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—
Chair

Mr. Gary Goodyear

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•(1105)

[English]

The Chair (Mr. Gary Goodyear (Cambridge, CPC)): Good morning, ladies and gentlemen. We'll call the meeting to order.

I would like to advise all members of the committee that the meeting today is public.

Today we are considering the report from the Subcommittee on Private Members' Business on the matter of Bill C-291. As you know, the Subcommittee on Private Members' Business has recommended in its first report that the private member's bill in question be deemed non-votable. The purpose of the meeting today is to consider whether this committee concurs.

Pursuant to our Standing Orders, we have this morning Mr. Leon Benoit, member of Parliament for Vegreville—Wainwright. Mr. Benoit has brought some guests, some speakers, to assist him. Mr. Benoit wishes, pursuant to our rules, to testify and to make his case, as it were, before the committee, sort of an appeal to our committee, on this matter of the first report.

I would ask you, Mr. Benoit, to proceed with any statement you wish to make. I'm going to grant you as much time as you need. If you want to introduce your guests, this would be an appropriate time to do that.

Following Mr. Benoit's statement, we will open to our standard round of questioning—eight minutes on the first round, then five minutes, and so on. Hopefully we can keep questions and answers very brief so that we can get as much information as we can.

I will tell the committee that we are instructed to make a decision on this issue today. We are responsible for that. There are no provisions for a delay or adjournment on this issue. We need to make a decision today.

Mr. Proulx, a comment?

Mr. Marcel Proulx (Hull—Aylmer, Lib.): Yes, thank you, Mr. Chair.

Is it the intent of this committee to reserve the meeting today, the entire two hours, to this particular matter?

The Chair: Indeed, it was my intention to offer the entire committee meeting to Mr. Benoit, given that this is an urgent matter and it's the fifth day. We are required to deal with this within five days of the subcommittee's first report. So that is the case.

If things wrap up very early, I would suggest that we proceed with other business. However, depending on when things wrap up, I will

look to the committee's recommendation to simply adjourn or move to other business for today. But today's meeting was dedicated to Mr. Benoit.

Mr. Marcel Proulx: In essence, you would be ready to consider two hours on this particular matter.

The Chair: I would be willing to consider whatever is necessary for the committee to make a decision, whether it's two hours or one.

Mr. Marcel Proulx: Okay, thank you.

The Chair: Mr. Benoit.

Mr. Leon Benoit (Vegreville—Wainwright, CPC): Thank you very much, Mr. Chair, and thanks to all of you for giving me this opportunity to present my case on my private members' bill, Bill C-291.

I do have a presentation. My guess is that it will take probably 20 minutes. I look forward to your questions following my presentation.

I will also be introducing to you Mary Talbot, who's sitting behind me today. She's here because in fact it was her situation that really brought this issue to my attention. I think what she says is important in the consideration of this private member's bill.

I was somewhat surprised, I have to admit, when I was told by the subcommittee that my private member's bill had been deemed—

•(1110)

The Chair: Yes, Mr. Proulx.

Mr. Marcel Proulx: On a point of order, Mr. Chair, I think I missed something to start with.

I have no objection that Mr. Benoit, as a member of Parliament, be in front of this committee to plead his appeal, if I can put it that way. But would you please refer me to where in the Standing Orders it says that he can have independent witnesses with him to plead his case?

My understanding—and correct me if I'm wrong, sir—is that a member of Parliament can come and testify in front of a committee and debate his rights. But from that to bringing one or two witnesses...and it doesn't matter how many; it could only be one.

I just don't recall seeing that in the Standing Orders.

The Chair: My understanding is that you cannot testify unless the committee agrees.

Mr. Marcel Proulx: You would need the unanimous consent of the committee.

The Chair: Correct. That is my understanding.

Mr. Marcel Proulx: Thank you; I apologize—

The Chair: Mr. Benoit, please continue.

Mr. Leon Benoit: Thank you, Mr. Chair.

As I had started to say, I was somewhat surprised when I heard from the committee that my bill was not votable. I guess I wasn't really aware enough, possibly, of the procedure, but I was quite shocked to find out that because the subcommittee meeting had been held in camera, I in no way would get the information that would allow me to know why my bill had been deemed unvotable—other than the one thing, that it was due to number two of the four criteria that are laid out for making items of private members' business non-votable. That number two says the following: "Bills and motions must not clearly violate the Constitution Acts, 1867 to 1982, including the Canadian Charter of Rights and Freedoms."

So I'm here before you today, making my case, not knowing what part of my bill may have, in the opinion of the subcommittee, violated the Constitution. I'm at a bit of a disadvantage, but I'll carry forward by guessing—addressing issues that I think may cause some concern for the committee. That's about the only way I can proceed, really. I'm kind of in the dark as to what in effect the charges are against me, and yet I'm here to defend myself. I'll do the best I can from that point of view.

I'll start by going through my bill. It's very short. I just want to make sure that everyone knows what my bill does say. I know the general committee hasn't probably dealt with it yet, so I'll do that.

Bill C-291 amends the Criminal Code as follows, regarding injuring or killing an unborn child while committing an offence, in proposed subsection 238.1(1):

Every one who injures or causes the death of a child before or during its birth while committing or attempting to commit an offence against the mother who is pregnant with the child is guilty of the offence of which the person would have been guilty had the injury or death occurred to the mother, and is liable to the punishment prescribed for that offence.

The second section is exclusion of defence. This short section of the Criminal Code would be added if my bill were to become votable and pass.

Proposed subsection 238.1(2) says: It is not a defence to a charge under subsection (1) that

- (a) the child is not a human being;
- (b) the accused did not know that the person was pregnant; or
- (c) the accused did not mean to injure or cause the death of the child.

Then it mentions separate offences in proposed subsection 238.1(3): The offence of injuring or causing the death of a child before or during its birth while committing or attempting to commit an offence against the mother who is pregnant with the child is not included in any offence committed against the mother.

These last two proposed subsections are in there to make it more difficult for someone charged with the offence to get off the hook, for reasons that are obvious, I think.

I want to make it clear that the intent of this bill is to make it so that.... Under current federal criminal law, an unborn child is not recognized as a victim with respect to violent crimes. This gap in federal law gives rise to grave injustices, I believe.

In November of 2005, Olivia Talbot of Edmonton, who was 27 weeks pregnant with her son, Lane Jr., was shot three times in the abdomen and twice in the head. Because we offer no legal protection for unborn children today, no charge could be laid in the death of baby Lane. Another pregnant woman in Edmonton, Liana White, was slain by her husband in the summer of 2005. Again, no charges could be laid in her baby's death.

Many Canadians are shocked to learn that when an attacker kills a woman's pre-born child, no charge is laid in the death of that child, even when the attacker purposely intended to kill the child. Clearly there are two victims in such cases, and the public recognizes this. A Robbins SCE Research poll conducted in December of 2005 found that 78% of Canadians support a separate homicide charge in the death of the unborn child in such cases. A *Calgary Herald* poll conducted on November 30 of 2005 showed 82% support.

• (1115)

The grieving families who have lost their loved ones in this type of a crime only too tragically recognize that there are two victims. Just ask Mary Talbot—who is in fact here today, witnessing the proceedings—how many victims there were when her daughter Olivia and her grandson baby Lane died that day.

If the committee would agree, I would like to allow Mary Talbot two to three minutes to let you know what this means to her. I'd like to do that at this time, if possible.

The Chair: Mr. Proulx.

Mr. Marcel Proulx: Mr. Chair, I have a point of order.

Before making a decision on the pertinence of hearing the witness, may we know this witness' expertise, or what her line of testimony would be all about? Is she a charter expert? Is she a medical expert? Is she a law expert? Why are we considering listening to this witness?

With all due respect, I would like to know why we would listen to a witness in this particular case, Mr. Chair.

The Chair: Mr. Benoit, do you have any answers to those questions?

Mr. Leon Benoit: Yes, thank you, Mr. Chair.

Certainly she provides none of the expertise the member has asked about. What she does provide is obvious first-hand expertise on the importance of changing the law to protect the pregnant mother and the unborn child.

The Chair: Mr. Reid, did you have a comment?

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): Not a comment, but I would be prepared to move the appropriate motion to allow her to go on.

The Chair: Let's just continue for one second.

Yes, please.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): I have a point of order on this.

My understanding is that the reasons for an issue to be considered or not considered are technical; it's whether they fall under one of those four points. I take Mr. Proulx' point, that the argument before us today is whether or not something meets within those four criteria. That's what we are here to hear from the witness and to discuss.

So I would argue that unless there's something within those four points, it's irrelevant.

The Chair: Even more simplistically than that, we are simply to concur or not concur on the report of the subcommittee, whose decision has been made already with respect to those four technical criteria.

Mr. Reid, would you like to make a motion?

Mr. Scott Reid: I'm sure the motion would be to allow Mrs. Talbot to make a presentation to us. I wouldn't mind speaking to that, actually, but that would be the motion.

The Chair: Mr. Benoit.

Mr. Leon Benoit: If I may, Mr. Chair, most of my presentation will be dealing with the technical aspects, which the members have rightfully referred to. I am just trying to stress, because my bill has been deemed non-votable, that this bill is extremely important to me. Any decision of this committee, in reviewing the decision of the subcommittee, should not be taken lightly. I'm trying to make that point as forcefully and as strongly as I can.

Certainly Mary Talbot, the mother of Olivia Talbot and the grandmother of baby Lane, could make that point, in a couple of minutes, more strongly and more effectively than I could ever make it.

The Chair: Unless there are some pending issues, I think the committee has heard the answers to the questions that we need to hear. I would just simply pose the question to the committee, do we have unanimous consent that Mrs. Talbot give a two- to three-minute statement to the committee?

Some hon. members: No.

Some hon. members: Yes.

• (1120)

The Chair: Seeing that there is not unanimous consent, I will have to rule that Mrs. Talbot will not be allowed to make a statement to the committee.

Mr. Benoit.

Mr. Leon Benoit: Thank you, Mr. Chair.

My private member's bill seeks to address this injustice by making it a separate offence to kill or injure a pre-born child during the commission of an offence against the child's mother. That is important to note, that it's only in the case where an offence has been committed against the child's mother. That offence will be the offence of the person who would have been found guilty had the injury or death occurred to the mother. In other words, the unborn child will be treated as if it were a human being, and the existing legal protection already defined for human beings in the Criminal Code would apply.

So the exact offence depends on what existing sections of the Criminal Code would apply under specific circumstances—e.g., murder, manslaughter.

I want to make the point that this bill excludes abortion. Note that the bill specifically states that it applies only "while committing or attempting to commit an offence against the mother". It says that clearly. Why is this important? Because this terminology was used precisely so that abortions would be excluded, and as we have seen from media reports, this issue has already been linked, by a few members of the media, to abortion.

Some people are worried that it somehow is an attempt to restrict access to abortion. But this bill has nothing to do with abortion. In fact, it is the very opposite to abortion. In the case of abortion, the woman chooses the procedure. This bill is about protecting those children whose mothers have not chosen abortion—mothers who have chosen to carry their children to term.

When a woman is pregnant she is especially vulnerable, because she has not only herself to protect and defend but her unborn child as well. The Society of Obstetricians and Gynaecologists says that physical abuse remains a frequently undetected risk factor in a large number of pregnancies, and that violence begins or increases during pregnancy. According to the Canadian perinatal surveillance system, women abused during pregnancy were four times as likely as other abused women to report having experienced very serious violence, including being beaten up, choked, threatened with a knife or a gun, or sexually assaulted.

It is very disturbing that when a woman is at her most vulnerable, she is at an increased risk of attack. This bill will act as a strong deterrent to perpetrating violence against pregnant women.

Now to the issue of the constitutionality and the charter. Again, I am working with very little information as to why the subcommittee determined that my bill was clearly against the Constitution, and that's the level that is required; it has to be clearly against the Constitution for this bill to be non-votable. I have to do a little bit of guessing here. I'm guessing that it could have something to do with the status of the pre-born child in current law.

I say this simply because whenever the issue of legal protection of the fetus is brought up—for example, in recent media reports on my private member's bill—the issue of personhood is raised. People refer to the fact that the Supreme Court has declared that the fetus is not a person. The court did say this, but that does not make this private member's bill unconstitutional. Let me explain.

We first need to understand how the Criminal Code defines "human being". Subsection 223(1) says:

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

That is clearly laid out in the Criminal Code, subsection 223(1). This means that in current federal law, the pre-born child is not considered a human being.

The Criminal Code defines homicide, in subsection 222(1), as follows:

A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

So in today's Criminal Code, legal protection is afforded to the child only once it becomes a "human being"—that is, once it has been born alive. The Criminal Code as it exists today offers no protection to the fetus, because the fetus is not a human being, and only human beings are protected under the Criminal Code as it exists today.

The amendment to the Criminal Code that I am proposing with my private member's bill would change this so that legal protection will be given not only to human beings, as defined by the Criminal Code, but also to unborn children who are harmed or killed during the commission of an offence against their mothers.

● (1125)

Proposed subsection 238.1(2) of my private member's bill states that: It is not a defence to a charge under subsection (1) that

(a) the child is not a human being;

This private member's bill does not change the definition of human being. What it does do is offer protection to the unborn child, despite the definition of human being.

If an amendment were made to the Criminal Code that changed the definition of a human being to include unborn children, then that would affect the abortion issue, because then an abortion would be considered homicide under subsection 222(1), cited above. Then that could potentially, under some circumstances, be a violation of a woman's right to security of person guaranteed under section 7 of the charter—for example, in the case where an abortion was necessary to save the life of a mother.

But that's not what my private member's bill does. It does not redefine human being, and so it does not affect abortion whatsoever. There is no way it can affect a woman's right to security of person—or any other charter right, for that matter. In fact, this bill, by offering protection to the pre-born child, is effectively offering more protection to the woman.

And that's the reason I brought this bill forth—to offer more protection to a pregnant woman.

I'm now going to talk a bit about Supreme Court rulings regarding fetal rights. One often hears the argument that the Supreme Court would not allow a fetus to have rights because it is said that the fetus is not a person, but that's a false interpretation of the court's rulings. It is the existing law that offers no rights to the fetus, and the courts have just been applying that existing law when they make their rulings. But the law has not changed, and that is the responsibility of Parliament, not the courts, as the Supreme Court itself has said in a number of cases.

The case of *Sullivan and Lemay v. the Queen*, 1991, is one example of that. Two midwives were charged with criminal negligence causing death of the child of Jewel Voth. The baby was born dead. At issue in this case was whether a living child, partially born, was a person within the meaning of section 203 of the Criminal Code, which states that everyone who, by criminal negligence, causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

The Supreme Court ruled that midwives could not be charged under this section, because the child is not considered a person for the purposes of the Criminal Code. Why did the court say this? Because the word "person" is not defined in the Criminal Code, but "human being" is, as previously discussed. The court said there was no reason to assume that person should mean anything different from human being. And since human being is defined as a child who is born alive, then the child before birth, if not a human being, is also not a person.

Chief Justice Lamer said:

Accordingly, I agree with the Court of Appeal that the introduction of the criminal negligence provisions by Parliament in 1954 was not intended to change the meaning of "person" and that the term, as used in section 203 of the Code, is synonymous with the term "human being." Therefore, according to section 206, the child of Jewel Voth was not a "person" within the meaning of section 203 and Sullivan and Lemay cannot be convicted of criminal negligence causing death to another person.

The Supreme Court was simply basing its ruling on existing criminal law, and nowhere in current law did it say that a fetus is a person. Since the current law does say that the fetus is not a human being, the court interpreted this to mean that section 203 did not apply. It was in no way saying that the law could not be changed to grant some sort of rights to a fetus.

In the case of *Winnipeg Child and Family Services*, 1997, involving a glue-sniffing pregnant woman, the issue at hand was whether child protective services could force a pregnant woman into custody in order to protect her unborn child. As in the previous case cited, the Supreme Court said that according to the existing law, the unborn child has no rights, and therefore the woman could not be forced into custody.

The court stated: "The law of Canada does not recognize the unborn child as a legal person possessing rights." The court went on to ask, "At what stage would a fetus acquire rights?" The court said that dealing with such "thorny moral and social issues" is "better dealt with by elected legislators than the courts".

Once again, the Supreme Court is clearly stating that the existing law does not offer legal protection for the fetus, and that it is not up to the court to change the law in order to offer this protection; it is the job of those elected to Parliament.

● (1130)

My private member's bill addresses this issue in one very specific way only, and that is by extending protection to the unborn child who is harmed or injured when the mother is a victim of violent crime. I know it's the second time I've stated that, but I think it's really important to note, that it applies only when the pregnant mother is the victim of a violent crime.

In 1989, in the case of *Chantal Daigle v. Jean-Guy Tremblay*, the Supreme Court again said that it was up to Parliament to determine what level of protection to give the unborn child. You have that in front of you.

Finally, in *Morgentaler, Smoling, and Scott v. the Queen*, in 1988, when the Supreme Court struck down the abortion law—for procedural and administrative reasons only, by the way, not because the judges found a charter right to abortion—the Supreme Court justices made it very clear that it was up to Parliament to determine what level of protection to afford an unborn child. They said it had to be done in such a way as to balance the rights of a woman with the rights of a fetus.

Chief Justice Dickson said: Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective.

Justice Beetz said: I am of the view that the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law....I think s. 1 of the Charter authorizes reasonable limits to be put on a woman's right having regard to the state interest in the protection of the foetus.

This balancing of rights would certainly be applicable in the case of an abortion where a woman wants the abortion. What I am proposing in Bill C-291, where we're not even faced with this balancing act, is actually enhancing the rights of both the mother and the child. There's absolutely no infringement here on the woman. The Supreme Court is clearly saying that the state does have an interest in protecting the unborn child. Bill C-291 is attempting to offer such protection in a particular circumstance only, in a very narrow, particular circumstance.

It is clear, from all these cases cited, that the Supreme Court has put the responsibility for granting legal protection to the fetus squarely in our hands, the hands of parliamentarians. My private member's bill attempts to do something that the Supreme Court has clearly stated is within Parliament's power to do. If we are doing something that the Supreme Court has said we have every right to do, then how can this be a violation of the charter? Again, keep in mind that I'm only guessing at what may have been the reasoning behind the subcommittee's declaring this bill to be clearly against the Constitution.

The second possibility is the doctrine of transferred intent. There's another possible reason why some people might think that this bill could be unconstitutional, and that has to do with the offender's intention with respect to harming or killing the pre-born child. This bill would make it a crime for someone to harm or kill a child, regardless of whether or not that person intended to harm or kill a child, as long as there was intent to harm or kill the woman.

My private members' bill states, in proposed paragraphs 238.1(2) (b) and (c), that:

- (2) It is not a defence to a charge under subsection (1) that
 - (b) the accused did not know that the person was pregnant; or
 - (c) the accused did not mean to injure or cause the death of the child.

This bill introduces nothing new in this concept, and that's important to note. It is a long-held common-law doctrine, called "transferred intent", that when a person who intends to harm one person accidentally harms a second person, the law will treat the offender as though he or she intended to harm that second person. That is, the intent to harm the first person is transferred to the second person.

●(1135)

The doctrine of transferred intent is incorporated in the Criminal Code under paragraph 229(b), which states:

Culpable homicide is murder

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being;

A case example can be found in *Droste v. the Queen*, 1984, where a man intending to kill his wife by staging a car accident in fact ended up killing his two children, who at the time were in the car with his wife. He was indicted on two charges—namely, first-degree murder of each child, even though he had not planned to kill the children.

As the court said,

The requirement of planning and deliberation is a requirement relating to the intention to take a human life and not to the identity of the victim....Causing death by accident normally results in acquittal or, at most, a conviction for manslaughter. When such a killing is accompanied by an intention to cause death to another human being s. 212(b)

—which is currently paragraph 229(b)—

dictates that the homicide is not manslaughter but murder, i.e., intentional killing.

This doctrine is applied not only in the case of murder but other offences as well. In the case of *R. v. Deakin*, 1974, the accused was "...convicted of assault causing bodily harm when, in an attempt to strike another person, he caused bodily harm to a bystander."

How can Bill C-291 be "clearly unconstitutional" if it is incorporating a doctrine that is already used in today's criminal law? Is the Subcommittee on Private Members' Business saying that paragraph 229(b) of the Criminal Code is "clearly unconstitutional"? I don't think so.

It has been told to me by two lawyers who deal with criminal law that this doctrine of transferred intent is a murky area, and the judges in *Droste* do indicate that it is a controversial doctrine. If it is controversial, maybe there are charter implications, but if Supreme Court judges say it's controversial, then how can it be clear to a committee of five members who do not have the same constitutional and criminal law background, one would think, as do these judges? What this tells me is that this transferred intent doctrine should be the basis of serious discussion during the committee stage, where we can call experts to advise us on this complex issue. In other words, if this bill is deemed votable, we could go through the debate. If, and only if, it passes a vote in the House and goes to committee, then at that time the committee should discuss this issue, which is murky regarding the Constitution. Again, the requirement is clear. For this bill to be deemed non-votable, it has to clearly contravene the Constitution.

Finally, one might argue that the term “child” should be defined. The Criminal Code currently uses the term child to refer to the woman’s offspring before or during birth, but it does not define it. If this is deemed problematic, then, again, this can be discussed at committee stage. If it's deemed necessary to define the term more precisely, then it can be done through an amendment, but again, this is not a charter issue. This is simply a matter of perfecting the wording of the bill to make it more precise. And I repeat, this is what committees do when they analyze bills; otherwise, why do we bother having committees? They deal with the wording and with the content of bills, and they can amend. They could amend this bill should it be deemed votable and should it make it to the committee stage.

In conclusion, we Canadians are privileged to be living in a democratic country. Let us use our democratic process the way it was intended to be used. Let us give all members of Parliament, elected to represent the Canadian people, the chance to be heard on this important issue of social justice.

The law I am proposing would act as a strong deterrent against violence that is perpetrated on women at the time when they're most vulnerable. We must, I think, send a strong signal to society that violence against pregnant women is not to be tolerated.

Bill C-291 is almost certainly in conformity with the Canadian Constitution, including the charter, as I have shown today. The one thing that is clear, I think, is that it does not “clearly” violate the charter. So I would ask this committee to actually do what's necessary to reverse the decision of the subcommittee and make my bill votable.

• (1140)

I would like to take a minute to talk about the process, because I think some of you have seen some of the problems with it. I mean, here I am before you and I don't even know why my bill was declared by the subcommittee to have somehow contravened the charter. That clearly isn't acceptable.

What I would propose to the committee and to the subcommittee is that absolutely, meet behind closed doors, in camera; most bills will be deemed votable. Not a problem, because those bills then go before the House, are debated, and either passed or shot down. But in a case where the subcommittee is considering deeming a bill non-votable, surely the committee—and nothing prevents them from doing this—could call the member whose bill it is to explain the case in front of the subcommittee before a final decision is made. I would ask this committee to seriously consider that procedure.

A private member's bill is one of the few meaningful rights an individual member of Parliament has. It's important. This bill is important to me. It's important to Mary Talbot, it's important to her husband, it's important to people across the country, as the polling has shown.

I would ask you to seriously consider that change for the future. It isn't going to help me in this case, but it certainly is important to me.

I'd now like to open it up to any questions the committee might have.

The Chair: Thank you very much, Mr. Benoit.

I'd remind the committee that our discussions today, questions and answers, will be to simply accept or not accept the subcommittee's motion.

We will open up for a round of questions, as I indicated earlier. We will go with eight minutes in the first round and five minutes in the second round. Please keep your questions and answers as brief as possible so that all members can have the opportunity to ask their questions and listen to the answers.

Once the questioning is complete, I will remind the committee that we are obliged to make a decision on whether or not to concur in the report. I will hand our decision to the House tomorrow.

Please, if I can ask the committee's indulgence, as the committee well knows, all members of the House are allowed to submit reports or opinions or whatever to the committee. I now will ask the clerk to hand out a letter that we received from Minister Vic Toews, the Attorney General of Canada. I will hand that report out now. I apologize that this wasn't delivered earlier. I just received it, frankly, five minutes before I left for the committee this morning. It is in both official languages.

If the committee agrees, we will proceed with questioning right now.

Mr. Leon Benoit: Mr. Chair, I would like to have a copy of that letter in front of me before we get into the questions.

The Chair: Okay. It's one paragraph.

I would recommend to the committee that, as I'm sure we all know, this letter was submitted without the privilege of hearing Mr. Benoit's arguments. I would encourage the committee members to remember that. This was submitted without the pleasure of listening to Mr. Benoit this morning.

Mr. Benoit, are you prepared for questions? I apologize for the late dishing out of that report, but it was received by my office, as I say, pretty much when I was on my way to the committee this morning.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Mr. Chair, this is perhaps a point of order.

Was this letter from the Minister of Justice requested by any of the members, or was it just the Attorney General on his own initiative, deciding to assist?

• (1145)

The Chair: I believe it was requested. I understand from Mr. Benoit as well, or from the subcommittee, that a report or an opinion of this nature was not available at the subcommittee level, so it was requested and brought before the committee.

Did you want to start the questioning, Mr. Lee?

Mr. Derek Lee: Thank you.

I actually don't have a lot of questions. I think Mr. Benoit did a very good job of presenting his perspective on this.

I also want to acknowledge the presence of Mary Talbot. Her presence certainly makes the case with the purpose intended. I would note that, even though she won't be speaking.

The Chair: I'm prepared to offer the official opposition seven and a half minutes for questioning, if you wanted to proceed.

Mr. Derek Lee: I want to speak to the motion, but I don't have a lot of questions, so I'll stand down.

The Chair: Okay.

Are there any questions at all from the official opposition? We'll take names from members if there are any questions. No questions?

We'll move to Mr. Reid.

Mr. Scott Reid: I apologize, Mr. Benoit, for the fact that I too am just reading through the comments now. The question I had intended to ask you has been somewhat altered by the document from the Minister of Justice in front of us. Maybe I'll go through what I meant to ask you, but I'll have to reshape the question a bit as I do it. Then perhaps you could respond accordingly.

It looks to me like proposed subsection 238.1(2), which your bill would add to the Criminal Code, is intended to be a limitation on rights as contemplated under section 1 of the Charter of Rights. Section 1 of the Charter of Rights says the following:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Maybe I'll start with this very brief question: was that the intention of that particular section of the act?

Mr. Leon Benoit: Yes, it was.

Mr. Scott Reid: Okay.

When I look at section 1 of the charter, it says "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Clearly, "prescribed by law" meets that test. The question is whether it's a reasonable limit and whether it can be demonstrably justified in a free and democratic society.

I meant to ask you to talk a little bit about that, but I noticed, going through this, that in the note submitted by the justice minister, he has written down, under the second bullet, that

...fault-based criminality is a principle of fundamental justice under s. 7 of the Charter and that an absolute liability offence (i.e., an offence that does not require a guilty mind or *mens rea*) that is punishable by imprisonment violates the principles of fundamental justice under s. 7 and that this violation cannot be saved under s. 1 (it cannot be demonstrably justified in a free and democratic society).

I have just one more thing before I ask you for your comment on that. Looking at section 7, which guarantees life, liberty, and security of the person, I think it's pretty clear we're not trying to protect the security of the person, or your bill isn't in any way limiting the security of the person or the life of the mother, so I assume it has to do with the liberty of the accused.

Would that be your take on this, that what they're getting at is an unjustified limitation of the liberty of the accused, or...?

Mr. Leon Benoit: I've just received this opinion from the Attorney General, as have you. I do have some comments on the whole issue of *mens rea*, though, which in the third point is what he goes into.

First of all, I would like to point out that I have a great deal of respect, of course, for the Attorney General of Canada. He's an

extremely wise man, with a strong background, and I certainly wouldn't argue with his opinion. But the fact that this is an opinion shows that it's not clear. It shows that it doesn't meet the test that the Constitution is clearly violated. And remember, that's the measure or the standard this committee has to meet to deem my bill non-votable. I in no way argue with the opinion of the Attorney General. He's an extremely wise man, with a lot of background in provincial politics and federal politics.

So I don't think this really changes the decision of the committee.

On the one issue that seems to be the key, the third bullet—I'm just going through this now—he deals with the issue of *mens rea* that reflects the particular nature of the offence.

I want to refer to a document from the American Congress, report 107-42. I'm just going to read three small parts of it that deal specifically with this issue of *mens rea*.

First of all, I want to show that the bill they were dealing with is—to my great surprise, by the way—very much like the bill that I have. They call it "H. R. 503", or House of Representatives 503. It says:

As a general rule, H.R. 503 provides that when one commits a violent crime against a pregnant woman, with criminal intent, and thereby injures or kills the victim's unborn child, the perpetrator is guilty of an additional offense, the punishment for which is the same as the punishment the defendant would have received had that same injury or death occurred to the unborn child's mother. In accordance with the well-established criminal law doctrine known as "transferred intent," the criminal intent directed toward the mother "transfers" to the unborn child, and the criminal is liable for the injury or death of the unborn child just as he would have been liable had a born person been injured or killed.

This transferred intent doctrine was recognized in England as early as 1576. It's not something that's been determined just recently.

In this Congress document, they note that one prominent criminal law commentator describes the modern formulation of the doctrine in this fashion...

Actually, I don't think that's really the issue. We'll go to another statement dealing with *mens rea*. This is again dealing with the issue of transferred intent. It just says that whether the intent is there or not, the prosecution doesn't have to prove that the defendant knew or should have known that the victim was pregnant.

Then we go on to a later section in this similar bill before the American House of Representatives:

H.R. 503 contains one exception to this general rule. In cases in which the prosecution proves that an individual committed one of the predicate violent crimes against a pregnant woman, with the intent to kill the unborn child, that individual shall be punished as provided under Federal law for intentionally killing or attempting to kill a human being. The bill thus ensures that those who engage in violent Federal crimes against pregnant women, with the intent to kill their unborn children, are subject to more severe punishment than those who do not act with the intent to kill the unborn child.

It goes on to say:

In situations in which the defendant kills or injures an unborn child during the commission of a Federal crime of violence against a pregnant woman, the *mens rea* requirement is satisfied because the criminal intent directed toward the mother transfers to the unborn child.

So they've taken a bill that is virtually identical to what I have and they have determined that the *mens rea* requirements are satisfied.

• (1150)

Certainly, as I've said, I have no argument at all with the Attorney General's opinion. The issue here is that the one thing that *is* clear is that we can't clearly say that my bill would violate the charter.

The Chair: We are out of time for Mr. Reid.

Are there any other questions for Mr. Benoit? If not, I will put the motion forward.

A question, Mr. Lukiwski.

• (1155)

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): It's just a comment to underscore what Mr. Benoit has been saying.

Again, I apologize; even though I'm a member of this committee, this is the first time I've attended a meeting for a while—I'm on the legislative committee for the Accountability Act—so I haven't been privy to a lot of the discussion on this one.

In my opinion, based on the limited knowledge I have—and just like every other committee member, I've just seen the Attorney General's opinion now—it appears to me that, as Mr. Lee said, Mr. Benoit has presented a fairly cogent case for some dispute in terms of the Attorney General's opinion. It appears to me that the point we are being asked to consider, whether this clearly violates the Constitution, is not clear at all.

Mr. Leon Benoit: Again, Mr. Lukiwski, I don't have any argument at all with the opinion, but the opinion does not say that my bill clearly violates the Constitution, which is the test that this committee has to meet.

So I have no argument with this, of course; on what basis could I? I'm not a lawyer, and I'm not as knowledgeable as the Attorney General. But in no way has it set the standard that the committee has to have, I believe, to reject my bill as being votable.

Mr. Tom Lukiwski: Yes. I guess all I'm saying, just for the record, is that I agree with your analysis that this does not demonstrate a clear violation of the Constitution. The waters are muddied somewhat. There are dissenting opinions on this, and therefore reasonable doubt. When a jury is determining a decision, is there a reasonable doubt? Well, I think here there is reasonable doubt, on the basis of an opinion shared by the Attorney General and the several opinions that you have demonstrated in your brief.

Mr. Leon Benoit: Thank you, Mr. Lukiwski. I appreciate that.

The Chair: Mr. Lee, please.

Mr. Derek Lee: Thank you.

Rather than speaking to it, I'll try to draw out some of these points in questions, if that's okay.

Hopefully, Mr. Benoit, you'll regard us as not so much as devils' advocates on this but friends of the court.

I also think this should be regarded as a fresh hearing of the issue, for the reasons that Mr. Benoit has referred to. He wouldn't have been apprised directly of the reasons in the earlier discussion at the subcommittee. We ought to feel free to address this not as overturning a prior decision but as taking a fresh look at the issue of whether or not his item should be votable.

Third, there is a section of the Criminal Code that does address protections for a child, but only during the act of birth, only during birthing. That is section 238, which reads:

Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.

So the code attempts to deal with the birth part of this. Mr. Benoit's proposed bill goes further back. It looks like it actually goes back to the point of conception, as it reads.

Here are the two hard questions. On the *mens rea* issue, it's been accepted in our law—it's a principle of fundamental justice in Canada—that *mens rea* is a component of our Criminal Code. I accept the doctrine of transferred intent that Mr. Benoit has referred to. Nevertheless, *mens rea* is that fundamental component. The charter says, in section 7, that

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

One of those principles of fundamental justice is the *mens rea* item I've just mentioned. So without bringing a whole busload of lawyers in here to chew over that one, I'll ask you this question.

In the first trimester of a pregnancy, when pregnancy would not be apparent to a third party—or a second party, depending on how many people there are in this scenario—and one were to intentionally push a female who's in the first trimester off the sidewalk into the street, causing her to fall down, seriously hurt herself, and have a miscarriage, is it your belief that the person who committed what starts off as a common assault but ends up causing a miscarriage, and thereby the death of an unborn child....? Is it your view that this section should legitimately have that person charged and convicted of a homicide even when the person couldn't have known the woman was pregnant? It could be a stranger not knowing the woman, not knowing that she's pregnant, having no inkling at all of there being a third person in the scene.

Is it your view that your bill covers that? Because if so, in my view it has charter implications.

• (1200)

Mr. Leon Benoit: I think the answer is that only if this person intends to kill the mother.

Mr. Derek Lee: With respect, that's not what you're.... If the person didn't intend to kill the mother, the person intended to assault the mother, but the assault causes the death of the unborn child, if I can put it that way—

Mr. Leon Benoit: Then it would be an assault, not murder.

Mr. Derek Lee: Well, that's not how I read this.

Mr. Leon Benoit: The point is that unless it can be proven that there is intent to kill the unborn child, or an intent to injure the mother, there can't be any charges laid.

Mr. Derek Lee: But your bill says it's anyone who "causes the death of a child...while committing or attempting to commit an offence against the mother". It's as simple as that. The scenario I have outlined appears to be covered by the words you've used in the bill.

Mr. Leon Benoit: But how could it be murder if...? Because that's covered elsewhere in the Criminal Code.

Mr. Derek Lee: I said "homicide". A couple of elements are missing from a—

Mr. Leon Benoit: Okay. But how could it be homicide when there still has to be the intent to commit that crime?

Mr. Derek Lee: Well, there was an intent to push the mother off the curb.

Mr. Leon Benoit: So then it would be intent to injure, maybe.

Mr. Derek Lee: An offence, yes.

Mr. Leon Benoit: Yes.

Mr. Derek Lee: At any rate, I have raised that and I have asked you to try to exclude the possibility that the individual would be liable to be charged and convicted of, say, manslaughter in that scenario when he or she would never have known about the existence of the unborn child.

Mr. Leon Benoit: Yes. And it's my understanding that this in fact would not do that. It wouldn't allow it.

Mr. Derek Lee: Okay. I read it differently, and we're entitled to that difference—

Mr. Leon Benoit: But that then is a matter, I think, to be debated when...unless you're saying it's connected to a constitutional issue. Certainly it's murky at best. Again, the standard that has to be met by the committee is that it has to clearly violate the Constitution, and it certainly doesn't.

Mr. Derek Lee: And I take the view that it's murky, at the least.

The second question, if I have time, has to do with a related issue. It has to do with the scenario where the mother is consenting, if there's a lack of clarity on the mother's consent. Even involving a situation where the mother submits to a therapeutic abortion, if there are questions about the consent, or in a situation where it's not clear where there's consent—and I'm not talking about therapeutic abortions, I'm talking about just inter-human conduct—we wouldn't allow the mother to consent to an assault on an unborn child, would we? I don't think we would. Yet this new section raises the spectre of a woman, if the unborn child does have Criminal Code protection, consenting to something that would hurt the child.

In my view, that raises a charter issue as well. It all has to do with the intentions of the mother at the time of the—

Mr. Leon Benoit: I can't see that at all. Again, what this bill says is very narrow, that only in the case where a violent crime is committed against a pregnant mother would this apply.

Mr. Derek Lee: Well, it's not just a violent crime, Mr. Benoit.

The Chair: It would appear that there will be a lot of time for another round.

Are there any other members who wish to ask a question?

Then we'll allow Mr. Lee to go on to the third round.

Mr. Derek Lee: No, I tried to bring out some of the reasons why I believe the subcommittee would have focused on charter issues, and Mr. Benoit had an opportunity to put that in context. I can probably pause now.

●(1205)

The Chair: Is there any other need for Mr. Benoit?

Mr. Benoit, you are invited to stay at the table, but I will move on to the next part of this, seeing that there are no further discussions or questions for you.

Mr. Leon Benoit: If I may, Mr. Chair, I have some photos that apply to the Talbot case. I won't pass them out to the committee—although pictures don't have to be translated, I don't think—but if anybody wants to pick some up on their way out, I would be happy to distribute them.

The Chair: Thank you.

What we will do now is refer to the actual subcommittee report. The motion before us today is that the first report of the Subcommittee on Private Members' Business be concurred in.

Again—it can be a little bit confusing—if we vote that it be concurred in, that means that we support the subcommittee's opinion that Mr. Benoit's bill is not votable.

Is everybody clear on that?

May I have a mover for this motion?

Thank you, Ms. Jennings.

Is there discussion on the motion, or shall we move to a vote?

I remind members that there are a couple of options on how we can vote. I can just ask for general consensus, I can ask for a show of hands, or I can ask that members' names be called and a vote be recorded.

I'm trying to be as open as possible here. Is there any discussion on how the committee wishes to vote? Otherwise, I will make the decision.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Recorded vote.

The Chair: Recorded vote; that has been put on the table.

Mr. Derek Lee: Mr. Chairman, I think you should just put the question. If we need a recorded vote, we'll have one. Otherwise, we'll do it as the committee normally does it.

The Chair: Fair enough.

Do you vote yea or nay, then, by a show of hands, that the first report of the Subcommittee on Private Members' Business be concurred in?

Three are abstaining.

(Motion agreed to)

The Chair: It will be reported to the House tomorrow.

Thank you.

Moving on to other business, just very briefly, there is a site visitation with respect to the security operations on the Hill, as members are well aware. I would congratulate members of this committee for having the foresight to look at the security issues on the Hill. As the members well know, we've been doing this now since Parliament resumed. However, there are site visitations arranged. You have the information on where and when. All members are invited, but the subcommittee particularly is invited, on Wednesday, June 7, at 3:30.

The security subcommittee will also meet on Thursday, June 8, and another site visit to the RCMP headquarters will take place on

June 13, with a subsequent meeting on June 15. We will also send out information on that.

I would remind members that the next meeting of the whole committee is here on Thursday, June 8. At that meeting we will continue with our review of the Canada Elections Act. Elections officials will appear next Tuesday, June 13.

Is there any other further business that I need to discuss?

Meeting adjourned.

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