court rejected that argument for a variety of reasons, including that the mistakes made by hunters would not be a “wilful” causing of “unnecessary pain or suffering” to the cubs and therefore not criminal conduct.

What does the Bill Change?

These are just some of the most serious problems with this Bill:

1) Offences against Animals would no longer be offences against “Certain Property”:

The most important change is that the new Bill either creates new sections, or moves the “Animal Cruelty” sections 445-447.1 from PART XI of the *Criminal Code* titled “Wilful and Forbidden Acts in Respect of Certain Property” to the end of the Part V “Sexual Offences” and creates a new Section Part V.1 “Cruelty To Animals”.

This one change is significant because it takes animal cruelty offences out of the section dealing with offences against “Certain Property” and moves to the section of the *Criminal Code* dealing with offences against persons, giving rise to the suggestion that Animals are no longer a special type of “property” but are beings entitled to rights similar to Persons.

The moving of these offences out of the “property” crime section, and into the “people” crimes section of the *Criminal Code* could affect the interpretation of the wording of the new section in this changed context. The preamble to the Bill does not allude to this change but says the purpose of the Bill is to “consolidate various offences relating to animal cruelty” but the impact of the Bill is far broader than that.

2) Inclusion of new “Recklessly” test:

The new section 182.1 includes the test of “recklessly” to the existing “wilfully” in the new section 182.1, which expands the kind of conduct that could be criminalized. A definition of “Reckless” is:

“It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance.”

As a result, in the example of the bear hunter in the *Animal Alliance* case, under the Bill a bear hunter who takes the risk that the bear is a boar and instead shoots a sow with cubs, could be deemed “reckless” and a criminal that harmed the cubs, when it would not be “wilful” conduct under the existing offences.

3) Definition of “Animal” as “vertebrates”:

This definition of “Animal” is not in the current *Criminal Code*. This definition would include birds and fish.

As a result activities involving cruelty to fish would clearly be included, which will broadly impact sport and commercial fishing.

4) New “kills an animal” offences:

The Bill adds two new offences that are not currently in the *Criminal Code*:

182.2(1) Everyone commits an offence who, wilfully or recklessly:

...

(b) kills an animal or, being the owner, permits an animal to be killed, brutally or viciously, regardless of whether the animal dies immediately

(c) kills an animal without lawful excuse;

This is the most serious issue in this Bill because “killing an animal” was not part of the focus of the previous offences, where cruelty, not killing, was the focus of the offence.

Under (b) the trigger is killing an animal “brutally or viciously”. This test is completely novel, and does not appear to have previously been used in any Canadian statute, or interpreted in any Canadian Court.

In effect this forces the Court to evaluate the method of killing chosen, and if it falls within the test criminalizes the behavior. It forces the Court to evaluate the method of killing chosen, and whether in view of the killing options available, and how those options are implemented, is “brutal or vicious”.

Under (c) the killing of an animal creates an offence in all cases, unless there is a “lawful excuse”. As a result if an animal is killed, an offence exists unless there is a lawful excuse for the conduct. These “lawful excuses” are not specified.

Put together these two sections could have the effect of criminalizing many popular sporting and commercial activities involving animals and violators can face up to 5 years in prison.

For example hunters may be criminalized. Bowhunting in particular may be deemed "brutal or vicious" or that it causes "unnecessary pain, suffering or injury". If bowhunter's clean kill is found by the Courts not to be "brutal or vicious", does a bad shot that kills by wounding re-criminalize the activity?

The treatment of fish by sport and commercial fisherman could violate these new offences. Is the use of barbed hooks, or landing a fish with a gaffe hook now criminal behaviour?

For farmers and butchers, Halal and Kosher butchering methods could violate the "brutal or vicious" killing standard, as these ritual traditional methods of killing are slower and more painful than modern commercial killing methods.

Similarly trappers and veterinarians and exterminators could all be vulnerable to being criminalized by this novel test, simply due to the methodology of killing that they choose, and whether they successfully use it.

Medical testing on animals that results in the death of an animal could also be criminalized.

5) Addition of "negligence" standard

The Bill creates a new offence in 182.3(1), which takes the wording of the 445.1(a) and amends it to read:

Everyone commits an offence who

(a) negligently causes unnecessary pain, suffering or injury to an animal;

The test for "negligently" is in 182.3(2):

"For the purposes of subsection (1), negligently means departing markedly from a standard of care that a reasonable person would use"

This widening of the test for criminalizing from "wilfully" under the current section to the much lower "negligently" test in the new Bill can have the potential of criminalizing far more types of behaviour.

What the new test does is lower the bar to ask whether the conduct of the person meets the standard of a reasonable person in doing the same task, which requires the determination of an acceptable standard of causing pain or injury, and whether the method was competently implemented.

A person will no longer have to be wilfully cruel to be criminalized, just clumsy or incompetent.

Activities by a very broad range of persons, including hunters and fisherman, but also farmers, ferriers, aquaculturists, circuses, zoos, fish plants, owners of skyscrapers that don't turn off lights causing birds to hit windows, veterinarians, wind farm owners who do not mitigate the risk of killing birds, ranchers, pack-horse outfitters, hunting guides, equestrians, race horse owners, hydro transmission companies,

butchers (Halal and kosher in particular), exterminators and many other persons working with animals could all be effected.

In addition, any industry that uses animal testing, including medical research and pharmaceuticals could also be affected as even if their methodology is proper, incompetence would be criminalized.

As an example of the breadth of this change, if a sport fisherman allows to fish to die in his boat's livewell because the battery fails, his conduct could be criminalized under this test.

This is a vast expansion of criminal liability to areas of activity that should not be affected by the Criminal law, or are already regulated under other existing Federal and Provincial legislation, and where the punishment for clumsiness can be 2 years in prison.

6) No specific exceptions for legal conduct to offences listed:

The Bill provides that 182.5 that common law defences in sections 8(3) and 429(2) of the *Criminal Code* are not affected. But these are defences to the commission of the offence, not the exception of otherwise legal activities from being criminalized under the *Criminal Code*.

These specific legal activities should be clearly listed in the Bill, so that otherwise legal activities should be taken out of the *Criminal Code* completely and not criminalized.

As an example, *The Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36 which establishes the OSPCA's in Ontario, grants them powers to enforce Ontario animal cruelty laws and creates animal cruelty offences specifically excludes certain activities:

Exception

(6) Subsections (1) and (2) do not apply in respect of,

(a) an activity permitted under the *Fish and Wildlife Conservation Act, 1997* in relation to wildlife in the wild;

(b) an activity permitted under the *Fish and Wildlife Conservation Act, 1997* or the *Fisheries Act (Canada)* in relation to fish;

(c) an activity carried on in accordance with reasonable and generally accepted practices of agricultural animalcare, management or husbandry; or

(d) a prescribed class of animals or animals living in prescribed circumstances or conditions, or prescribed activities. 2008, c. 16, s. 8.

Same

(7) Subsections (1) and (2) do not apply to,

(a) a veterinarian providing veterinary care, or boarding an animal as part of its care, in accordance with the standards of practice established under the *Veterinarians Act*;

(b) a person acting under the supervision of a veterinarian described in clause (a); or

(c) a person acting under the orders of a veterinarian described in clause (a), but only in respect of what the person does or does not do in following those orders. 2008, c. 16, s. 8.

Similar exception provisions must be included in the Bill, drafted in consultation with all of the stakeholders affected by this vast expansion of the criminal offences relating to animal cruelty proposed under the Bill.

7) Possible Constitutional issues:

Where a Federal bill criminalizes activity that is deemed lawful and regulated under Provincial law, constitutional issues relating to the validity of the statutes arise. This is another reason to clearly and specifically spell out which otherwise lawful activities are not being criminalized.