



Abortion Rights
Coalition of Canada

Coalition pour le droit à
l'avortement au Canada

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ARCC Cannot Support Bill C-225

It gives some human rights to fetuses and could thereby pose a threat to women's constitutional rights and abortion rights.

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- [Highlights / Summary](#)
- [Background / Legal Situation](#)
- [The Bill Smuggles in Fetal Personhood](#)
- [Risk of Arrest for Pregnant Women and Support Persons Cannot Be Ruled Out](#)
- [The Bill Won't Prevent Intimate Partner Violence](#)
- [The "Aggravating Circumstance" Clause Should Be Presented as Separate Bill](#)
- [Conclusion: ARCC Opposes Bill C-225](#)

Highlights / Summary:

- Cassandra Kaake's murder while 7 months pregnant was a terrible tragedy that everyone deplores.
- Victims and their families deserve a voice, but should not drive the passage of new laws. Our justice system needs to remain impartial and protect the common good.
- The bill is almost identical to Bill C-484, a 2008 bill that passed 2nd reading but got no further, and was widely criticized as a sneak attack on abortion rights. Both bills make it a separate offence to injure or kill a fetus when a pregnant woman is assaulted.
- Like C-484, the new bill ascribes an implicit form of legal personhood to a fetus, which would endanger women's constitutional rights by opening the door to more legal rights for fetuses.
- Support for the bill comes primarily from the anti-choice movement, which would use it as a stepping stone to restrict abortion.
- The bill's definition of the fetus as *not* a human being is a Trojan horse move. C-225 gives the fetus the human right not to be injured or killed, which would set a worrying precedent for women's rights.
- Assaulting a pregnant woman and hurting or killing her fetus is first and foremost a crime against the woman. But like C-484, Bill C-225 focuses on the fetus and leaves the pregnant woman on the sidelines.
- The bill provides no exemptions for pregnant women or those helping them in good faith, raising fears that either could be arrested if they commit an offence that harms the fetus.

- The bill won't prevent intimate partner violence or other violence against women. We need to enforce existing laws and provide more funding for shelters and other resources to help vulnerable women.
- The best way to protect fetuses is to directly protect pregnant women by upholding their constitutional rights, and ensuring they have the necessary supports and resources for good pregnancy outcomes.
- An aggravating circumstance clause for pregnancy is not necessary because judges already have discretion to impose harsher sentences.
- However, if it might help give some redress and comfort to victims and their families, ARCC would be willing to support an aggravating circumstances clause, but it must be separated from C-225 and presented as a standalone bill.
- ARCC opposes Bill C-225.

Background / Legal Situation

What happened to Cassandra Kaake was a [horrific tragedy](#). Cassie was 7 months pregnant at the time of her murder in 2014, and her choice to have a much-wanted baby, who she had named Molly, was brutally taken away by her killer. All of us who support a woman's right to choose are truly saddened when we hear of terrible events like these.

The accused killer was charged with first degree murder (among other counts), which is the maximum charge possible under [current Canadian law](#), carrying an automatic sentence of 25 years in prison before the possibility of parole. He is still awaiting trial but began his pre-trial on January 28, 2016.

Some months after Cassie's murder in December 2014, her grieving partner and family and friends began a campaign to have her fetus recognized in law as a separate victim of crime, because they felt that Molly's death was being unjustly ignored. The result is Bill C-225, introduced on February 23 by Conservative anti-choice MP Cathay Wagantall (Yorkton-Melville). It creates separate offences for injuring or killing a fetus while committing an offence against a pregnant woman.

The bill is nearly identical to a previous failed bill from 2007/8 (C-484), also from a Conservative anti-choice MP. Both bills are/were [strongly promoted](#) by the [anti-choice movement](#) and [supporters](#). If passed, C-225 would likely be used as a stepping stone to restrict abortion, as it gives some legal recognition to fetuses as persons. In Canada, the anti-choice movement has frequently tried to obtain fetal rights via [45 past bills and motions](#) they've introduced since 1987, most of which would have granted legal status to fetuses, including by re-criminalizing abortion.

At the time of C-484, ARCC pointed out [problems and concerns](#) with the bill, and we fought the bill as a threat to abortion rights and even pregnant women's rights. Because little has changed with C-225, neither have our main conclusions about the similar dangers it poses. Why didn't the authors of the present bill learn from the previous bill? Why didn't they consult ARCC or any of the [over 100 groups opposed to C-484](#)?

Families of crime victims deserve sympathy and support, and their voices should be heard. But we can't let the passage of laws or administration of justice be driven by the grief and anger of victims or their families, as that could result in impacts that harm the greater good and an escalation of injustice. The role of the criminal justice system is to keep public order and protect human rights for the benefit of all, and to do so impartially to ensure fair treatment of the accused. As stated in an [October 27, 2013 opinion piece in the Toronto Star](#):

“One of the greatest innovations of the criminal justice system was the realization that the wrongful injuries people inflict are primarily offences against the public moral order represented by the Queen, not just particular harms to individuals in a given situation. The notion of crime as a moral affront to be answered by a public trial rather than a private feud, and as an offence to public value rather than to private interests, divides primitive from modern justice.”

In Canada today, judges already have the discretion to take into account aggravating factors such as pregnancy. Moreover, under a new 2015 law passed by the Conservatives, the [Victims Bill of Rights](#), Cassandra Kaake’s family has the right to have their views heard and considered in the criminal justice system, and the right to request a restitution order against the offender. In addition, they could bring a civil suit against the offender for further remedy if desired.

Bill C-225 will not give Cassie’s partner and family the result they seek. Adding a separate offence for injuring or killing a fetus will rarely result in any additional punishment, given Canada’s use of mandatory sentences for crimes such as murder, and concurrent sentences for additional crimes. Further, because a pregnant woman and her fetus are “physically one” (as per the Supreme Court in [Dobson v. Dobson](#)), such a law carries the potential to compromise the constitutional rights of all pregnant women in favour of their fetuses. It is not possible to give rights to fetuses without taking them away from pregnant women.

The Bill Smuggles in Fetal Personhood

ARCC cannot support Bill C-225 because it tries to give legal recognition and rights to fetuses, with all the contradictions and dangers to women’s constitutional rights and abortion rights that this entails.

The bill gives the fetus a right not to be injured or killed. Even though this right is activated only when a crime is committed against a pregnant woman, it’s still giving a right directly to a fetus. However, assaulting a pregnant woman, whether it harms her fetus or not, is *first and foremost* a crime against the woman. Like C-484 from 2008, Bill C-225 focuses on the fetus, leaving the pregnant woman on the sidelines. In this bill, she’s like a third party, her body the scene of a separate crime involving a second victim.

This sets a worrying precedent for future legal confusion. If a fetus has a right not be injured or killed in one circumstance, why not other circumstances? The bill is a gift to the anti-choice movement, one that would fire up the “abortion debate” and keep it going for years to come, with ongoing attempts to build on the existing protections for fetuses.

The bill specifically defines the fetus as *not* a human being, but this is a Trojan horse definition. The fetus is given some legal protections as a human being under the pretence that it’s not a human being. In other words, the assurances that a “preborn child” is not a human being are negated by the effect the bill’s new offences would have. This can only muddy the waters between fetal “rights” and women’s rights, and potentially lead to violations of the latter.

Let’s look at the sections of the bill that try to define a fetus as not a human being. The bill’s Preamble says: “Whereas not being considered a human being under the Criminal Code does not mean that a preborn child does not deserve protection under the law.” Wagantall’s [Q&A](#) justifies this on the basis that animals and private property are protected under the Criminal Code even though they’re not human beings (another example is dead bodies). But neither animals nor private property reside in the

uterus of a woman, who IS a human being with rights. There is simply no comparison, and these are misleading analogies.

The bill also defines a “preborn child” as: “a child ... that has not yet become a human being within the meaning of section 223”. This definition acknowledges the legal reality that the fetus is not a human being under the Criminal Code, but the bill wants to have it both ways. It makes the fetus a victim who can be injured or killed, and includes the new crimes under the “Offences Against the Person” section.

Further, the term “preborn child” is unprecedented in the Criminal Code, and so are the new protections for it at “any stage of development”, which includes zygotes and embryos as well as fetuses. The anti-choice phrase “preborn child”, as well as the use of “mother” to twice refer to a pregnant woman, is factually and logically inaccurate and helps to confer personhood on the fetus. Calling human beings “preborn” is as absurd and meaningless as calling them “predead”. One needs to be both born and alive to have rights and personhood. (For a detailed discussion of the similar language pitfalls with C-484, see page 4 of ARCC’s 2008 rebuttal to the MP who promoted C-484, under [“Epp’s bill establishes fetal personhood”](#).)

Finally, Canadian courts have a track record of [refusing to grant any fetal rights](#) due to the conflict with women’s rights. Little C-225 is butting up against a big wall of prior established precedent and won’t likely make any dents in it.

Risk of Arrest for Pregnant Women and Support Persons Cannot Be Ruled Out

About 35 states in the U.S. have laws giving legal personhood to fetuses, mostly through [fetal homicide laws](#) that aim to protect pregnant women from third-party attackers. In practice however, these laws have been [primarily used to arrest hundreds of pregnant women](#) for allegedly harming their fetuses – even in states where the law specifically exempts pregnant women from liability:

“A prosecutor on a mission can change the law just by charging until it sticks, and hoping that the court will engage in judicial activism and allow laws that explicitly say that they won’t be used against pregnant women to be used against pregnant women,” explained Diaz-Tello. Indeed, [a recent study](#) by [National Advocates for Pregnant Women] Executive Director Lynn Paltrow and Jeanne Flavin, a sociology professor at Fordham University, found 413 cases in which laws intended to protect fetuses have been used to arrest, prosecute, and detain women, or to force them to submit to medical intervention. (RH Reality Check, [“Feticide Laws Advance ‘Personhood,’ Punish Pregnant Women”](#))

Although Canada and the U.S. have different legal traditions and practices, we fear that Bill C-225 could carry a similar risk. Unlike Bill C-484, it doesn’t even contain exemptions for legal abortion or for “acts or omissions” by the pregnant woman or someone trying to help her in good faith. Wagantall’s [Backgrounder](#) and [Q&A](#) claim that pregnant women and legal abortion are “by definition” excluded from being penalized or impacted by the bill, and that the bill is aimed only at third parties. However, these claims are not supported in the bill itself.

Remember that the bill creates a *separate* offence for injuring or killing a fetus while committing a crime against a pregnant woman. Could this open any possibility that she herself or a support person could be charged with an offence against her fetus, if either committed an offence against the woman or herself? What if a pregnant woman takes illegal drugs, which a police officer (say, an anti-choice one) might see as a potential injury to her fetus while committing an offence against herself? Technically, you can’t

commit crimes against yourself under Canadian law, but bringing fetuses into it as a separate victim might confuse matters, as it certainly has in the U.S. What about women in PEI, who have been known to [engage in self-harm](#) to try to induce an abortion because there's no abortion access on the Island? Partners or friends may sometimes help women do this. Could a boyfriend be arrested for killing a fetus if his girlfriend asked him to punch her stomach in an abortion attempt? Although Canada's legal system would hopefully make it unlikely that any such charges would stick (compared to the U.S.), Bill C-225 creates some uncertainty that a prosecutor or judge might need to sort out – but only *after* the woman or her support person has been arrested or prosecuted by an overzealous cop or Crown lawyer. And let's not forget that even without any legal protections for fetuses, charges have been laid in the past for their death or injury: [Sullivan and Lemay](#) in 1991 and [Brenda Drummond](#) in 1996. Would C-225 renew or foster that risk?

Abortion is legal, but the goal of Canada's anti-choice movement is to re-criminalize it. Hopefully that will never happen, but if it did, pregnant women and doctors would then suddenly become "offenders" under this bill. Given the volatile political atmosphere around abortion, and ongoing abortion stigma and discrimination against women, we cannot support any bill that has any potential to criminalize women and providers in the future, especially since the law would be leveraged by the anti-choice movement to achieve exactly this end.

Even if the exemptions for abortion, pregnant women, and those acting in good faith were added to Bill C-225, ARCC still can't support the bill because of its implicit recognition of fetuses as persons with some rights.

The Bill Won't Prevent Intimate Partner Violence

Most pregnant women who are assaulted or killed are victims of intimate partner violence (IPV), so Cassandra Kaake's murder is an exception to the general rule. Homicide is a [leading killer](#) of pregnant women if not the [top cause](#) (at least in the United States), and it's well-known that IPV against women increases during pregnancy. Wagantall's [Backgrounder](#) recognizes this, noting that "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 gun/knife or sexually assaulted."

However, it's highly unlikely that Bill C-225 will have any deterrent or beneficial effect in terms of reducing IPV or other violence against pregnant women. Certainly, fetal homicide laws [in the U.S.](#) have done nothing to protect them, and instead have targeted them for scrutiny and forced interventions, and arrests and prosecutions. Further, men who are determined to kill women are not likely to stop and rethink because of an additional offence against the fetus or an increased penalty if she is pregnant. And waiting until a pregnant woman is dead in order to obtain justice for her (or her fetus) is the wrong approach. What we need instead are resources and measures to enforce existing legislation to protect all women from violence. We need more funding for shelters, more outreach to vulnerable women, and more public awareness on the increased threat pregnant women face when living in or fleeing violent situations.

The best way to protect fetuses is to directly protect their sole caretakers – pregnant women. We can do this by upholding their full constitutional rights, and giving them the supports and resources they need for good pregnancy outcomes, including better protection from intimate partner violence.

Incidentally, the aim of Bill C-225 is to protect wanted fetuses – those destined to be born. But women who have recently given birth, or have had abortions or are planning to have abortions, are also at increased risk of IPV. This bill fails them.

The “Aggravating Circumstance” Clause Should Be Presented as Separate Bill

One key difference between the old C-484 and the new C-225 is that the latter includes an “aggravating circumstance” clause. This would be added to Section 718.2 of the Criminal Code, which requires judges to take into account certain aggravating circumstances of the crime, and apply a harsher sentence if warranted. C-225 would add pregnancy to the list. It can’t be just a coincidence that this C-225 clause is exactly the same as the [text of Bill C-543](#) from 2008, introduced by then-Liberal MP Brent St. Denis as a better alternative to C-484. We wonder if the promoters of C-225 perhaps noted ARCC’s previous [qualified support of C-543](#) and are trying to assuage our concerns.

The reasoning behind most other aggravating factors is the vulnerability of victims based on some circumstance like a position of trust or authority, intimacy, age gap, or being a member of a disadvantaged minority. Because pregnant women are more vulnerable to violence and abuse than non-pregnant women, they fit into the reasoning for aggravating factors. To be clear, it’s not because they have another “person” inside them – the clause relates *only* to a crime against a pregnant woman, not her fetus, so does not carry any risk of granting fetal personhood.

Several U.S. states have passed these “aggravating circumstance” laws instead of fetal homicide laws (some other states have passed both), or have passed laws that specifically criminalize attacks on pregnant women, not their fetuses. These states include [Colorado](#), [Connecticut](#), [Delaware](#), [Maine](#), [New Hampshire](#), and [New Mexico](#). The laws have not resulted in any arrests or of negative impacts on pregnant women, and they are supported by the National Advocates for Pregnant Women, which is strongly pro-choice.

Therefore, although an aggravating circumstance clause is not strictly necessary because judges already have discretion to impose harsher sentences, ARCC would be willing to support it, especially if it might help give some redress and comfort to victims and their families. But it must be separated from C-225 and presented as a standalone bill, and C-225 must be withdrawn.

Conclusion: ARCC Opposes Bill C-225

To summarize, the Abortion Rights Coalition of Canada opposes Bill C-225 because of the legal confusion it would create with two separate “victims” in one body, the conflicts and risks it poses to women’s constitutional rights, the uncertainty around its potential to target pregnant women and their support persons if they commit offences, its inability to address or deter intimate partner violence, and its use as a political vehicle to advance an anti-choice agenda that seeks to establish fetal rights in order to recriminalize abortion. It is not right to use Cassandra Kaake’s tragic murder as a means to such ends.