

Aboriginal Peoples and the Welfare of Animal Persons:

Dissolving the Bill C-10B Conflict

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I	Introduction	40
II	The Saga of Bill C-10B: Juxtaposing Aboriginal Rights versus Animal Welfare	42
	Philosophical Issues: The Concepts of Animal Welfare and Animal Cruelty	42
	The Legal-Political Context of Wildlife Welfare in Canada	43
	The Failure of Bill C-10B: Debating Aboriginal Rights versus Wildlife Welfare	46
III	Western Ontology, Epistemology and “Practice” Centricity in Canadian Aboriginal Rights Jurisprudence	52
IV	The Failure of Practice Centricity in the Animal Welfare Context	56
V	Dissolving the Conflict: What Emerges by “Taking the Aboriginal Perspective”?	60
VI	Moving Forward: Implications for the Animal Cruelty Debate in Canada	65
VII	Conclusion: What Can Aboriginal Peoples Teach Others about Animal Personhood?	69

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During Parliamentary debates surrounding Bill C-10B in 2003, Canadian public discourse swerved down a dangerous path by framing First Nations' exercise of treaty and Aboriginal rights as incompatible with animal welfare developments concerning wildlife. This unfortunate presumption remained embedded in a series of subsequent federal bills, including the most recent iteration introduced before Parliament in 2008, and may soon concretize in Canadian law. Political and academic commentary has neglected to sufficiently re-examine the logic of opposing Aboriginal culture versus animal welfare. This article endeavors to fill that gap.

The article recounts the legal and political trajectory of Bill C-10B, explaining how various factors led to the implicit association of Aboriginal peoples with animal cruelty. The author then examines the ontological and epistemological postulates of Canadian Aboriginal rights jurisprudence as it concerns First Nations' relations with wild animals. The author argues that these postulates would prevent Canadian courts from coherently adjudicating an animal cruelty prosecution involving an Aboriginal defendant under the proposed Criminal Code amendments. The article then explores Aboriginal perspectives on human-animal ontology and the related manner by which Aboriginal legal orders address animal cruelty, demonstrating the supposed conflict between Aboriginal rights and animal welfare to evaporate. The author develops the political and doctrinal implications of this realization for the ongoing animal cruelty debate in Canada, moving beyond the impasse that emerged from the Bill C-10B episode.

I Introduction

In 2003, Canadian public discourse swerved down a dangerous path by framing First Nations' exercise of treaty and Aboriginal rights¹ as incompatible with animal welfare developments concerning wildlife. This unfortunate presumption arose during the Parliamentary debates surrounding the failed Bill C-10B,² which proposed to amend the *Criminal Code* provisions dealing with cruelty to animals.³ These amendments would have dramatically strength-

1 As recognized by s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. For a thorough exegesis of Canadian Aboriginal rights law, see John J. Borrows & Leonard I. Rotman, *Aboriginal Legal Issues*, 3rd ed. (Markham: LexisNexis, 2007) at 93-183. This article explores Aboriginal rights jurisprudence specifically as it applies to Aboriginal relations with animals; see section III, below.

2 Bill C-10B, *An Act to Amend the Criminal Code (Cruelty to Animals)*, 2nd Sess., 37th Parl., 2003.

3 The current provisions are located at R.S.C. 1985, c. C-46, ss. 444-47.1.

ened protection for wild animals. Perceiving that this change would expose Aboriginal communities to prosecution, the Senate insisted on an exemption for Aboriginal peoples that would be unique within the *Code*.⁴ This proposal was well intended insofar as it reflected the Senate's attempt to avoid further governmental intrusion on Aboriginal sovereignty. In responding to one problem, however, these senators created another: the exemption risks promoting a misleading perception among the Canadian public that Aboriginal cultural practices entail cruelty to animals.

This issue remains vitally important: the proposed exemption that emerged in 2003 remained embedded in a series of subsequent federal bills,⁵ including the most recent iteration introduced in 2008, which was the object of a sustained advocacy campaign.⁶ The political inevitability of amending the *Criminal Code* suggests that this exemption and its associated ideological risks may soon concretize in Canadian law.⁷ Political and academic discourse has neglected to sufficiently re-examine the logic of opposing Aboriginal culture versus animal welfare. Nor have commentators adequately questioned whether the exemption model is an appropriate response to the risk of state intrusion that troubled the Senate. This article endeavors to fill these gaps; it argues that such an exemption is not only ideologically misleading but also legally intractable, and proposes a more promising and readily available solution to the intrusiveness problem.

The article will proceed as follows: Section II recounts the legal and political trajectory of Bill C-10B, explaining how various factors led to the Senate's insistence on an Aboriginal exemption and considering the potential ideological implications of incorporating such a provision within the *Criminal Code*. Section III examines the ontological and epistemic postulates of Canadian Aboriginal rights jurisprudence as it concerns First Nations' relations with wild animals. Section IV analyzes how these postulates would prevent Canadian courts from coherently adjudicating an animal cruelty prosecution involving an Aboriginal defendant if the *Criminal Code* were amended to include the exemption contained in recent bills. Section V explores Aboriginal perspectives on human-animal ontology and the related manner by which Aboriginal legal orders address animal cruelty, demonstrating how the supposed conflict between Aboriginal rights and animal welfare evaporates when one moves beyond the intractable presumptions of the Canadian legal system. More specifically, obligations to respect animals and minimize their suffer-

4 See *infra* note 50 and accompanying text.

5 For a chronological list of these bills, see *infra* note 56.

6 The most recent bill was titled C-229, *An Act to Amend the Criminal Code (Cruelty to Animals)*, 1st Sess., 40th Parl., 2008. See *infra* note 55 for information about the related advocacy campaign.

7 See *infra* note 31 and accompanying text.

ing will be demonstrated as general features of many Aboriginal legal orders, flowing directly from Aboriginal ontological conceptions of human-animal relationships. Section VI develops the implications of the preceding realization for the ongoing animal welfare debate in Canada, proposing a more appropriate legal-political solution to the problem of state intrusion than the one that emerged through the Bill C-10B debates. Section VII concludes and identifies further opportunities for academic and policy research at the under-explored intersection of Aboriginal rights and animal personhood.

II The Saga of Bill C-10B: Juxtaposing Aboriginal Rights versus Animal Welfare

An examination of the Canadian legal-political context surrounding wildlife welfare is necessary to appreciate the impetus for the Bill C-10B saga. To situate the discussion, the next subsection provides some preliminary background about the twin concepts of animal welfare and animal cruelty that underpin Canada's approach to the criminal law aspects of governing animal-human relations.

Philosophical Issues: The Concepts of Animal Welfare and Animal Cruelty

Animal welfare refers to the objective of improving the living conditions of non-human animals insofar as this is possible without fundamentally altering the framework of interactions between humans and other animals—thus, for example, minimizing the suffering experienced by wild animals when they are hunted by humans, without challenging a perceived human entitlement to hunt or an underlying conception of animals as “natural resources” for humans to exploit.⁸ Animal welfare is often contrasted to the concept of animal rights, which rejects the imposition of any suffering and thereby challenges virtually all existing human practices utilizing animals.⁹

The idea of “necessary suffering” is perhaps animal welfare's most important sub-concept; it holds that some level of suffering is “necessary” or “humane” in furtherance of interactions considered appropriate under the prevailing ontological and legal framework, since if that “necessary” level of suffering were not permitted, the activity that necessarily entails the suffering

8 See Christina G. Skibinsky, “Changes in Store for the Livestock Industry? Canada's Recurring Proposed Animal Cruelty Amendments” (2005) 68 Sask. L. Rev. 173 at 179-81. This is not to suggest that the “natural resource” conception is the only possible ontological grounding of a perceived human entitlement to hunt; as explored below in section V, Canadian Aboriginal peoples' social ontologies differ substantially from the “natural resource” conception but still maintain a qualified human entitlement to kill wild animals under certain circumstances.

9 See *ibid.* at 180.

could not be undertaken.¹⁰ The concept of animal cruelty is correlative to the concept of necessary suffering: it captures harm inflicted on animals where that harm is either in excess of the level necessary to undertake an activity perceived to be legitimate or alternatively is inflicted outside the pursuit of any such activity.¹¹ Criminal laws guided by this conception of animal cruelty, including Canada's, therefore function in two ways: they prohibit in general terms the infliction of harm that is either unnecessary (in the sense just defined) or not pursuant to an activity considered legitimate,¹² and they specifically prohibit certain activities that are implicitly deemed illegitimate.¹³

The Legal-Political Context of Wildlife Welfare in Canada

Since criminal legislation falls under the exclusive jurisdiction of the federal government,¹⁴ the most widely applicable and punitively severe offences prohibiting cruelty toward animals are contained within the federal *Criminal Code*.¹⁵ The *Code* treats animal cruelty as a subcategory of property offences (Part XI of the *Code*).¹⁶ Activists and academics have persistently criticized these provisions for leaving wildlife "virtually unprotected".¹⁷ In particular,

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- 10 See Gary L. Francione, "Animals, Property and Legal Welfarism: 'Unnecessary' Suffering and the 'Humane' Treatment of Animals" (1994) 46 Rutgers L. Rev. 721 at 744-45.
- 11 See *ibid.* at 739-40.
- 12 In the first category, see, e.g., *Criminal Code*, R.S.C. 1985, c. C-46, s. 445.1(1)(a), prohibiting "unnecessary pain, suffering or injury"; in the second category, see the "lawful excuse" qualification embedded into *ibid.*, s. 445(1).
- 13 See, e.g., the prohibitions against fighting, baiting, and liberating for the purposes of subsequent shooting in *ibid.*, s. 445.1(1)(b), (d), (e).
- 14 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27), reprinted in R.S.C. 1985, App. II, No. 5.
- 15 *Supra* note 12, ss. 444-47.1. Although this article focuses on the federal context, note that every Canadian province and territory has also enacted legislation protecting certain animals from human cruelty in some circumstances. For comprehensive surveys of provincial legislation, see: Elaine L. Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal L. 23 at 35-42; Stephen K. Otto, *Animal Protection Laws of the United States & Canada* (2010), online: Animal Legal Defense Fund <<http://aldf.org/article.php?id=259>>. Provincial offences carry shorter maximum imprisonment terms in comparison to the federal criminal offences, though in some cases higher maximum fines; see, e.g., *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, s. 18.1(3), providing for fines up to \$60,000 as opposed to the \$10,000 maximum applicable to the most severe federal animal cruelty offences. Despite its generally weaker punitive severity, however, provincial legislation tends to be enforced more frequently than the federal criminal regime; see, e.g., Jackie Wepru, *A Report on Animal Welfare Law in Canada* (Alberta Farm Animal Care, 2004), online: <<http://www.afac.ab.ca/lawsregs/awlcanada.pdf>>.
- 16 The precise title of Part XI is Wilful and Forbidden Acts in Respect of Certain Property.
- 17 International Fund for Animal Welfare, *Falling Behind: An International Comparison of Canada's Animal Cruelty Legislation* (Ottawa: IFAW, 2008) at 9. See also, e.g., Canadian Federation of Human Societies, *Federal Legislation: Commonly Asked Questions About the Amendments*, online: CFHS <http://cfhs.ca/law/commonly_asked_questions_regarding_animal_cruelty_amendments/>; Christina G. Skibinsky, *supra* note 8 at 183.

most offences explicitly require an animal to be “domestic”, “captive”, or “kept for a lawful purpose” in order for his or her killing, maiming, wounding, poisoning or injury to be prosecutable.¹⁸ A possible exception is s. 445.1(1)(a)—prohibiting “unnecessary pain, suffering or injury to an animal”.¹⁹ Since this provision contains no explicit limitation, some authors have suggested literally reading it as applicable to wildlife.²⁰ The issue is unclear, however, because s. 445.1(1)(a) has apparently never been utilized to prosecute cruelty to a wild animal, according to the Department of Justice Canada, and its applicability is therefore “a matter of theory”.²¹ One might object to the aforementioned literal reading by first observing that a wild animal may or may not be the object of property rights, depending on the province and species in question,²² and on this basis arguing that inflicting unnecessary pain on a wild animal would strictly speaking often not be conceivable as a property offence under Part XI. This line of reasoning follows the interpretation of the Law and Government Division of the Parliamentary Information and Research Service, which suggested that the legislature’s classification of animal cruelty offences under property crimes means that the former are “viewed solely as offences against property” and therefore “dependent on an ownership relationship with

18 See in particular *Criminal Code*, *supra* note 12, ss. 445(1)(a), (b); 445.1(1)(c), (d); 446(1)(b); cf. s. 446(1)(a). Note that most of the provincial statutes that explicitly prohibit cruelty similarly distinguish between wild and captive animals. Approximately half of the provinces and territories wholly exclude wildlife from the ambit of their primary cruelty legislation, either impliedly or expressly. In the first category, Quebec’s legislation applies only to dogs and cats kept in captivity (*Animal Species of Categories Designated under Division IV.1.1 of the Animal Health Protection Act*, R.R.Q. 2004, c. P-42, r.1.01, s. 1.), while the Northwest Territories similarly protects dogs only (*Dog Act*, R.S.N.W.T. 1988, c. D-7). In the second category, Nova Scotia, British Columbia and Yukon explicitly exclude wildlife from the scope of their cruelty statutes’ protections (*Animal Protection Act*, S.N.S. 2008, c. 33, s. 3(1); *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372, s. 2; *Act to Amend the Animal Protection Act*, S.Y. 2008, c. 13, s. 2). Those provinces that do not wholly exclude wild animals from protection under their primary cruelty legislation nevertheless typically exempt human activities related to wildlife such as hunting and fishing, when undertaken in a conventional manner; see, e.g., *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, s. 11.2(6)(a); *Animal Protection Act*, R.S.A. 2000, c. A-41, s. 2(2); *Animal Care Act*, C.C.S.M., c. A84, s. 4(1)(i). This is not to suggest, however, that all wild animals are left wholly unprotected where they are excluded from primary cruelty legislation. Other forms of legislation may protect certain animals in some circumstances; see *infra* note 29 and accompanying text.

19 *Criminal Code*, *supra* note 12, s. 445.1(1)(a).

20 See, e.g., Hughes & Meyer, *supra* note 15 at 37.

21 See Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 39th Parl., 1st sess., issue 15 (9 November 2006) (testimony of Joanne Klineberg, Counsel, Criminal Law Policy, Department of Justice) [Senate Committee Proceedings, 9 November 2006]. See also *infra* note 27 and accompanying text.

22 In Quebec, art. 934 C.C.Q. provides that wild animals are “without an owner”. In Alberta, by contrast, certain enumerated species are by default owned by the province (*Wildlife Act*, R.S.A. 2000, c. W-10, ss. 1(1)(l), 7; *Wildlife Regulation*, Alta. Reg. 143/1997, s. 4(1)(a)-(g)).

a human being”.²³ This interpretation would, however, seem to contradict court decisions holding that s. 445.1(1)(a) protects stray companion animals and does not require the proof of ownership that courts have insisted on in relation to the other animal cruelty offences.²⁴ By extension, these decisions might be taken to imply that s. 445.1(1)(a) does in fact protect wild animals in addition to stray companion animals. Nevertheless, in practice prosecutors appear unwilling to utilize s. 445.1(1)(a) in respect to wildlife.²⁵ Indeed, the Department of Justice Canada’s Criminal Law Policy Counsel described the issue as a “confused” theoretical point addressed by “exceptionally few cases” in *obiter*, and never tested through prosecution.²⁶

Prior to the Bill C-10B episode, therefore, Aboriginal peoples in Canada were practically, if not necessarily theoretically, unlikely to be subjected to criminal cruelty prosecution in respect to their relations with wild animals.²⁷ That is, while they needed to comply with applicable statutory provisions and regulations intended to reduce suffering in certain hunted species—for instance, the federal *Fisheries Act* requirement that seals be struck “until [the cranium] has been crushed”,²⁸ or the various provincial regulations prescribing trapping methods for certain fur-bearing animals²⁹—the federal criminal regime was of little practical relevance.

23 Canada, Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, *Bill C-558 on Animal Cruelty* (Ottawa: Library of Parliament, 10 July 2008) at 4-5.

24 See, e.g., *R. v. Menard* (1978), 4 C.R. (3rd) 333, 43 C.C.C. (2d) 458 (Qc. C.A.), leave to appeal to S.C.C. refused, [1978] 2 S.C.R. viii [*Menard*] (accused convicted of causing unnecessary pain to stray dogs); *R. v. McGuire* (1983), 32 C.R. (3d) 381 (Ont. Co. Ct.) (accused convicted of causing unnecessary injury to stray dog); *R. v. Power* (2003), 176 C.C.C. (3d) 209 (Ont. C.A.) (accused convicted of causing unnecessary pain to cat of unknown ownership). See also *R. v. Murphy*, 2010 NSPC 4 at para. 19 (s. 445.1(a) would apply to stray dogs because it “makes an offence of causing unnecessary suffering to an animal, irregardless of ownership”). Cf. *R. v. Deschamps* (1978), 43 C.C.C. (2d) 45 (Ont. Prov. Ct.) (charge under s. 445(1)(a) dismissed because cat was stray and not “kept for a lawful purpose”).

25 For example, in 2004, a Quebec man who admitted to repeatedly running over a bear cub with his jet ski, then tying its leg and holding its head underwater, was simply fined for possession of a bear without a permit (Gary Dimmock, “Buddy Bear Free at Last: Orphaned Cub Starts New Life After Ordeal in Gatineau River” *The Ottawa Citizen* (8 July 2004) C1).

26 Senate Committee Proceedings, 9 November 2006, *supra* note 21.

27 As the next subsection discusses, this assumption manifested itself through several Aboriginal (and non-Aboriginal) senators’ characterization of proposed amendments as an intrusion into a previously un-criminalized space.

28 *Marine Mammal Regulations*, S.O.R. 93-56, s. 28(2); see also ss. 28(3), (4).

29 See, e.g., *Trapping*, O. Reg. 667/98, s. 18; *Wildlife Regulation*, Alta. Reg. 143/1997, s. 109. See also Monique M. Passelact-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta* (Calgary: Canadian Institute of Resources Law, 2005) at 48. These regulations reflect the more general tendency of provinces and territories to include provisions within their wildlife conservation legislation and/or regulations that prescribe and proscribe certain methods of hunting and trapping, even though they do not include provisions explicitly targeting cruelty toward wild animals in general terms. Note however that a few provinces and territories have enacted more explicit cruelty provisions within their wildlife conservation statutes; nevertheless the

This state of affairs has become increasingly unstable. Academics argue that providing weaker protection for wild animals as opposed to other animals is ethically unsatisfactory, since, according to the utilitarian philosophy underlying animal welfarism, capacity to suffer is the relevant criterion to govern animals' legal treatment—whether an animal happens to be owned is beside the point.³⁰ Moreover, change appears politically inevitable, considering that the Canadian public overwhelmingly supports the introduction of more effective criminal prohibitions against cruelty to wildlife.³¹ Such a shift would parallel recent developments in other countries.³² Inspired by this anachronistic limitation in the current law, among others,³³ the past eleven years have witnessed a saga of attempts to amend the *Criminal Code*. The Senate, however, has persistently blocked these efforts, contesting the scope of change envisioned by the House of Commons; a staggering thirteen bills have been introduced, so far without resulting in any substantive revision to the current offences.³⁴

The Failure of Bill C-10B: Debating Aboriginal Rights versus Wildlife Welfare

The implications that proposed amendments would hold for Aboriginal peoples became a major stumbling block in 2003, resulting in a deadlock between the Senate and the House of Commons, and culminating in the failure of Bill

ambit of these provisions remains restricted to certain hunting activities and/or species targeted for hunting, rather than applying to wild animals generally. See *Fish and Wildlife Conservation Act*, R.S.O. 1997, c. 41, s. 31(5); *Wildlife Act*, R.S.Nuv. 2003, c. 26, s. 75 [*Nunavut Wildlife Act*].

30 See Hughes & Meyer, *supra* note 15 at 49-51.

31 This support was documented in a 2006 SES Research national survey commissioned by the International Fund for Animal Welfare and the Canadian Federation of Humane Societies (85% of Canadians Want Real Protection for Animals (2006), online: CFHS <http://cfhs.ca/features/cfhs_releases_poll_data_that_shows_canadians_want_effective_animal_cruelty_laws/>).

32 For example, the United Kingdom extended protection to wild mammals in 1996 (*Wild Mammals Protection Act 1996* (U.K.), 1996, c. 3).

33 See, e.g., the litany of problems rendering prosecution difficult under the current law, identified by Hughes & Meyer, *supra* note 15, in particular (at 60-63) the infamously unintelligible “wilful neglect” requirement under s. 446(1).

34 Only a single bill, titled S-203 (2nd Sess., 39th Parl., 2007), was successfully enacted, on 17 April 2008; this amendment increased penalties but did not revise the substantive offences, thereby retaining all the controversial barriers impeding prosecution and conviction. For this reason, Bill S-203 was widely opposed by animal advocacy groups but supported by animal industry representatives. For historical surveys and detailed analyses of these bills and amendments, see: Skibinsky, *supra* note 8; John Sorenson, “Some Strange Things Happening in our Country: Opposing Proposed Changes in Anti-Cruelty Laws in Canada” (2003) 12 *Social & Legal Studies* 377; Charles Hall, *Canadian Animal Anti-Cruelty Legislation* (2006), online: Michigan State University <<http://www.animallaw.info/nonus/articles/ddcanimalcrueltylegislation.htm>>; Canadian Federation of Human Societies, *Federal Legislation: History of the Amendments*, online: CFHS <http://cfhs.ca/law/history_of_the_amendments/>.

C-10B.³⁵ The key problem, as expressed by Senator Serge Joyal, was the Senate's perception that "this bill has been conceived by non-Aboriginal people to deal with how Aboriginal peoples deal with animals".³⁶ This reaction stemmed from two aspects of the proposed amendments: First, the Cruelty to Animals section was to be extracted from property offences (Part XI) and granted its own place (Part V.1) in the *Criminal Code*. Second, explicit references to "domestic" or "kept" animals were to be eliminated.³⁷ These changes were understood by both Houses to collapse the earlier distinction between owned and wild animals, thereby clearly rendering it illegal under proposed s. 182.2(1) to impose "unnecessary pain, suffering, or injury" upon wildlife, or to kill a wild animal "brutally or viciously" or "without lawful excuse".³⁸ According to Senator George Furey, who chaired the Committee examining Bill C-10B, these changes would "[introduce] a revolution into the *Code*", in that Aboriginal peoples would for the first time be exposed to criminal sanction during hunting, trapping and fishing activities.³⁹

The Senate's misgivings appear rooted in the manner by which the courts have interpreted "unnecessary pain, suffering, or injury" under s. 445.1(1)(a). The leading decision, *R. v. Menard*,⁴⁰ established that "unnecessary" suffering is that which is not inevitable given "the means available [to kill an animal] and their accessibility".⁴¹ In other words, where a method exists that is reasonably accessible and not cost-prohibitive, and that reduces suffering to the minimum inevitable level, it will be criminal not to adopt that method.⁴² The debates in the House of Commons evidence an intention to subject Aboriginal hunting, trapping and fishing to precisely this standard: Parliamentary Secretary to the Minister of Justice Paul Macklin stated that "the intent [of the amendments] was to ensure that Aboriginal persons were subject to the law just as

35 Bill C-10B, *supra* note 2. For an account of the procedural history of this bill, see Canadian Federation of Humane Societies, *A Sad Day for Animals* (2003), online: CFHS <http://cfhs.ca/info/a_sad_day_for_animals/>.

36 *Debates of the Senate (Hansard)*, vol. 140, issue 60 (29 May 2003) at 1410 [Senate Debates, 29 May 2003].

37 See in particular Bill C-10B, *supra* note 2, s. 182.2(1)(b)-(d).

38 *Debates of the Senate (Hansard)*, vol. 140, issue 82 (7 October 2003) at 1510 [Senate Debates, 7 October 2003]; Bill C-10B, *ibid.*, s. 182.2(1)(a)-(c).

39 Senate Debates, 7 October 2003, *supra* note 38 at 1510.

40 *Supra* note 24. Canadian courts continue to rely on *Menard* as the most influential interpretation of s. 445.1(1)(a); see, e.g., *Whitehorse (City of) v. Miller*, 2003 YKSC 64 at paras. 13-17; *R. v. McRae* (19 December 2002), O.J. No. 4987 (Ont. S.C.J.) at para. 11; *R. v. L. (D.)* (1999), 242 A.R. 357 (Alta. Prov. Ct.) at paras. 29-30; *R. v. S. (J.)* (2003), Corner Brook 1303Y-00022 (N.L. Prov. Ct.) at paras. 24-26.

41 *Menard*, *supra* note 24 at paras. 51, 53.

42 *Ibid.* at paras. 57-59. This analysis is subject to the legal justification defense under *Criminal Code* s. 429(2), so that behaviour in accordance with regulatory standards—for example, those governing commercial ritual slaughter plants (e.g., *Meat*, O. Reg. 31/05, s. 75(8))—will not be criminal (see Skibinsky, *supra* note 8 at 210).

other Canadians are”.⁴³ Further, should Bill C-10B have passed, Aboriginal persons would be “at risk of prosecution or conviction for ... activities that are [not] humane and cause [more] pain than is necessary”.⁴⁴ In Committee proceedings, Assistant Deputy Justice Minister Richard Mosley made it clear that under such an analysis, the relevant issue would be whether a particular method is objectively necessary, not whether the method is traditional; for example, harpooning a seal *may* be “necessary” during certain months of the year “to prevent it from sinking to the bottom of the sea”, but not simply by virtue of tradition.⁴⁵ According to Mosley, the same objective analysis would “[apply] ... whether the hunter is an Aboriginal with Aboriginal rights or is a non-Aboriginal”.⁴⁶ In a subsequent Committee hearing, Macklin suggested that “adjustments” in traditional practices might be necessitated as available technology evolves.⁴⁷

The Senate appears to have balked at these statements. In particular, Senator Furey worried that “by a simple process of comparison similar to *Me-nard*, traditional practices may indeed come under attack [by being] measured against the latest techniques of killing that exist in the marketplace”.⁴⁸ Inuit Senator Charlie Watt strongly criticized this possibility as equating to “people who live in the south [questioning Aboriginal] methods”, and remarked “there is more than one way of killing animals”.⁴⁹

The Senate reacted vigorously to mitigate this perceived threat: it insisted upon a “special amendment” that would offer “*absolute* protection for Aboriginals to practice their traditional hunting, fishing and gathering *in the ways that they have always done it ... exempted from a charge of cruelty*”.⁵⁰ This immunity would follow the model of the Queensland *Animal Care and Protection Act 2001*, which exempts “an act done, or omission made by ... an Aborigine under Aboriginal Tradition”.⁵¹ The House of Commons rejected this proposal as inconsistent with its desire to implement a single standard across Canada.⁵² The House instead suggested that Aboriginal persons who were prosecuted under the amended provisions could “in any case ... raise the

43 *House of Commons Debates*, vol. 138, no. 113 (6 June 2003) at 1020 [House Debates, 6 June 2003].

44 *Ibid.*

45 Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 37th Parl. 2nd sess., issue 9 (30 April 2003) [Senate Committee Proceedings, 30 April 2003].

46 *Ibid.*

47 Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 37th Parl. 2nd sess., issue 12 (12 June 2003).

48 Senate Debates, 7 October 2003, *supra* note 38 at 1520.

49 *Debates of the Senate (Hansard)*, vol. 140, issue 90 (28 October 2003) at 1630 [Senate Debates, 28 October 2003].

50 Senate Debates, 29 May 2003, *supra* note 36 at 1420 (Senator Tommy Banks, emphasis added).

51 *Animal Care and Protection Act 2001* (Qld.), s. 8(1)(a).

52 House Debates, 6 June 2003, *supra* note 43 at 1020.

claim that the law violates their protected [s. 35 Aboriginal] rights” in an unjustified manner according to the *R. v. Sparrow* framework established by the Supreme Court of Canada.⁵³ Nevertheless, the Senate eventually prevailed: Subsequent iterations of Bill C-10B—including the most recent Bill C-229 which was introduced by Minister of Parliament Mark Holland in 2008⁵⁴ and which was the object of a sustained advocacy campaign⁵⁵—have contained proposed s. 182.6, which provides that “nothing in this Part shall be construed so as to abrogate or derogate from” First Nations’ treaty or Aboriginal rights.⁵⁶ This non-derogation clause suggests that where a protected right to fish, hunt or trap incorporates traditional methods, the *Menard* analysis under proposed *Criminal Code* s. 182.2(1)(a) would be inapplicable. This would effectively always hold for treaty rights, either explicitly—for example, under the *James Bay and Northern Quebec Agreement*, which stipulates that “the right to harvest shall include the use of present *and traditional methods*”, subject only to public safety and conservation limitations⁵⁷—or in consideration of Supreme Court Justice Cory’s statement in *R. v. Badger* that “[limitations] on the method ... of Indian hunting under a treaty” will generally constitute *prima facie*

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- 53 *Ibid.* at 1020-25; *R. v. Sparrow*, [1990] 1 S.C.R. 1075. *Sparrow* established a multifaceted “test” by which Canadian courts determine whether an unjustified infringement of an Aboriginal right has occurred. At the first stage, the plaintiff must demonstrate a *prima facie* infringement; at the second stage, the government must demonstrate a valid objective; at the third stage, the government must demonstrate consistency between the impugned governmental action and the “special trust” relationship between the Crown and Aboriginal peoples.
- 54 Bill C-229, *supra* note 6.
- 55 Large public rallies supporting Bill C-229 were held in multiple Canadian cities in the spring of 2009 and the spring of 2010; see, e.g., *Rally for Bill C229* (2010), online: Windsor/Essex County Humane Society <http://www.windsorhumane.org/index.php?option=com_events&task=view_detail&agid=144&year=2010&month=05&day=30&Itemid=41&catid=29/39/37/35/34>. An online group dedicated to advocating for Bill C-229 now possesses approximately 14,600 members, and claims to enjoy the support of 150,000 Canadians (see *Stop Animal Cruelty in Canada with Effective Legislation*, online: Facebook <<http://www.facebook.com/group.php?gid=2559701041>>).
- 56 Bill C-229, *supra* note 6, s.182.6. The iterations of Bill C-10B prior to Bill C-229 that likewise included proposed s. 182.6 are listed in chronological order as follows: Bill C-50, *An Act to Amend the Criminal Code (Cruelty to Animals)*, 1st Sess., 38th Parl., 2005; Bill C-373, *An Act to Amend the Criminal Code (Cruelty to Animals)*, 1st Sess., 39th Parl., 2006; Bill C-558, *An Act to Amend the Criminal Code (Cruelty to Animals)*, 2nd Sess., 39th Parl., 2008. The only bill reproducing the content of Bill C-10B that did not include proposed s. 182.6 was Bill C-22 (*An Act to Amend the Criminal Code (Cruelty to Animals)*, 3rd Sess., 37th Parl., 2004), introduced directly subsequent to Bill C-10B. No iteration later than Bill C-22 has omitted proposed s. 182.6. Note that Bill S-203, the amendment successfully passed in 2008 (see *supra* note 34) did not include a non-derogation clause, since it did not collapse the current owned/wild distinction (and was, for that reason and others, opposed by animal welfare activists, as explained *supra*, note 34).
- 57 *James Bay and Northern Quebec Agreement*, ss. 24.3.14, 24.2.1 (emphasis added), as given effect by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32. See also Ghislain Otis, *Inuit Subsistence Rights Under the James Bay and Northern Quebec Agreement: A Legal Perspective on Food Security in Nunavik* (2000) at 3, online: Laval University <<http://www.chaireconditionautochtone.fss.ulaval.ca/extranet/doc/120.pdf>>.

infringement.⁵⁸ Ascertaining the import of proposed s. 182.6 would entail a more contextual analysis in respect to Aboriginal rights, since *prima facie* infringement depends on effective interference as defined by *Sparrow*, including whether the traditional method is “the preferred means of exercising [the] right”.⁵⁹ For either treaty or Aboriginal rights, therefore, so long as the “unnecessarily” painful methods (as *Menard* defines that term) are inherent to exercising the right in question, Aboriginal people would not be confined to “kill using the least painful means”, as Senator Furey envisioned.⁶⁰

At first impression, one may sympathize with the Senate’s concerns during the Bill C-10B debates, in contrast to the apparent heavy-handedness of the House of Commons. In light of the Canadian criminal justice system’s widely acknowledged “failure [for] Aboriginal people”,⁶¹ it is also tempting to regard proposed s. 182.6 as a reasonable conciliatory step. Under such an interpretation, the non-derogation clause could be taken to represent an attempt by the government not to further intrude on Aboriginal sovereignty in respect to the regulation of human interaction with wild animals, a previously non-criminalized sphere of particular importance to Aboriginal communities. Indeed, Senator Watt appears to have understood proposed s. 182.6 in this way.⁶² This attempt might be thought to align with recent provincial and territorial initiatives that have transferred administration of wildlife-related activities to Aboriginal communities or referentially incorporated Aboriginal normative standards within state legislation.⁶³ I do not dispute this interpretation insofar as it recognizes that further intrusion upon Aboriginal sovereignty was an important political issue raised by the proposed *Criminal Code* amendments, and insofar as it recognizes that the inclusion of a non-derogation clause was *intended* by the Senate to rectify that problem. I shall argue, however, that the potential application of a non-derogation clause to Aboriginal communities would not only be legally intractable but would exacerbate state interference instead of alleviating it, and therefore that proposed s. 182.6 is no solution at all to this problem.⁶⁴

In addition, irrespective of the non-derogation clause’s political motivation and therefore without contradicting the preceding interpretation,⁶⁵

58 *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 90; see also Passelact-Ross, *supra* note 29 at 25-26.

59 *Sparrow*, *supra* note 53 at para. 70.

60 Senate Debates, 7 October 2003, *supra* note 38 at 1510.

61 Borrows & Rotman, *supra* note 1 at 987.

62 See Senate Debates, 28 October 2003, *supra* note 49 at 1630, where Senator Watt argues that “Aboriginal peoples have been hunting animals for many years, and we have been successful in maintaining a certain level of harvest and managing wildlife. Perhaps those people who live in the south should question their methods of killing animals rather than questioning ours”.

63 See, e.g., *infra* notes 165-175 and accompanying text.

64 See text accompanying *infra* note 187.

65 For clarification, my point here is that one may believe both that s. 182.6 responded to the problem of state intrusion and that s. 182.6 holds ideological implications, or either of these

the Senate's insistence on proposed s. 182.6 introduced a second problem through its attempt to solve the first. Specifically, the internal logic of the non-derogation clause suggests inferences that would be ideologically dangerous if concretized into Canadian law. It is plausible—and, I think, probable—that many in the Canadian public would interpret the language of the clause⁶⁶ to imply that the legislature envisages a potential for substantive conflict between the demands of the proposed criminal prohibitions and the exercise of Aboriginal rights. To elaborate, the dangerous inference is that Aboriginal cultural practices *inherently* entail cruelty to animals, and that Aboriginal hunting, fishing and trapping would by definition constitute criminal behaviour absent an exemption—i.e., that traditional practices *are* “unnecessarily” painful and that “adjustments” *would* be inconsistent with Aboriginal cultures. Assistant Deputy Justice Minister Mosley appears to have recognized this problem during Committee hearings, in arguing that s. 182.6 effectively translates to “[passing] an act that says that Aboriginal persons are entitled to be cruel”.⁶⁷ Such an interpretation is further encouraged by the prominence and uniqueness⁶⁸ of s. 182.6, which could be taken to suggest that political deference is especially necessary in this context because of a high potential for substantive conflict between Aboriginal activities and the amended cruelty prohibitions.⁶⁹ Indeed, based on the evidence from the legislative debates reviewed earlier, the non-derogation clause was at least partly inspired by a belief held by multiple senators that such conflict was likely. For the preceding reasons, the provision does little to address Innu Senator Aurélien Gill's concern that Bill C-10B would “add problems” for Aboriginal communities by giving the broader Canadian public an additional reason to “continue to [view] Aboriginal people as outlaws”.⁷⁰ The ideological inferences suggested by the language of s. 182.6 risk promoting exactly the latter viewpoint.

Section VI of this article outlines a different solution to the problem of state intrusion that would both more effectively rectify that problem *and* would avoid the dangerous ideological implications of the non-derogation

propositions singularly, without contradiction. However, the two interpretations could also be understood as mutually supportive; see text accompanying *infra* note 69.

66 See *supra* note 56 and accompanying text.

67 Senate Committee Proceedings, 30 April 2003, *supra* note 45.

68 During the Bill C-10B Committee hearings, the Department of Justice emphasized that such an exemption currently exists nowhere in the *Criminal Code*, and would therefore be unprecedented (Senate Committee Proceedings, 30 April 2003, *ibid.*).

69 Another plausible reason why one might regard political deference as especially necessary in this context, as mentioned earlier, is the particular importance of hunting, trapping and fishing activities to Aboriginal peoples. I do not dispute this reasoning but I do not think it wholly accounts for the evidence from the legislative debates reviewed in this section; see, e.g., *supra* notes 47-50 (documenting that several participants in the debates were motivated by their belief in a potential for the type of substantive conflict suggested above) and accompanying text.

70 Senate Debates, 28 October 2003, *supra* note 49 at 1620.

clause.⁷¹ To lay the groundwork for this argument, however, and to substantiate its critique of the non-derogation clause approach, we must first explore a fundamental question raised by the preceding discussion: would using “the least painful means” truly be irreconcilable with “Aboriginal perspective[s] ... on the meaning of the rights at stake”, or the “preferred means of exercising the right[s]”?⁷² As argued below, the answer to this question will generally lie in the negative, *if* Aboriginal relations with animals are engaged at the level of their ontological and normative fabric. This requires moving beyond a currently pervasive “practice”-centric perspective that systematically mischaracterizes Aboriginal peoples’ relationships with wildlife. The following section examines that perspective.

III Western Ontology, Epistemology and “Practice” Centricity in Canadian Aboriginal Rights Jurisprudence

Colin Scott warns against “[reducing] the sharing of knowledge ... to a skimming-off ... of indigenous empirical insights, and their mere insertion into existing Western paradigms”, lest we enter “an impoverished and failed exchange that would ultimately [undermine] indigenous [cultures]”.⁷³ This pattern, unfortunately, seems endemic in the wildlife context. Anthropologist Paul Nadasdy, in particular, has repeatedly illuminated how Western ontological and epistemic biases operate as twin filters that distill Aboriginal relations with wildlife from their cultural fabric, resulting in distorted and patronizing translations.⁷⁴ Ontology refers to the conceptual nature and relational classification of objects and beings. Accordingly, the Western ontological filter reflects how Western cultures conceive of the being of wild animals and categorize them in relation to human beings. This filter holds that wild animals (as opposed to, for example, companion animals)⁷⁵ are Cartesian

71 See text accompanying *infra* notes 189-93.

72 *Sparrow*, *supra* note 53 at para. 69.

73 Colin Scott, “Science for the West, Myth for the Rest?: The Case of James Bay Cree Knowledge Construction” in Laura Nader, ed., *Naked Science: Anthropological Inquiry into Boundaries, Power, and Knowledge* (New York: Routledge, 1996) 69 at 71. See also Maneesha Deckha, “Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals” (2007) 2 *J. Animal L. & Ethics* 189 at 220-21.

74 Paul Nadasdy, “The Politics of TEK: Power and the Integration of Knowledge” (1999) 36 *Arctic Anthropology* 1 [Nadasdy, “The Politics of TEK”]; Paul Nadasdy, “The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice” (2005) 47 *Anthropologica* 215 [Nadasdy, “The Anti-Politics of TEK”]; Paul Nadasdy, “The Gift in the Animal: The Ontology of Hunting and Human-Animal Sociality” (2007) 34 *American Ethnologist* 25 [Nadasdy, “The Gift in the Animal”]; Paul Nadasdy, “Wildlife as Renewable Resource: Competing Conceptions of Wildlife, Time, and Management in the Yukon” in Elizabeth Emma Ferry & Mandana E. Limbert, eds., *Timely Assets: The Politics of Resources and their Temporalities* (Santa Fe, NM: School of Advanced Research, 2008) 75 [Nadasdy, “Wildlife as Renewable Resource”].

75 Nadasdy, “The Anti-Politics of TEK”, *supra* note 74 at 227.

“natural resources” lacking agency, to be “managed” as “raw material for the biological and/or mental lives of humans”.⁷⁶ Scott employs similar terms, as does David Smith.⁷⁷ This characterization appears supported by the work of several sociologists. For example, Stephen Kellert’s statistical analysis finds “the dominant perspective in the United States” to be “the subordination of [wild] animals for the practical benefit of people”, and the public’s interest in a given species to depend upon the latter’s aesthetic merit.⁷⁸ Similarly, Adrian Franklin assesses the conflict between hunters and opponents to hunting (excepting animal rights activists) as “less an ethical issue than a competition for . . . consumption and control over wildlife”.⁷⁹ Epistemology refers to the nature of knowledge and the means of its acquisition. Accordingly, the Western epistemic filter reflects how Western cultures conceive of knowledge about animals and how such knowledge can be acquired. This filter holds that since animals are “resources” more akin to objects than to persons, knowledge about them must be objective and empirical—“quantitative, analytical, reductionist and literate”.⁸⁰

Nadasdy’s field work chronicles the distillation process that unfolded within the Ruby Range Sheep Steering Committee, a co-management institution involving the Kluane First Nation and the Yukon Fish and Wildlife Management Board. In accordance with the aforementioned epistemic filter, a rather farcical process of “traditional knowledge acquisition” involved government scientists and resource managers meeting with Kluane hunters and elders, in order to question the latter about “the state of the resource”—numbers of sheep they sighted, as well as the dates and locations of those sightings.⁸¹ The scientists then applied this “traditional knowledge” to infer numerical properties of “the resource” (e.g., average production of offspring)

76 Nadasdy, “The Gift in the Animal”, *supra* note 74 at 26, 29-30; Nadasdy, “The Politics of TEK”, *supra* note 74 at 10; Nadasdy, “Wildlife as Renewable Resource”, *supra* note 74 at 75-77. This perspective may seem at odds with the popular welfarist sentiments motivating the *Criminal Code* amendments, but at root it is not: Since cruelty is permissible where “necessary” to an accepted human pursuit, no matter whether the latter is itself justified as necessary rather than merely conventional, animals may coherently be subjugated and managed though treated “humanely”. Likewise, pain may be construed as a physical phenomenon to be avoided, but nevertheless detached from the possibility of an animal’s social agency. See Skibinsky, *supra* note 8 at 205-206.

77 Scott, *supra* note 73 at 72; David M. Smith, “An Athapaskan Way of Knowing: Chipewyan Ontology” (1998) 25 *American Ethnologist* 412 at 416.

78 Stephen R. Kellert, “Attitudes, Knowledge and Behaviour Toward Wildlife Among the Industrial Superpowers” in Aubrey Manning & James Serpell, eds., *Animals and Human Society* (London: Routledge, 1994) 166 at 179.

79 Adrian Franklin, *Animals and Modern Cultures: A Sociology of Human-Animal Relations in Modernity* (London: Sage, 1999) at 124.

80 Nadasdy, “The Politics of TEK”, *supra* note 74 at 2.

81 *Ibid.* at 7, 10.

and to formulate an optimal exploitation strategy.⁸² In accordance with the ontological filter, the government representatives “[were] not interested in ... the stories, values, and social relations” embedded in the Kluane understanding of sheep as “sentient members of the social, moral, meaning-filled universe”.⁸³ Kluane representatives thus “got nowhere” when they expressed concern that the proposed “full curl rule”—allowing an unlimited number of mature rams (which coincidentally happened to be the “trophies” prized by big-game outfitters whom the government managers had also been consulting)⁸⁴ to be killed—would strip the community of its teachers and prevent younger rams from learning proper behaviour.⁸⁵ Nadasdy explains that this argument was unquantifiable, and depended upon a social understanding of sheep that government biologists were unable to empirically verify within “the existing scientific literature”.⁸⁶ Perhaps more fundamentally though, as Scott argues, “so embedded are the Cartesian myths ... that we tend to privilege models of physical causality, rather than relations of consciousness or significance, in our perception even of sentient nature”.⁸⁷ Perhaps then, it was difficult for the government biologists to fully comprehend the Kluane representatives’ argument, because it relied on an ontological schema that the biologists did not share and could not appreciate. This dispute left the Kluane community frustrated with the Cartesian view—“biologists think animals are stupid”—an approach they regard as disrespectful to sheep themselves.⁸⁸

Nadasdy’s account, while apparently the most thoroughly documented, is by no means unique. Anthony Gulig, for instance, observes that the Wisconsin Department of Natural Resources, charged with regulating the Chippewas’ hunting, trapping and fishing throughout most of the twentieth century, attributed “little importance” to the latter’s traditional knowledge, preferring to “[draw] their conclusions from empirical evidence [and] scientific management” which they felt was “more accurate”.⁸⁹ Scott, more generally, asserts that “the historical disqualification and subjugation of indigenous knowledge is intimately linked to Western culture’s domination of nature”.⁹⁰

The Canadian jurisprudential formulation of animal-related Aboriginal rights bears a striking resemblance to the distillation process identified by Nadasdy. In accordance with the Western epistemic filter, an Aboriginal right

82 *Ibid.* at 8.

83 *Ibid.* at 7.

84 Nadasdy, “The Anti-Politics of TEK”, *supra* note 74 at 221.

85 *Ibid.* at 226.

86 *Ibid.*

87 Scott, *supra* note 73 at 72.

88 Nadasdy, “The Politics of TEK”, *supra* note 74 at 8.

89 Anthony G. Gulig, “Whales, Walleyes, and Moose: Recent Case Studies in a Comparison of Indian Law in the United States and Canada” (2005) 16 *Native Studies Review* 91 at 102.

90 Scott, *supra* note 73 at 85.

is characterized as a claim to exercise a particular animal-related “activity”, which may be empirically ascertained to be a distinctive “feature” of a pre-contact society.⁹¹ Impliedly, culture is restrictively constituted by a set of externally observable “practices”, as Patrick Macklem has pointed out.⁹² Thus, in the seminal Supreme Court decision *R. v. Van Der Peet*, the activity of “[exchanging] fish for money or other goods” could be culturally relevant only to the extent that its frequency in the pre-contact era was quantifiable as “widespread”.⁹³ Although the court claims to “take into account the Aboriginal perspective”,⁹⁴ its analytic process clearly adopts a fully external perspective—that of a detached observer from another culture, who measures the scale and frequency of fish exchange, just as Nadasdy’s biologists measure the numbers and locations of sheep sightings. As Nadasdy writes, this distillation of cultural knowledge into *quantifiable* data “tends to remove those *qualitative* aspects” which “make [a practice] meaningful”,⁹⁵ necessarily preventing the court from taking the hermeneutic perspective it claims. Likewise, the Supreme Court’s external vantage point limits it to noting in *Sparrow* that fishing is “connected to” Musqueam culture *in some way*⁹⁶, and fulfills *some* type of “ceremonial purpose”,⁹⁷ but is unable to assess whether that connection might embrace commerce (absent evidence of “a [past] commercial fishery”).⁹⁸ Accordingly, the only way the court can conceive of assessing infringement is empirical—“whether the fish catch has been reduced below that needed” for ceremonies, or whether “undue time and money per fish caught” is imposed.⁹⁹ The court cannot assess infringement by reference to Musqueam culture, because the latter has been distilled away as a result of the court’s epistemic vantage point.

Sparrow also demonstrates the operation of Nadasdy’s ontological filter. The court quickly moves past a scant two sentences referencing the Musqueam social ontology of salmon and humans bonded in a reciprocal relationship, then distills this relationship to the activity of “*taking*”—directly opposed to the Musqueam understanding of *being given*—salmon for food, social and unspecified “ceremonial purposes”.¹⁰⁰ The court then repeatedly characterizes Musqueam interaction with salmon as participation in an

91 *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 at paras. 46, 59.

92 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 52-53.

93 *Van Der Peet*, *supra* note 91 at para. 88.

94 *Ibid.* at para. 49.

95 Nadasdy, “The Politics of TEK”, *supra* note 74 at 9 (emphasis added).

96 *Sparrow*, *supra* note 53 at para. 40.

97 *Ibid.* at para. 45.

98 *Ibid.* at para. 43.

99 *Ibid.* at para. 70.

100 *Ibid.* at paras. 29, 40.

“economically valuable” “natural resource”,¹⁰¹ “recognizes” the desires of “numerous interveners representing commercial fishing interests” (perhaps reminiscently of Nadasdy’s government managers’ consultations with game outfitters), and plays resource manager in rather conveniently limiting the Musqueam people’s entitlement to encompass only the number of salmon required for non-commercial “purposes”.¹⁰² This “resource management” mindset is not unique to *Sparrow*; it is also displayed in *R. v. Marshall*, another important Supreme Court decision, where the court again characterizes fish as “the natural resources”, and again appoints itself manager in rather dubiously interpreting a Mi’kmaq trading treaty as “not [encompassing] the accumulation of wealth”, in an apparent attempt to assuage the Crown’s “ultimate fear” that Aboriginal fishers might compete with “commercial or recreational fishermen”.¹⁰³ The commodified understanding of wildlife displayed in these decisions is remarkably paradigmatic of Nadasdy’s Cartesian ontology of human-wildlife interaction, belying the Supreme Court’s claim to “take into account” Aboriginal perspectives.

IV The Failure of Practice Centricity in the Animal Welfare Context

Let us now consider the hypothetical scenario of a Canadian court tasked with adjudicating a criminal trial pursuant to proposed *Criminal Code* s. 182.2(1) (a), as formulated in Bill C-10B and its subsequent iterations, where the accused defends herself by claiming to exercise an animal-related s. 35 Aboriginal right via an allegedly protected “traditional” method of hunting, fishing or trapping. The court would need to ascertain whether a finding of unnecessary cruelty under the *Menard* analysis would trigger the proposed non-derogation clause, s. 182.6—that is, whether proscribing the “traditional” method would “abrogate or derogate” from the Aboriginal right in question, or conversely, whether the right could equivalently be exercised by a less “cruel” method without effective interference. This section will demonstrate that the practice-centric formulation of Aboriginal rights is not equipped to address this question, and therefore that the non-derogation clause approach inspired by the Bill C-10B debates would be legally intractable in the face of Aboriginal rights jurisprudence as it has developed in Canada.

Although the Supreme Court in *Van Der Peet* stated that a past practice *may* evolve to be carried out in modern form (i.e., the activity is not necessarily “frozen” in its pre-contact iteration),¹⁰⁴ the court did not provide any

101 The court employs this terminology no fewer than twenty-six times throughout the (rather short) decision.

102 See *Sparrow*, *supra* note 53 at para. 43.

103 [1999] 3 S.C.R. 456 at paras. 57-61.

104 *Van Der Peet*, *supra* note 91 at para. 54.

framework to identify when a *state-imposed* evolution would be inconsistent with the right itself (assuming that the evolved form does not negatively impact *Sparrow*'s empirical criteria such as the number of animals available, and the cost and time per animal). While *Sparrow* established that an Aboriginal person's "preferred means of exercising the right" must be considered,¹⁰⁵ this merely begs the question: what methods fall within the perimeter of the right, considering that its exercise is to be "in keeping with the culture" of the Aboriginal group?¹⁰⁶ The Supreme Court's current approach precludes such an analysis, because it distills away the information required: The external observations of pre-contact "practices" passed through the epistemic filter are ambiguous, because the question of whether a society used a particular method to hunt in the past does not in any way illuminate whether (and if so, how) that method was inherently meaningful to participants within the culture. As Dominique Thiriet argues in the Australian context, it may well be that "the method ... has no particular cultural significance and is not immutable".¹⁰⁷ In that case, "switching to more humane methods ... will not detract from tradition".¹⁰⁸

To remedy this ambiguity, Thiriet proposes that courts inquire into whether the *purpose* or *method* of a practice holds cultural significance.¹⁰⁹ If the former, an Aboriginal right need not be interpreted as related to any particular form of the practice, since that would "[go] beyond what is necessary for giving [the right] effect".¹¹⁰ Thiriet argues that this is generally the case for Australian Aboriginal cultures.¹¹¹ It also seems demonstrable with respect to several Canadian Aboriginal peoples. The Mistassini, for instance, place importance upon peripheral items rather than weapons, and thus attach traditional beaded charms to modern rifles.¹¹² Likewise, Inuit whaling "has always been adaptive"; although the Inuit originally used skin-covered boats with stone and bone weapons, Inuit whalers now employ radios, snowmobiles,

105 *Sparrow*, *supra* note 53 at para. 69.

106 *Ibid.* at para. 68. This point may appear irrelevant at the moment, since one might presume a traditional method to always be in keeping with the culture of the Aboriginal group; however, as will become clear below, "unnecessarily cruel" methods which may be "traditional" in the *empirical* sense, may paradoxically not accord with the culture in a *normative* sense. Thus, the question of what methods actually constitute 'exercising the right' remains relevant in assessing whether a particular person's "preferred method" truly conforms to the right in question.

107 Dominique Thiriet, "Traditional Hunting: Cultural Rights v. Animal Welfare" (2006) 31 *Alt. L. J.* 63 at 63 [Thiriet, "Traditional Hunting"].

108 Dominique Thiriet, "Tradition and Change: Avenues for Improving Animal Welfare in Indigenous Hunting" (2004) 11 *JCULR* 159 at 171 [Thiriet, "Tradition and Change"].

109 *Ibid.* at 171-73.

110 Thiriet, "Traditional Hunting", *supra* note 107 at 63.

111 Thiriet, "Tradition and Change", *supra* note 108 at 168-70.

112 Adrian Tanner, *Bringing Home Animals: Religious Ideology and the Mode of Production of the Mistassini Cree Hunters* (London: Hurst, 1979) at 140-41.

radio-equipped floats and state-of-the-art explosive charges.¹¹³ Other whaling peoples have similarly adapted.¹¹⁴

While Thiriet's approach moves beyond *Van Der Peet* in considering the perspective of cultural participants to a limited extent, it still does not take the hermeneutic viewpoint far enough. Thiriet asks only *if* a method is culturally significant, not *how* it is significant in relation to its surrounding cultural and normative fabric. Her approach therefore remains necessarily tied to *Sparrow's* limitation in inferring methods are only *somehow* "connected to" culture. Consequently, Thiriet's analysis can at most conclude that animal welfare developments would be "unimportant" to the Aboriginal culture in question—in her conception, a method is either culturally significant and non-malleable or culturally insignificant and indifferently malleable.¹¹⁵ Thiriet's dichotomy overlooks the possibility that methods may be simultaneously culturally significant and malleable. Most importantly, evolving methods may be *internally required* by the culture's normative order. In particular, if the culture contains a legal norm dictating that hunters minimize animals' suffering, a "modern" hunting method may in fact be *more* consistent with tradition than a "traditional" method (to the extent that the former inflicts less pain upon an animal).¹¹⁶

The next section will demonstrate that such evolutions in method are internally required by the legal orders of numerous Canadian Aboriginal cultures. Recognizing this possibility requires asking *how*, not just *if* methods are relevant. In order to properly engage an Aboriginal legal order in this way, however, the culture's social ontology of animal-human interaction must also be engaged, since any legal order is intimately related with its culture's conception of possible actors and relationships.¹¹⁷ More precisely, if suffering is to be minimized because obligations are owed *to animals* (rather than, for example, their owners), then animals must be conceptualized as social ac-

113 Milton M.R. Freeman, *Inuit, Whaling and Sustainability* (Walnut Creek, CA: AltaMira, 1998) at 26.

114 Randall R. Reeves, "The Origins and Character of Aboriginal Subsistence Whaling: A Global Review" (2002) 32 *Mammal Rev.* 71 at 98.

115 Thiriet, "Tradition and Change", *supra* note 108 at 171.

116 This insight reveals the fallacy in the frequent and stigmatizing argument that "modern" hunting methods reveal an inconsistency between Aboriginal peoples' current practices and their "traditional" cultures; see George Wenzel, *Animal Rights, Human Rights: Ecology, Economy and Ideology in the Canadian Arctic* (Toronto: University of Toronto, 1991) at 163-65; see also Deckha, *supra* note 73 at 217.

117 In other words, law presumes that the social world operates in a certain way—"in order to describe how the world *should* be, norms must describe how things *can* be" (Joost Breuker, "Managing Legal Domains: In Search of a Core Ontology for Law" (Paper presented to the International Conference on Knowledge Capture, Sanibel Island, Florida, 25 October 2003) at 12, online: <<ftp://ftp-sop.inria.fr/acacia/proceedings/2003/kcap-kmsw/kcap2003-kmsw-Breuker.pdf>>).

tors capable of legal subjectivity, which they are not in Western legal systems (where they are instead conceived of as objects of property).¹¹⁸

To answer the imperative question posed by the proposed s. 182.6, therefore, a court would have to robustly “take into account the Aboriginal perspective”, rather than filtering externally observed “practices” through the lens of the mainstream legal culture’s ontological schema. Without taking the former approach, the non-derogation clause would be legally intractable. Predicating a jurisprudential analysis upon Aboriginal ontology would, moreover, appear the only way for courts to move beyond discussions of “ceremonial purpose” that are at root misconceived. As the following section will demonstrate, Aboriginal cultures do not typically kill animals *for the purpose* of undertaking a ritual; rather, the ritual is an *inherent part* of killing the animal, necessitated by obligations owed to the animal (or to its species as a whole), which are themselves components of a wider pattern of reciprocal animal-human relations only conceivable according to the culture’s social ontology. This realization does not, however, imply that Canadian courts could or should engage in a radically reformulated Aboriginal rights analysis, predicated on a neo-imperialist assumption that monomorphic Aboriginal ontology and legal orders could be adduced and authenticated like any other evidence.¹¹⁹ Such an approach does not seem either pragmatically promising or politically justifiable. The next section instead undertakes a thought experiment—not a doctrinal prescription—exploring what a court might discover if it seriously examined “the Aboriginal perspective” with respect to animal-related Aboriginal rights. The outcome of this experiment leads to a rather different solution to the Bill C-10B impasse, which will be proposed in section VI.

118 Of course, Western legal systems do prohibit unnecessary suffering, as discussed earlier, but at least in respect to the current formulation of Canadian law, it is arguable that such obligations are owed to the owners of animals (considering, in particular, that animal cruelty is currently understood to be a property offence), and not to the animals themselves, as the latter do not possess legal personhood and thus cannot be creditors of obligations. Admittedly, this probably represents a logical incoherency in legal systems where animals are construed as property.

119 See Deckha, *supra* note 73 at 216-19, discussing the errors in such an approach. This is not to claim that Aboriginal legal orders cannot be described from outside, or that no understanding of an Aboriginal legal order can be preferable to another. As Jeremy Webber argues, legal cultures can be investigated without assuming they exist in stasis. To do so, one would “[portray] the range of contending arguments; the normative resources on which those arguments can build; the relationship between those arguments on the one hand, and practices, interests, patterns of historical experience and individuals’ identifications on the other; [and] the extant mechanisms for resolving social disagreement . . .” (Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 *Osgoode Hall L.J.* 167 at 192). Nevertheless, this more open-ended process does not appear easily compatible with the evidentiary requirements of Aboriginal rights jurisprudence as it currently exists.

V Dissolving the Conflict: What Emerges by “Taking the Aboriginal Perspective”?

Although over-generalization should be avoided in discussing Aboriginal social ontologies and normative systems,¹²⁰ certain commonalities can be identified among “northern hunting peoples”, and, according to Bird-David, among hunter-gatherer peoples more generally.¹²¹ First and foundationally, these peoples’ understandings of the social world are structured around conceptions of animal personhood. Animal personhood is an exceedingly difficult and multifaceted concept to define, mirroring the complexity of personhood itself.¹²² In the social-ontological sense that is most important for the purposes of this section, it refers to the idea that animals are active individuals capable of intentional social interaction that can be understood via the same basic relational concepts used to conceptualize human social interaction—such as reciprocal exchange, as we shall see—and are in this sense different from (or more technically, members of a different ontological category from) passive objects that react mechanistically to physical forces.¹²³ In simpler terms, Gary Francione writes that “the moral universe is limited to only two kinds of beings: persons and things”; animal personhood entails moving animals from the “thing” category to the “person” category.¹²⁴ The term “animal personhood” is also sometimes employed in a secondary sense when referring to legal orders that treat animals as legal persons, as the Aboriginal legal orders surveyed later in this section do, in that animals are conceived of as creditors of legal obligations owed by humans rather than as passive objects of legal obligations owed between humans (e.g., as objects of property relations within Western state legal orders). As will become evident below, this second, legal conception of animal personhood is dependent on the primary social-ontological sense insofar as social relations between ontological persons generate the structure within which legal obligations arise.

Canadian Aboriginal worldviews are built on notions of animal personhood in the primary, social-ontological sense because they typically include animals as members of the same general ontological category as humans,

120 David H. Bennett, for instance, points out that “to pursue the idea of the ... Aboriginal view ... is to pursue a phantom” (“Animal Rights and Aboriginal Concepts” in David B. Croft, ed., *Australian People and Animals in Today’s Dreamtime: The Role of Comparative Psychology in the Management of Natural Resources* (New York: Praeger, 1991) 53 at 62).

121 Nadasdy, “The Gift in the Animal”, *supra* note 74 at 25; Nurit Bird-David, “The Giving Environment: Another Perspective on the Economic System of Gatherer-Hunters” (1990) 31 *Current Anthropology* 189 at 194.

122 See “What We Talk About When We Talk About Persons: The Language of a Legal Fiction” (2001) 114 *Harv. L. Rev.* 1745.

123 See Elisa Aaltola, “Personhood and Animals” (2008) 30 *Environmental Ethics* 175.

124 Gary Francione, “Animals—Property or Persons?” in *Animals as Persons: Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008) 25 at 61.

insofar as they consider animals to be conscious, sentient beings who possess volition, plan and deliberate, interact socially and communicate with each other and with humans. The Rock Cree, for instance, believe that animals possess *ahcak*, “the seat of identity, perception and intelligence”, just as humans do.¹²⁵ The Waswanipi perceive that animal persons “act intelligently, and have wills and idiosyncrasies, and understand and are understood by men”.¹²⁶ The Makah, Inuit and Inupiat conceive of whales as volitional beings, more intelligent and powerful than humans.¹²⁷ The James Bay Cree word for person, *iyiyuu*, applies equally to humans and animals.¹²⁸ The Gitxaala, likewise, conceive of no distinction between humans and animals; both are considered “social beings”.¹²⁹ The Ojibwa ontology also includes a “person” class for which “neither animal nor human characteristics define categorical differences in the core of being”.¹³⁰ The Chipewyan believe that animals are persons inherently possessing *inkonze*—“power and knowledge”—that they teach to humans.¹³¹ The Mistassini envision human-animal relations as “[exchanges] between persons [at an] equivalent level”.¹³²

Nadasdy emphasizes that such conceptions are not “purely symbolic or metaphorical”, but literal—for the Kluane, animals are not “like” people, “[they] *are* people”.¹³³ Moreover, as both Nadasdy and Scott review, recent science suggests Aboriginal conceptions are *more accurate* than the Western ontological conception of animals discussed in section III, in that the former reflect more sophisticated knowledge about social behaviour, learning and communication.¹³⁴ This should not be surprising; as Sharp reminds us, “[for] thousands of years ... the [Chipewyan people] have thought long and deeply about animals ... with a passion to understand them”.¹³⁵

That animals are personified in all these cultures’ ontologies is no coincidence; it intimately relates to what Bird-David hypothesizes is “a theme that is

125 Robert Brightman, *Grateful Prey: Rock Cree Human-Animal Relationships* (Berkeley: University of California Press, 1993) at 118.

126 Harvey A. Feit, “The Ethno-Ecology of the Waswanipi Cree” in Bruce Cox, ed., *Cultural Ecology* (Toronto: McClelland and Stewart, 1973) 115 at 116.

127 Robert J. Miller, “Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling” (2001) 25 *Am. Indian L. Rev.* 165 at 237-38.

128 Scott, *supra* note 73 at 72.

129 Charles R. Menzies & Caroline F. Butler, “Returning to Selective Fishing Through Indigenous Knowledge” (2007) 31 *American Indian Quarterly* 441 at 461.

130 A. Irving Hallowell, “Ojibwa Ontology, Behavior, and World View” in Stanley Diamond, ed., *Culture in History: Essays in Honor of Paul Radin* (New York: Columbia University Press, 1960) 19 at 35.

131 Henry S. Sharp, *Loon: Memory, Meaning, and Reality in a Northern Dene Community* (Lincoln: University of Nebraska Press, 2001) at 66, 73; Smith, *supra* note 77 at 413.

132 Tanner, *supra* note 112 at 153.

133 Nadasdy, “The Gift in the Animal”, *supra* note 74 at 31.

134 *Ibid.* at 31-33; Scott, *supra* note 73 at 76-77.

135 Sharp, *supra* note 131 at 66.

characteristic of gatherer-hunters in general ... a common view of the environment as giving”, according to which animals “give themselves to hunters ... [in a] long-term relationship of reciprocal exchange”.¹³⁶ This characterization accords with every culture mentioned above.¹³⁷ As Nadasdy explains, reciprocity necessitates personhood, since giving entails intentionality and therefore “is a social act that can occur only among persons”.¹³⁸ Social reciprocity entails another important corollary: since gifts are non-mandatory, animals may refuse to sacrifice themselves, and in fact “consciously regulate hunters’ access to them”.¹³⁹ The Chipewyan believe, for instance, that the mechanics of shooting a rifle are irrelevant—“the willingness of an animal/person to allow itself to die for a hunter is the relevant issue”, and hunters are otherwise powerless to kill.¹⁴⁰ In all these cultures, animals thus possess direct power over human survival, and relations with wildlife are subject to a *grundnorm* of “respect born of necessity”,¹⁴¹ since animals facilitate human life *only* “in return for appropriate conduct”.¹⁴² Humans therefore “incur specific and direct obligations to [animals]” at every stage of the relationship,¹⁴³ and in fact, “the same standards which apply to mutual obligations between human beings are implied”¹⁴⁴—the Rock Cree, for instance, say “you got to give [an animal] the same respect you give yourself”.¹⁴⁵ This entails, firstly, seeking an animal’s permission to kill it: the Mistassini must spiritually and verbally convince the bear to offer itself,¹⁴⁶ the Rock Cree must sing,¹⁴⁷ and the Makah must prepare for months to “flatter and cajole the whale”.¹⁴⁸ Anthropologists describe modern instances where Aboriginal hunters do not even attempt to kill an animal because they feel the latter has not adequately submitted.¹⁴⁹ After the kill, several cultures expressly denote the animal an “honoured guest” of

136 Bird-David, *supra* note 121 at 194; Nadasdy, “The Gift in the Animal”, *supra* note 74 at 25.

137 See Scott, *supra* note 73 at 81-84; Tanner, *supra* note 112 at 136; Menzies & Butler, *supra* note 129 at 461; Feit, *supra* note 126 at 116; Hallowell, *supra* note 130 at 45-46; Smith, *supra* note 77 at 412-13; Miller, *supra* note 127 at 237-38; Brightman, *supra* note 125 at 187; Nadasdy, “The Gift in the Animal”, *supra* note 74 at 27.

138 Nadasdy, “The Gift in the Animal”, *supra* note 74 at 29.

139 Brightman, *supra* note 125 at 103.

140 Sharp, *supra* note 131 at 92-93; see also Nadasdy, “Wildlife as Renewable Resource”, *supra* note 74 at 78-79.

141 Brightman, *supra* note 125 at 103.

142 Bird-David, *supra* note 121 at 190.

143 Nadasdy, “The Gift in the Animal”, *supra* note 74 at 30.

144 Hallowell, *supra* note 130 at 46.

145 Brightman, *supra* note 125 at 110.

146 Tanner, *supra* note 112 at 146.

147 Brightman, *supra* note 125 at 104-105.

148 Miller, *supra* note 127 at 185-86.

149 See, e.g., Smith, *supra* note 77 at 415; Hallowell, *supra* note 130 at 36; Nadasdy, “The Gift in the Animal”, *supra* note 74 at 35.

the community,¹⁵⁰ and all follow a complex of rules in retrieving, butchering, consuming, utilizing and honouring the animal.¹⁵¹

Most crucial for present purposes, however, are the laws to be observed during the kill itself. An essential implication of the respect *grundnorm* is the need to minimize pain to the animal. Thus, “it is expected that [the Waswanipi] kill animals swiftly, and avoid causing them undue suffering”,¹⁵² that the James Bay Cree “strive for impeccable technique . . . to avoid undue suffering or disturbance”,¹⁵³ that the Ojibwa “[avoid] unnecessary acts of cruelty”,¹⁵⁴ that a Chipewyan hunter avoid “abuse . . . [in] the manner in which a caribou is killed”,¹⁵⁵ that a Chipewyan trapper “minimize suffering as much as possible”,¹⁵⁶ and that the Rock Cree kill as quickly as possible without unnecessary pain.¹⁵⁷ The stringent observation of these laws is literally necessary to survival: A Chipewyan who inflicts excess suffering “can expect very poor success [since] the animal people will simply shun him, and he will receive no visitations from animal helpers in dreams”.¹⁵⁸ A James Bay Cree animal abuser can likewise expect “poverty or death”,¹⁵⁹ and a cruel Inuit will see “[the] action come back on [himself or herself] in the form of illness or sickness in [his or her] children or the people [he or she] love[s]”.¹⁶⁰ A cruel Ojibwa will offend animals and thus be denied their cooperation in attaining *pimadaziwin*, “the central goal of life” in “longevity, health and freedom from misfortune”.¹⁶¹ Rather understandably, Brightman observed the Rock Cree “express guilt about particular productive episodes” where excess pain was accidentally inflicted, declare the meat inedible as “[suffering] goes into the body and makes the meat bad”, and worry about the incidents’ negative implications for future trapping endeavours.¹⁶² While these Aboriginal cultures differ in respect to the precise nature and mechanism of the consequences flowing from norm violation, the latter should be understood as reflecting shared ontological postulates; more specifically, a common understanding of an ongoing social relationship between animal and human groups, whose

150 Scott, *supra* note 73 at 82; Miller, *supra* note 127 at 238; Brightman, *supra* note 125 at 187.

151 See, e.g., Brightman, *supra* note 125 at 112-20; Tanner, *supra* note 112 at 153-81; Miller, *supra* note 127 at 180-84.

152 Feit, *supra* note 126 at 116-17.

153 Scott, *supra* note 73 at 82.

154 Hollowell, *supra* note 130 at 47.

155 Sharp, *supra* note 131 at 67-68.

156 Smith, *supra* note 77 at 426.

157 Brightman, *supra* note 125 at 110.

158 Smith, *supra* note 77 at 426.

159 Scott, *supra* note 73 at 83.

160 Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 37th Parl. 2nd sess., issue 7 (12 February 2003), (testimony of Mr. Jose Amaujaq Kusugak, President, Inuit Tapiriit Kanatami) [Senate Committee Proceedings, 12 February 2003].

161 Hollowell, *supra* note 130 at 45-47.

162 Brightman, *supra* note 125 at 110-11.

cyclicity can be maintained only through reciprocity instantiated via traditional legal ordering.¹⁶³

These laws are not vestiges of the past. Some Aboriginal peoples have expressed them in the form of Western legal instruments: The Makah Law and Order Code, for example, includes a lengthy animal cruelty provision applicable to hunting and fishing.¹⁶⁴ Humane trapping standards were likewise incorporated within the *Trapping Harmonization Agreement* between Ontario's Ministry of Natural Resources and the Anishinaabe Nation, signed in 2005, which sets out the parameters of the latter's "takeover, management and administration of trapping within [its] territories".¹⁶⁵ In another 2005 development, Nunavut's *Wildlife Act* incorporated thirteen principles of Inuit Qaujimagatuqangit—often translated as "traditional knowledge" but explicitly understood to include epistemic and ontological aspects¹⁶⁶—pertaining to human-animal interaction.¹⁶⁷ These principles include Iliijaqsuittailiniq/Kimaitailinik, prohibiting "malice" toward animals;¹⁶⁸ Sirliqsaqtittitailiniq/Naklihaaktitihuiluhi, requiring hunters to "avoid causing wild animals unnecessary suffering when harvesting them";¹⁶⁹ Akiraqtuutijariaqanginniq Nirjutiit Pijjutigillugit/Hangiaguikluhi Nekyutit InuupPiutigingitait, which holds that "wildlife and habitat are not possessions";¹⁷⁰ kpigusuttiarniq Nirjutilimaanik/Pitiaklugit nekyutit, mandating that "all wildlife should be treated respectfully";¹⁷¹ and Pilimmaksarniq/Ayoikyumikatakhimanik, requiring that hunting skills be "improved and maintained through experience and practice".¹⁷² Although the statute refers to most of these as merely "guiding principles and concepts",¹⁷³ the principles of Iliijaqsuittailiniq/Kimaitailinik and Sirliqsaqtittitailiniq/Naklihaaktitihuiluhi were specifically rendered mandatory for "anyone harvesting an animal".¹⁷⁴ This latter requirement represents

163 On the cyclical space-time of human-animal relationships in Aboriginal ontology, see Nadasdy, "Wildlife as Renewable Resource", *supra* note 74.

164 *Makah Law and Order Code* (1999), ss. 1.3.01, 5.2.10, 5.5.05, online: Native American Rights Fund <<http://www.narf.org/nill/Codes/makahcode/makahcodetoc.htm>>.

165 *Treaty #3 Trapping Harmonization Agreement*, online: Grand Council of Treaty #3, <<http://www.gct3.net/administrative-office/trapping/>>; *Backgrounder: Ontario Trapping Harmonization Agreements* (2006), online: Indian and Northern Affairs Canada <<http://www.ainc-inac.gc.ca/ai/mr/nr/j-a2006/02714bk-eng.asp>>.

166 See Dorothy Francis, "What is Inuit Qaujimagatuqangit? Using Inuit family and kinship relationships to apply Inuit Qaujimagatuqangit" Canku Ota (13 January 2001), online: Canku Ota <http://www.turtletrack.org/Issues01/Co01132001/CO_01132001_Inuit.htm>.

167 See Nunavut *Wildlife Act*, *supra* note 29, s. 8.

168 *Ibid.*, s. 8(j).

169 *Ibid.*, s. 8(k).

170 *Ibid.*, s. 8(l).

171 *Ibid.*, s. 8(m).

172 *Ibid.*, s. 8(d).

173 *Ibid.*, s. 8.

174 *Ibid.*, s. 7.5.

an innovative model of a territorial animal cruelty provision referentially incorporating principles of traditional Aboriginal legality; Nunavut's *Wildlife Act* illustrates, to this author's knowledge, the only Canadian provincial or territorial example of this harmonization strategy.¹⁷⁵

Other Aboriginal communities have not codified such laws or explicitly harmonized them with state normative frameworks, but maintain them nonetheless. According to Jose Amaujaq Kusugak, President of Inuit Tapiriit Kanatami, "cruelty and brutality to animals are such old offences under the Inuit traditional laws", and "from Alaska to Greenland to Iqaluit [are] very similar and imprinted", that they are "not necessarily written down ... [but] taught from generation to generation".¹⁷⁶ Brightman recounts how modern Rock Cree take extreme care to respect animals according to their laws, and indeed, they have adopted modern, humane trapping methods "consistently with [their] religious values"; where they dispute a new standard, it is typically because they question its actual humaneness in comparison to traditional methods.¹⁷⁷

VI Moving Forward: Implications for the Animal Cruelty Debate in Canada

Although it would be imprudent to universalize the preceding discussion, it does appear safe to conclude that the Senate's concerns about Bill C-10B were overblown insofar as they posited a substantive conflict between the exercise of Aboriginal rights and the criminal prohibition of unnecessary animal suffering. The Aboriginal legal orders surveyed above include obligations to minimize suffering as necessary implications of their ontological structures, and thereby *internally* require evolution in hunting, fishing and trapping methods. The operation of proposed *Criminal Code* s. 182.2(1)(a), as formulated in Bill C-10B and its subsequent iterations, would thus seem to harmonize with these Aboriginal traditions rather than conflict with them. This complementary relationship suggests that the proposed s. 182.6 non-derogation clause would be unnecessary in the sense that it would not be triggered on an adequately hermeneutic understanding of Aboriginal rights rooted in these cultures—that is, an understanding that interprets Aboriginal rights in light of their ontological and normative contexts, as section IV argued would be necessary to determine the relevance of s. 182.6 in a specific case.

175 Though innovative, this strategy is not free of controversy, and may not represent an optimal solution to the problem of governmental interference in Aboriginal normative ordering. See *infra* notes 190-191 and accompanying text.

176 Senate Committee Proceedings, 12 February 2003, *supra* note 160.

177 Brightman, *supra* note 125 at 110-20.

One might raise an objection at this point that surely some hunting methods practiced by some Aboriginal communities would fail to meet the *Menard* standard under proposed s. 182.2(1)(a), and therefore that s. 182.6 might not be unnecessary, as the previous paragraph suggested, insofar as it might function to safeguard such practices. It seems difficult to entirely rule out the first proposition as a factual matter, although the evidence reviewed in section V militates against it. This article's argument does, however, imply that s. 182.6 should *still* typically not be triggered in such cases, because on the ontologically and normatively sensitive interpretation of Aboriginal rights that section IV argued would be necessary to apply s. 182.6, methods that fail to meet the *Menard* standard would typically not lie within the perimeter of the right and so would not be exempted by s. 182.6. To elaborate, and at the risk of generalizing, if a hunting method exercised by a member of an Aboriginal community were to fail to meet the standard of proposed s. 182.2(1)(a), the important insight of section V is that it would *also* in all likelihood fail to meet the standard of that Aboriginal community's traditional legality. For this reason, as suggested earlier,¹⁷⁸ "traditional" or conventional practices in the empirical sense may well be inconsistent with traditional culture in the normative sense. Moving beyond the practice-centric perspective criticized in sections III and IV entails on one hand shifting away from enshrining "Aboriginal methods" of killing animals, and on the other hand recognizing and giving effect to Aboriginal legality. From this perspective, the possibility that some existing methods practiced by some Aboriginal persons could require changes in the course of legal evolution consistent with Aboriginal legality starts to appear as more of a beneficial consequence and less of a problem, so long as this evolution occurs consistently with respect for Aboriginal sovereignty and is not employed as a rationale for state intrusion and the suppression of traditional legal ordering.¹⁷⁹

Indeed, somewhat perplexingly, it is unclear that Aboriginal representatives were even concerned with the supposed problem of unnecessarily painful "Aboriginal methods". Notably, the only Aboriginal group to appear before the Senate Committee reviewing Bill C-10B, Inuit Tapiriit Kanatami, focused on the bill's "failure to define" the meaning of "brutal" or "vicious" killing under proposed s. 182.2(1)(b), in the fear that this provision could effectively reclassify seal and whale hunting as criminal irrespective of efforts to minimize suffering to the level which is "necessary".¹⁸⁰ By contrast, Inuit Tapiriit Kanatami expressed no indication of apprehension about the *Menard* analysis under proposed s. 182.2(1)(a). The former concern is analogous to

178 *Supra* note 106.

179 The discussion returns to this qualification shortly below.

180 Senate Committee Proceedings, 12 February 2003, *supra* note 160.

that raised by sport hunters,¹⁸¹ in response to which the Department of Justice “extremely plainly” stated that s. 182.2(1)(b) would not inherently criminalize “normal and regulated activities ... such as hunting”.¹⁸² Rather, this provision was designed to address “morally reprehensible” behaviour not involving demonstrable suffering, which is—notoriously—currently legal under s. 445.1(1)(a).¹⁸³ The Department of Justice’s clarification plainly dispenses with Inuit Tapiriit Kanatami’s concern, especially considering that Aboriginal hunting of seals and whales is expressly permitted and regulated under the federal *Fisheries Act*.¹⁸⁴ Such hunting, moreover, is in any case not susceptible to categorization as an inherently criminal activity, owing to the availability of the legal justification defense under existing *Criminal Code* s. 429(2).¹⁸⁵

On the available evidence, therefore, proposed non-derogation clause s. 182.6 appears unnecessary in the respect that proposed *Criminal Code* s. 182.2(1)(a) should not conflict with the exercise of s. 35 Aboriginal rights as the logic of the non-derogation clause presupposes. Worse yet, as examined in section II, the implication that such a conflict *would* legitimately arise represents a dangerous ideological development, inaccurately suggesting that Aboriginal traditions involve animal cruelty and thereby encouraging further misunderstanding of Aboriginal cultures within broader Canadian society. The ongoing incorporation of s. 182.6 into every new iteration of Bill C-10B since 2005—including the most recent Bill C-229—while politically understandable as a means to avoid another debate, nevertheless further embeds this ideology, and risks concretizing it within the *Criminal Code* when one of these bills eventually (and inevitably) is enacted.¹⁸⁶ What Canadian society needs to properly surmount this false juxtaposition is to reveal its irony through a less reactionary, more thoughtful debate—not the maintenance of the defective impasse represented by s. 182.6.

As discussed in section II, however, there remains the important issue of potential further state intrusion upon Aboriginal sovereignty, a problem that at least partially inspired proposed s. 182.6, and that might be thought to arise again if the provision were abandoned. Can the ideological implications of a non-derogation clause be avoided without reintroducing the problem of state intrusion, or must Canadian legislators navigate a tradeoff between two undesirable consequences?

181 See Hall, *supra* note 34; Skibinsky, *supra* note 8 at 208.

182 Skibinsky, *supra* note 8 at 209.

183 For example, killing a stray animal by application of overwhelming force, as in the notorious case of two boys who beat a dog to death with a bat but could not be prosecuted, because the dog died too quickly to have demonstrably suffered (see Hughes & Meyer, *supra* note 15 at 53-54, 75).

184 See *Marine Mammal Regulations*, *supra* note 28.

185 See *supra* note 42.

186 See *supra* note 56 for a list of the subsequent iterations of Bill C-10B that incorporate s. 182.6.

The first point to note is that proposed s. 182.6 does not actually solve the problem of state intrusion. Section IV argued that a non-derogation clause would be legally intractable in the existing framework of Canadian Aboriginal rights jurisprudence. For a related reason, it would also worsen the problem its advocates intended to solve. As implied by the analysis in section IV, s. 182.6 actually threatens *increased* intrusion by Canadian courts, since it necessitates authoritatively adjudicating the precise correspondence between a particular activity and the cultural scope of an animal-related Aboriginal right.¹⁸⁷ If such adjudication were attempted without reforming the practice-centric manner in which Aboriginal rights jurisprudence currently operates, moreover, this process would necessarily distort the nature of the right in question, in the worst scenario overstating the cultural significance of “Aboriginal methods” and highlighting their ostensible conflict with cruelty prohibitions. Such interpretive violence would both exacerbate the ideological dangers raised earlier and intrude on Aboriginal sovereignty by overriding the ongoing significance of traditional legality. For these reasons, a non-derogation clause would really be no solution at all to the problem of state interference raised by the proposed *Criminal Code* amendments.

The second point is that advocating for the abandonment of the non-derogation clause in subsequent bills does not necessarily entail promoting yet another intrusion of the Canadian criminal law into the normative lives of Aboriginal peoples, precipitated by the inevitable collapse of the owned-wild distinction in the *Criminal Code*. I do not reach this conclusion merely on the basis that the new criminal prohibitions would largely harmonize substantively with obligations already extant within the Aboriginal legal orders surveyed earlier. Aboriginal peoples would still rightly resist the unmediated state application of those norms as an unnecessary and imperious development. As Brightman observes, for instance, the Rock Cree understandably “resent external interference in their trapping techniques”, since they clearly do not require the Canadian state to instruct them about the importance of preventing animal suffering.¹⁸⁸ This imperative not to interfere with Aboriginal normative ordering might seem to suggest that some form of Aboriginal exception is still necessary. Fortunately, the explorations of section V suggest a different and more effective solution that promises the important ancillary benefit of avoiding the ideological implications criticized earlier. Considering that the *Menard* analysis already references societal and regulatory standards in assessing what amount of suffering is “necessary”, a less damaging and immediately available approach would be to explicitly recognize Aboriginal peoples’ collectively developed standards as appropriate to their community contexts—

187 See text accompanying notes 104-106 and 119, *supra*.

188 Brightman, *supra* note 125 at 112.

for example, harpooning during those times of the year when seals' fat layer is too thin to allow them to float.¹⁸⁹ To facilitate ascertaining such standards in a way that would minimize state intrusion and maximize respect for Aboriginal sovereignty, solutions analogous to the Anishinaabe *Trapping Harmonization Agreement* could be adopted, whereby Aboriginal communities would formally administer their own standards in accordance with their obligations toward animals. Those standards would then be referentially incorporated as valid regulatory standards within the s. 182.2(1)(a) *Menard* analysis. This solution would partially follow the Nunavut *Wildlife Act's* model of referential incorporation, discussed earlier, with the important difference that Aboriginal communities would retain full responsibility for translating their traditional legalities into specific regulatory standards on an ongoing and evolving basis, as those legalities indeed internally require—rather than concretizing more abstract traditional principles into state legislation to be interpreted by non-Aboriginal state officials and judges,¹⁹⁰ an implication of the Nunavut *Wildlife Act* that has already proven controversial.¹⁹¹ In contrast to the latter approach, normative contestation about the treatment of animals would occur internally within Aboriginal communities, which Maneesha Deckha suggests as a more politically justifiable form of legal process.¹⁹² This solution would therefore greatly reduce the intrusiveness of an amended Criminal Code while simultaneously avoiding the ideological connotations inherent to a non-derogation clause such as s. 182.6.¹⁹³

VII Conclusion: What Can Aboriginal Peoples Teach Others about Animal Personhood?

Despite this article's conclusion that future efforts to amend the *Criminal Code's* animal cruelty provisions should discard the non-derogation clause model that emerged from the Bill C-10B debates—a well intended but nevertheless ineffective and ideologically dangerous approach—the clause provided an illuminating vehicle to explore the distillation process embodied by

189 See Senate Committee Proceedings, 12 February 2003, *supra* note 160.

190 See Nunavut *Wildlife Act*, *supra* note 29, s. 3, providing that the territorial government and courts "shall interpret and apply" the statute, and authorizing the former entities to determine the "meaning of any guiding principle or concept of Inuit Qaujimajatuqangit" incorporated within the legislation.

191 See John Thompson, "Lawyers, Bureaucrats Wrangle Over GN Hunting Law" *Nunatsiaq News* (27 October 2006), online: Nunatsiaq News <http://www.nunatsiaqonline.ca/archives/61027/news/nunavut/61027_06.html#top>.

192 See Deckha, *supra* note 73 at 222.

193 Of course, I do not intend this proposal as a long-term or generalized solution for political relations between the Canadian state and Aboriginal peoples; rather, it merely constitutes an immediately available and preferable alternative to the non-derogation clause approach in the context of the political impasse following the Bill C-10B debates.

the current jurisprudential framework used to interpret s. 35 Aboriginal rights as they relate to wildlife. The Canadian legal system's adoption of the Cartesian ontological conception of animals, both in their property status and in the "natural resource" management approach developed by the Supreme Court, denies animals' ontological and legal personhood within Aboriginal cultures, resulting in a one-sided translation of fundamentally reciprocal relationships. This disjuncture clearly illustrates one of the problems inherent to recasting relationships as rights, as Metallic & Monture-Angus have highlighted.¹⁹⁴ Moreover, it raises an important question: if Aboriginal conceptions of animals as social agents are conducive to the latter's ethical treatment, and, as Nadasdy and Scott review, in fact more scientifically accurate, why should the Canadian legal system continue to reinforce the anachronism that animals are property rather than persons? In fact, several prominent non-Aboriginal legal scholars advocate extending legal personhood to animals.¹⁹⁵ Although that development certainly appears far off in the Canadian context—if the saga of the *Criminal Code* amendments is any indication—it might well remove a significant barrier to the translation of Aboriginal legal relationships on a reciprocal rather than exclusively human-focused basis, and thereby instantiate a less one-sided knowledge exchange among Canada's multiple legal traditions.¹⁹⁶ Once one recognizes that Aboriginal peoples have rich traditional knowledge of animal welfare laws, might one *also* contemplate that Aboriginal peoples have something to teach non-Aboriginal animal advocates about how legal personhood actually can—and has—been implemented? This question merits much more serious attention than it has been accorded at present, both from scholars of animal personhood and from forward-thinking policymakers.

One should not imagine such a knowledge exchange to proceed unimpeded, however. In particular, the prospect of Canadian legal personhood for animals raises yet another difficult problem in relation to Aboriginal peoples, which Maneesha Deckha highlights in a recent article: How can one regard animals as equally legitimate persons but nonetheless persist in hunting and killing them, as do all the Aboriginal cultures surveyed earlier in section V?¹⁹⁷ Once a society recognizes the legal personhood of a group, how can those persons (animal or human) be deprived of basic rights, including the right to

194 Candice Metallic & Patricia Monture-Angus, "Domestic Laws Versus Aboriginal Visions: An Analysis of the Delgamuukw Decision" (2002) 1:2 *Borderlands* at para. 1.

195 See, e.g., Gary Francione, "Animals—Property or Persons?", *supra* note 124; Steven M. Wise, "Legal Personhood and the Nonhuman Rights Project" (2010) 17 *Animal Law Review* 1.

196 Note again, however, that the above comments are not intended to advocate or imply some "improved" form of Aboriginal rights jurisprudence that would remain predicated on the assumption of the state legal order's superiority to all others in a posited hierarchical schema—and consequent claim to authoritatively interpret or translate Aboriginal legal orders. See text accompanying note 119, *supra*.

197 See Deckha, *supra* note 73 at 211.

their lives? Animal rights theorists usually argue that legal personhood for animals would preclude any human utilization of animals, and consequently that the animal welfare approach would no longer be relevant.¹⁹⁸ The Aboriginal traditions surveyed earlier seem to confound this logic because they recognize animals as legal persons but nonetheless conceive of human obligations toward animals according to the welfarist concept of unnecessary suffering. At least one scholar has thereby concluded that Aboriginal traditions have little to contribute to the cutting edge of thinking about animal rights.¹⁹⁹ The difficulty that non-Aboriginal thinkers—for whom animal personhood and animal rights appear as inexorably interrelated concepts—encounter in contemplating this apparent contradiction suggests the ironic possibility that the Canadian state's belated discovery of animal personhood would legally imperil the activities of Aboriginal cultures who embraced the former concept long ago.²⁰⁰

Although this problem lies outside the scope of the present article, some nascent thoughts suggest themselves on the basis of the preceding analysis. First and foremost, scholars and advocates should not conceive of legal personhood for animals as a one-size-fits-all package; its specific normative implications for animal-human relations depend on all the rest of a community's ontological-normative schemas, just as the cruelty norms surveyed in section V could only be understood as deriving from specific ontological foundations. In particular, for cultural traditions wherein legal ordering is not predicated upon the European concept of rights, but rather on reciprocal social obligations,²⁰¹ one should not expect the concept of animal rights to flow logically from notions of personhood. There is nothing paradoxical or mysterious about this—just cultural differences in basic principles of normative ordering. Only by inadvertently importing additional, culturally specific normative axioms—legal personhood entails being a subject of rights, in particular—can one regard personhood without rights as a paradox.

This inadvertent mental importation of the personhood/rights connection represents yet another instance of the ontological distillation process examined earlier in this article. Constructive knowledge exchange or political dialogue is unlikely to arise so long as this basic cultural disjuncture remains insufficiently acknowledged by non-Aboriginal thinkers. Indeed, even to conceive of Aboriginal hunting as “violent”, “instrumental [use]”, “exploitation”, or

198 See, e.g., Francione, “Animals—Property or Persons?”, *supra* note 124 at 62.

199 See Bennett, *supra* note 120 at 67.

200 See Deckha, *supra* note 73 at 207, suggesting that noncommodification of animals by the Canadian state could reduce the scope of Aboriginal rights, to the extent that currently protected Aboriginal activities infringe animals' putative rights to life and liberty.

201 On the incompatibility between rights-based legal paradigms and Aboriginal legal traditions centered on the concept of social responsibility, see Mary Ellen Turpel, “Aboriginal Rights and the Canadian Charter: Interpretive Monopolies, Cultural Differences” in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 503 at 517-27.

“marginalization” of animals, as Deckha alternately implies²⁰²—and therefore in violation of basic animal rights—is questionable because it contradicts the Aboriginal conception of the activities in question. As reviewed earlier, animal-human relations in Aboriginal ontology entail reciprocal gifting among equals, not unilateral *taking* by humans who exploit a power differential. Recall, in particular, that Aboriginal peoples typically do not view human hunters as exercising *any* ability to take an animal against the latter’s will. As Nadasdy writes, therefore, “[h]unting in such societies should not be viewed as a violent process whereby hunters take the lives of animals by force”.²⁰³ In addition, given their typical belief in reincarnation, Aboriginal hunters do not even consider the animals they kill to die in the occidental sense of the term.²⁰⁴ To characterize Aboriginal hunting as an animal rights violation in the terms usually applied to externally analogous activities conducted by non-Aboriginal people, therefore, is to imply a notional non-Aboriginal observer whose perspective is presumed more objective or honest: “Aboriginal hunting *is* exploitative, even if Aboriginal peoples do not understand it that way”. Yet this position closes down any possibility of meaningful ethical or legal dialogue across the Aboriginal/non-Aboriginal cultural divide. Ethical deliberation about appropriate animal-human relations requires a shared foundation of principles, values and commitments, the extent of which can only be ascertained through non-presumptive, mutual consideration.²⁰⁵ Scholars of animal personhood should not overlook this challenge, despite the ontological reflexivity it insists upon. Much work therefore remains at this interstice between Aboriginal and non-Aboriginal legal traditions, animal personhood and animal rights.

202 See Deckha, *supra* note 73 at 211, 229.

203 Nadasdy, “Wildlife as Renewable Resource”, *supra* note 74 at 78.

204 *Ibid.*

205 See Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (Toronto: Anansi, 2006) at 1-51.