

What's Wrong with Canada's Animal Cruelty Laws? Bill C-50, a Touchstone for Change

by

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B.A. Simon Fraser University, 2002

LL.B. University of British Columbia, 2005

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ABSTRACT

This thesis considers the current Canadian *Criminal Code* provisions on animal cruelty, and the most recent proposal to amend these provisions, Bill C-50, *An Act to amend the Criminal Code in respect to cruelty to animals*. The paper argues that Bill C-50, much like the current *Criminal Code* provisions are reformist in nature and do not signify a fundamental re-conception of the status of animals in Canada. Yet, despite the Bill's shortcomings for many animals and their advocates, the paper argues that Bill C-50 should not be rejected outright as too incremental or ineffectual. Bill C-50 ought to be supported by animal advocates as a significant and positive (albeit modest) stepping stone toward the improved status and welfare of animals in Canada.

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... when a human being relates to an individual nonhuman being as an anonymous object, rather than as a being with its own subjectivity, it is the human and not the other animal, who relinquishes personhood.

-Barbara Smuts, "Reflections" in J.M Coetzee, *The Lives of Animals* (New Jersey: Princeton University Press, 1999).

The Ones Who Walk Away ...

PREFACE TO THESIS

One of my most favoured stories is Ursula Le Guin's "The Ones Who Walk Away from Omelas."¹ The story is set in the fictitious town of Omelas where its citizens are celebrating the "Festival of Summer." Le Guin describes a jovial place filled with music, laughter, singing, "cheerful faint sweetness of the air," and a "great joyous clanging" of bells.² She describes Omelas' citizens as "mature, intelligent, passionate adults whose lives [are] not wretched," and the "victory they celebrate is life."³ This utopia is however, not without a catch.

While most of the citizens of Omelas celebrate, Le Guin describes a contrasting, more dismal setting in another part of town. In a basement, underneath one of Omelas' beautiful buildings, is a room with "a locked door, and no window." The small room contains "a couple of mops, with stiff, clotted, foul-smelling heads" rusting in a bucket. The room is tiny, "a mere broom closet," and damp and dirty.⁴ Housed in this room is a child. The child is described as an "it" who looks to be about six but is actually ten. "It is feeble-minded. Perhaps it was born defective or perhaps it has become imbecile through fear, malnutrition, and neglect."⁵ The child is isolated save for the occasional rattling of the door where someone may come and kick "it" and make it stand up. "The food bowl and water jug are hastily filled, the door is locked, the eyes disappear."⁶ The child is thin

¹ Ursula Le Guin, "The Ones Who Walk Away From Omelas" in *The Wind's Twelve Quarters: Short Stories* (New York: Harper & Row, 1975). The piece was introduced to me as assigned course reading by my law professor, Shi-Ling Hsu for his "Environmental Law and Policy" course at the University of British Columbia a couple of years ago.

² *Ibid.* at 15.

³ *Ibid.* at 16.

⁴ *Ibid.* at 17.

⁵ *Ibid.*

⁶ *Ibid.*

and emaciated from a meager diet of corn meal and grease. "Its buttocks and thighs are a mass of festered sores, as it sits in its own excrement continually."⁷

The citizens of Omelas are not ignorant of the deplorable conditions the child is made to live in. Rather they all know "it" is there:

Some of them have come to see it, others are content merely to know it is there. They all know that it has to be there. Some of them understand why, and some do not, but they all understand their happiness, the beauty of their city, the tenderness of their friendships, the health of their children, the wisdom of their scholars, the skill of their makers, even the abundance of their harvest and the kindly weathers of their skies, depend wholly on this child's abominable misery.⁸

Although the citizens of Omelas are always shocked, outraged and sickened when they first learn about the child, they come to understand and accept that their prosperous lives are dependent on the misery of this child. As time goes by they make excuses for the treatment of the child. Even if they were to liberate the child now "its habits are too uncouth for it to respond to humane treatment. Indeed after so long it would probably be wretched without walls around it, and darkness for its eyes, and its own excrement to sit in."⁹ Though virtually all citizens of Omelas become complicit in the mistreatment of the child, Le Guin tells us of the rare citizen who rejects the order of things in Omelas:

They leave Omelas, they walk ahead into the darkness, and they do not come back. The place they go towards is the place even less imaginable to most of us than the city of happiness. I cannot describe it at all. It is a place that does not exist. But they seem to know where they are going, the ones who walk away from Omelas.¹⁰

I am not entirely sure of the message Ursula Le Guin is attempting to convey in this story, but find the loveliness of this tale is in its ambiguity and ability to impact its readers in different ways.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.* at 18.

¹⁰ *Ibid.*

In reading and re-reading “The Ones Who Walk Away From Omelas,” I draw many parallels between the fictional treatment of the child in Omelas and our very real, contemporary treatment of animals in Canada. The living conditions of the child in Omelas mirror the present-day living conditions of many factory farm and experiment animals in Canada, which make up the vast majority of animals in our country.¹¹ Like the child of Omelas, the animals we lock away – out of public view – are not beings but “its.” And, like the citizens of Omelas, we Canadian citizens are generally aware of this fact, or choose to remain willfully blind to this fact.¹² If we were to seek out the truth (perhaps in the screams of terrified pigs prior to their slaughter) we know that we would feel compelled to change our lives (perhaps to abstain from using or consuming products borne of animal suffering), and that would be just too life-altering, or too expensive, or too time-consuming for us to do. So we forget. Or we justify the benefits we receive from the suffering of animals on the grounds that we are superior beings, that animals consent to their suffering, that there is simply no other way. But then there are those few who do not accept this order of things in Canada. There are those who - as much as they can - refuse to participate in our mass exploitation of animals.

¹¹ The supporting evidence for these truths will be detailed throughout my thesis.

¹² When I tell other humans that my thesis topic is animal cruelty, the general response is that they couldn't bare to know – *do not want to know* - about such things.

I dedicate this thesis to the non-human animals who have suffered at our human animal hands; and to the humans who have chosen to walk away.

And to the memory of Powder.

Introduction

The current Canadian *Criminal Code* provisions on animal cruelty¹ have not been substantively amended since 1892.² The provisions were developed when humans³ were still heavily dependent on livestock in everyday life. Thus, the provisions reflect a desire to protect the valuable property/economic interests of those animals.⁴ The provisions are located in the property section of the *Code*, for example, and call for stiffer penalties for cruelty to cattle than any other animal.⁵ With the exception of cattle, animal cruelty is currently only punishable on summary conviction.⁶

Animal advocacy groups in Canada, particularly in the last two decades, have pressed for reform of the current provisions.⁷ They claim the provisions inappropriately equate animals (as sentient beings) with inanimate property. Further, they argue that the current *Criminal Code* penalties for animal cruelty do not sufficiently punish and deter offenders.

¹ R.S.C. 1985, c. C-46, ss. 444-447.

² Department of Justice Canada, *Crimes Against Animals: A Consultation Paper* (Ottawa: Department of Justice, 1998).

³ For brevity and simplicity I generally will use the term "humans" or "people" to describe human animals, or human animals recognized as "persons" and the status that accrues with personhood. I use the term "animals" to refer to non-human animals.

⁴ Gary Francione notes for example that the word *cattle* derives from the same word root as the word *capital*, and that two are synonymous in many languages. In Spanish, the word for property is *ganaderia* while the word for cattle is *ganado*. Similarly, the Latin word for money, *pecunia*, originates from the word *pecus* which means "cattle." See Gary L. Francione, *Introduction to Animal Rights: Your Child or Your Dog?* (Philadelphia: Temple University Press, 2001) at 50-51.

⁵ The *Criminal Code*'s definition of cattle includes horses, mules, pigs, sheep, and goats. Injuring or endangering cattle is an indictable offence (s. 444, *Criminal Code*).

⁶ See ss. 445 and 446(2).

⁷ See e.g. Toronto Coalition for Anticruelty Legislation, online: <<http://www.anticruelty.ca/>>; the Canadian Federation of Humane Societies, online: <<http://www.cfhs.ca/index.html>>; The International Fund for Animal Welfare, online: <<http://www.ifaw.org/>>; the BC Society for the Prevention of Cruelty to Animals (SPCA), online: <<http://www.sPCA.bc.ca/legislation/default.asp>>; the Ontario SPCA, online: <<http://www.osPCA.on.ca/>>; the Sir James Dunn Animal Welfare Centre, online: <<http://www.upei.ca/awc/cruelty.htm>>; the Meow Foundation, online: <<http://www.meowfoundation.com/health/billc50.html>>; The Better Dog Network and Humane Society, online: <<http://www.bdnhumanesociety.com/billC50.htm>>.

Despite demand for reform, bills to amend the cruelty provisions have been met with resistance from animal industry groups, as well as conservative members of Canada's senate and have thus far failed: Bill C-17, Bill C-15 and more recently Bill C-22 have been rejected as too radical. Nonetheless, the Liberal government persisted in resurrecting these proposed amendments, introducing Bill C-50, *An Act to amend the Criminal Code in respect to cruelty to animals* in 2005.⁸ Two of the more notable changes proposed by Bill C-50 are:

- (1) Stiffer penalties for animal cruelty offences. The Bill recreates animal cruelty offences as hybrid offences with a maximum penalty of a \$10,000 or a five-year prison sentence.
- (2) The movement of the animal cruelty provisions from the Property section of the *Code* (Part XI), to a new separate section (Part V.1) entitled "Cruelty to Animals," under the broader section of Part V of the *Criminal Code*: "Sexual Offences, Public Morals and Disorderly Conduct."

Bill C-50 also deviates from its predecessors in one important way with the inclusion of a new "derogation clause" which assures that the Bill will not affect Aboriginal rights.⁹

Bill C-50 warrants heavy consideration as it expresses a legislative will to make real changes to our archaic animal cruelty provisions and reflects the culmination of ongoing debates on the status and treatment of animals in Canada.¹⁰ Academic and legal analysis of Bill C-50 is scant.¹¹ It is hoped that this research endeavour will contribute to the modest

⁸ Despite its introduction in 2005, Bill C-50 recently died on the order paper with the dissolution of Parliament following the federal election in January, 2006.

⁹ S. 182.6.

¹⁰ Bill C-50 can be contrasted with Bill S-213, proposed by Conservative Senate member John Bryden, and supported by the recently elected Conservative government. This Bill does nothing to change the current animal cruelty provisions except increase penalties. Bill S-213 is not supported by any of the major animal advocacy groups in Canada. See the Canadian Federation of Humane Societies (CFHS), "Conservatives support inadequate legislation" (Ottawa: CFHS, 2006), online: http://cfhs.ca/features/conservatives_support_inadequate_legislation/.

¹¹ There are three articles to date, that I am aware of, dealing with Bill C-50's predecessors, Bill C-10 and Bill C-15. See e.g. John Sorenson, "Some Strange Things Happening In Our Country": Opposing Proposed Changes in Anti-Cruelty Laws in Canada" (2003) 12 *Social & Legal Studies* 337; Lyne Létourneau, "Toward Animal Liberation? The New Anti-Cruelty Provisions in Canada and Their Impact on the Status

body of Canadian literature in the area of animal cruelty laws in general, and more specifically, shed some light on the legal and practical implications of the changes proposed in Bill C-50 for animals and our human relationships with them.

The broad aim of this thesis is to consider whether animal advocates should support the changes proposed in Bill C-50. This consideration involves an analysis of the actual changes proposed by Bill C-50, in Part I of this thesis. In Part II, I consider both the impetus and purpose driving Bill C-50 in order to determine the likely legal and practical implications of these proposed changes. In Part III, I respond to the various arguments that have been put forth to oppose the Bill – on the grounds that it either goes too far, or does not go far enough. In particular, I consider the *sui generis* issue of Aboriginal rights to hunt, trap and fish, which have factored in as a prominent piece of the debate surrounding Bill C-50 and its predecessors. Finally, in Part IV, I give concluding remarks on the legitimacy and viability of the changes proposed in Bill C-50 for animal advocates.

I argue that Bill C-50, much like the current *Criminal Code* provisions are reformist in nature and do not signify a fundamental re-conception of the status of animals in Canada. I suggest that the impetus for reform of the current *Criminal Code* provisions centre around public outcry over the seemingly anomalous acts of cruelty to animals, committed by “deviant” individuals, rather than any concern for more conventional cruelty that serves a human purpose, such as factory farming and animal experimentation. As a result, animal cruelty which falls within an established standard

of Animals” 40 Alta. L. Rev. 1041; F.C. DeCoste, “Animals and Political Community: Preliminary Reflections Prompted by Bill C-10” (2003) 40 Alta. L. Rev. 1057. I am not aware of any academic articles that specifically discuss Bill C-50.

practice will generally remain outside of the purview of criminal sanction. Yet, despite the Bill's shortcomings for many animals and their advocates, I argue that Bill C-50 should not be rejected outright as too incremental or ineffectual. Bill C-50 ought to be supported by animal advocates as a significant and positive (albeit modest) stepping stone toward the improved status and welfare of animals in Canada.

PART I: INTRODUCTION TO BILL C-50

A. Discussion of current Criminal Code provisions

i) Jurisdiction

As the current animal cruelty provisions are contained in the *Criminal Code* of Canada, they fall under federal jurisdiction.¹² It is explicitly set out in Canada's *Constitution Act, 1867*¹³ under s. 91(27) that criminal law falls within the legislative power of the federal government rather than the provinces. Under this head of power, the federal government may prohibit any act relating to animals as long as it is in pith and substance a criminal law rather than a "colourable attempt by the federal government to invade or regulate a matter otherwise falling within the provincial sphere of competence."¹⁴ In *Ward v. Canada*,¹⁵ the Supreme Court of Canada recently re-affirmed the necessary requirements of a valid criminal law:

Legislation may amount to criminal law if it possesses three components: a prohibited act, a penalty and a valid purpose ... Examples of a criminal law purpose include public peace, order, security, health and morality ... Courts also look to whether the particular law has traditionally been held to be criminal law.¹⁶

¹² A substantive consideration of international animal cruelty legislation, anti-cruelty statutes in other jurisdictions, and provincial and municipal laws addressing animal cruelty is outside the scope of thesis.

¹³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. Reprinted in R.S.C. 1985, App. II, No. 5.

¹⁴ Monique Hebert, "Animal Protection: An Overview" (Ottawa: Library of Parliament Research Branch, 1984).

¹⁵ *Ward v. Canada (Attorney General)* [2002] 1 S.C.R. 569; 2002 SCC 17 [*Ward*].

¹⁶ *Ibid.* at para. 51. In re-affirming these requirements the court cites *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, (1995), 127 D.L.R. (4th) 1 (SCC); *R. v. Morgentaler*, [1993] 3 S.C.R. 463, (1993), 107 D.L.R. (4th) 537 (SCC); *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, (1997), 151 D.L.R. (4th) 32; *Canadian Federation of*

Although under Canada's *Constitution Act*, 1867 animals are not explicitly mentioned,¹⁷ the court in *Ward* also specifically turned its attention to the *Criminal Code*¹⁸ provisions on animal cruelty. The court in *Ward* confirmed that: "the federal criminal law powers could extend to prohibitions on the killing and manner of killing of animals ... as a matter of public peace, order, security, health or morality."¹⁹

Using the federal criminal law power to prohibit animal cruelty has several advantages. First, as a clearly established federal head of power, the federal government has room to expand or amend the current *Criminal Code* animal cruelty provisions.²⁰ Second, federal provisions – unlike provincial provisions – achieve uniformity throughout Canada. Animals across Canada are, at least in theory, equally protected under the *Criminal Code* provisions. There is a connotation that Canada as a whole, not just a province or two, is concerned with animal cruelty. Third, criminal law also has the potential to be taken seriously, as any legislation under the criminal law head of power must include both a prohibition and a penalty. For most Canadians being charged or convicted of a criminal offence (and the accompanying threat of a criminal record or incarceration) is a troubling and stressful scenario. Although the current *Criminal Code* provisions on animal cruelty contain broad exemptions, and relatively lightweight

Agriculture v. Attorney-General for Quebec, [1951] A.C. 179 (P.C.), [1950] 4 D.L.R. 689 (the "*Margarine Reference*").

¹⁷ For a discussion of the division of powers between the federal and provincial governments relating to animals see: Monique Hebert, *supra* note 14; Patricia Wilson, *Legal opinion letter re: Legislative Jurisdiction over Animals Used in Research, Teaching and Testing* prepared for the Canadian Council on Animal Care (CCAC) November 26, 1998.

¹⁸ *Criminal Code*, *supra* note 1.

¹⁹ *Ward*, *supra* note 15 at para. 53.

²⁰ See Wilson, *supra* note 17 at 3.

penalties for most animal cruelty convictions,²¹ there is room under this head of power for the federal government to expand prohibitions and increase penalties.²² As noted in the introduction of this thesis, these are two of the chief aims of Bill C-50 which would amend the current *Criminal Code* provisions on animal cruelty.

Valid criminal law legislation must also include a legitimate public purpose. Although this requirement gives the federal government fairly broad scope to enact criminal laws pertaining to animals, the *Criminal Code* provisions on animal cruelty focus on a particular set of human-centric purposes. For example, in a consultation paper on the *Criminal Code* provisions on animal cruelty, Department of Justice Canada states that the public purpose of the criminal law is to “contribute to the maintenance of a just, peaceful and safe society by prohibiting behaviour that causes or threatens to cause serious harm to individuals or society.”²³ I think we can safely assume the Department of Justice is referring to *human* individuals and society. According to the Department of Justice, the *Criminal Code* provisions on animal cruelty contribute to this public purpose in two ways: First, by condemning “intentional and malicious hurting or killing of an animal,” and second, prohibiting “neglect in the provision of necessary food, water, shelter or care.”²⁴ The Department’s consultation paper goes on to make the link between these two types of cruelties (malicious abuse and neglect) with violence towards humans: “Because there is a connection between violence towards animals and violence towards

²¹ In *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra* note 16, Forest J, held that criminal law may “validly contain exemptions for certain conduct without losing its status as criminal law (at pp. 263-64). See also *Lords Day Alliance of Canada v. British Columbia (A.G.)*, [1959] S.C.R. 497; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 161; *R v. Furtney*, [1991] 3 S.C.R. 89.

²² See Wilson, *supra* note 17 at 4.

²³ Department of Justice Canada, *supra* note 2 at 2.

²⁴ *Ibid.* at 3.

people ... this type of conduct must continue to be condemned.”²⁵ This statement implies that violence against animals that is not linked to violence against humans would be permissible. In fact, the Department of Justice is quick to note that the *Criminal Code* provisions are not intended to “interfere with normal and regulated activities involving animals, such as hunting, fishing and slaughter for food” but are directed at “conduct that falls outside of normally accepted behaviour.”²⁶

Thus, the purpose of the *Criminal Code* animal cruelty provisions are not to condemn animal cruelty as morally reprehensible because of the harms caused to animals, but to curb behaviour that is linked with violence against *humans*. This viewpoint is summed up in the recent case *R v. Clarke*,²⁷ where the accused, Mr. Clarke, was charged with cruelty to his dogs:

The manner in which we treat animals may be considered as a reflection of our own humanity ... intentional cruelty to animals is an indicator of ‘a potential for increasing violence and dangerousness’ against people.²⁸

In sum, there are advantages of having animal cruelty law fall under federal, and more specifically criminal law jurisdiction. The criminal law, for example, is generally taken more seriously than other areas of law. However, as I have tried to illustrate the current penalties for animal cruelty offences are notably low and do not pose much a deterrent. Moreover, it is evident that the purpose of Canada’s animal cruelty laws is not to protect animals per se, but to monitor for the type of offender who might also harm humans (such as serial killers).²⁹ In the following subsection I consider the origins of the current

²⁵ *Ibid.* at 4.

²⁶ *Ibid.* at 3.

²⁷ *R v. Clarke* [2001] N.J. No. 191 (Nfld. Prov. Ct.), citing the Department of Justice consultation paper, *supra* note 2. This case is also discussed at *infra* note 255.

²⁸ *Ibid.* at para. 53.

²⁹ In support of animal cruelty reforms in Canada, the Canadian Federation of Humane Societies (CFHS) has pointed out that most serial killers have also tortured animals. CFHS notes that both the United States

Criminal Code animal cruelty provisions. Once situated in their historical and social context, we can see that Canada's animal cruelty laws were spurred on by egregious cruelty to livestock animals in the eighteenth and nineteenth century. However our concern about animal cruelty shifted in the twentieth century to a more limited regard for companion animals ("pets").

ii) History of current animal cruelty provisions

The current *Criminal Code* provisions on animal cruelty hark back to 1892, and reflect the social climate of the eighteenth and nineteenth century. The 1800's saw a myriad of social reform movements such as those related to the abolition of (human) slavery, rights for women, prison reform, and child welfare concerns.³⁰ During this time, humans were also heavily dependent on livestock in both urban and rural settings. Without any legal protection whatsoever, abuses of these working animals were prolific and carried out in plain view of the public. Charles Niven notes that by the close of the eighteenth century, England was known as "a hell for animals."³¹ Nineteenth century author Lewis Gompertz documented some of the horrors he witnessed during this period:

Sheep were driven for above a hundred miles to the markets, and were goaded through the crowded street of Metropolis, where after vainly attempting to allay their thirst by the filth of the gutters, they dropped from exhaustion. Sometimes their ears were torn off by dogs, sometimes their eyes were knocked out and their legs broken by drovers.

FBI and Scotland Yard treat animal cruelty as an indicator of future *human* violence. See CFHS, "Legal Analysis re: Bill C-15B – Section 15, Cruelty to Animals" (Ontario: CFHS, 2001) at 25-27.

³⁰ Simon Brooman & Debbie Legge, "Law relating to animals" (1997) 1 *Animals* 39; Elaine Hughes & Christiane Meyer, "Animal Welfare Law in Canada & Europe" (2000) 6 *Animal Law* 23; Moira Ferguson, *Animal Advocacy and Englishwomen, 1780-1900: Patriots, Nation, and Empire* (Ann Arbor: University of Michigan Press, 2001).

³¹ Charles D. Niven, *History of the Humane Movement* (London: Johnson Publications, Ltd., 1967) at 49. Increasing concern for cruelty to visible livestock during the eighteenth and nineteenth century led to a proliferation of literature (fictional and non-fictional) de-crying animal cruelty: Lewis Gompertz, *Moral Inquiries into the Situation of Man and of Brutes* (London: printed for the author, 1824); Anna Sewell, *Black Beauty: The Autobiography of a Horse* (England: Jarrold & Sons, 1877); Henry Salt, *Animals' Rights: Considered in Relation to Social Progress* (New York: Macmillan & Co, 1892); Margaret Marshal Saunders, *Beautiful Joe* (Washington: American Baptist Publication Society, 1893); William Hogarth's art piece, "The Four Stages of Cruelty" originally designed in London, 1822 also expressed similar sentiments.

Oxen were compelled to travel for many days with little or no food. Footsore and weary they were ... hamstrung on their way to the slaughter-house, where they were killed by repeated blows from hammers on their heads.

Horses and donkeys were driven to death ... pigs were whipped to death. In the streets one heard the unceasing sound of the lash.³²

The transparency of cruel treatment of animals in this era of social reform led to concern for the plight of working animals.³³ This spirit of social reform, coupled with concern for the welfare of animals, prompted philosopher Jeremy Bentham to make an impassioned plea against cruel treatment of animals:

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity if the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week or even a month, old. But suppose they were otherwise, what would avail? The question is not, Can they *reason*? Nor, Can they *talk*? but, Can they *suffer*?³⁴

Following Bentham's now famous passage, and after several failed reform attempts between 1800 and 1821,³⁵ the first animal cruelty statute known to the western world was enacted in Britain in 1822.³⁶ Several decades later, Canada (then as a

³² Cited in Edward Fairholme & Wellesley Pain, *A Century of Work for Animals* (London: John Murray Ltd, 1924) at 52.

³³ Noël Sweeney, *Animals and Cruelty and the Law* (Great Britain: Alibi, 1990); Greater London Authority, *Caring for Animals in London: The Mayor's Animal Welfare Framework* (Greater London Authority, 2004). Niven, *supra* note at 49-50 notes that bull-baiting, bear-baiting, cock-fighting, and cock-throwing were also popular pastimes, particularly of affluent human society in the late eighteenth and early nineteenth century.

³⁴ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907).

³⁵ Elaine Hughes & Christiane Meyer, *supra* note 30 at 25; David Favre & Vivien Tsang, "The Development of Anti-Cruelty Laws During the 1800's" (1993) 1 *Detroit College L. Rev.* 1 at 2.

³⁶ *An Act to Prevent the Cruel and Improper Treatment of Cattle, 1822* (U.K.), 3 *Geo. IV.*, c. 71. The Act is also commonly referred to as "Martin's Act" after the barrister and MP Richard ("Humanity Dick") who introduced the act. See Noël Sweeney, *Animals and Cruelty and the Law* (Great Britain: Alibi, 1990); Favre & Tsang, *supra* note 35.

dominion) followed suit with its first federal animal cruelty statute in 1869.³⁷ Lack of enforcement of these anti-cruelty statutes led to the formation of organized groups concerned with the welfare of animals.³⁸ In 1824 the first Society for the Prevention of Cruelty to Animals (SPCA) was formed in Britain. Sister branches of the SPCA quickly sprouted across Europe and in other countries, with Canada's first SPCA being founded in 1869.³⁹ Originally, the SPCA focused its attentions on working livestock animals, on which humans continued to rely for everyday use. Overdriving of work animals, for example, was a chief concern of the SPCA in the nineteenth century.⁴⁰ In this context, we can see why Canada's current animal cruelty provisions, drafted in the nineteenth century, provide the greatest concern for working animals or "livestock." In Canada, only offences against "cattle" or livestock are indictable offences.

In the twentieth century the urban visibility of cruelty to livestock began to wane and humane societies began to focus their attention primarily on companion animals: "since the horse had disappeared, the dog had taken the horse's place as the drawing card for public sympathy with S.P.C.A. work."⁴¹ SPCA International for example, states in its mission statement that it's chief concern is "helping people with their pets."⁴² Most of us

³⁷ An Act respecting Cruelty to Animals, S.C. 1869, c. 27.

³⁸ Hughes & Meyer, *supra* note 30 at 27.

³⁹ Since the inception of the first SPCA, the organization has perhaps become the most well-known animal welfare organization in Canada to date. The Canadian Federation of Humane Societies (CFHS) which is the national voice of the SPCAs in Canada claims to have the "enviable credibility as the 'go-to' national voice on animal welfare issues for industry, media, government, non-governmental organizations, and the public." Other more radical animal advocacy organizations, or smaller grass-roots organizations are often perceived as less legitimate in the eyes of government officials, and animal industry groups. See CFHS, "Who we are" (CFHS: Ottawa, 2006), online: <http://cfhs.ca/info/who_we_are/>. For a critique of the disparity between the CFHS (comprised of Canada's SPCA's and humane societies) and other animal advocacy groups see Charlotte Montgomery *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000) at 123 and 230-231.

⁴⁰ Greater London Authority, *supra* note 33; Niven, *supra* note 31.

⁴¹ Niven, *supra* note 31 at 110.

⁴² SPCA International, "Mission" (SPCA International Inc., 2006), online: <http://www.sPCA.com/SPCA_a/mission/>.

recognize the SPCA as an organization that houses “stray” and “unwanted” animals, and seeks to adopt these animals out as pets. A more cynical take is provided by Niven who suggests that the purpose of the SPCA is to “sweep these little dogs off the street” so that “the needs of suffering animals will be kept out of public view and out of the minds of charitable people ...”⁴³ This type of criticism is borne of a history of the SPCA and local animal pounds killing many “unwanted” animals, or selling other unwanted animals to animal experimenters.⁴⁴

With fairness to the SPCA, I recently had the opportunity to tour an SPCA shelter in Vancouver, British Columbia, and saw that the staff and volunteers appeared to genuinely care a great deal about the cats, dogs, rabbits, mice, rats, guinea pigs, hamsters, gerbils, and birds that they housed. Staff boasted that many of the animals received organic food and that the SPCA had a strict screening process for anyone who wanted to adopt shelter animals. This branch of the BC SPCA has also developed a “no kill” policy, and continues to work towards demonstrating and meeting the *emotional* needs of cats and dogs.⁴⁵ The SPCA sees their role as much broader than simply “sweeping little dogs off the street.” Certainly the SPCAs policies on companion animals – such as the “no kill” policy – are more progressive than in the past. I think the majority of SPCA staff genuinely believe they making a difference in the lives of (companion) animals.

⁴³ Niven, *supra* note 31 at 110.

⁴⁴ Montgomery, *supra* note 38 at 64 and 84; Peter Singer, *Animal Liberation* (New York: Harper Collins Publishers Inc, 2002) at 63; Douglas Quan, “Alberta mistake raises fears strays used for experiments: Lost pet winds up in research lab” *Ottawa Citizen* (6 March 2000) online: <<http://www.cruelscience.ca/pound-news.htm#3>>; Animal Alliance Canada, “The Political, Economic, Scientific, and Humane Case Against the Sale of Pet Dogs and Cats to Research: A Brief to the Government of Quebec” (Ontario: Animal Alliance Canada, 2003).

⁴⁵ The BC SPCA has developed the “hid-and-perch box” for cats which has been shown to reduce stress in cats in environments by allowing them to exercise natural “hide and perch” tendencies. The BC SPCA has also developed a video and manual (available for purchase) entitled: “The Emotional Lives of Cats.” See the BCSPCA, “CatSense: The Emotional Life of Cats: Video & Manual” (Vancouver: BCSCPA, 2007), online: <<http://www.sPCA.bc.ca/specialprograms/EmotionalLifeCats.asp>>.

However, it is important to emphasize that the SPCA's focus is indeed companion animals, which make up only an approximate one percent of the population of animals.⁴⁶ The vast majority of animals in Canada are farm animals, and the SPCA "recognizes that animals have been kept and will be kept for agricultural purposes" and does not question "the use of animals for meat, clothing, and agricultural products for both human and animal consumption."⁴⁷

Despite the SPCA's limited mandate, it is the entity delegated with the task of investigating and enforcing "laws relating to animal cruelty and to prepare cases for Crown Counsel for the prosecution of individuals who inflict suffering on animals."⁴⁸ Many of these SPCAs or humane societies are now supporting members of the Canadian Federation of Humane Societies (CFHS).⁴⁹ Developed in 1957, the CFHS describes itself as a "the national voice for animal welfare" with the goal of "working to improve conditions for all animals across Canada."⁵⁰ Obviously, like its SPCA and provincial humane society affiliates, the CFHS does not oppose many of our human uses of animals. For example, it is not inconsistent with the CFHS's values that a president of the CFHS, Robert Gardiner, has also simultaneously held leadership roles in "various trapping and wildlife organizations and committees as well as being a member of an animals care committee at a major experimental research institution."⁵¹ Former members of the CFHS,

⁴⁶ BC SPCA, "Protecting Farm Animals" (Fall/Winter 2005) *Animal Sense* 5.

⁴⁷ Saskatchewan SPCA, "SSPCA Charter" (Saskatchewan SPCA,), online: <<http://www.sspca.ca/>>.

⁴⁸ BC SPCA, "Our Mission and Charter" (Vancouver: BC SPCA, 2004), online: <<http://www.sPCA.bc.ca/about/default.asp>>; Ontario SPCA, "Who to call to report animal cruelty" (Ontario SPCA, online: <<http://ontariosPCA.ca/1-whocall.shtml>>).

⁴⁹ According to CFHS, CFHS "represents over a 100 member societies and branches across Canada, and speaks collectively for more than 400,000 individuals. A society is eligible for membership with the CFHS if it is "devoted to the prevention of cruelty to or the suffering of animals." See CFHS, "About CFHS" (Ottawa: CFHS, n.d.), online: <<http://www.cfhs.ca/information/information/>>.

⁵⁰ CFHS, *ibid.*

⁵¹ Sorenson, *supra* note 11 at 383.

and other unaffiliated animal advocacy groups, have been critical of CFHC for its conservative approach in improving animal welfare.⁵²

Canadian animal cruelty law then has shifted from an original concern about cruelty to livestock animals, to a concern for the minority of animals in Canada, companion animals. As I have shown in this subsection the mandate of Canada's SPCAs and humane societies is to help improve the lives of "pets" and not to question the use and intentional killing of the majority of Canada's animals, livestock or "food" animals, and animals used in experiments. In the next subsection I consider another historical piece of our animal cruelty provisions, the status of animals as human property.

iii) animals as property

*"The characteristic feature of slaves is that they lack self-ownership."*⁵³

A discussion of the history of the current *Criminal Code* provisions also necessitates a discussion of the property status of animals, as this status has remained unchanged since 1892. It likely goes without saying that animals in Canada are human property or, to state it more precisely, the object of human property (rights).⁵⁴ The current animal cruelty provisions, like its 1892 predecessor continue to codify the English common law conception of animals as property. As noted in the introduction, the animal cruelty provisions of the *Criminal Code* are located in a section of the Code (Part XI)

⁵² Sorenson, *ibid.*; Montgomery, *supra* note 38 at 75-77.

⁵³ Anita L. Allen, "Surrogacy, Slavery, and the Ownership of Life" (1990), 13 *Harvard J. of Law & Public Policy* 139 at 140.

⁵⁴ Law Professor Bruce Ziff describes human property rights as "a bundle of rights." He suggests that this metaphor reveals to us that "property is not a thing but ... a collection of rights (over 'things') enforceable against others." See Bruce Ziff, *Principles of Property Law*, 3rd Ed. (Toronto: Carswell, 2000) at 2. Thus, under Canadian law, animals are 'things' that humans have a bundle of rights over. A human owner, for example, has a set of rights with respect to his owned dog (thing) meaning he has the right do almost anything he wishes to his dog (such as kill his dog, so long as the killing does not involve gratuitous killing that is "unnecessary"), and other humans are excluded from interfering with an owner's rights (for example, other humans who may want to save the dog from death).

entitled: "Wilful and Forbidden Acts *in Respect of Certain Property*."⁵⁵ The current legal status of animals as property is problematic for two reasons. First, the notion of property, embodied in the current *Criminal Code* provisions, is an antiquated conception of property which does not reflect our contemporary societal values with respect to animals. Second, in defining animals as property at all, animals' interests are unfairly pitted against the property rights of human owners.

In the eighteenth century the common law notion of property was scribed and reflected in treatises produced by William Blackstone entitled: *Commentaries on the Law of England*. In these authoritative texts,⁵⁶ Blackstone defines property as "that sole and despotic dominion which one man [sic] claims and exercises over the external things of the world, in total exclusion of the right of any other individual of the universe."⁵⁷

Under the common law, humans are given an unqualified property right in domesticated animals.⁵⁸ Humans can also own wild animals if the animals reside on a human's owned land or water bed, and thus are constructively "possessed."⁵⁹ In this case

⁵⁵ See Part XI of the *Code*, *supra* note 1 [emphasis added].

⁵⁶ Blackstone's recitation of property law is highly respected and oft-cited by legal scholars and professionals. I certainly became well-acquainted with the name "Blackstone" in present-day law school. Blackstone's treatises are regarded as an accurate description of not only historical conceptions of property under the common law, but as the foundation of our present-day conception of property as well.

⁵⁷ William Blackstone, *Commentaries on the Law of England* (Oxford: Clarendon Press, 1965-1969) at Book II, ch. i, p. 2. Blackstone's infamous quote reflects and supports the notion that "a man's home is his castle," and that within the sphere a man rules his wife, children, and animals. In Blackstone's time women were not legal persons and owned property in only very limited circumstances. See e.g. Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 *Law and History Review* 211; Constance Backhouse, *Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Osgood University Press, 1999). We also know that Blackstone is presuming a white man when he refers to property ownership, as other racialized groups in eighteenth century England and North America would also have been denied personhood, and property rights. See e.g. Patricia Williams, "On Being the Object of Property" (1988) 14 *Signs* 1; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: Osgoode University Press, 1999).

⁵⁸ Hebert, *supra* note 14; Ziff, *supra* note 54 especially p. 122.

⁵⁹ Hebert, *ibid*; Ziff, *ibid*; Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997).

a land or water bed owner can hold animals captive,⁶⁰ or kill and make use of the dead bodies of those animals. In some provinces wildlife ownership under the common law has been modified by provincial wildlife statutes which hold that jurisdiction of all wildlife vests in the Crown, and that a person may only acquire ownership of wildlife through permits/licences issued by the provinces.⁶¹ What is important to glean is that this change in legislation does not alter the fact that even wild animals are owned by human(s); be they humans in government, humans controlling a corporate “person,”⁶² or a private landowner.⁶³ The wild animal – living her own life, amongst her kin, according to her own species’ rules – is always already subject to capture; once the capture amounts to “possession” in law, a test that varies with the particular animal and context,⁶⁴ she is now owned, and can be used or killed by her human owner. There are many examples of this conversion of wild animals from common property to private ownership: Wild horses rounded up and “broke” as riding horses; or, wild horses rounded up and slaughtered for European consumption; wild seals killed en masse in annual Canadian seal hunts; ducks,

⁶⁰ In order to promote control of animals, title was lost if an animal escaped. However, an animal with a habit of returning to the landowner was viewed as constructively possessed by the landowner, and therefore the landowner’s property. Ziff suggests that this “habit of returning principle” (or *animus revertendi*) was created to encourage owners to tame and control these animals.

⁶¹ See e.g. *BC Wildlife Act*, R.S.B.C., 1996, c. 488, s. 2.

⁶² A well-known English case, *Salomon v. Salomon & Co.* [1897] A.C. 22 (H.L.) that determined that corporations are autonomous, legal persons who can hold property. Corporations in Canada (as well as England, and the United States) continue to be separate legal persons from the humans that run them. For a critique of the separate legal personality of corporations see Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin Group, 2002).

⁶³ It is important to note that many Aboriginal groups dispute the presumed ownership of lands by the Canadian (western) government, companies and other private persons throughout Canada. These Aboriginal groups remind us that Canada is made up of traditional Aboriginal territories. Through treaties and other agreements between Aboriginal peoples and the Canadian/British government, much of these territories were to be maintained so that Aboriginal peoples could continue their way of life. Many of these agreements were not honoured on the part of the Canadian government; as a result many land claims by Aboriginal peoples remain outstanding today. See e.g. *Delgamuukw* [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia*, [2004] 3 S.C.R.; BC Treaty Commission, “A Brief History of Aboriginal Relations” (Vancouver: BC Treaty Commission, 2004), online: <http://www.bctreaty.net/files_2/timeline.html>.

⁶⁴ See Bruce Ziff, “The Concept of Possession” in Ziff *supra* note 54; Hebert, *supra* note 14.

rabbits, deer and fish hunted for sport, mountain goats and foxes killed for pelts; wild bears, wolves and lynxes used in zoos.

In sum, human landownership is revered in Canadian, western (dominant) jurisprudence, and animals are simply allocated according to human landownership rules.⁶⁵ Of course government regulation of animals, and the requirement of hunting permits, likely reflects a more contemporary conservationist effort unknown or underrated in Blackstone's eighteenth century, English context. Most modern humans have come to understand (some humans more slowly than others!) that destroying entire animal species and the ecosystems they reside in has the effect of (eventually) destroying ourselves.⁶⁶ The danger of inadvertently destroying our own species has motivated some humans to preserve animal species for the good of "biodiversity," and to ensure future human generations will have adequate numbers of animals to "harvest."⁶⁷ In other cases, some thriving or "nuisance" animal species are "culled" in the name of conservation.⁶⁸ My latter point here is that even the left-leaning, (so-called) progressive environmentalist

⁶⁵ With respect to Crown lands, wildlife belongs to whichever government owns the land in question: either a province or the federal government. See Hebert, *supra* note 14 at 4. Many Aboriginal groups claim to conceive of land and animals in a radically different way from dominant Canadian jurisprudence. See Part III, C. of this thesis for a more detailed discussion.

⁶⁶ See generally, Rachel Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962); Aldo Leopold, *A Sand County Almanac, with Other Essays on Conservation from Round River* (New York: Oxford University Press, 1966); Garret Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243; Christopher Stone, "Should Trees Have Standing? Towards Legal Rights for Natural Objects" (1972) 45 *S. Cal. L. Rev.* 450; David R. Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003).

⁶⁷ See e.g. the BC Ministry of Environment, "Conservation and Management" (BC Ministry of Environment, 2001), online: <<http://www.env.gov.bc.ca/wld/wildman.htm>>; Canadian Wildlife Service, "National Site" (Ottawa: Environment Canada, 2006), online: <http://www.cws-scf.ec.gc.ca/index_e.cfm>. "Harvest" is another polite word we like to use to describe killing animals. I have attempted to problemize this euphemism.

⁶⁸ See e.g. Vancouver Sun, "Canada's Top Ten Animal Problems" *Vancouver Sun* (8 May 2003) A1. "Culled" is yet another word we like to use when we exterminate populations of other species because we have determined them to be overly plentiful, not useful to humans, and therefore a "nuisance." Although humans have proven to be the most over-populated pest on the planet we uphold (at least officially) the sanctity of human life. In contrast I have been told that the rabbit populations at the university I attend are "culled" each spring. In other communities feral cats and dogs, bears, raccoons, wolves, coyotes, rats, mice and so on are similarly exterminated.

or conservationist movement does not assist us in problematizing the concept of animals as property.⁶⁹

Periodically members of the general Canadian public denounce our nineteenth century version of property, arguing that it fails to adequately capture the relations that humans have with animals in contemporary Canadian society. One such critique, in the form of a newspaper editorial, reads:

The law treats animals as property and is concerned mainly with the mistreatment of cattle and dogs. Yet our society has changed dramatically since the late 19th century, and with it our attitudes toward animals. We now see animals as sentient beings that are capable of feeling fear and pain. It is a national disgrace that our laws have yet to reflect that shift.⁷⁰

The average Canadian no longer interacts directly with livestock or working animals,⁷¹ but with companion animals who are often viewed as honorary family members. Humans who have interacted with fellow (non-human) animals have scads of stories to share about the meaningful relationships they have with other animals; and the intelligence, personality, intuitiveness, humour, and empathy demonstrated by the animals they know.⁷² I include an excerpt of one such story, which provides a glimpse into the life of the pig “Piglet.” I have chosen this particular excerpt among many because it is so rare to

⁶⁹ For an overview of the important differences between the environmental movement, and the animal rights movement see Angus Taylor, “Can Liberationists Be Environmentalists?” in Angus Taylor, *Animals and Ethics: An Overview of the Philosophical Debate* (Ontario: Broadview Press, 2003) 145.

⁷⁰ Editorial, “Update our laws on animal rights” *Toronto Star* (31 March 2005) A28.

⁷¹ Of course many Canadians interact with *dead* livestock animals on their dinner plates.

⁷² Jeffrey Moussaieff Masson & Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals* (New York: Dell Publishing, 1995); Barbara Smuts, “Reflections” in J.M Coetzee, *The Lives of Animals* (New Jersey: Princeton University Press, 1999); Cynthia Moss, *Elephant Memories: Thirteen Years in the Life of an Elephant Family* (University of Chicago Press, 2000); Jane Goodall, *Through a Window: 30 Years Observing the Gombe Chimpanzees* (London: Weidenfeld & Nicolson, 1990); Dian Fossey, *Gorillas in the Mist: A Remarkable Story of Thirteen Years Spent Living with the Greatest of the Great Apes* (London: Houghton and Mifflin Company, 1983); Monty Roberts, *The Man Who Listens to Horses* (New York: Ballantine Books, 1997); Hope Ryden, *Lily Pond: Four Years with a Family of Beavers* (New York: William Morrow & Co., 1989); Marc Bekoff, ed. *Smile of a Dolphin: Remarkable Accounts of Animal Emotions* (New York: Discovery Books, 2000); Donna Haraway, *Companion Species Manifesto: Dogs, People, and Significant Otherness* (Chicago: Prickly Paradigm Press, 2003); Jeffrey Moussaieff Masson, *The Pig who Sang to the Moon: The Emotional World of Farm Animals* (New York: Random House Publishing, 2003).

encounter stories of living pigs living out their natural lives. We are more likely to interact with dead pig bodies in the form of “pork chops,” “ham” and “bacon.”

My family and I were visiting Auckland New Zealand, when we heard about a pig who lived on a beach just fifteen minutes from downtown. The pig was famous; school children came to visit, she had been proposed for mayor ... We heard many stories about this amazing pig who liked to go for a swim early in the morning when the sea was at its calmest, and who enjoyed having children sit on her side, as long as they gave her a tummy rub before leaving. She was immaculate, well-mannered, sensitive, intelligent, and kind to strangers. When we finally met her, we could see that you could not ask for a better neighbour or ambassador for farm animals. Her emotional life was particularly near the surface ... She especially seemed to enjoy music on the beach at night when there was a full moon. Tony took a picture quite recently, of her making the sweetest sounds during a night of the full moon, as if she were actually singing to the moon.⁷³

As someone who has spent a lot of time with various individual cats, horses, dogs and rats, I could tell many stories of my own that defy conventional “wisdom” on the limitations of non-human animals (in relation to the “superior” human animal); that belie animals’ property status. But, of course, this is a risky disclosure for any newcomer to academia, especially for a woman.⁷⁴ There is an arsenal of scientific research, “rational” philosophy, and economic expertise, among others to castigate my relationship with animals – and particularly my discussion of it in an academic forum - as sentimentalist, and anthropomorphizing.⁷⁵ Perhaps this is why well-known animal liberation proponent Peter Singer, feels it necessary to distinguish himself from those he refers to as “animal lovers.”⁷⁶ He states that he is not “especially ‘interested in’ animals” nor “inordinately fond of dogs, cats or horses in the way many people are.”⁷⁷ He goes on to make an analogy to racial minorities: “No one ... would suggest that in order to be concerned

⁷³ Masson (2003), *ibid.* at ix-x.

⁷⁴ Various feminist authors have countered that it is our “emotional fellowship” with animals rather than “heartless” rationality or science that should guide any theory/practice of animal advocacy. See generally, Josephine Donovan & Carol J. Adams, eds., *A Feminist Caring Ethic for the Treatment of Animals* (New York: The Continuum Publishing Company, 1996).

⁷⁵ Feminist authors such as Donovan and Adams, *ibid.*, have detailed the way authors like Peter Singer, and Tom Regan, *infra* note 121, have trivialized or discounted such “womanish” sentimentalism.

⁷⁶ Peter Singer, *supra* note 44 at xxi.

⁷⁷ *Ibid.*

about equality for mistreated racial minorities one would have to love those minorities, or regard them as cute and cuddly.”⁷⁸ Rather Singer insists that he does not appeal to emotion, but reason.⁷⁹ The irony of Singer’s privileging of “reason” (over emotion) is that Singer simultaneously argues that the capacity for “reason” should not be criterion for justifying the unequal treatment of animals.⁸⁰ Singer, like other well-known (male) animal advocacy theorists, invokes a Cartesian mind/body dualism to legitimize his arguments.⁸¹

I concur with feminist authors, like Carol J. Adams and Josephine Donovan that:

One does not have to eviscerate theory of emotional content and reflection to present legitimate theory. Nor does the presence of emotional content and reflection eradicate or militate against thinking theoretically. By disavowing emotional responses [authors like Singer] close off the intellectual space for recognizing the role of emotions in knowledge and therefore theory-making.⁸²

Moreover, on a practical level, I do not think it is helpful to discount the significance of human relationships with non-humans. It is precisely these relationships that rouse human concern for animal suffering and death.⁸³ For example, Barbara Yaffe, a columnist writer for the Vancouver Sun, writes about her relationship with her dog Dickens, and her ability to “converse” with him about the necessity of bathing: “He looked at me with big

⁷⁸ Ibid.

⁷⁹ Ibid. at. xxii.

⁸⁰ See Peter Singer, “All Animals are Equal” in Singer, *supra* note 44 at 1. I credit my thesis supervisor, Law Professor Maneesha Deckha for drawing my attention to this point in one of our numerous conversations.

⁸¹ Cartesianism refers to the seventeenth century philosopher Rene Descartes who asserted that the mind or intelligence is a non-physical substance and is therefore separate from the physical body. Descartes is criticized today by animal advocates for his argument that animals lack consciousness or reason, and are therefore merely automata or biological machines. Animal researchers have long-since relied on Descartes’ notion of animals as justification for animal experiments such as vivisection. See John Cottingham, *et al* (translator), *The Philosophical Writings of Descartes* (Cambridge: Cambridge University Press, 1991). For a (feminist) critique of the contemporary manifestations of Cartesian dualism see Maneesha Deckha, “The Salience of Species Difference for Feminist Theory” (2006) 17 *Hastings Women’s Law Journal* 1.

⁸² Carol J. Adams, “Caring about Suffering: A Feminist Exploration” in Donovan and Adams, *supra* note 74 at 173.

⁸³ Other feminists have also made this point. See *e.g.* Carol J. Adams, *Neither Man nor Beast Feminism and the Defense of Animals* (California, AK Press, 1996); Carol J. Adams & Josephine Donovan, *supra* note 74.

baby browns, appearing to take in my assurances, and slowly emerged from under the chair with a posture of resignation. He proceeded to take the ensuing sudsing, rinsing and blowdrying like a St. Bernard.”⁸⁴ Her interactions with Dickens prompt Yaffe to consider: “If a dog understands the ups and downs of bath time, what does a cow feel while being trucked to a slaughterhouse in dark, hot, cramped confines?”⁸⁵

Humans who are emotionally connected to animals are more easily convinced that research animals feel pain; that animals subject to factory farm conditions, suffer. The more distant we are from animals, the more likely we are to become complacent, like the citizens of Omelas, in un-knowing these nameless “its.” Animal researchers and farmers know this. With animal experimentation on the rise,⁸⁶ researchers are careful to choose the animals we do not know. Pigs are the animals of choice (again when is the last time you interacted with a live pig?) for many animal experiments given that many Canadians already accept to some degree, the slaughter of pigs for human consumption.⁸⁷ When I recently had the opportunity to visit a University animal research facility, they had phased out all of their research dogs, and repopulated the kennels with pigs.⁸⁸

In any event there are humans who have a lot of affection for, and/or admiration of the individual animals they form relationships with. But when a wrong is committed against a companion animal – such as injury or death - the owner of the companion

⁸⁴ Barbara Yaffe, “Liberals propose bill on animal cruelty for a fifth time” *Vancouver Sun* (27 May 2005) A19.

⁸⁵ *Ibid.*

⁸⁶ Steve Connor, “The Big Question: Are there too many scientific experiments on animals in Britain?” *The Independent* (25 July 2006), online:

<http://news.independent.co.uk/world/science_technology/article1195277.ece>; Rebecca Bratspies, “Glowing in the Dark: How America’s First Transgenic Animal Escaped Regulation” (2005) 6 *Minn. J.L. Sci. & Tech.* 457; Laurel Aziz “Animal Pharm” *Equinox* (December/January 2000) 32.

⁸⁷ Aziz, *ibid.*; Fritz Bach, Adrian Ivinson & Christopher Weeramantry, “Ethical and Legal Issues in Technology: Xenotransplantation” (2001) *Am. J.L. & Med.* 283 at 284.

⁸⁸ University of British Columbia Animal Care Centre, Vancouver, BC., 2006. Most of the pigs were recovering from experiments already performed on them, such as organ harvesting.

animal is often shocked to learn of the way the law treats such a wrong. In *Oliver v. Canada*,⁸⁹ Mr. Oliver's four cows and his cat and dog were ordered quarantined and destroyed by the Ministry of Agriculture, as a neighbouring herd of cows had tested positive for brucellosis. Mr. Oliver sought compensation for all of his animals as set out in the Canadian *Animal Disease and Protection Act*.⁹⁰ Mr. Justice Collier first noted that the compensation to be paid under the Act is based on the market value of the animals. For his economically valuable cows, Mr. Oliver was awarded between \$500 and \$1500 for each cow. With respect to the cat and the dog, the court found that they were "ordinary pets" and that was no evidence of the animals' market value. Mr. Justice Collier commented: "I suspect the two pets had none. Their value was as pets, loved and part of the household."⁹¹ Mr Justice Collier confirmed the compensation awarded to Mr. Oliver by the Minister of Agriculture: \$50 for the dog, and \$5 for the cat. He added that the Minister had been generous in the amounts provided for Mr. Oliver's companion animals:

If the Minister had wished to be strict on the law, no compensation could probably have been the decision for those two animals ... even though I have every sympathy for Mr. Oliver. The compensation awarded is confirmed.⁹²

Although the court recognized that Mr. Oliver was likely most attached to his cat and dog as loved members of his household, the law is only equipped to measure the animals' worth according to their economic value.

In *Barclay v. Askeland*⁹³ Ms. Barclay sought damages resulting from an attack on herself and her companion poodle, Nicholas, by the defendant's German Shepard, Lady.

⁸⁹ *Oliver v. Canada*, [1988] F.C.J. No. 50 [*Oliver*].

⁹⁰ *Animal Disease and Protection Act*, R.S.C. 1970 c. A-13.

⁹¹ *Oliver*, *supra* note 89 at 3.

⁹² *Ibid.*

⁹³ *Barclay v. Askeland*, [1990] O.J. No. 1196.

Specifically Ms. Barclay sought damages for diminution of enjoyment of her life suffered as a result of the attack. She claimed that she could no longer walk her dog as regularly as she used to for fear of a similar attack. Justice Fleury noted that the attack was undoubtedly a “traumatic incident” for Ms. Barclay, but that most trauma “was related to the injuries suffered by her dog which she described as being ‘everything’ to her.”⁹⁴ Ms. Barclay testified that: “I can't imagine not having that dog. That dog has been with me for 7 years. We talk, we do everything together.”⁹⁵ Justice Fleury dismissed Ms. Barclay’s claim finding that:

Unfortunately, damages of this kind are not recoverable under this legislation. The Act specifically limits liability to damages resulting from an attack on a person. Although I have found that both Ms. Barclay and her dog were initially attacked, I am satisfied that the damages being sought in this section of the claim are being sought to compensate for the trauma to the poodle or for Ms. Barclay's emotional upset. Until the Legislature decides to significantly amend the legislation, such damages cannot be recovered ... This does not fall into the category of damages incurred by persons who were very close relatives of victims. There is no policy reason for extending the ambit of recovery to cover situations where a cherished animal has been injured by someone's wrongdoing.⁹⁶

The court awarded Ms. Barclay \$187.73 to cover the cost of veterinary bills, over-the-counter medicine and torn clothing. As Justice Fleury notes, Canadian law only recognizes harm done to humans, not to animals. The law is only prepared to compensate a human for harm done to their owned animal, if the human suffers a loss as a result. This situation is unsatisfactory because, in the words of one veterinarian, “I don’t think any ‘pet’ owner that values their relationship with any particular animal would be content

⁹⁴ *Ibid.* at. 1199.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at. 1200.

with being reimbursed for the purchase price of that animal if someone purposely harmed or killed it (sic).”⁹⁷

Despite increasing criticism of the property status of animals,⁹⁸ the Supreme Court of Canada recently re-affirmed human property rights in animals, in *Harvard College v. Canada*.⁹⁹ In *Harvard College* the court considered the patentability of the “oncomouse;” a genetically altered cancer-prone mouse. Animal advocate interveners objected to the deliberate creation of painful, cancerous tumours in the mice - as sentient beings. This position was summarily dismissed by Justice Binnie given animals’ status as property under Canadian law: “Of course, whatever position is adopted under *patent* law, animals have been and will continue to be used in laboratories for scientific research. Pets are property. Mice are already commodified.”¹⁰⁰

American lawyer and law professor Gary Francione argues that it is the legal status of animals as property that is the chief impediment for real change in the treatment and status of animals. Francione postulates that notwithstanding animal cruelty provisions, animals – as property – have no rights:

To say that an animal (or humans) is property is to say that, as a matter of law, the animal (or human) has no value, or holds no interests, apart from the value accorded, or the interests recognized, by the individual property owner. In other words, to classify something as property is to defend its treatment solely as a means to the ends chosen by the property owner.¹⁰¹

⁹⁷ Anonymous veterinarian, “Questionnaire” (May 10, 2006), per the University of Victoria Human Research Ethics Board Application for Ethics Approval for Human Participant Research, Protocol No. 06.038, March 9, 2006.

⁹⁸ See e.g. Gary Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, MA: Perseus, 2000); Leslie Bisgould, W. King & J. Stopford, *Anything Goes: An Overview of Canada’s Legal Approach to Animals on Factory Farms* (Animal Alliance of Canada, 2001).

⁹⁹ *Harvard College v. Canada*, 2002 SCC 76 [Harvard College].

¹⁰⁰ *Ibid.* at para. 100. Binnie J. for the dissent found that a genetically modified mouse could be considered an invention under Canada’s *Patent Act*, R.S.C. 1985, c. P-4. Despite the property status of animals, Bastarache J. for the majority held that the oncomouse was not an invention within the meaning of the *Patent Act*.

¹⁰¹ Francione, *supra* note 98 at 114.

Consider the fact that an owned animal does not have a right to live should an owner decide to have their animal “euthanised”¹⁰² for whatever reason. In *(Re) Wilshire Estates*,¹⁰³ Clive Wilshire directed in his will that, upon his death his executors have his four horses shot and buried by the Royal Canadian Mounted Police (RCMP). The direction resulted in strong public protest, and the RCMP refused to shoot the horses without a court order. Justice Riordon noted that in deciding the fate of the four horses, he could not base his decision on “sentiment or public opinion” but on “legal principles in accordance with the law of the land.”¹⁰⁴ Justice Riordon also noted that “Clive Wilshire, just like any other citizen has, had the right and privilege to make a Will to bequeath and dispose of *his property*.”¹⁰⁵

Ultimately Justice Riordon held that the lives of the four horses would be spared, but not because of any law that protected the horses per se. Justice Riordon considered the intention of Mr. Wilshire in having his horses shot, and found that Mr. Wilshire’s intent was to ensure his horses would not be abused if he was not able to provide for their welfare:

There is, in my view, reason to believe that Clive Wilshire would have wanted his horses to live if he had been aware that they would be attended to and properly cared for and not abused. The evidence is clear that he had a great love for his horses and he was undoubtedly unaware that others would be prepared to provide and care for them and not abuse them. I of course have now the benefit of information that Clive Wilshire did not have when he made his will.¹⁰⁶

¹⁰² “Euthanize” is the most commonly used term to describe the intentional killing of animals by veterinarians (and/or assistants) on behalf of owners. I have put quotations around the word to problematize the common employment of the term to characterize the death of (often healthy and/or young) animals as necessary, pleasant and or painless.

¹⁰³ *(Re) Wilshire Estates*, [1992] N.B.J. No. 547.

¹⁰⁴ *Ibid.* at 553

¹⁰⁵ *Ibid.* at. 554 [emphasis added].

¹⁰⁶ *Ibid.*

Interestingly, Justice Riordon also decided it would also be contrary to public policy to allow for “the destruction of four healthy animals for no useful purpose.”¹⁰⁷ He went on to state that “to destroy the horses would benefit no one and would be a waste of resources and estate assets.”¹⁰⁸

This decision tells us two things. First, it is not the actual lives of the horses that matter but Mr. Wilshire’s intentions. Had the court found that Mr. Wilshire did not love his horses or have concern for their welfare, the court would have upheld his will directive. Second, it would be a shame to kill the horses, not because they are living creatures, but because it does not make sense to destroy economically valuable property. Justice Riordon likely would have arrived at a completely different decision were these horses middle-aged or afflicted with health problems.

As Francione maintains, even the most fundamental interest of animals – the right to live – is trumped by the whim of a human owner. Humane societies document the following “justifications” that human owners provide in disposing of their owned animals: *“I just don’t have the time” / “I have new furniture, and there’s too much hair” / “He’s digging up our backyard” / “We’re moving/going on holidays and we can’t take her with us” / “She needs to live in the country” / “He’s too ‘hyper’” / “He’s too ‘yappy’” / “We didn’t know Dalmatians (or Siamese cats or rabbits or lizards or ferrets) were like that” / “He doesn’t really match the couch.”*¹⁰⁹

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 555.

¹⁰⁹ See Augusta Animal Services, “Ending Suffering or Convenience Killing?” (Georgia: Augusta Animal Services, 2006), online: <http://www.augustaga.gov/departments/animal_services/euthanasia.asp>; Bob Wright, Dan Kenney & Gerrit Rietveld, “Euthanasia of Horses” (Ottawa: Ministry of Agriculture, Food and Rural Affairs, 2006), online: <http://www.omafra.gov.on.ca/english/livestock/horses/facts/info_euthanasia.htm>; Teresa Wagner, “The Tragedy of Shelter Euthanasia and What You Can Do to Stop It” (Teresa Wagner, 2006), online: <<http://www.animalsinourhearts.com/shelter/because1.htm>>.

Of course, the preceding paragraph is referring only to companion animals who we generally proclaim to love the same as our human family members. Other owned animals are “nameless its” owned solely for economic reasons, and pre-destined to be killed for food, clothing and/or scientific research. Francione suggests that anticruelty laws are generally geared towards the protection of such human ownership rights and economic interests rather than to protect animals from cruelty:

statutes also seek to provide only that level of protection of animals that is consistent with the most productive use of the animal in the particular context. Moreover, since animals are the property of owners we assume that the owners of property seek to maximize the value of their property, we rely to a great extent on self-governance to ensure that animals are given the level of welfare needed to ensure their most efficient exploitation.¹¹⁰

Note how Francione’s hypothesis is aligned with the Canadian case, *Re Wilshire Estates* to the extent that Justice Riordon could not stomach the idea of having useful property (four young healthy horses) wasted. An owner’s motivation to protect and/or maximize his animal property may coincide with the welfare of his animals (as in the *Wilshire* case), but this does not mean therefore that animals have legal rights. In the words of Neil MacCormick, “consider the oddity of saying that turkeys have a right to be well fed in order to be fat for the Christmas table.”¹¹¹ Recall that the animal cruelty provisions in the *Criminal Code* treat offences against livestock much more seriously than any other animals. Livestock are not a group of animals that are more sentient than other animals; livestock are a group of animals that are traditionally and continually of more economic value to humans than other animals.

What makes the property status of animals especially problematic is that human property rights are revered under Canadian law, and difficult to dislodge. For example, in

¹¹⁰ Francione, *supra* note 98 at 28.

¹¹¹ Neil MacCormick, “Children’s Rights: A Test Case” in *Legal Rights and Social Democracy* (Oxford: Clarendon Press, 1982).

1948, Canada signed the United Nations *Universal Declaration of Human Rights*,¹¹² which includes an article stating:

17. 1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his [sic] property.

The right of a person to enjoy his or her property and not be deprived thereof is also codified in the Canadian Bill of Rights.¹¹³ The high status of human property rights is also confirmed in the Supreme Court of Canada case *Harrison v. Carswell*¹¹⁴ where Justice Dickson stated for the majority:

Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, of any interest therein, save by due process of law.¹¹⁵

As Wendy Adams notes, “property rights are exceedingly difficult to displace by anything less than the most compelling norms and values relevant to humans.”¹¹⁶ Adams’ point is similar to the point made by Francione that, given law’s reverence of individual property rights, animals are particularly vulnerable as property:

As far as the law is concerned, it is as if we were resolving a conflict between a person and a lamp. The winner of the dispute is predetermined by the way in which the conflict

¹¹² *Resolution, Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

¹¹³ Canadian Bill of Rights, S.C., 1960, c. 44, s. 1(a). There have been moves by various government actors to codify this property right in Canada’s *Charter of Rights and Freedoms* as well. See David Johansen, “Property Rights and the Constitution” (Ottawa: Government of Canada, 1991).

¹¹⁴ *Harrison v. Carswell*, [1976] S.C.R. 200; (1975), 62 D.L.R. (3d) 68.

¹¹⁵ *Ibid.* at p. 89. Contemporary legal scholars, including many feminist legal scholars, are critical of Canadian jurisprudence that emphasizes *negative* liberty interests (such as the right to be “free” from government interference). Feminists have argued that negative liberty rights are male-centric and hark back to the antiquated notions that “a man’s castle is his home” (and it is none of the government’s business if he beats or rapes his wife in that home). Feminist and other critics have argued that the state has a responsibility to intervene in some cases, to protect women from domestic violence, to provide adequate living standards for all Canadians, and/or to sufficiently fund legal aid. Proponents of positive liberty interests have been critical of the recent Supreme Court of Canada case *Gosselin v. Quebec* (2002) 4 S.C.R. 429 where the court held that our Constitution does not invoke positive liberty interests. See Joel Bakan, “Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)” (1991) 70 Can. Bar Rev. 307; Hester Lessard, “Relationship, Particularity, and Change: Reflections on R. v. Morgentaler and Feminist Approaches to Liberty” (1991) 36 McGill L.J. 263.

¹¹⁶ Wendy Adams, “The Myth of Ethical Neutrality: Property, Patents, Animal Rights and Animal Welfare in *Commissioner of Patents v. President and Fellows of Harvard University*” (2003) 39 Canadian Business Law Journal 181 at 214.

is conceptualized in the first place. The human interest in regarding animals as property is so strong that even when people do not want to consider animals as mere 'property' and instead view animals as members of their family ... the law generally refuses to recognize that relationship.¹¹⁷

Given these inherent problems with the property status of animals, Adams hints that a new conception of property rights, in relation to animals, is required: to expect limits to be placed on the exercise of a property right based ... on the interests of the object of the property itself, is to rely on an analytical notion of property which has yet to be mindfully acknowledged or explored."¹¹⁸

To recap this subsection, the current property status of animals can be traced to antiquated common law notions of property, developed during a time when women and other non-white humans were themselves generally viewed as the property of white males.¹¹⁹ Since Blackstone's time women and racialized, non-white humans have made many important legal gains.¹²⁰ Animals on the other hand have not.¹²¹ Yet many humans are increasingly calling into question our legal categorization of animals as property. Some argue that animals' status as property is out of touch with our contemporary views about animals. Other humans have significant relationships with other animals and are troubled by the legal characterization of that relationship as strictly economical. I am in accord with animal advocates, such as Francione and Adams who conclude that the

¹¹⁷ Francione, *supra* note 98 at 24.

¹¹⁸ W. Adams, *supra* note 116 at 214.

¹¹⁹ See, *supra* notes 56-57.

¹²⁰ Such as the right to vote, the right to personhood, and the right to equality with specific recognition of the historic disadvantage of women and racialized groups. See the Canadian *Charter of Rights and Freedoms*, *supra* note 113. In contrast, animals remain property as they did under eighteenth century common law.

¹²¹ Several animal advocates have argued that animals are the last disadvantaged group to be liberated. See Singer (2001), *supra* note 44; Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983); Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (New York: Mirror Books, 1996); Deckha, *supra* note 81; Joan Dunayer, *Speciesism* (Maryland: Ryce Publishing, 2004).

continued property status of animals is on shaky ethical grounds, and is in dire need of re-examination in Canada. In the following subsection I problematize another aspect of our current anti-cruelty provisions: the prohibition of “unnecessary cruelty to animals.”

iv) “Unnecessary” pain and suffering

Although animals are characterized as property in the anti-cruelty provisions of *Criminal Code*, these provisions also appear to recognize the obvious fact that animals are quite distinct from other forms of property because animals, unlike lamp shades or cars, are more akin to humans, and have the ability to feel pain. Peter Singer, a utilitarian, illustrates this point well:

It would be nonsense to say that it was not in the interests of a stone to be kicked along the road by a schoolboy. A stone does not have interests because it cannot suffer ... A mouse, for example, does have an interest in not being kicked along the road, because it will suffer if it is.¹²²

Singer is reviving and elaborating on Jeremy Bentham’s nineteenth century passage emphasizing that it is animal’s capacity to suffer that should guide treatment of animals.¹²³

Likely a reflection of the growing consensus in the nineteenth century that animals feel pain, the *Criminal Code* provisions on animal cruelty do address pain and suffering in animals. Section 446(1) of the *Criminal Code* makes it an offence for anyone to wilfully cause, or, being an owner, wilfully permit *unnecessary* pain, suffering or injury to an animal. The *Code* does not define what “unnecessary” means. However, several Canadian cases have considered the scope and meaning of “unnecessary.” In *R. v. Pacific Meat Co. Ltd.*,¹²⁴ Swencisky J. considered whether a method of slaughtering pigs

¹²² Singer (2000), *supra* note 44 at 7-8.

¹²³ Bentham, *supra* note 34.

¹²⁴ *R. v. Pacific Meat Co., Ltd.* (1957), 119 C.C.C. 237 (Co. Ct. Vanc.) (Swencisky J.).

for human consumption caused unnecessary pain, suffering or injury. The method used to slaughter the pigs was as follows: Each pig's leg was shackled and attached to a chain. The chain, attached to a vertical hoist, lifted the pig up into the air at a height of about 15-18 feet. The pig struck against a metal wall with some force as he or she struggled and squealed. The pig then had his or her throat slit by a slaughterhouse worker (also called the 'sticker') while hoisted. While Swencisky J. conceded that the pigs suffered pain in the slaughter process,¹²⁵ he went on to determine that the pain and suffering endured by slaughterhouse pigs was necessary:

Hogs fulfil a purpose of providing food for human beings. Before the hogs can be eaten by mankind [sic] they must of necessity be killed, so that the fatal injury that is administered to each hog by the 'sticker' is a necessity and therefore not 'unnecessary.'¹²⁶

Justice Swencisky determined that the pain and suffering of the pigs was necessary, as part and parcel of the slaughter process to ensure humans can eat the pigs. But is eating pigs – or an animal for that matter - truly necessary in the ordinary sense of the word? It is widely held that the human body does not require animal flesh or animal products to maintain physical health. In fact, various medical professionals tout the physical health benefits of becoming vegetarian and vegan, such as: reduced risk of heart disease, obesity, high blood pressure, Type 2 diabetes, osteoporosis, kidney stones, gallbladder disease, and some cancers.¹²⁷

¹²⁵ Despite evidence that the pigs struggled and squealed during the slaughtering process, and numerous Crown witnesses arguing that the pigs suffered pain during this process, Swencisky J. held that none of the witnesses were "in law competent to give opinion evidence" and would have dismissed the evidence had counsel for the respondents not already conceded that the slaughter method caused pain, and suffering to the pigs.

¹²⁶ *Ibid.* at p. 239.

¹²⁷ See e.g. Dietitians of Canada, "Can I become a Vegetarian and Still Achieve Healthy Eating?" (British Columbia, Dietitians of Canada, 2006), online: <http://www.dietitians.ca/public/content/eat_well_live_well/english/faqs_tips_facts/faqs/index.asp?fn=view&id=969&idstring=4997%7C2701%7C969%7C2718%7C1304%7C1310%7C1254%7C2206%7C1296>; American Dietetic Association & the Dietitians of Canada, "Position of the American Dietetic Association and Dietitians of Canada: Vegetarian Diets" (2003) 64 Canadian Journal of Dietetic Practice and Research

In *R. v. Pacific Meat Co. Ltd.* Justice Swencisky went on to give an example of the type of act that could constitute unnecessary pain within the meaning of the *Criminal Code* animal cruelty provisions:

If someone who was not employed in a slaughterhouse was to shackle a hog as described in this case, and if such person hoisted the animal as herein described, just to hear it [sic] squeal or for any other sadistic reason, and if evidence was adduced that the hog in fact suffered pain in the process, then I would hold that such pain and suffering was ‘unnecessary and that such a person would be guilty.’¹²⁸

The focus then is not on the actual or subjective pain or suffering of an animal but on the human purpose that is served by the pain and suffering.

The most recent interpretation of unnecessary pain was rendered by Lamer J.A. (as he was then) in the leading case *R. v. Menard*.¹²⁹ Citing with approval the British case, *Ford v. Wiley*,¹³⁰ Lamer held that the “mere infliction of pain” is not of itself sufficient. Unnecessary pain must be “substantial pain ... inflicted without necessity.”¹³¹ Lamer went on to find that two of our most widespread human (ab)uses of animals: eating them and experimenting on them are “necessary.” Perhaps recognizing that human consumption of animal flesh is not truly necessary, Lamer suggested that it is the privileged, superior position of man [sic] that requires us to take a broad meaning of what is necessary for humans at the expense of animals:

... even if it not be necessary for man [sic] to eat meat and if he could abstain from doing so, as many in fact do, *it is the privilege of man to eat it.* Considered in terms of the

62; Lynda Lowry, “Balancing the Issues in Agriculture: Healthy Vegetarian Diets” (Manitoba Agriculture, Food and Rural Initiatives, 2005), online: <<http://www.gov.mb.ca/agriculture/homeec/cbd04s01.html>>; Timothy Key, Gwenyth Davey & Paul Appleby, “Health benefits of a Vegetarian Diet” (1999) 58 *Proceedings of the Nutrition Society* 271.

¹²⁸ *R. v. Pacific Meat Co.*, supra note 124 at p. 240.

¹²⁹ *R. v. Menard* (1978), 43 C.C.C. (2d) 458 (Q.C.A.). (Lamer J.A.).

¹³⁰ *Ford v. Wiley* (1889), 23 Q.B.D. 203, 58 L.J.M.C 145. In *Ford v. Wiley* the British court was interpreting the meaning of words in an anti-cruelty provision similar to our own: “pain, suffering or injury, without necessity.”

¹³¹ *Menard*, supra note 129 at p. 462.

purpose sought the expression 'without necessity' must interpreted taking into account the privileged position which man occupies in nature.¹³²

In *Menard*, Lamer also interpreted experiments and research involving animals as necessary: "Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of lives."¹³³

Even plain human entertainment has been protected by the unnecessary requirement of our anti-cruelty provisions. In *R v. Linder*¹³⁴ the court of appeal held that rodeo bucking horses, subjected to spurs and bucking straps, were not subjected to "unnecessary cruelty."¹³⁵ The unanimous court found that the horses did not suffer *substantially* from the strap and spurs, and therefore did not unnecessarily suffer: "... the intent of the section is to make it an offence to cause unnecessary *substantial* suffering to any animal."¹³⁶

A few authors have been critical of statutes that prohibit only "unnecessary" pain and suffering.¹³⁷ Canadian professor Michael Allen Fox argues that the necessary/unnecessary construct is "empty of meaning" because it permits humans to cause animals to "suffer in abundance."¹³⁸ In the name of "necessary suffering" we permit widespread suffering and painful practices to the vast majority of Canada's

¹³² *Ibid.* at p. 465 [emphasis added]. *R. v. Menard* is still considered the leading authority on determining "necessity" in the animal cruelty provisions of the *Criminal Code*.

¹³³ *Ibid.* at p. 462. Numerous authors challenge the legitimacy of animal experimentation, see *infra* note .

¹³⁴ *R. v. Linder*, (1950) 97 C.C.C. 147 (B.C.C.A.) (Bird J.A.).

¹³⁵ *Ibid.* at 176. This case has yet to be distinguished or overruled in Canada.

¹³⁶ *Ibid.* [emphasis added].

¹³⁷ Other statutes and policies in Canada also employ this type of language. See *e.g.* The *Ontario Animals for Research Act*, R.S.O. 1990, c. A.22, ss. 16-17; The Canadian Council on Animal Care (CCAC), "Policy Statement: Ethics of Animal Investigation" (Ottawa: CCAC, 1989) s. 2, online:

<http://www.ccac.ca/en/CCAC_Programs/Guidelines_Policies/POLICIES/ETHICS.HTM>; *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, s. 1; the *New Brunswick Society for the Prevention of Cruelty to Animals Act*, R.S.N.B. 1973, c. S-12, s. 19(3); the *Newfoundland Animal Protection Act*, R.S.N.L.1990, c. A-10, ss. 2(b) and 4(5); *Nova Scotia Animal Cruelty Prevention Act*, R.N.S. 1996, c. 22, s. 11(1). *Prince Edward Island Animal Health and Protection Act*, R.S.P.E.I. 1988, c. A-11.1, s. 8.1(1); *Yukon Animal Protection Act*, R.S.Y. 2002, c. 6.

¹³⁸ Michael Allen Fox, "On the 'necessary suffering' of non-human animals" (1997) 3 *Animal L.* 25 at 25.

animals. Recall that the majority of Canada's animals are not the companion animals we love and care for, but animals we rear for human consumption or research experiments.

The "necessity" of eating animals

The 600-700 million animals¹³⁹ reared and slaughtered for human consumption each year in Canada are hot-iron branded, de-horned, castrated, tail-docked and have their beaks seared - all without anaesthetic.¹⁴⁰ All of these practices are acknowledged by veterinary experts as painful.¹⁴¹ All of these practices are also permitted by the Canadian Agri-Food Research Council's (CARC) Livestock Codes of Practice.

The Codes of Practice are nationally developed guidelines setting out recommended "housing and management practices for farm animals as well as transportation and processing."¹⁴² The Codes are developed by stakeholders in the

¹³⁹ In the last recorded year (2004), 676,538,784 animals were reared and slaughtered for human consumption. In arriving at this number, I relied on figures provided by Agriculture and Agri-food Canada for 2004. See: Agriculture and Agri-food Canada, "2005 Annual Livestock and Meat Report" (Ottawa: Agriculture and Agri-food Canada, 2006), online: <<http://www.agr.gc.ca/redmeat/almr2005.htm>>; Agriculture and Agri-food Canada, "Poultry Slaughter" (Ottawa: Agriculture and Agri-food Canada, 2006), online: <http://www.agr.gc.ca/poultry/slau-abat_e.htm#mature>. Included in this figure are: all cows (including calves), pigs, sheep (including lambs), chickens (including mature chickens), turkeys, pigs, ducks, geese and farmed deer. In arriving at this figure I did not include "game-species" (such as rabbits, wild boars, reindeer, bison, elk and caribou). 662,408 game animals were slaughtered in 2004. I also did not include horses: 51,610 horses were slaughtered in Canada in 2004. Other animals slaughtered in Canada are also excluded: marine mammals (such as seals and whales); farmed and wild fish; animals farmed or trapped primarily for fur (such as minks and foxes); and animals slaughtered that are not reported to Agriculture and Agri-food Canada, or not slaughtered in federally or provincially inspected establishments.

¹⁴⁰ All of these procedures are routine husbandry practices in Canada.

¹⁴¹ See Michael Gentle, "Pain in Birds" (1992) 1 *Animal Welfare* 235; J. McGlone & J. Hellman, "Local and general anesthetic effects on behavior and performance of 2 and 7 week old castrated and non-castrated piglets" (1988) 66 *Journal of Animal Science* 3049; J. Kent, R. Jackson, V. Molony, B.D. Hosie, "Effects of acute pain reduction methods on the chronic inflammatory lesions and behaviour of lambs castrated and tail docked with rubber rings at less than two days of age" (2000) 160 *Veterinary Journal* 33; B. Graf & M. Senn, "Behavioural and physiological responses of calves to dehorning by heat cauterization with or without local anaesthesia" (1999) 62 *Applied Animal Behaviour Science* 153; K.S. Schwartzkopf-Genswein, J.M. Stookey, A. dePassille & J. Rushen, "Comparison of hot-iron and freeze branding on cortisol levels and pain sensitivity in beef cattle" (1997) 77 *Canadian Journal of Animal Science* 369.

¹⁴² Canadian Agri-food Research Council [CARC], "Policy Guidelines and Development Process: For Recommended Codes of Practice for the Care and Handling of Farm Animals and Factsheets" (Ottawa: Canadian Agri-food Research Council, 1998), online: <http://www.carc-crac.ca/english/codes_of_practice/guidplcy.htm>.

animal-use industry itself in conjunction with the Canadian Federation of Humane Societies.

While the Codes of Practice sanction some forms of animal cruelty, they do “recommend” against other forms of cruelty. The Code of Practice dealing with veal calves, for example, states that hitting a calf over the head “with a blunt instrument is no longer an approved method of rendering a calf unconscious.”¹⁴³ The Code of Practice for sheep recommends against lifting sheep by the “head, ears, horns, tail or fleece.”¹⁴⁴ The Code for “beef” cattle “discourages” the use of electric cattle prods, however, if prods are “required,” the Code states that “care must be taken to not use prods on the genital and anal areas, head and udder of cattle.”¹⁴⁵ The Code for pigs suggests to “avoid pulling legs in directions in which they do not naturally move.”¹⁴⁶

In any event, what is recommended or not recommended by the Codes of Practice is not of much consequence because the Codes are entirely voluntary and therefore not binding. In *R. v. Vandongen*,¹⁴⁷ the British Columbia court considered the enforceability of the Codes of Practice. In this case the accused was charged with permitting his cattle to be in distress contrary to the *BC Prevention of Cruelty to Animals Act*.¹⁴⁸ A veterinarian, Dr. Steinebach, testified on behalf of the Crown that the manure in the cattle barn was ankle deep and posed a serious health risk to the cows:

The amount of manure on the floor of the loading area meant that many cows would be reluctant to lie down because they are basically clean animals who prefer a clean, dry area for this activity. Since lying down is so important to their food digestion, inability to do so could eventually lead to digestive problems ... If, on the other hand, the cows did choose to lie down despite the manure, it could lead to their ingesting contaminate

¹⁴³ Recommended Code of Practice: Veal Calves, at s. 8.7.3.

¹⁴⁴ Recommended Code of Practice: Sheep, at s. 14.8

¹⁴⁵ Recommended Code of Practice: Beef Cattle, at s. 15.2.3.

¹⁴⁶ Recommended Code of Practice: Pigs, at p. 18.

¹⁴⁷ *R. v. Vandongen*, [2004] B.C.J. No. 2740 [*Vandongen*].

¹⁴⁸ BC Prevention of Cruelty to Animals Act, R.S.B.C. 1996, c. 372.

material with faecal organisms in it. This could occur, for example, when the cows groomed themselves. In turn, the disease could then spread to other cows ... the cows could also develop foot rot or foot infections and skin disease.¹⁴⁹

In providing his opinion, Dr. Steinebach referred to the CARC's recommended Codes of Practice.

Justice Gulbransen acquitted the accused finding that the Crown could not prove the cows actually suffered any harm. In arriving at this decision Justice Gulbransen emphasized that:

the issue in this case is whether the Crown has proven, beyond a reasonable doubt, that Mr. Van Dongen permitted his animals to be "in distress" as defined in the Prevention of Cruelty to Animals Act, not whether his farming practices complied with voluntary guidelines created by Agriculture Canada.¹⁵⁰

Similarly the federal government is quick to point out that the Practice Codes "should not and of themselves be used to determine compliance of the legality of a particular operation. Codes are ... not required standards."¹⁵¹ So, even when cruel farming practices occur that are not sanctioned by the Codes of Practice, we can safely assume, as Bisgould King and Stopford do, that "unless some piece of legislation specifically says otherwise, these practices may lawfully occur and do; if they did not, there would not be any reason to make recommendation in regard to them."¹⁵²

Animals reared for human consumption in Canada are generally raised in warehouse-type barns prompting many to refer to modern-day agri-business as factory farming. This style of farming means "you can drive through the country side, through centres of agricultural production, and see relatively few animals. They are mostly

¹⁴⁹ *Vandongen*, *supra* note 147 at paras. 11-12.

¹⁵⁰ *Ibid.* at para. 30.

¹⁵¹ Canadian Agri-food Research Council [CARC], *supra* note 142 at 1.

¹⁵² Bisgould, King & Stopford, *supra* note 98 at 39-40.

indoors ...”¹⁵³ Another result of this type of farming is that animals are often confined to spaces so small that they cannot turn around or move more than a step.¹⁵⁴ For example, the Code of Practice on veal calves provides that a stall width of 70 centimetres (27.5 inches) is acceptable housing for untethered calves.¹⁵⁵ Calves can be tethered so long as ropes are short enough to “prevent them from turning around, and to protect them from strangulation.”¹⁵⁶ The Code of Practice on pigs states that female pigs (sows) can be kept in farrowing crates measuring just 75 centimetres (30 inches) wide.¹⁵⁷ As a female pig can weigh over 250 kilograms (500 pounds), the crate severely restricts her movement.¹⁵⁸ The Code of Practice on “Layer” hens suggests that up to seven hens be kept in a (battery) cage of 67 square inches; providing each hen with less than ten inches of space (about the size of this sheet of paper).¹⁵⁹ Again, as the Codes of Practice are mere guidelines we can assume that humans can keep animals in even smaller spaces without fear of legal sanction.

The crowding, restricted movement, and unnatural conditions create high levels of aggression, fear, stress, and stereotypic behaviour¹⁶⁰ not ordinarily seen in the animals’

¹⁵³ Montgomery, *supra* note 38 at 134.

¹⁵⁴ See generally the housing recommendations provided in the CARC’s Recommended Codes of Practice for the Care and Handling of Farm Animals. Of course even the tiny quarters recommended for farm animals in the Codes of Practice are at the high water mark for animal housing conditions in Canada. See also Montgomery, *ibid.*

¹⁵⁵ Recommended Code of Practice: Veal Calves, at 1.7.4

¹⁵⁶ *Ibid.* at s. 1.8.1.

¹⁵⁷ Recommended Code of Practice: Pigs, at p. 13.

¹⁵⁸ The purpose of a farrowing crate is to restrict the movement of a pregnant and lactating pig. There is a concern that a pig may crush her piglets because in the intensive farm setting a pig is not provided the space or tools to birth and care for her piglets as she would if left to her own accord. Ordinarily she would build a nest that would prevent her from crushing her piglets, as well as keep the piglets safe and warm. See Erik Marcus, *Meat Market: Animals, Ethics and Money* (New York: Brio Press, 2005).

¹⁵⁹ Recommended Code of Practice: Poultry – Layers, at 4.1.1 and 4.1.2.

¹⁶⁰ Stereotypic behaviour or stereotypies are generally defined as: “unvarying, repetitive behaviour patterns that have no obvious goal or function ... they are often described as ‘abnormal’ and thought by many to indicate welfare problems for animals displaying them. Indeed, stereotypies are most often observed where animals are confined and there are constraints on their ability to perform certain behaviour patterns.” See J.

wild/feral counterparts.¹⁶¹ Many of the housing and husbandry recommendations set out in the Codes of Practice fall short of what is recommended or required in other jurisdictions, particularly in European nations.¹⁶²

Animals are both starved and force-fed to achieve efficient production yields. Breeding female pigs (sows) and male pigs (boars) are given “approximately 60% of the amount they would consume on a concentrate food offered *ad libitum* ... broiler breeders are offered roughly one-quarter to a half as much as unrestricted birds.”¹⁶³ To make the “delicacy” foie gras, geese and ducks are force-fed pounds of corn so that their livers enlarge up to ten times its normal size.¹⁶⁴

Unsurprisingly, the conditions and practices of rearing food animals in Canada lead to a myriad of physical problems for food animals. Given the intensive rearing of broiler chickens and turkeys, for example, it is estimated that approximately one-quarter of them are in chronic pain for about a third of their lives.¹⁶⁵ It is estimated that only 29% of “finishing” pigs are disease free.¹⁶⁶ Given the concentration of urine and manure build-up involved in intensive farming, many factory farm animals suffer from respiratory ailments.¹⁶⁷

Carol Petherwick & Jeff Rushen, “Behaviour Restriction” in Michael Appleby & Barry Hughes, eds. *Animal Welfare* (Oxford: CAB International, 1997) at 103.

¹⁶¹ Joy Mench, “Behaviour” in Appleby & Hughes, *ibid.* at 127; Bernard Rollin, *Farm Animal Welfare: Social, Bioethical, and Research Issues* (Iowa: Iowa State University Press, 1995).

¹⁶² Hughes & Meyer, *supra* note 30; Singer (2000), *supra* note 44.

¹⁶³ Ilias Kyriazakis & C. John Savory, “Hunger and Thirst” in Appleby & Hughes, *supra* note 160 at 51-53; Rollin, *supra* note 161; Marcus, *supra* note 158.

¹⁶⁴ Rollin (1995), *ibid.*; Canadian Coalition for Farm Animals (CCFA), “Facts About Our Food: Foie Gras” (Toronto: CCFA, n.d.), online: <http://www.humanefood.ca/docs/foie_gras_factsheet_6.pdf>. Given the welfare implications of producing foie gras many European nations have banned it. See Appleby & Hughes, *supra* note 160.

¹⁶⁵ See Paul Flecknell & Vince Molony, “Pain and Injury” in Appleby & Hughes, *ibid.* at 68; Marcus, *supra* note 158; Rollin (1995), *supra* note 161.

¹⁶⁶ Barry Hughes and Peter Curtis, “Health and Disease” in Appleby & Hughes, *ibid.* at 112; Rollin (1995), *ibid.*

¹⁶⁷ Marcus, *supra* note 158; Appleby & Waran in Appleby & Hughes, *ibid.*; Rollin (1995), *ibid.*

The suffering of the majority of Canada's animals is not necessary in any true sense of the word. The modern-day factory farm is driven by profit. As Bisgould King and Stopford note, under Canadian laws and practices "animals are nothing more than production units to be used in the most economically efficient manner possible."¹⁶⁸ Agri-Food Canada boasts that our agriculture sector contributes over 8 per cent of the Canadian Gross Domestic Product, and is the largest manufacturing sector in 7 provinces.¹⁶⁹ The profits obtained annually from the (generally miserable) lives and deaths of food animals is over \$26 billion.¹⁷⁰ Agri-Food Canada states that high profits and low-costs are possible because of the highly efficient nature of Canada's farms:

One person can operate a unit of 50,000 broiler chickens ... Poultry processing plants in Canada are effectively mechanized, which allow them to slaughter and prepare 25,000 broiler chickens for market per hour.¹⁷¹

Other countries have moved away from many of the factory farming practices used in Canada. Sweden outlawed the battery cage system for hens in 1991.¹⁷² The European Union has decided that its 15 member states will need to provide individual hens with at least 750 square centimetres (120 inches) of space (recall that Canadian hens can be kept in less than ten inches of space).¹⁷³ Britain banned the farrowing crate

¹⁶⁸ Bisgould, King & Stopford, *supra* note 98 at 2.

¹⁶⁹ Agriculture and Agri-Food Canada, "Overview of the Canadian Agriculture and Agri-Food Sector" (Ottawa: Agriculture and Agri-Food Canada, 2004), online: <<http://www.investincanada.com/external.aspx?url=http%3a%2f%2fatn-riae.agr.ca%2finvest%2fbusiness-e.htm>>.

¹⁷⁰ Information gathered from Agriculture and Agri-Food Canada's "Fact Sheets" in the following sectors: Dairy, egg, poultry, red meat, and fish and seafood industry. Links to these fact sheets are available at Agriculture and Agri-Food Canada, *ibid*.

¹⁷¹ Agriculture and Agri-Food Canada, "Fact Sheet: Canada's Poultry Industry" (Ottawa: Agriculture and Agri-Food Canada, 2004), online: <<http://www.investincanada.com/external.aspx?url=http%3a%2f%2fatn-riae.agr.ca%2finvest%2fbusiness-e.htm>> at 1.

¹⁷² Singer (2002), *supra* note 44; Hughes & Meyer, *supra* note 30; Ute Knierim & William Jackson, "Legislation" in Appleby & Hughes, *supra* note 160 at 249.

¹⁷³ Singer, *supra* note 44.

system for pregnant pigs in 1998. Veal crates have also been banned in Britain, and will be banned in all European Union states by 2007.¹⁷⁴

As Elaine Hughes and Christiane Meyers note surely “a wealthy, democratic western industrialized nation such as Canada should be able to meet or surpass the level of care for animals that European nations have agreed is socially and economically possible.”¹⁷⁵ Of course, again, it is not necessary for us to be rearing animals for food at all ... But I realize that it may be overly optimistic to believe the majority of Canadians in contemporary are Canada are prepared to relinquish the *privilege* of consuming animals.

The “necessity” of experimenting on animals

The near two-and-a-half million animals used in research and experiments in Canada¹⁷⁶ are also subject to a myriad of painful practices, and ultimately death. I recently had the opportunity to view first-hand the operation of a Canadian animal research facility. There I learned about some experiments performed on animals in Canada, though of course I was not privy to witnessing any actual experiments.

The facility I toured was the Animal “Care”¹⁷⁷ Centre, at the University of British Columbia (UBC) campus in Vancouver. The Animal Care Centre (ACC) “serves as a supply source for animals for investigators on and off the campus.”¹⁷⁸ Other services provided by the ACC are animal ordering services, particularly rat and mice colonies, rat

¹⁷⁴ Singer, *ibid.*

¹⁷⁵ Hughes & Meyer, *supra* note 30 at 41.

¹⁷⁶ See Canadian Council on Animal Care (CCAC), “Survey of Animal Use: 2004” (Ottawa: CCAC, 2004), online: <http://www.ccac.ca/en/Publications/New_Facts_Figures/analysis/analysis_2004.htm>.

¹⁷⁷ Yet another euphemism we like to use to describe our use of animals for the sole purpose of experimenting on them.

¹⁷⁸ Animal Care Centre, “UBC Animal Care Centre Services” (Vancouver: UBC Animal Care Centre, n.d), online: <<http://www.acc.ubc.ca/ACCser.html>>.

and mouse “timed pregnancies,” boarding for cats, sheep, monkeys, pigs and rabbits, “pathology and autopsy,” and “surgical procedures.”¹⁷⁹

I was able to visit this particular university animal research facility as part of a moderate animal welfare class; I do not know if I would have been admitted otherwise. The facility itself is in an obscure and wooded part of campus, which I would never have encountered in my previous three years attending UBC without directions. The road to the facility does not have sidewalks and there is no place to park outside of the facility itself. The entrance to the UBC Animal Care Centre is guarded by a tall metal gate, topped with barbed wire. The gate is plastered in unwelcoming signs telling visitors to “Keep Out.”

Once inside I learned that “purpose-bred” animals are being produced with every disease or ailment imaginable: diabetes, AIDS, arthritis, congenital heart disease, and cancer.¹⁸⁰ These purpose-bred animal “models” can be ordered by catalogue number and shipped to the customer’s own facility.¹⁸¹ While we were touring the facility, a shipment of guinea pigs arrived in stacks of cardboard boxes. Our tour guide, an on-site veterinarian, noted that some airport handlers were better than others in handling the live animals with care. We also saw pigs who were being kept so their various organs could be periodically harvested. We saw seemingly ordinary cats altered to have “blood as thick as cream,” which creates all sorts of unique problems for the cats but provides an

¹⁷⁹ Animal Care Centre, “Services” (Vancouver: UBC Animal Care Centre, 2005), online: <<http://www.animalcare.ubc.ca/services/index.htm>>.

¹⁸⁰ A major supplier of animal “models” in Canada is Charles River Laboratories. See their alphabetical list of “disease models” at Charles River Laboratories, “Disease Models” (Massachusetts: Charles River Laboratories, 2006). Online: <http://www.criver.com/research_models_and_services/research_models/dm_rats_and_mice.html>. See also Jackson Laboratory. “New Jax Mice Strains Recently Released for Distribution” (Maine: Jackson Laboratory, 2006), online: <<http://jaxmice.jax.org/newstrains/index.html>>.

¹⁸¹ Animal Care Centre, *supra* note 178.

interesting research specimen for the science folks. We were able to peer into a secured chamber window and see monkeys in cells induced with Parkinson's Disease, available for research. We learned that large quantities of blood are collected from the rabbits as part of research at the facility. Rats, mice, sheep and ferrets were also on-site.

If the animals survive the experiments, they are given some time to recover and are used again. Whatever experiment is conducted on each particular animal, they all generally share the same fate: death. It is not the policy at this particular care facility to adopt any of the research animals out. According to our tour guide there are just too many animals, and in particular too many animals with special needs (such as animals with diseases, thickened blood or missing organs) to adopt them out. I also have a suspicion that laboratories busy trying to profit from breeding unique strains of purpose-bred animals would not be too keen on having these unique strains in the hands of "lay people" outside the lab-setting. According to our veterinary tour guide, the cost of a purpose-bred guinea pig can run up to \$1500. In a similar tour of an animal research facility at the University of Alberta, another researcher provided Charlotte Montgomery with further reason for the death of research animals in Canada: "Researchers want to look at the tissue, blood or body parts and draw some conclusions."¹⁸² Even dead these animals are part of research projects.

There was no discussion at the UBC Animal Care Centre about any pain experienced by research animals during and after experiments, rather the discussion focused on the top-notch care the research animals receive in the facility. Yet we know that painful animal experiments are occurring in Canada, given the reports produced by the Canadian Council on Animal Care (CCAC). CCAC is the "national organization

¹⁸² Montgomery, *supra* note 38 at 80.

responsible for setting and maintaining standards for the care and use of animals in research, teaching and testing throughout Canada.”¹⁸³

As part of their monitoring duties, the CCAC has developed categories to determine the level of “invasiveness” used in animal experiments.¹⁸⁴ Experiments in Category “A” for example, involve experiments on invertebrates or live isolates only. Category “B” involves experiments on animals which cause “little or no discomfort or stress.”¹⁸⁵ Examples of Category B experiments include “short-term and skilful restraint of animals ...decapitation preceded by sedation or light anaesthesia; short periods of food and/or water deprivation equivalent to periods of abstinence in nature.”¹⁸⁶ Category “C” involves experiments which “cause minor stress or pain of short duration.” Possible examples in this category are: “short periods of food and/or water deprivation which exceeds periods of abstinence in nature; behavioural experiments on conscious animals that involve short-term, stressful restraint; exposure to non-lethal levels of drugs or chemicals.”¹⁸⁷ Category “D” experiments include experiments which cause “moderate to severe distress or discomfort.” Category D experiments might include:

prolonged (several hours or more) periods of physical restraint; induction of behavioural stresses such as maternal deprivation, aggression, predator-prey interactions; procedures which cause severe, persistent or irreversible disruption of sensorimotor organization ... induction of anatomical and physiological abnormalities that will result in pain or distress; the exposure of an animal to noxious stimuli from which escape is impossible; the production of radiation sickness; exposure to drugs or chemicals at levels that impair physiological systems.¹⁸⁸

¹⁸³ Canadian Council on Animal Care (CCAC), “Welcome to the CCAC” (Ottawa: CCAC, 2005), online: <http://www.ccac.ca/en/CCAC_Main.htm>. Critics of CCAC point out that much of its mandates and guidelines are voluntary and rarely enforced; that inspections are rarely done, and that all information about its lab assessments are kept strictly confidential. See Charlotte Montgomery, “Research: Keeping Humans Alive” in *Blood Relations*, *supra* note 38 at 80-127.

¹⁸⁴ CCAC, “Categories of Invasiveness in Animal Experiments (1991)” (Ottawa: CCAC, 2005), online: <http://www.ccac.ca/en/CCAC_Programs/Guidelines_Policies/POLICIES/CATEG.HTM>.

¹⁸⁵ *Ibid.* at 1.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

Finally, Category “E” involves the most invasive of animal experiments which cause “severe pain near, at or above the pain tolerance threshold of unanesthetized conscious animals.” Examples of Category E experiments include:

... exposure to noxious stimuli or agents whose effects are unknown; exposure to drugs or chemicals at levels that (may) markedly impair physiological systems and which cause death, severe pain, or extreme distress ... behavioural studies about which the effects of the distress are not known; use of muscle relaxants or paralytic drugs without anaesthesia; burn or trauma infliction on unanesthetized animals; a euthanasia method not approved by the CCAC; and procedures (e.g., the injection of noxious agents or the induction of severe stress or shock) that will result in pain which approaches the pain tolerance threshold and cannot be relieved by analgesia (e.g., when toxicity testing and experimentally-induced infectious disease studies have death as the endpoint).¹⁸⁹

Based on the CCAC’s own categories of invasiveness, the CCAC reports that hundreds of thousands of animals are subject to painful experiments in Canada each year. In 2004 for example, 761,030 animals were subject to category “B” experiments while 668,725 animals were subject to Category “C” experiments. 775,144 animals were subject to Category “D” experiments (the second most painful category), and 102,333 animals were subject to the most painful experiments of all in Category “E” experiments.¹⁹⁰ Despite continued criticism of animal experimentation,¹⁹¹ the number of experiments involving minimal or moderate pain in research animals has remained relatively constant since

¹⁸⁹ *Ibid.* at 2.

¹⁹⁰ CCAC, “Trends in Animal Use: Number of Animals Used per Category of Invasiveness from 1996 to 2004” (Ottawa: CCAC, 2005), online: <http://www.ccac.ca/en/Publications/New_Facts_Figures/trends/trends_05.htm>.

¹⁹¹ Singer, (2000), *supra* note 44; Montgomery, *supra* note 38; Gary Francione, *Introduction to Animal Rights: Your Child or Your Dog?* (Philadelphia: Temple University Press, 2001); Medical Research Modernization Committee, “A Critical Look at Animal Experimentation, 6th ed.” (Ohio: Medical Research Modernization Committee, 2002), online: <http://www.mrmcmcd.org/Critical_Look.pdf>; Alix Fano, *Lethal Laws: Animal Testing, Human Health and Environmental Policy* (New York: Zed Books, 1997); Michael W. Fox, *Inhumane Society* (New York: St. Martin’s Press, 1990); Bernard Rollin, *The Unheeded Cry: Animal Consciousness, Animal Pain, and Science* (Iowa State University Press, 1998); C. Ray Greek and Jean Swingle Greek, *Sacred Cows and Golden Geese: The Human Cost of Experiments on Animals* (London: Continuum International Publishing Group, 2000).

1996, while the number of experiments involving severe or extreme pain in animals (Categories D and E) has actually increased.¹⁹²

Again, the law in Canada – specifically the *Criminal Code* provisions on animal cruelty - treats painful experiments on animals as “necessary.” Recall Justice Lamer’s finding in the leading case, *Menard* that: “certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of lives.”¹⁹³

Are experiments involving animals necessary? Many lawyers, philosophers, scientists, and others challenge this assumption. In his book *Animal Liberation*, Singer documents various animal experiments that are void of “the remotest prospect of significant benefits for human beings or any other animals.”¹⁹⁴ He points out, for example, that many research animals are poisoned every year not to test life-saving drugs but to test cosmetics, food-colouring and household products. Singer asks: “Don’t we already have an excess of most of these products? Who benefits from their introduction, except those companies who hope to profit from them?”¹⁹⁵ Singer is also sceptical of the benefits of much of the medical products produced through animal testing. He cites a study by the British Department of Health and Social Security which found new drugs

have largely been introduced into therapeutic areas already heavily oversubscribed ... for conditions which are common, largely chronic and occur principally in the affluent Western society. Innovation is therefore largely directed towards commercial returns rather than therapeutic need.¹⁹⁶

¹⁹² CCAC, *supra* note 142.

¹⁹³ *Menard*, *supra* note 129 at p. 462.

¹⁹⁴ Singer (2000), *supra* note 44 at 36.

¹⁹⁵ *Ibid.* at 53.

¹⁹⁶ *Ibid.* This point is also made by Francione (2000) *supra* note 191, and Niall Shanks, *Animals and Science: A Guide to the Debates* (California: ABC-CLIO, 2002), especially at 179 to 191.

Singer also makes the point that it is a risky endeavour to extrapolate data from one species to another. He provides as an example the drug thalidomide, “the most noxious drug to have caused unexpected harm to humans ... which was extensively tested on animals before it was released.”¹⁹⁷ Given this sort of risk, some doctors will not rely on data produced through animal testing. In the words of one physician:

As a board-certified emergency medicine physician with over 17 years of experience in the treatment of accidental poisoning and toxic exposures, I know of no instance in which an emergency physician has used Draize¹⁹⁸ data to aid in the management of an eye injury. I have never used results from animal tests to manage accidental poisoning. Emergency physicians rely on case reports, clinical experience and experimental data from clinical trials in humans when determining the optimal course of treatment for their patients.¹⁹⁹

American scientist, Dr. Elizabeth Whelan points out: “It doesn’t take a Ph.D. in the sciences to grasp the fact that rodent exposure to the saccharin equivalent of 1,800 bottles of soda pop a day doesn’t relate well to our daily ingestion of a few glasses of the stuff.”²⁰⁰

The irony of animal experiments is that animal researchers justify their work on the basis that animals are *similar enough* to humans to make data from animals applicable to humans. On the other hand, animal researchers attempt to justify the infliction of painful experiments and/or death on animals on the basis that humans are fundamentally different from and superior to non-human animals. Scientists are in the precarious position of arguing that data derived from experiments on pigs, for example, can be applied to humans because the two species are akin; while at the same time maintaining it

¹⁹⁷ *Ibid.* at 57.

¹⁹⁸ The Draize test involved putting chemicals into the eyes of rabbits to measure the extent of irritation and damage (including blindness in some instances) the chemicals cause. The test is used in some Canadian research facilities and some American states.

¹⁹⁹ *Ibid.* at 56

²⁰⁰ *Ibid.* at 57.

is not unethical or morally wrong to experiment on pigs because they are *not like us*.²⁰¹ It is generally argued by animal researchers that all animals lack traits, or even just one particular trait, and it is this “lack” which makes them inferior.

Writing in favour of animal experimentation, Michael Leahy for example argues that animals lack consciousness and therefore do not experience pain and suffering:

Plants can suffer from too much sun or too little water, or a watch from rough handling ... An animal can also obviously suffer in this way, although like plants and watches and unlike the reader, the fact can never be brought to the creature's attention.²⁰²

On this basis Leahy argues that animals can have no expectations or rights, and that the best that can be hoped for is an indirect duty of kindness towards animals

since our direct duty is not to animals but to our fellow human beings whose objections to cruelty constitute genuine rights against us ... in a like manner, our duty to desist from damaging pictures or monuments is grounded in society's desire to preserve its cultural heritage.²⁰³

Animal advocates respond to this line of reasoning by arguing that at least some animals are indeed conscious, and that if consciousness is the criteria for rights or expectations, then some humans ought to be excluded from the moral community. Contemporary authors have revived the argument posed by Jeremy Bentham in the eighteenth century as thus: “But a full grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month old”²⁰⁴

Notwithstanding Bentham's intuitive and progressive understanding of animal capabilities, humans in and outside the scientific community have continued to discover,

²⁰¹ Carol J. Adams makes this point in her book *Neither Man Nor Beast: Feminism and the Defense of Animals*, *supra* note 83.

²⁰² Michael Leahy, *Against Liberation: Putting Animals in Perspective* (New York: Routledge, 1991) at 223 [emphasis in original] Similar arguments are also made by Euan Macphail, *The Evolution of Consciousness* (Oxford: Oxford University Press, 1998); Carl Cohen, “The Case for the use of Animals in Biomedical Research” (1986) 315 *The New England Journal of Medicine* 865; R.G. Frey, *Interests and Rights: The Case Against Animals* (Oxford: Clarendon Press, 1980); William L. Wade in John Kistler, *People Promoting and People Opposing Animal Rights*. (Connecticut: Greenwood Press, 2002).

²⁰³ *Ibid.* at 181.

²⁰⁴ Bentham, *supra* note 34.

and confirm, that various animal species demonstrate self-recognition, symbolic capacities, tool use, language “and other markers of humanness that formerly were thought to render humans unique.”²⁰⁵ Conversely, there are human beings, who for various reasons, do not have these “human” capacities. With respect to the humans who do not meet the “human-criteria” Evelyn Pluhar asks:

May they be sacrificed to further the interests of full persons as non-humans are? Is it permissible to test potentially dangerous drugs on the severely retarded before the drugs are offered to normal humans? May we ‘harvest’ their hearts for transplantation into ailing full persons?²⁰⁶

Gary Francione answers that humans reject as wrong the proposition of using ten unwilling humans in a painful experiment (leading to their death) even if the experiment would lead to an immediate cure for cancer.²⁰⁷ Though the experiment may be necessary to save the lives of millions of other humans, “people overwhelmingly reject such a scenario, and they do so on the grounds that consequences simply do not matter when certain interests are involved.”²⁰⁸

The sanctity and protection of human life and liberty are embodied in a myriad of Canadian legislation, including the highest law of the land, the *Canadian Charter of*

²⁰⁵ Raymond Corbey, *The Metaphysics of Apes: Negotiating the Animal-Human Boundary* (Cambridge: Cambridge University Press, 2005) at 148. See also: L.M Herman, A.A. Pack & A.M. Wood, “Bottlenosed Dolphins Can Generalize Rules and Develop Abstract Concepts” (1994) 10 *Marine Mammal Science* 70; I.M. Pepperberg & J.D. Gordon, “Number Comprehension by a Grey Parrot (*Psittacus erithacus*), Including a Zero-Like Concept” (2005) 119 *J. Comp. Psych* 197; Alex Kirby, “Parrot’s oratory stuns scientists *BBC News Online* (26 January 2004), online:

<<http://news.bbc.co.uk/2/hi/science/nature/3430481.stm>>; H.S. Terrace. *Nim: A Chimpanzee Who Learned Sign Language* (New York: Knopf, 1979); Sue Savage-Rumbaugh & Roger Lewin, *Kanzi: The Ape at the Brink of the Human Mind* (New York: John Wiley & Sons, 1994); John Roach, “Crows have human-like intelligence, author says” *National Geographic News* (6 June 2006), online:

<<http://news.nationalgeographic.com/news/2006/06/060606-crows.html>>; Juliane Kaminiski, Josep Call & Julia Fischer, “Word Learning in a Domestic Dog: Evidence for ‘Fast Mapping’” (June 2004) 304 *Science* 1682; Candace Savage, *Bird Brains: The Intelligence of Crows, Ravens, Magpies, and Jays* (Washington: Sierra Club Books, 1997).

²⁰⁶ Evelyn Pluhar, *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals* (London: Duke University Press, 1995) at 67.

²⁰⁷ Francione (1995), *supra* note 98 at 168.

²⁰⁸ *Ibid.* at 169.

Rights and Freedoms.²⁰⁹ More specifically, Canadian law protects human life and liberty even if sacrifice of these human interests might prove necessary to research breakthroughs. For example, the Canadian government's official Policy Statement on research involving humans states that any ethic of research involving human subjects must include respect for "human dignity."²¹⁰ Although research on humans may be necessary to "alleviate human suffering, to validate social or scientific theories, to dispel ignorance, to analyze policy, and to understand human behaviour and the evolving human condition,"²¹¹ the Policy Statement tells us that in conducting such research "it is unacceptable to treat persons solely as means (mere objects or things), because doing so fails to respect their intrinsic human dignity and thus impoverishes all of humanity."²¹² In contrast Canadian *Criminal Code* provisions on animal cruelty frame the sacrifice of animal interests in painful experiments and death as "necessary suffering" outside the purview of legal sanction.²¹³

In this subsection I have suggested that our purported protection of animals from "unnecessary cruelty" rings hollow. Our animal cruelty laws are only prepared to protect animals when there is a clear human benefit. For example, we may be prepared to preserve the lives of animals when it is to our economic benefit (as in the *Wilshire*

²⁰⁹ Charter, *supra* note 113.

²¹⁰ Interagency Secretariat on Research Ethics, on behalf of the Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council & Social Sciences and Humanities Research Council, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (Public Works and Government Services Canada, 2005), online:

<http://www.pre.ethics.gc.ca/english/pdf/TCPS%20October%202005_E.pdf> at i.4.

²¹¹ *Ibid.*

²¹² *Ibid.* at i.5.

²¹³ Several authors have critiqued this inconsistency as speciesist; that is the arbitrary discrimination against animals on the basis of species membership. See Singer (2002), *supra* note 44; Deckha, *supra* note 81; Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford: Oxford University Press, 2001); Dunayer, *supra* note 121; Steven Wise, *Drawing the Line: Science and the Case for Animal Rights* (Massachusetts: Perseus Publishing, 2002).

case),²¹⁴ or to protect humans from sadistic individuals (like the hypothetical sadistic abattoir worker alluded to in the *Pacific Meat Co.* case).²¹⁵ I have also set out to show that the legalized suffering and death we inflict on the majority of animals in Canada, via commercial farming and experimentations is not “necessary” in the ordinary sense of the word. In the next subsection I review the current penalties for those few wasteful or sadistic offenders convicted of animal cruelty.

v) Penalties

Another criticism of the current *Criminal Code* provisions on animal cruelty is the penalties provided for conviction of such crimes. The first concern is the discrepancy in penalties for different categories of animals. Section 444 of the *Code*, for example, makes it a criminal offence to wilfully wound or injure cattle.²¹⁶ Anyone who wounds or injures cattle is guilty of an indictable offence, and liable to prison term of up to five years. Section 445 of the *Code* makes it an offence to wilfully wound or injure “dogs, birds or animals that are not cattle.” However, anyone guilty of wounding or injuring an animal under s. 445 is only guilty of a summary offence and liable to a maximum six-month jail sentence, and/or \$2,000 fine. This discrepancy privileges cattle, not because they have the ability to suffer more than other animals, but because they are historically viewed as more economically valuable. Critics argue that this unequal valuation is out of line with contemporary values and realities and “not in accord with the concern for the welfare of

²¹⁴ *Supra* note 103.

²¹⁵ *Supra* note 124.

²¹⁶ The *Criminal Code* defines cattle in s. 2 of the *Code* (“definitions” section) as “neat cattle” or an animal of the bovine species ... and includes any horse, mule, ass, pig, sheep or goat.

animals and their need to be protected from cruelty regardless of their status as property.²¹⁷

The second critique of the *Criminal Code* penalties for animal cruelty offences, is that the penalties are simply too weak. A person can beat a dog so badly as to break most of her bones, then drag her with a rope behind a vehicle for several blocks, and still only be convicted of a summary offence. This is not a hypothetical situation but an actual offence recently committed against a Labrador-Retriever Collie named Daisy Duke in Didsbury, Alberta.²¹⁸ Daisy Duke was injured so badly that she was euthanized by a veterinarian. Daisy Duke's owner Daniel Charles Haskett, and an unidentified youth are charged with animal cruelty. If convicted they face a maximum \$2,000 fine and or a six-month prison term. Critics argue the penalties for such crimes do not reflect public moral condemnation of animal cruelty, and that they fail to deter offenders. The beating and death of Daisy Duke has prompted public protest, and one Didsbury resident in particular, Tamara Chaney, is organizing a Canada-wide petition calling for more serious penalties in animal cruelty cases. "A maximum of six months in jail and a \$2,000 fine is not strong enough punishment," she says.²¹⁹

In this subsection then, I have argued that the current penalties for animal cruelty offences unjustifiably distinguish between different species of animals. Moreover, the penalties are so low that they fail to capture public denunciation and outrage at horrific crimes committed against animals. A summary conviction fails to connote the seriousness of an offence to an offender, as well as the Canadian public. In the following subsection I

²¹⁷ Department of Justice, *supra* note 2 at Part 3.

²¹⁸ Jason van Rassel, "Dog beaten, dragged, left for dead" *Calgary Herald* (12 October 2006), online: <<http://www.canada.com/calgaryherald/news/city/story.html?id=dd8b2c14-da66-4f36-9f91-4fc06d52459e>>.

²¹⁹ CBC News, "Dog's beating draws protestors to courthouse" *CBC News Online* (6 November 2006), online: <<http://www.cbc.ca/canada/calgary/story/2006/11/06/dog-courtapp.html>>.

consider the defences available to an accused that further undermines the current animal cruelty provisions.

vi) Defences

Irrespective of the penalties for animal cruelty offences, the Crown must first convict the accused. This is not an easy task, in part, because the accused has many defences available to him (or her). When charged with an animal cruelty offence, an accused can attempt to raise a reasonable doubt with the Crown's case. An accused could lead evidence suggesting the act (or *actus reus*) did not occur; for example, that the pain inflicted on the animal was necessary. Or the accused could argue that he (or she) did not have the requisite mental state (or *mens rea*); that is, that he (or she) did not commit the act "wilfully," as is required under the animal cruelty provisions.

The accused also has defences available to him (her). Section 429(2) of the *Criminal Code* creates a defence for anyone accused of animal cruelty under the *Criminal Code*. Section 429(2) states that no one will be convicted under either section 444 or section 446 if the *Criminal Code* where "he [sic] proves that he acted with legal justification or excuse and with colour of right." The colour of right defence was considered in *R v. Fussell*²²⁰ where Justice Taylor held that an accused was justified in shooting and killing a dog: "The evidence shows clearly that the accused justified the shooting because the dog was chasing some pigs belonging to her husband around the yard and biting them."²²¹ While Justice Taylor conceded that killing the dog was a "harsh measure" for the accused to take, he went on to emphasize that "one pig died from a dog bite and others had their ears chewed by a dog, it can safely be stated that there was at

²²⁰ *R. v. Fusell, supra* note 220.

²²¹ *Ibid.* at 2.

least 'colour of right.'"²²² In *R. v. Etherington*,²²³ the court also considered whether the accused had legal justification in shooting a dog. The accused found a dog frightening his sheep and after chasing the dog away, tracked the dog to a neighbouring farm, and shot and wounded the her.²²⁴ In this case the court found that the accused did not have lawful justification or excuse for shooting the dog, because the dog was not a "present danger" to the accused or his livestock at the time he shot her. Indeed, other than killing an animal to defend oneself, other humans or property (such as owned animals), an accused may invoke this defence for a myriad of other reasons such as "killing an animal out of mercy ... honest belief (mistake of fact), necessity, automatism, due diligence, entrapment, provocation, defence with claim of right, third party offender, duress and *res judicata*, issue estoppel, amongst others."²²⁵

Activities authorized by Canadian common law, statutes, regulations, permits or policy also fall under the ambit of lawful excuse. In the only known Canadian case which considered the cruelty of food animals, *R. v. Pacific Meat Co. Ltd.*,²²⁶ the court dismissed the charges against Pacific Meat Co. finding that the cruelty inflicted on a pig was lawful because the majority of slaughterhouses in Canada also practiced the same cruel method in slaughtering pigs:

The evidence ... established the fact that every slaughterhouse situate[d] in Canada kills hogs by exactly the same procedure as that carried out at the premises of Pacific Meat Co. ... I would not be able, on the evidence before me, to make a finding that the pain or suffering endured by the hogs was any less than the pain or suffering endured by the hogs at the premises of the [accused], Pacific Meat Co.²²⁷

²²² *Ibid.*

²²³ *R v. Etherington* [1963] 2 C.C.C. 230 (Ont. County Ct.) (Magistrate Glenn Hays).

²²⁴ The dog recovered from her wounds after five days of veterinary treatment.

²²⁵ Canadian Federation of Humane Societies (CFHS), *supra* note 29 at iv.

²²⁶ *R. v. Pacific Meat Co. supra* note 124.

²²⁷ *Ibid.* at 241.

Thus, cruelty is lawful when it is “normal,” common, or conforms to an industry-wide standard. Cruelty is no longer cruelty so long as it is widespread:

Ironically it is the fact that so many producers engage in harmful activities that protects their legal status as ‘generally accepted’, where such acts would otherwise attract criminal censure.²²⁸

The Canadian Federation of Humane Societies notes that lawful activities, such as farming, hunting, trapping, fishing and experimental research account for over 400,000,000 animal deaths in Canada each year.²²⁹ Given these “layers of protection” for the accused, it is perhaps unsurprising that that less than a 1/4 of 1% of animal cruelty investigations end in conviction.²³⁰ It is evident then from the above discussion that the vast majority of cruel acts against animals are not actually caught by our animal cruelty provisions. Rather, a myriad of defences are available to insulate an accused from the purview of legal sanction. Next I will consider the *Criminal Code’s* distinction between intentionally or malicious cruelty to animals, and neglect. I argue that these particular forms of animal cruelty are prohibited under the *Criminal Code* only because they do not serve a useful *human* purpose.

vii) Intentional or malicious cruelty versus neglect

As mentioned earlier,²³¹ animal cruelty as set out in s. 446(1) of the *Criminal Code* can be divided into two types of offences: (1) offences where an accused intentionally or maliciously sets out to harm or kill an animal (s. 446(1)(a) (d) and (e)); and neglect where an accused is negligent in providing for the basic physical needs of an animal in his or her care, such as adequate food, water and shelter (s. 446(1)(b) and (c)).

²²⁸ Bisgould, King & Stopford, *supra* note 98 at 64.

²²⁹ *Ibid.*

²³⁰ *Ibid.* at 2 & 6.

²³¹ See the Introduction of this Thesis.

Though both these types of offences may be construed as entirely different, they are both punishable on summary conviction.

The Department of Justice maintains that both types of offences are captured in s. 446 because “the animal suffers needlessly in either case.” However, as we have seen, animal suffering is permitted in many other scenarios. I would provide an alternate explanation for the coupling of intentional (malicious) cruelty and neglect. Neither of these types of offences against animals contributes to, as Francione would say, social wealth. Rather these two types of abuses against animals are viewed as a social or economic cost to *human* society, and therefore prohibited.

In a recent Canadian neglect case, for example, Carl Purdy was charged under the *Criminal Code* for failing to provide adequate food, water, and shelter for his farm animals.²³² SPCA inspectors found ten dead animals on Mr. Purdy’s property, and observed a starving pig eating the carcass of a cow that had been dead for ten days.²³³ In questioning Mr. Purdy, Crown counsel focussed on the danger of humans consuming such neglected animals rather than the suffering and death the neglected animals experienced: “For 10 days you left the heifer in the barn. This is how the disease is spread, and ultimately that would make it on to someone’s dinner plate.”²³⁴

²³² Times Colonist, “Farmer blames neglect on US” *Times Colonist (Victoria)* (19 January 2006), online: <http://archives.foodsafetynetwork.ca/animalnet/2006/1-2006/animalnet_jan_19.htm#story4>.

²³³ Paula McCooey, “Farmer says he could not afford to clear dead cows: Accused of Neglect” *National Post* (19 January 2006), online: <<http://cattle.guelph.on.ca/communications/Stories%202005/1-20-06.html#Farmer%20says>>.

²³⁴ *Ibid.*

In *R v. Campbell Brown*²³⁵ the court considered the intentional killing of a neighbour's dog, which Justice Brown described as "horrendous."²³⁶ In sentencing the accused, Justice Brown focussed on the social costs to humans in such cases:

Protection of animals is part of our criminal law because a person's treatment of animals, like the treatment of children, the infirm or other vulnerable parties, is viewed as a barometer of that person's treatment of people. As with all other criminal offences, harming animals amounts to hurting everyone.²³⁷

Again it is generally only wasteful or sadistic cruelty to animals that is caught by our *Criminal Code* provisions. It is a waste of human food to neglect a herd of cows, and it is dangerous (to humans) to allow sadistic animal killers to go unpunished. Recall that that the starvation of animals is a common factory farm practice, but this practice is not viewed as "neglect" under the law because in this case, animal starvation benefits humans (to increase the yield of animal products and flesh). Also consider that scientific researchers perform experiments on animals that can be characterized as sadistic (burning the skin of pigs with a blowtorch).²³⁸ Again such research is not regarded by the law as sadistic because it purports to benefit humans. I conclude my discussion of the current *Criminal Code* provisions with a brief look at the miscellaneous sections of the *Code* that pertain to animals but are not within the animal cruelty part of the *Code*. These sections help illustrate the extent to which Canada's criminal law is more preoccupied with protecting human property and liberty interests than protecting animals from cruelty.

viii) Related Offences: ss: 160, 264.1(1)(c), 322, 338

²³⁵ *R v. Campbell Brown*, [2004] A.J. NO. 201 (Alta. Prov. Ct). Ms. Campbell Brown, finding the neighbour's dog a nuisance, entered her neighbour's and shot their dog Ziggy in their carport. It was found that Ziggy did not die immediately from his bullet wounds, but survived for at least ten minutes afterwards.

²³⁶ *Ibid.* at para 3.

²³⁷ *Ibid.* at para. 31.

²³⁸ CFHS, *supra* note 29.

There are several sections of the *Criminal Code* that do not pertain to animal cruelty but nonetheless specifically consider animals. Interestingly, these related offences warrant stiffer penalties than those found in the animal cruelty provisions. Section 264.1(1)(c) makes it an offence to knowingly utter, convey, or cause a person to receive a threat “to kill, poison, or injure an animal or bird that is the property of any person. Contravening s. 364.1(1)(c) can warrant a maximum sentence of two years imprisonment.²³⁹

Section 322 codifies the common law conception of animals as property in making it an offence to deprive, temporarily or absolutely, an owner, or person with a special property interest in an “animate” property. Section 322(5) makes specific reference to wild living creatures, stating that “a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it [sic] while it [sic] is in captivity and after it [sic] has escaped from captivity.” Punishment for theft of an owned animal depends on his/her monetary worth. Theft of an animal worth more than \$5,000 is an indictable offence with a maximum jail term of ten years.²⁴⁰ Theft of an animal worth less than \$5,000 is a hybrid offence with a maximum imprisonment term of two years.²⁴¹ Section 338 of the *Criminal Code* provides specific provisions for the theft or brand defacing of cattle. Cattle theft is still considered to be serious (indictable) offence in Canada. Anyone found guilty of stealing cattle is liable to imprisonment term of up to ten years.²⁴² These related offences highlight the extent to which animals *are* human property, and the heightened concern the *Criminal Code* shows for human property rights

²³⁹ See s. 264.1(1)(3) of the *Criminal Code*. Threats to cause death or bodily harm to a *person* is deemed a more serious offence, with a maximum penalty of five years. See. S. 264.1(1)(a) and 264.1(2) of the *Code*.

²⁴⁰ S. 334 (a).

²⁴¹ S. 334(b).

²⁴² S. 338(2).

(indictable and hybrid offences) in animals in relation to animal cruelty (summary offence for an animals other than cattle). Now that I have provided a detailed overview of Canada's current animal cruelty provisions, I move onto consider the changes that have recently been proposed in Bill C-50, *An Act to amend the Criminal Code in respect to cruelty to animals*.

B. Changes proposed in Bill C-50

i) Stiffer/modern penalties

Bill C-50 recreates animal cruelty as a hybrid offence. As an indictable offence a (maximum) five-year jail sentence can be imposed.²⁴³ As a summary offence the maximum jail sentence has been raised from six months, to 18 months.²⁴⁴ Fines for summary offences have also been raised from a \$2000 maximum to \$10,000, while the fine amount for an indictable offence is not capped.²⁴⁵ The Bill allows judges to impose a lifetime ownership ban on anyone convicted of animal cruelty. The current animal cruelty provisions only allow for a maximum two-year ownership ban.²⁴⁶ The Bill also allows a court to order a convicted person to pay restitution to an animal welfare organization that has incurred costs of caring for abused or neglected animals. This is an entirely new measure not permitted under the current *Criminal Code* provisions.²⁴⁷

ii) animals out of property section

The Bill also moves animal cruelty out the property section of the *Criminal Code* to a new "Cruelty to Animals" section, under the *Code* heading: "Sexual Offences, Public

²⁴³ See Bill C-50, s. 182.2(2)(a). Recall that under the current *Criminal Code* provisions, animal cruelty (other than cruelty to cattle) is punishable on summary conviction only, with a maximum imprisonment term of six months.

²⁴⁴ Section 182.2(2)(b).

²⁴⁵ Section 182.2(2)(b). Under the current *Criminal Code* provisions the maximum fine for an animal cruelty conviction (other than cattle) is \$2,000 (s. 446(2)).

²⁴⁶ See s. 446(5).

²⁴⁷ Sections 182.4(1)(a) and 182.4(1)(b) respectively.

Morals & Disorderly Conduct.” The impetus behind this change is ongoing criticism that animals, as sentient beings, need to be distinguished from other inanimate property.²⁴⁸ The Department of Justice recognizes that current phraseology of the animal cruelty provisions, such as “domestic animal,” an animal “kept in captivity,” “animals kept for a lawful purpose,” indicate that the *Criminal Code* is “primarily concerned with those animals in which human beings have a particular interest as property.”²⁴⁹ Section 447(2) for example, deals specifically with the offence of keeping a cockpit, and the confiscation and destruction of a person’s property – the cocks – if a cockpit is found on that person’s premises. Incidentally, Bill C-50 does away with the odd requirement that confiscated cocks *shall* be destroyed.²⁵⁰

The Department of Justice also points out that not all the animal cruelty provisions are concerned with a human’s ownership rights in an animal. Section 446(1)(a) for example makes it an offence for an owner to wilfully cause or permit pain, suffering or injury on his or her animal. As this provision is in the spirit of protecting an animal – rather than protecting a human’s property interests – it does not make sense as a provision in the property section of the *Code*.

iii) Use of the term “Wilful”

Under most of the current *Criminal Code* animal cruelty provisions, the Crown must prove that an act of animal cruelty or neglect was done “wilfully.” Section 446(1)(b) provides for example that a person commits an offence if by *wilful* neglect he or she causes damage or injury to animals (or birds) while the animals are being “driven

²⁴⁸ Canadian Federation of Humane Societies (2001), *supra* note 29 at i; W. Adams, *supra* note 116; Hughes & Meyer, *supra* note 30; Bigould, King & Stopford, *supra* note 98.

²⁴⁹ Department of Justice, *supra* note 2 at Part 3.

²⁵⁰ Section 447(2).

or conveyed.” Similarly s. 446(1)(c) states for example that it is an offence for an owner (or person with custody of control) of an animal to *wilfully* neglect that animal.²⁵¹ Thus, it is not enough for the Crown to prove that an accused committed cruelty or neglect but that it that the accused committed the act *wilfully*. Shelagh MacDonald, with the Canadian Federation of Humane Societies says that the term “wilful neglect” in the current legislation is “one of the most serious deficiencies of the current legislation.”²⁵² MacDonald explains that: “such wording requires proof that an accused *intended* to neglect their animals – something that is virtually impossible to prove.”²⁵³ Hughes and Meyer also maintain that where wilfulness is a statutory requirement “acquittal is more likely due to evidentiary problems.”²⁵⁴

The following two Canadian cases where the Crown could not meet its burden to prove wilfulness, illustrate this difficulty. In *R. v. Clarke*²⁵⁵ Justice Gorman considered whether Mr. Clarke had wilfully neglected his dogs. The SPCA had seized the dogs because they appeared to be without food, water and adequate shelter, and the majority of the dogs were thin and suffering from eye or skin infections. In determining whether Mr. Clarke was wilful, Justice Gorman turned to sections 429(1) and 446 of the *Code*. Section 429(1) states that a person will be deemed wilful if he or she:

causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do so, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not.

²⁵¹ See also ss. 444, 445, 446(a) & (e).

²⁵² Shelagh MacDonald, “Questionnaire” (May 18, 2006), *supra* note 29.

²⁵³ *Ibid.*

²⁵⁴ Hughes & Meyer, *supra* note 30 at 60.

²⁵⁵ *R. v. Clarke*, [2001] N.J. No. 191.

The court then considered s. 446 of the *Code* and held that inclusion of the word wilful in the section does not require the Crown to prove an “evil intent” on the part of the accused:

The Crown does not have to prove any ulterior motive nor does the Crown have to prove that the accused knew that the animal was suffering or that he or she intended for the animal to suffer. The Crown must prove that the accused acted wilfully and caused the actus reus knowing that suffering was a likely result or that a reasonable person would realize that this was a likely result.²⁵⁶

Having considered the facts of the case and the meaning of wilful, Justice Gorman acquitted Mr. Clark because the Crown did not present “evidence of what would be suitable or adequate in the circumstances and that the accused fell below this standard.”²⁵⁷

Similarly in *R. v. Heynan*, the accused testified that he did not know that leaving the horses unattended in the pasture over the winter, without any supplementary feed would lead to starvation of the horses. The Crown provided an expert witness who testified that horses should not be required to forage for food under snow, as grass that has overwintered is very low in nutrients. In light of the expert evidence the court found Mr. Heynan’s belief to be “incredibly naive.” Nonetheless the court went on to find that Mr. Heynan’s belief was “genuinely and honestly held,” and that the Crown did not discharge its burden that the accused acted “wilfully.”

Bill C-50 seeks to remove the word “wilful” from animal cruelty provisions pertaining to two types of negligence. Section 182.3(1) would provide that everyone commits an offence who:

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

²⁵⁶ *Ibid.* at para. 59

²⁵⁷ *R. v. Clark*, *supra* note 255 at para. 70.

- (b) negligently fails to provide suitable and adequate food, water, air, shelter and care for it [sic].²⁵⁸
- (c) negligently injures an animal while it [sic] is being conveyed.

Bob Gardiner of the Canadian Federation of Humane Societies argues that the word wilful has been omitted from Bill C-50 because the concept of wilful neglect is an anachronism:

modern criminal law has moved away from a requirement to prove that neglect was intended, with respect to a crime where a person failed to carry out an obligation. The concept of neglect is actually incompatible with a requirement for wilfulness or intention; neglect is a lesser and distinct state of mind.²⁵⁹

I would agree with Gardiner that the phraseology “wilful neglect” in the *Criminal Code* provisions is peculiar because the legal concept of neglect generally connotes an *unintentional* wrong. The term wilful presents an unusually high burden to the Crown in proving neglect; deletion of the word “wilful” would help alleviate the Crown’s burden as well as broaden the scope of neglect consistent with the general meaning of “neglect” in Canadian jurisprudence.

iv) Brutal or vicious killing

Bill C-50 makes it an offence for anyone who kills, or being the owner, permits an animal to be killed “brutally or viciously, regardless of whether the animal dies immediately.”²⁶⁰ The Canadian Federation of Humane Societies (CFHS) explains that this provision is intended to target “previously unpunished atrocities which have outraged the public because of the brutal nature of the killings.”²⁶¹ Obviously the focus of the crime is not on the suffering of the animal – as the animal may die instantly– but the human social cost of such crimes. In a brief on the proposed brutal and vicious killing

²⁵⁸ The first part of s. 182.3(b) retains the words “wilful” and “reckless” in pertaining to the abandonment of animals.

²⁵⁹ CFHS, *supra* note 29 at 17.

²⁶⁰ See Bill C-50, s. 182.2(1)(b).

²⁶¹ CFHS (2001), *supra* note 29 at 14.

offence, the CFHS goes to great lengths to demonstrate the link between animal cruelty and human violence: “this crime focuses upon the brutality of the perpetrator’s intentions rather than upon the suffering of an animal. Brutal killing of animals has been a hallmark of aggressive criminals who caused serious harm to humans.”²⁶²

v) animals defined

Section 182.1 of Bill C-50 provides a definition of “animal” for the purposes of the proposed animal cruelty provisions. The Bill defines an animal as “a vertebrate other than a human being.” The proposed animal definition is consistent with the wording in animal definitions provided in other jurisdictions, such as the Alberta *Animal Protection Act*²⁶³ and the New Zealand *Animal Welfare Act*.²⁶⁴

This section’s definition applies equally to all of the animal cruelty offences under Bill C-50, “instead of referring to different species as the current legislation does.”²⁶⁵ Hughes and Meyer are supportive of this shift to ensure animals receive “consistent legal treatment.”²⁶⁶ In their words, “(t)here would seem to no reason, for example, to give better protection to an owned cat than to a stray cat or a lynx, or to give better protection to a cow (due to its economic value) than to a dog.”²⁶⁷

²⁶² *Ibid.* The CFHS Brief also includes a Backgrounder entitled “Linking Animal Cruelty to Human Violence” and an Appendix called on “Serial Killers” and “School Shootings” linking these offences to animal cruelty.

²⁶³ The Alberta *Animal Protection Act*, S.A., 2006, ch. A-41, s. 1(1)(a) has the broadest definition of animals in Canada stating simply that an animal “is not a human being.”

²⁶⁴ The New Zealand *Animals Welfare Act 1999* (N.Z.) 1999/142. Definition provided in s. 1(a) is quite broad and includes any living mammal (excluding humans), bird, reptile, amphibian, fish, octopus, squid, crab lobster or crayfish. Section 1(b) also includes any mammalian fetus or avian or reptilian pre-hatched young in the last half of its period of gestation or development.

²⁶⁵ Shelagh MacDonald, *supra* note 252.

²⁶⁶ Hughes & Meyer, *supra* note 30 at 49.

²⁶⁷ *Ibid.* Scientific evidence suggests that at least most vertebrates (including fish, reptiles and birds) and some cephalopods, a class of invertebrates (such as squids and octopuses) meet the behavioural and physiological criteria used to measure pain. Such evidence should lead us to be concerned about pain and suffering of most or all vertebrate animals, and at least some invertebrates such as cephalopods. See e.g. David Degrazia, *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge: Cambridge

In using the new animal definition consistently throughout the Bill, Bill C-50 does away with the cattle/non-cattle distinction in the current law, and eliminates the *Code's* superfluous language such as “dogs, birds or animal.”²⁶⁸ The use of the new definition also broadens the scope of s. 446(1)(f) of the *Criminal Code*. Subsection 446(1)(f) prohibits the release of a captive bird for the purpose of shooting her after she is liberated. Subsection 182.2(1)(g) of Bill C-50 makes it an offence to release any captive animal (per the definition provided in s. 182.1) for the purpose of being shot the moment he or she is liberated. The Bill also broadens the wording of the current *Criminal Code* ban on cockfighting to include all animal fights.²⁶⁹ Having provided a detailed discussion of the current animal cruelty provisions as well as the reforms proposed in Bill C-50, I analyze Bill C-50 in greater depth. In particular I consider both the impetus and purpose underpinning Bill C-50 in order to determine the likely legal and practical implications of these proposed changes.

PART II: CONTEXTUALIZING BILL C-50

A. The Impetus Behind Bill C-50

i) History of the Bill

Bill C-50 is not the first attempt to amend Canada's archaic animal cruelty provisions. In December 1999 Bill C-17 was introduced into Parliament. Bill C-17 sought to amend the *Criminal Code* with respect to cruelty to animals, disarming a peace officer,

University Press, 1996); Margaret Rose & David Adams, “Evidence for Pain and Suffering in Other Animals,” in Gill Langley, ed., *Animal Experimentation: The Consensus Changes* (New York: Chapman and Hall, 1989) 42; Bernard Rollin, *supra* note 191; Patrick Bateson, “Assessment of Pain in Animals” (1991) 42 *Animal Behaviour* 827; Jane A. Smith & Kenneth M. Boyd (eds.), *Lives in the Balance: The Ethics or Using Animals in Biomedical Research* (New York: Oxford University Press, 1991); David DeGrazia & Andrew Rowan “Pain, Suffering and Anxiety in Animals and Humans” (1991) 12 *Theoretical Medicine* 193.

²⁶⁸ Section 445

²⁶⁹ Section 182.2(1)(e)(f)(g) and (h).

and firearms. This Bill died on the order paper when an election was called by the Liberal government in October, 2000. In March 2001, Bill C-15 was introduced into Parliament as an omnibus bill which, among other things, sought to amend the *Criminal Code* provisions on animal cruelty. In September 2001 the House of Commons passed a motion directing that omnibus bill be split into two autonomous bills. After the split, the part of the Bill pertaining to animal cruelty became Bill C-15B *An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act*. In October 2001 the House of Commons' Standing Committee on Justice and Human Rights began hearings allowing the Committee to hear the views of both animal user groups, and animal advocacy groups on Bill C-15B. Animal advocacy groups expressed their support for the bill, including Zoo Check, Animal Alliance Canada, the World Society for the Protection of Animals, the International Fund for Animal Welfare and the Canadian Federation of Humane Societies.²⁷⁰

Conversely, several animal-user groups expressed their opposition to Bill C-15B including the Fur Institute of Canada, the Poultry Welfare Coalition, the Canadian Cattleman's Association, the Canadian Council on Animal Care, Chiens de chasse, and the Canadian Mink Breeders Association. Specifically, the Bill was subsequently amended to address some of the concerns of animal user groups, in particular the Bill was changed to

ensure that the principles of the common law that render any circumstance a justification or excuse for an act or a defence to charge would continue to apply to offences against animals.²⁷¹

²⁷⁰ See the Standing Committee on Justice and Human Rights (16 October 2001).

²⁷¹ Robin McKay, Legislative Summary, Bill C-50: An Act to Amend the Criminal Code in Respect of Cruelty to Animals (Ottawa: Library of Parliament, 2005) at 6.

In June 2002 Bill C-15B passed third reading in the House of Commons, and first and second reading in the Senate. However the bill did not proceed past the Legal and Constitutional Affairs Committee of the Senate before Parliament was prorogued.²⁷²

Bill C-15B was reintroduced into Parliament as Bill C-10 on October 9, 2002. On the same day the new bill swiftly passed first, second and third reading in the House of Commons, and the following day past first reading in the Senate. However, the reincarnated Bill was again referred to the Senate's Legal and Constitutional Affairs Committee, and it was again ordered that the Bill be split. The section of the Bill related to amending the *Firearms Act* became Bill C10-A, while the section related to animal cruelty became Bill C10B, An Act to amend the Criminal Code (cruelty to animals).²⁷³ In May 2003 Bill C-10B passed third reading in the Senate after several amendments were made. These amendments included: a change to the definition of the term "animal" to a "vertebrate, other than a human being" and an explicit recognition of Aboriginal hunting, trapping and fishing practices. Per these amendments, Bill C-10B was sent back to the House of Commons for a vote. During this process Bill C-10B died on the order paper when Parliament prorogued in November 2003.²⁷⁴

Thereafter, Bill C-10B was re-introduced into Parliament as Bill C-22 when Parliament resumed in the spring of 2004. Bill C-22 incorporated the animal definition proposed by the Senate in relation to Bill C-10B. Bill C-22, unlike its predecessors also made specific reference to the defences set out in s. 429(2) of the *Criminal Code*: "The bill clarified that these defences would apply to any offence related to cruelty to

²⁷² McKay, *ibid.* at 7.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

animals.”²⁷⁵ However, Bill C-22 did not incorporate Senate concerns about the protection of Aboriginal hunting, fishing and trapping rights. Again, the Bill had been referred to the Senate’s Legal and Constitutional Affairs Committee when Parliament was dissolved in May 2004.

In May 2005 Bill C-22 was re-introduced as Bill C-50 with the inclusion of a non-derogation clause that would protect existing Aboriginal hunting, fishing and trapping rights.²⁷⁶ The Bill received first reading in the House of Commons in May, 2005, and then Justice Minister Irwin Cotler expressed hope that Bill C-50 “alleviate[d] the concerns of the Senate”²⁷⁷ however, Bill C-50 died on the order paper on November 28, 2005.

ii) Archaic:

Bill C-50 and its predecessors were proposed in large part to modernize our current animal cruelty laws. In 1998 the Department of Justice produced a consultation paper which expressed concern over the “mounting scientific evidence of the link between animal abuse and domestic violence and violence against people generally.”²⁷⁸ Given this evidence, the Department of Justice stated that “existing penalties appear to do little to deter people who abuse animals.”²⁷⁹

The Department of Justice reviewed animal cruelty laws in other jurisdictions, and noted that many American states have amended their animal cruelty laws over the years to increase jail terms, create mandatory sentences for repeat offenders, require counselling, provide restitution to animal shelters and so. Similarly in a government

²⁷⁵ *Ibid.* at 8.

²⁷⁶ S. 182.6

²⁷⁷ CFHS, “Bill C-50” (Ottawa: CFHS, 2006), online: <http://cfhs.ca/law/bill_c_50/>.

²⁷⁸ Covering letter to *Crimes Against Animals, A Consultation Paper*, Department of Justice, *supra* note 2.

²⁷⁹ Department of Justice, Consultation Paper, *ibid.* at 1.

legislative summary, Robin McKay notes the numerous changes made to animal cruelty laws in England, New Zealand and Australia over the twentieth and twenty-first century. In contrast, the Department of Justice says that Canadian laws “have remained largely unchanged since 1892, and the time has come to re-examine the issue.”²⁸⁰

iii) Animal advocates

Animal advocacy groups have played a large role in insisting that our existing *Criminal Code* provisions on animal cruelty be amended. At the Standing Committee on Justice and Human Rights these groups argued that Canadian public opinion on animal cruelty has changed dramatically since 1892. At the Committee Bob Gardiner for the Canadian Federation of Humane Societies argued that public attitude has evolved since the “horse and buggy days.” He noted that in the United States, 27 of the states “have elevated cruelty from a misdemeanour to a felony offence.”²⁸¹ Gardiner went on to argue that animal cruelty is not taken seriously enough by the justice system and that reforms would shift focus to the concept of cruelty rather than the property status of animals. Stiffer penalties would signal to Crown Counsel and judges that they need to treat animal cruelty as seriously as the public does.²⁸²

Troy Seidle for Zoocheck argued at the Committee that animal cruelty reforms were required for “basic housekeeping” purposes. Given the archaic and anachronistic language of the current provisions, the reforms would simplify and consolidate sections that are “either redundant or inconsistent.”²⁸³ When Richard Smith for the International Fund for Animal Welfare addressed the Committee, he stated that the current *Criminal*

²⁸⁰ *Ibid.*

²⁸¹ Bob Gardiner, CFHS, Standing Committee on Justice and Human Rights (17 October 2001) at 1600.

²⁸² Gardiner, *ibid.*

²⁸³ Troy Seidle, Zoocheck, Standing Committee, *ibid.* at 1620.

Code amendments are “simply not working” and that law enforcement officers do not have the requisite tools to obtain successful convictions. Smith commended the reforms proposed as a recognition that “crimes of cruelty are a serious problem across this country and that Canadians are placing increasing priority on having these crimes firmly but fairly dealt with.”²⁸⁴ David Loan of the same organization added that an estimated 62% of the Canadian public, and more than 400,000 members of humane societies and SPCA’s across Canada support tougher penalties for animals cruelty.²⁸⁵

Liz White, for Animal Alliance Canada strongly recommended amendments to the animal cruelty provisions of the *Criminal Code* in her presentation to the Standing Committee. White argued that the move of animals out of the property section would take into account that the offence is actually occurring against the animal rather than his/her owner. Anna Louise Richardson of the same organization told of the animal cruelty she encountered in her work: squirrels with stab wounds, swans shot in the head, skunks and raccoons missing legs from leghold traps. She concluded, “I know the people of Canada do not want this to continue to happen. It does not represent the society we choose to live in.”²⁸⁶

Lesli Bigould for the World Society of Protection for Animals suggested to the committee that the current *Criminal Code* provisions fail to deter and punish offenders. She noted that she had just received a speeding ticket a week before the committee and that the penalty to be paid for the ticket was “higher than the penalty to be paid by a

²⁸⁴ Richard Smith. International Fund for Animal Welfare, Standing Committee (24 October 2001) at 1805.

²⁸⁵ Based on a national survey conducted by Pollara for the International Fund for Animal Welfare.

²⁸⁶ Anna Louise Richardson, Animal Alliance Canada, Standing Committee (31 October 2005) at 1950.

woman in Alberta who recently removed her dog's testicles with a razor blade.”²⁸⁷ Bisgould also made the point to the committee that the status of animals as property creates practical limitations for law enforcement, and erroneously focuses on the financial or emotional concerns of animal owners. She argued, for example, that if an animal is tortured to death it should be irrelevant whether “there is a little boy or girl at home crying about it.”²⁸⁸

iv) Public Opinion

Perhaps the biggest impetus for change for the government is public outcry when acts of animal cruelty are committed.²⁸⁹ As one scholar notes the public is frustrated “over the lack of prosecutions and very slight sentences for acts that many people regard as detestable.”²⁹⁰ And arguably public concern over animals is ever increasing with more and more people taking an interest in animal issues, and a proliferation of literature and courses on animal ethics.²⁹¹ In this subsection I review three cases of animal cruelty to illustrate the limitations of the current *Criminal Code* provisions, and the public’s outrage with the law’s inability to effectively deal with animal cruelty.

Kensington

In 2001, Jesse Power, Matthew Kaczorowski, and Anthony Wennekers, found a domesticated cat named Kensington²⁹² on the street, and took him to a rooming house in Toronto. While Kensington was still alive, (mewing and moving) the trio disembowelled,

²⁸⁷ Lesli Bisgould, World Society for the Protection of Animals, Standing Committee (16 October 2005) at 1605.

²⁸⁸ *Ibid.*

²⁸⁹ Lesli Bisgould, “Questionnaire” (April 15, 2006), *supra* note 97; Anonymous veterinarian, *supra* note 97.

²⁹⁰ Anonymous scholar, “Questionnaire” (March 28, 2006), *ibid.*

²⁹¹ Anonymous scholar, *ibid.*

²⁹² Apparently the name Kensington was only given to the cat after his death “by caring people who heard of his story. Kensington is the neighbourhood where he was seized.” See Barbara Yaffe, “Addressing animal cruelty” *Guardian (Charlottetown, PEI)* (28 June 2003).

stabbed, impaled, kicked, and skinned Kensington before finally beheading him all while videotaping the torture.²⁹³ The men were charged with the *Criminal Code* offence of animal cruelty,²⁹⁴ but the public decried the sentences available for the accused.²⁹⁵ The then and current *Criminal Code* provisions on animal cruelty only allow for a summary conviction with a maximum jail term of six months.²⁹⁶ In an attempt to seek a harsher penalty, the Crown counsel also charged the accused men with “mischief to *property*” which allows for a maximum two-year prison sentence, but this attempt was dismissed by the Court:

While the mischief charge was made out given that the cat belongs to someone else, that charge added little to the wrong for which the respondent had to be punished. That wrong, the cruelty to the cat, is punishable by a maximum of six months in jail. The maximum cannot be artificially increased by adding a second charge which arises from exactly the same conduct and addresses an interest which is only tenuously engaged in the circumstances.²⁹⁷

The Canadian public was further outraged when the trial judge decided not to impose the maximum penalty for animal cruelty. Rather than the maximum six-month jail term, Jesse Power received a 90 days intermittent sentence on the animal cruelty charge, to be served on weekends, enabling Power to attend an art college during the week.²⁹⁸ Moreover, the Court of Appeal upheld the trial judge’s decision, finding that

²⁹³ See *R. v. Power*, [2003] O.J. No. 2414 (O.N.C.A.) (Doherty J.A.); Rosie DiManno, “Unspeakable horror of the cat torturers” *Toronto Star* (15 April 2002) A2.

²⁹⁴ Section 446(1)(a).

²⁹⁵ See Yaffe, *supra* note 292; Canadian Press, “Man who skinned cat released: Animal-cruelty laws not harsh enough for this case, lawyers say” *Halifax Daily News* (12 June 2003) p. 11; Pat Tohill, “Canada’s animal-cruelty laws not doing their job” *Windsor Star* (4 October 2004) A6.

²⁹⁶ See *R. v. Power*, *supra* note 293; Canadian Press, *ibid.*

²⁹⁷ *R. v. Power*, *ibid.* at para. 15.

²⁹⁸ The Crown did not appeal Ryan Wennekers’s sentence. The third man involved, Matthew Kaczorowski, had not been apprehended at the time of the sentencing of the two men, or the appeal of Power’s sentence. Kaczorowski was finally apprehended in 2003 and pled guilty to animal cruelty and mischief. He received the maximum six-month sentence for the animal cruelty charge, and three years probation for the mischief charge. See Mick Hayley, “Vancouver man who tortured, killed cat is freed” *Vancouver Sun* (12 July 2003) A8; Nick Pron, “Man pleads guilty in cat torture case” *Toronto Star* (10 April 2003) B3.

Jesse Powers' positive character and background ought to temper the need for deterrence and denunciation.²⁹⁹ One media commentator writes:

More than anything else, the Kensington cat-killing highlights the need to update our animal cruelty laws ... Under our Criminal Code, animal cruelty is a crime committed against someone's property ... If the Bill were in place already, people such as Mr. Power could have served significant jail time.³⁰⁰

Another media commentator adds that the outcome of the Kensington case showcases "Canada's woeful lack of legislative protection for animals and demonstrates the extent to which our judges are willing to tolerate wanton, meaningless violence."³⁰¹

Sniffy

But even less gruesome acts of animal cruelty in Canada have prompted public outcry. In 1990, Vancouver artist Rick Gibson proposed to crush a rented rat, named Sniffy, to death with concrete blocks. The general public was outraged that our (current) anti-cruelty laws would not protect Sniffy.³⁰² Our *Criminal Code* animal cruelty provisions only prohibit causing animal "unnecessary" pain or suffering. As Sniffy's death would be instantaneous, and presumably painless, it would be outside the purview of the *Code* provisions.³⁰³

The Vancouver Society for the Prevention of Cruelty to Animals (SCPA) though "totally and utterly opposed" to Sniffy's planned demise, conceded that Sniffy's death was perfectly legal.³⁰⁴ Nonetheless, Michael Weeks of the Vancouver SPCA was confident that the public would successfully prevent Gibson's art performance, legal or not. Weeks was reported as saying: "I don't think people will let it happen. There are

²⁹⁹ *R. v. Power*, *supra* note 294 at para. 12.

³⁰⁰ Tohill, *supra* note 295.

³⁰¹ Yaffe, *supra* note 292.

³⁰² As a result, the public commenced with a North American-wide campaign to save Sniffy. See Ian Austin, "Continent-wide cries raised to save a rat" *The Province* (4 January, 1990) 3.

³⁰³ See s. 446(1)(a) of the *Canada Criminal Code*, *supra* note 1.

³⁰⁴ Canadian Press, "B.C. man calls killing a rat 'art'" *Toronto Star* (29 December 1989) A2.

people coming from Seattle, there are people coming from Toronto.”³⁰⁵ Indeed approximately three hundred people showed up on the day of Rick Gibson’s planned performance, and confiscated his concrete (killing) blocks from his van. An angry crowd of about 300 protesters circled Gibson and “persuaded Gibson to return Sniffy to a pet store unharmed.”³⁰⁶ A news clip of the event depicts one man confronting Gibson: “We should be killing you. This idea to kill a small mouse. You’re a monster!”³⁰⁷ Gibson escaped the incensed protestors by sprinting and ducking into a nearby hotel.³⁰⁸

Pregnant Rabbit

More recently, a University of Victoria student received notoriety after he was witnessed catching a near-term pregnant rabbit on the University campus, and punching her repeatedly. Apparently the drunken student and a friend, were leaving the campus pub, and thought it would be entertaining to catch a rabbit. Campbell became enraged when in struggling to capture the rabbit, she bit him. The Society for the Prevention of Cruelty to Animals (SPCA) was called to the scene and brought the rabbit to a veterinarian clinic in attempt to save her, but the rabbit, who was described as “vocalizing loudly,” and in “obvious pain,” later died from the beating.³⁰⁹

Nicholas Campbell was charged with and pled guilty to animal cruelty. Crown and defence counsel agreed that an absolute discharge was appropriate for “a young man

³⁰⁵ Austin, *supra* note 302.

³⁰⁶ Nash Nolton & Karen Webb, “Squishing Sniffy” *The National* (6 January 1990), television broadcast. See also Chris Dafoe, “In East Van, tour group celebrates a rat’s celebrity” *Vancouver Sun* (23 October 2001) E5. Gibson surrendered Sniffy to the Aquariums West pet store where he was purchased by Life Force, an animal rights group. See Life Force’s website: <<http://www.lifeforcefoundation.org/>>, where they list saving Sniffy as one of the organization’s accomplishments.

³⁰⁷ Nolton & Webb, *ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ Paul Walton, “Bunny puncher hops away from rap” *Nanaimo Daily News* (23 September 2004) A1.

with an ambition to be a lawyer.”³¹⁰ Crown counsel for the case, Ron Parsons, noted the irony of the charge: if Campbell’s punch had immediately killed the rabbit (as in the Sniffy case) there would have been no charge at all.³¹¹ Judge Leo Nimsick was receptive to the sentence proposed by both lawyers, finding that the act of cruelty was out of character for the accused, and that he had paid for his actions given the “humiliating” publicity of the charge.³¹² President of the Student Animal Legal Defence Fund at the University of Victoria,³¹³ Shannon Elliot, commented that the case is an example of the “inability of the court to effectively deal with matters regarding animal cruelty ...”³¹⁴

A Call for Reform

What are we to make of these three cases? In each of these cases the current *Criminal Code* provisions on animal cruelty were ill-equipped to address animal cruelty. In the Kensington and pregnant rabbit cases, the low maximum penalty provided in the *Criminal Code* signals to the courts that animal cruelty – even the most heinous acts of cruelty involving long drawn out torture - are only punishable by summary conviction, with the worst offenders receiving six-month imprisonment. The legislation tells us that it is a much greater offence to commit mischief to a person’s property, which can be punishable by indictable conviction, and calls for a maximum punishment of two years; or that an absolute discharge is a reasonable punishment for beating a pregnant animal to death. The Sniffy case illustrates the inability of the current *Criminal Code* provisions to stop a person from killing an animal in their possession (or un-owned animal) on a whim, if done quickly.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ See the UVic Student Legal Defence Fund’s website at: <<http://www.law.uvic.ca/saldf/>>.

³¹⁴ Shannon Elliott, cited in Ford Walker, “Uvic bunny killer gets discharge” *Martlet* (30 September 2004), online: <<http://www.martlet.ca/old/archives/040930/news2.html>>.

These three cases are only three of many similar types of cases publicized in Canada regularly.³¹⁵ Such cases have led the public to call for a re-conception of animals under the criminal law, as different from inanimate property, and stiffer penalties for those who would perpetrate cruelty against animals. Consider the following small sampling of the public's criticism of the current *Criminal Code* provisions on animal cruelty:

*Evidence that there is a strong link between animal cruelty and violence against humans, along with compassion for the plight on animals who, too suffer pain and fear, should move us into action without further hesitation. Otherwise, what right do we have to call ourselves developed if we refuse to change laws that are more than 100 years old?*³¹⁶

*But for the person or persons who last week put two kittens in a dumpster behind a Nanaimo trucking business, there is a special circle in hell. There are worst scenarios of cruelty going on this country almost daily, but this is one small example of why our federal politicians urgently need to pass long-awaited new animal cruelty legislation.*³¹⁷

*Surely, since 1892, the rights of animals have advanced. According to the current laws animals are property, so if an abused animal has no owner, there is no crime ... Punishments and fines for animal abuse are so light that most people charges are just acquitted anyway. It is time for these laws to change.*³¹⁸

Bonds with animals

The Canadian public reacts strongly to such cases because most Canadians have interacted with animals on very personal level. As the Canadian Federation of Human Societies points out, over 50% of Canadian households contain an animal.³¹⁹ Parliament Member Pat Martin recently articulated this animal-human relationship to express his own approval of Bill C-50:

³¹⁵ See *supra* note 2.

³¹⁶ Sonja Sen-Martinello (editorial), "Urge MPs to pass animal cruelty law" *Toronto Star* (24 October 2005) A21.

³¹⁷ Editorial, "Cruelty has a price" *Nanaimo Daily News* (12 September 2005) A6. See also, Tohill, *supra* note 295.

³¹⁸ Caittee Akins (letter), "Animal abuse laws need for more teeth" *Harbour City Star (Nanaimo)* (9 October 2004) A8; Charlie Filmore, "Support needed to help animals" *Nanaimo Daily News* (9 September 2005) A6; Marianne Smith, "Law not a deterrent" *Toronto Star* (26 October 2005) A29; Barbara Yaffe, *supra* note 292; Val Williams, "Government needs prompting on new animal cruelty bill" *Harbour City Star* (30 October 2004) A8.

³¹⁹ CFHS (2001), *supra* note 29.

Anyone who has ever owned animals or even pets and looked into the eyes of their dog are ready to accept that this is not a possession, this is a being with a spirit, this is a being that has feelings, and this is a being that deserves to be treated in a humane way. I am speaking for a lot of animal lovers around the country when I say that we celebrate the idea of being able to recognize that cruelty to animals should be acknowledged as a crime and that penalties for cruelty to animals should be greater than they are currently today.³²⁰

In this section I have argued that there are several forces spurring on the push for reform to Canada's animal cruelty provisions. First of all our provisions have remained relatively untouched since the nineteenth century. Many argue that the current provisions are simply out of line with contemporary Canadian values. Moreover, animal advocacy groups in Canada have insisted that our animal cruelty laws inappropriately equate animals with inanimate property, and fail to take animal cruelty seriously. Indeed the general public is outraged when animal cruelty cases are brought to light. In the following section I consider government response to these pressures. I conclude that, for the most part, the government's purpose in proposing Bill C-50 is to pacify critics of the current provisions while continuing to support institutionalized forms of animal cruelty.

B. Purpose of Bill C-50

Government Rhetoric & Other Motivations

The purported purpose of Bill C-50 is to protect all animals, yet the Bill is very selective in the animals it chooses to protect. While the tortured pet cat, or beaten pet dog may have - at least theoretically³²¹ - more recourse via Bill C-50, animals who are bound up in the various animal industries in Canada are subject to the "lawful" and "necessary" cruel practices of industry. First, there is the "necessity" of death itself: an estimated 500-

³²⁰ *Ibid.* at 1725.

³²¹ I say theoretically because animal cruelty prosecutions have never been high on the relative priority list, and the Humane Societies in charge of investigating animal cruelty cases are notoriously underfunded. See e.g. Crystal Chaluk, "SPCA lacks money, stops investigating animal cruelty *Telegram (St. John's)* (1 August 2004) A1; Rick Sargent, "B.C. SPCA calls for provincial support to increase funding" *Daily Townsman* (1 June 2004) 2.

700 million animals in Canada are slaughtered for human consumption every year.³²² Even if we want to argue that is not the killing/death of animals that should concern us, but the “humane” treatment of animals when they are alive,³²³ we still have to confront the cruel practices dubbed as normal and legal within animal industries.

If Bill C-50 is not intended to protect the majority of Canada’s animals, what purpose does it serve? I argue that one of the dominant purposes of Bill C-50 is not to substantively address animal cruelty but to make it more discreet, and out of public view. This purpose is most apparent in s. 182.2(1)(b) of Bill C-50. This section makes it an offence to kill an animal, or “being the owner permits an animal to be killed, brutally or viciously, regardless of whether the animal dies immediately.” It has probably been the most contentious aspect of Bill C-50, with critics latching on to it to argue that Bill C-50 radically changes the current *Criminal Code* provisions on animal cruelty, and will target legitimate practices such as hunting, fishing, and farming.³²⁴ In a recent debate on the Bill, Conservative Member of Parliament, Vic Toews stated that he had “a lot of concerns about that particular provision ... the real point we need to consider is not simply whether it *looks* brutal or vicious, but whether the animal in fact dies immediately. We want to minimize animals’ pain.”³²⁵ Similarly, Conservative Parliament Member Garry

³²² Bisgould, King & Stopford, *supra* note 98; Montgomery, *supra* note 38.

³²³ This is the classic or central debate within animal advocacy circles, known as the “welfare vs. rights debate.” Should we be concerned with using animals humanely, or abolishing our use of them at all? See e.g. Angus Taylor, *supra* note 69; Marc Bekoff with Carron A. Meaney, eds. *Encyclopedia of Animal Rights and Welfare* (Westport: Greenwood Press, 1998); Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (Michigan: University of Michigan Press, 1996); Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996); Jim Motavalli, “Rights from Wrongs” *E Magazine* (March/April 2003).

³²⁴ See e.g. Michael A. Reader, “Proposed bill makes criminals out of sportspeople” *Ottawa Citizen* (28 August 2005) A11; *Standing Committee*, *supra* note 270.

³²⁵ *Hansard*, No. 126 (6 December 2001) at 1545.

Breitkreuz, expresses fears about s. 182.2(1)(b) by referring to a legal opinion letter obtained by angling and fishing organizations in Canada:

Specifically we object to s. 182.2(1)(b), which for the first time in Canadian history, makes it an offence to kill an animal brutally or viciously without defining those terms and does not exempt from this offence normal hunting and fishing. This new offence will be used by those animal rights activists who will employ provisions of the Criminal Code to bring private prosecutions to harass lawful anglers and hunters.³²⁶

However, the Liberal government made it quite clear that the Bill is not intended to affect already lawful practices in Canada such as hunting, trapping, farming and fishing. This intent is made clear in the wording of the Bill itself which leaves intact the broad exemptions. Nonetheless, the government went to greater lengths to ensure that s. 182.2(1)(b) in particular is not meant to target lawful or widely-accepted practices in the animal industries.

In response to concerns or criticisms about the section, Liberal Parliament Member Michael Savage responds: "People who hunt and who have done so for years, and who have taken hunter safety and hunting courses and know how to kill an animal in an appropriate way, will not be affected by the Bill."³²⁷ Parliament Member Peter Adams adds that the section "... has nothing do with normal hunting and fishing practices. It has to do with people who are viciously cruel, unnecessarily cruel to animals of any sort."³²⁸

Liberal Member Larry Bagnall belabours the point:

People should note that it does not change any of the traditional activities. There is nothing new. People can still hunt and fish and do research and sports with animals and there will still be traditional aboriginal hunting and fishing. All that remains the same.

³²⁶ This legal opinion was written by Peter Hayden, Q.C., of the Lang Michener law firm, for the British Columbia Wildlife Federation, the Alberta Fish and Game Association, the Manitoba Wildlife Federation, the Ontario Federation of Anglers and Hunters, the Fédération québécoise de la faune, and the Canadian Sporting Arms and Ammunition Association. Read into the record by Garry Breitkreuz in *Hansard, supra* note 325 at 1650.

³²⁷ *Hansard, ibid.* at 1645.

³²⁸ *Ibid.* at 1815.

There are no changes here and there are no more chances of being prosecuted in those areas than there were before.³²⁹

The government goes on to explain exactly what they are getting at in s. 182.2(1)(b): “One can think of sets of circumstances where there would be immediate death but we would call what happens as being very cruel, for instance chaining an animal to train tracks.”³³⁰ Liberal Parliament Member, Michael Savage explains the section in greater detail:

The amendments will create a new offence that directly targets the wilful killing of an animal with brutal intention, such as by strapping an explosive on the animal – we have heard of that – or fastening the animal to a railway line. These types of acts, which most people consider impossible to imagine, are perhaps the most despicable form of cruelty we can imagine and may not be caught by our existing law ... We are closing the loophole so that even when the law allows a person to kill an animal, he or she cannot do it with the intention of being brutal.³³¹

Savage continues to provide more examples of the type of animal cruelty that will be deemed “brutal and vicious:”

Exploding an animal in a microwave, which we have heard of, or dropping it from a tall building are examples. If someone kills an animal with that state of mind, there is a good chance he or she is being deliberately brutal. The law must clearly prohibit and sternly punish this type of behaviour.³³²

Savage then goes on to distinguish the type of acts that will be caught under s. 182.2(1)(b), from the ordinary or accepted practices of slaughter and hunting in Canada. He maintains that the latter practices contain the hallmarks of humane treatment: “the methods are tried and true. They involve a minimization of pain and suffering. They are reproducible and reliable and do not pose any risk of failure or risk of harm to others.”³³³

But critics of Bill C-50 raise a legitimate point: Why should we concern ourselves with the painless/instantaneous death of some animals? This seems especially illogical

³²⁹ *Ibid.* at 1740.

³³⁰ *Ibid.* at 1700 (Borys Wrzesnewskyj, Lib.).

³³¹ *Ibid.* at 1640.

³³² *Ibid.*

³³³ *Ibid.*

because we are assured over and over by the Liberal government that the vast majority of Canadian animals will not be protected by the Bill: The Bill, like the current *Criminal Code* provisions, allows for lawful or necessary animal cruelty by animal industries. This discrepancy does make sense however, if we hypothesize that the central aim of Bill C-50 (exemplified in s. 182.2(1)(b)), is to focus on the deviant types of animal cruelty, committed by individual citizens. It is these types of animal cruelty – not animal industry cruelty – that tends to attract media attention, and public furor. I maintain that it is exactly this type of public furor, aroused by the Kensington, Sniffy, and pregnant rabbit type of cases, that the government seeks to quell.

The recent debate on Bill C-50 demonstrates that the government is well-aware of the powerful images of animal cruelty have on the general public. In supporting the Bill New Democrat Party Member Pat Martin notes: “Many of us viewed television screens in the last week where yet another one of these puppy mills was revealed in a news magazine-type television broadcast. It was horrifying. It made Canadians angry.”³³⁴

Liberal supporter Garry Breitkreuz states:

One of the rather ugly perspectives has to do with the scenario of a person conspicuously torturing and killing a domestic animal or pet. These ugly incidents often end up in newspapers, magazines and in the electronic media. And the public says that we, in Canada, have to do something to prevent that from happening and where it does happen, to firmly respond.³³⁵

In contrast to the sensationalized animal cruelty perpetrated by individual owners or breeders, animal industry cruelty is not well-publicized. Rather animal cruelty by industry is protected (shrouded) by the animal-cruelty exemptions provided in the *Criminal Code*; exemptions that are perpetuated in Bill C-50.

³³⁴ *Ibid.* at 1725.

³³⁵ *Ibid.* at 1710.

These statutes ... are generally ineffective in providing protection to these animals as humane society inspectors are not normally entitled to access private property without sufficient grounds, grounds which are unlikely to come to their attention without access to the property. Nor is it really the function of humane societies, whose authority extends to specific instances of animal distress, to fundamentally modify industrial behaviour and eliminate the kind of institutional suffering that is the norm in a particular industry.³³⁶

In focusing on the handful of deviant individuals in Canada who abuse animals,

Bill C-50 obscures the reality of animal cruelty in Canada:

For at the same time many people seem eager to extend the circle of our moral consideration to animals, in our factory farm and laboratories we are inflicting more suffering on animals than at any time in history³³⁷

Simply pinning the animal cruelty rap on the handful of individual deviant offenders who beat a rabbit, or torture a domestic cat, serves the purpose of obscuring the root of the problem. Animal cruelty in Canada is a “systematic expression of the way our institutions function and will continue to function unless impeded by an aroused public that comes to understand”³³⁸ the nature of these institutions and how they perpetrate animal cruelty.³³⁹

The purpose of Bill C-50’s subsection 182.2(1)(b) then is to shield the public from gruesome and distasteful suffering and death of animals. Like the citizens of Omelas we would rather not see and we would rather not know. Canadians prefer to experience dead animal flesh as neatly packaged, anonymous and disguised slabs of what

³³⁶ Bisgould, King & Stopford, *supra* note 98 at 4.

³³⁷ Michael Pollan, “An Animal’s Place” *New York Times Magazine*, November 10, 2002 at 2.

³³⁸ This phraseology is borrowed from Noam Chomsky’s “The Manufacture of Consent” (1985) 17 *Our Generation* 83 at 90.

³³⁹ We, as the general public are also complicit in supporting the animal industry (and its cruel practices) by consuming its products (animal flesh, and other animal products). It can also be argued that this is especially true of non-vegetarians/vegans. This is why many contemporary animal advocates call for vegetarianism/veganism as the most promising avenue for changing our human treatment of animals. However, I still think that it is worthwhile to point out the ways “the law” acts as a “headwind,” – to borrow the terminology from law professor Rebecca Johnson - pushing us towards consuming animals/animal products, while at the same time, obscuring the cruelty generally involved in producing these products.

we palatably dub as “meat.”³⁴⁰ Given the purpose underpinning Bill C-50, I consider the legal and practical implications of the Bill.

C. The Legal Implications of Bill C-50

i) lawful/normal cruelty untouched

The Bill leaves intact exemptions in the *Criminal Code* which allow for “lawful” or “necessary” cruelty to animals.³⁴¹ Similar to the current *Criminal Code* provisions, Bill C-50 protects animal industries such as factory farming or animal experimentation, where the vast majority of Canada’s animals are raised (and often killed) for human consumption and use.³⁴² This intent is clearly expressed by the Secretary to the Minister of Justice and the Attorney General, Paul Harold Macklin:

We are all very conscious about wanting to, first, protect our animals, but we are equally conscious of ensuring that those who make their living from this are properly protected so that they will not suffer the risk of being prosecuted for simply carrying on in their normal trade practice the way in which is acceptable for that trade or profession ...³⁴³

And again by New Democrat Party proponent of the Bill, Joe Comartin:

It is the standard of care within that operation. We are saying that as long as the standard is met with respect to, for example, the way chinchillas are raised, treated and eventually killed, there is no breach of this legislation. The bill is quite clear on that ... the full protection is clearly set out in the Bill.³⁴⁴

What is the standard of care within animal-use industries? As I discussed in Part I of this thesis, it is legally permissible in these industries to de-horn, de-beak, castrate hot-iron

³⁴⁰ Carol J. Adams argues that our use of the word “meat” is a form of (dominant) cultural production to quell any concerns we may have about killing animals for human consumption. See Carol J. Adams, (1995) *supra* note 83.

³⁴¹ See Bill C-50, ss. 182.2(1)(a), (c), (d); s. 182.3(1)(a); s. 182.5.

³⁴² I highlight factory farms and animal experimentation given the sheer numbers of animals used, and the mechanisms inherent in the practices which result in most egregious forms of animal cruelty. Moreover, it is these industries where power and wealth are most concentrated. See Bisgould, King & Stopford, *supra* note 98; Montgomery, *supra* note 38; David Wolfson, “Beyond the Law: Agribusiness and Systemic Abuse of Animals Raised for Food or Food Production” (1996) 2 *Animal Law* 123.

³⁴³ *Hansard*, *supra* note 325 at 1540 (Hon. Paul Harold Macklin).

³⁴⁴ *Ibid.* at 1630.

brand, de-horn, and tail-dock farm animals without anaesthetic.³⁴⁵ Recall also that it is deemed legitimate in Canada for animals to be used in experiments that cause severe pain “near, at or above the pain tolerance threshold of unanesthetized conscious animals.”³⁴⁶

Even the Canadian Federation of Humane Societies (CFHS) – the chief animal advocacy group supporting Bill C-50 – does not oppose the cruel uses of animals in agriculture and research. CFHS’s director Robert Gardiner has repeatedly expressed his support of such industry practices, while simultaneously advocating for Bill C-50: “I’ve killed 180,000 animals in my life by documents that I’ve signed after reading the protocols to kill them, I trap animals. I have been involved in experiments where ... we’ve burned the skin of pigs with a blowtorch.”³⁴⁷

ii) animals are still property

Though Bill C-50 moves animal cruelty out of the property section, the gesture does not in any real way change the status of animals as property.³⁴⁸ “Your dog is still your dog as such as your kitchen table is your kitchen table.”³⁴⁹ As Member of Parliament Paul Harold Macklin explains, the move is a symbolic gesture to “reflect that animal cruelty is more appropriately characterized as a gross violation of public standards

³⁴⁵ Bisgould, King & Stopford, *supra* note 98; Montgomery, *supra* note 38; Wolfson, *supra* note 342; Hughes & Meyer *supra* note 30.

³⁴⁶ Definition provided by the Canadian Council on Animal Care (CCAC), the national body that oversees researching, teaching and testing with the use of animals in Canada. See the CCAC’s website at: <<http://www.ccac.ca/>>.

³⁴⁷ Standing Committee, *supra* note 230 at 26 (Robert Gardiner). At the time Gardiner was advocating for Bill C-50’s predecessor Bill C-15B.

³⁴⁸ See e.g. Hansard, *supra* note 325 at 1530 (Hon. Paul Harold Macklin); Lyne Létourneau, *supra* note 11. Law professor and animal rights activist Gary Francione argues that we cannot claim to be bestowing any moral significance on animals until we truly abolish property ownership of animals. A full discussion of the implications of animals’ status as property is outside the scope of this paper, but several other scholars address this issue head-on. See especially Francione, *supra* note 98. See also Wendy Adams, *supra* note 116; Amie Dryden, “Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals” (2001-2002) 38 Idaho L. Rev. 177; J. Tannenbaum, “Animals and the Law: Property, Cruelty, Rights” (1995) 62 Social Research 539.

³⁴⁹ CFHS, cited in the Standing Committee, *supra* note 270 (16 October 2001) (Robert Gardiner) 26.

of acceptable behaviour, as oftentimes it is a serious offence of violence.”³⁵⁰ Gardiner highlights other sections in the *Criminal Code* which would continue to deal specifically with human property interest in animals, such as s. 322, s. 338, s. 264. The status of animals as property is also entrenched in various other statutes, predominantly provincial statutes as property falls within provincial jurisdiction. On that note Denis Paradis of the Liberal party states:

I don't think that we are going to change the Bank Act to say that we are no allowed anymore to have liens on animals. We are not going to change Quebec's Civil Code by saying that animals are no longer property. Banks will continue to take horses, pigs, chickens and other farm animals as collateral.³⁵¹

Some Canadians, however, see the symbolic move of animals out of the property section of the *Code* as nonetheless significant.

D. The Practical Implications of Bill C-50

The Canadian Federation of Humane Societies, projects that Bill C-50, if passed, would boost the morale of Canadian SPCA/Human Societies, who currently feel like it is not worth pursuing criminal charges under the current provisions. Similarly, the Ontario SPCA surmises that Bill C-50 would increase the number of investigations and prosecutions because SPCA investigators “will then be better equipped with legal tools they require to charge and prosecute animal abusers.”³⁵² Bill C-50 would make it easier for the Crown to prove negligence. Moreover, in cases like *R v. Powers*, the Crown would not have to rely on a mischief charge to obtain higher penalties. Under Bill C-50 judges could impose stiffer penalties where warranted, and would have a broader range of penalties to choose from. Hughes and Meyer make the point that reforms to the current

³⁵⁰ *Hansard*, *supra* note 325 at 1530 (Hon. Paul Harold Macklin).

³⁵¹ Standing Committee, *supra* note 270 at 1720.

³⁵² Ontario SPCA, *supra* note 7.

provisions would be particularly helpful in the provinces that currently lack strong anti-cruelty legislation. They note for example that in some provinces animal cruelty legislation is limited and/or provides express exemptions.³⁵³ Bill C-50 will provide investigators and crown counsel in such provinces an additional tool in dealing with animal cruelty. In Part II I have contextualized Bill C-50 in order to hypothesize about the Bill's likely impact. In Part III I respond to the arguments made by various naysayers to the Bill – on the grounds that the Bill either goes too far, or does not go far enough. In this Part I also contemplate the weighty issue of Aboriginal hunting, trapping and fishing rights which has figured prominently in the debate surrounding Bill C-50.

PART III: RESPONDING TO THE NAYSAYERS

A. Bill C-50 goes too far (conservatives)

As we shall see in this section, Bill C-50 is not without its critics. Many animal advocates in Canada argue that it is such critics that have held up the Bill (and its predecessors) from becoming law.³⁵⁴ Although the government is influenced by public pressure and animal advocacy groups to reform our anti-cruelty laws, the government has equally been influenced by proponents of animal industry who argue Bill C-50 is too extreme.

i) Practice/interpretation of law rather than law itself is the issue

Law professor Frederick DeCoste recently considered Bill C-50's predecessor, Bill C-10 and concludes that the property status of animals is not problematic because ownership confers responsibility on the human owner, and thus a "relatively high level of

³⁵³ Hughes & Meyer *supra* note 30 at 38; Manitoba *Animal Diseases Act*, C.C.S.M., ch. A84; Nova Scotia *Animal Cruelty Prevention Act*, *supra* note 137

³⁵⁴ Bisgould (2006), *supra* note; MacDonald, *supra* note 252; Anonymous scholar, *supra* note 290.

protection for animals.”³⁵⁵ He faults legal actors rather than the law itself for the lack of protection of animals:

That the practice of our law itself has not protected, properly and fully, many animals, particularly those owned and raised by industrial farming, is an indictment, in my view, of the fidelity of the law’s practitioners, rather than law’s conception of the place of animals and of the protection and respect owed to them.³⁵⁶

Alan Herscovici, with the Fur Institute of Canada, makes a similar argument: “The fact that animals are property is often key to their protection, because owners can be held accountable for their welfare.”³⁵⁷ Herscovici also argues that the move of animals out of the property section will not prompt judges to view animal cruelty offences more seriously: “there is absolutely no support for that suggestion ... even the animal rights groups are saying the penalties are never fully imposed, so you might wonder why we have to bring in stronger ones or stronger measures.”³⁵⁸ Along the same line of reasoning

Vic Toews maintains that:

the provisions to increase the penalties are really a fiction because we know that those maximum penalties under the existing law are rarely, if ever, imposed. Therefore we can increase the penalties all we want. It will not make a difference if the judges do not impose or the prosecutors do not request those maximum penalties.³⁵⁹

Response

Animal advocates argue that maximum penalties are not utilized by judges precisely because of the current wording of the *Criminal Code* provisions on animal cruelty. The current provisions emphasize the property status of animals, and offer minor penalties even for skinning animals, like Kensington, alive. It is because of this emphasis on property status and low penalties that, according to lawyer Lesli Bisgould, “the courts

³⁵⁵ Frederick Decoste, *supra* note 11 at 1064.

³⁵⁶ *Ibid.*

³⁵⁷ Herscovici, Standing Committee, *supra* note 270.

³⁵⁸ *Ibid.*

³⁵⁹ Vic Toews, *Hansard* No. 165 (April 10 2002) at 1630.

are inclined to look for a direct harm to human interests, rather than looking at the harm to the animal. The result is quite lenient sentences in most cases.”³⁶⁰ It is evident that, not just animal advocates, but the general public, finds it atrocious when such acts are committed and are only punishable on summary conviction with the possibility of a six-month jail sentence or a \$2000 fine. Ironically, courts often take public outrage into account when sentencing an offender because it is thought that such outrage serves to deter and punish in itself.

The changes proposed in Bill C-50, particularly the Bill’s new emphasis on the harm suffered by an abused animal will indicate to the courts that animal cruelty is to be treated more seriously, and not just as an offence against an animal owner. Presently judges are saying that the current legislation ties their hands; that they do not have the ability to impose penalties more reflective of the harm done to animals, even if they wanted to. The Crown and judges know that the maximum six-month sentence or \$2,000 fine must be reserved for the worst offenders committing the worst offences possible.

Recall that even in *R. v. Powers* case, where Powers skinned a cat, named Kensington, alive, the court held that the offence itself was “very high on the continuum of the worst offence” but that Powers was not the worst offender. The Court of Appeal found that notwithstanding Powers’ torture of Kensington, he was “an intelligent, artistically gifted, principled young man with a strong social conscious” who was remorseful for his actions.³⁶¹ The Court of Appeal upheld the trial judge’s sentence of three-and-a-half months intermittent incarceration for Powers stating that: “In fixing the appropriate penalty, the trial judge had to bear in mind that six months was the maximum

³⁶⁰ Bisgould, Standing Committee (October 16, 2001), *supra* note 270 at 1620.

³⁶¹ *R. v. Powers*, *supra* note 294 at para. 9.

penalty provided for the offence. *It may well be that the present maximum is wholly inadequate. That is however a matter for Parliament.*"³⁶²

ii) Animals are humanized

Other critics argue that the Bill has the effect of inappropriately humanizing animals. David Borth of the BC Cattlemen's Association has stated that proposed reforms are moving from "property rights to almost human rights ... we have some concerns about what this is indicating."³⁶³ Herscovici argues that reform proposals such as Bill C-50 are part of an "extreme animal rights agenda" aimed at establishing "personhood and quasi-human standing for animals."³⁶⁴ Likewise Decoste argues that the reforms proposed in Bill C-50 blur "the division between persons and animals" and "elevate the status of animals at law." He argues that this elevation is "good neither for them nor for us" because non-human animals are fundamentally different and foreign to humans.³⁶⁵

The (then) Liberal government's proposed animal cruelty reforms have also received strong opposition from Canada's conservative parties. Progressive Conservative member Inky Mark (as he was then) commented that the proposed amendments are not about cruelty to animals but the "humanization of animals."³⁶⁶ Canadian Alliance member Larry Spencer (as he was then) has suggested that proposed amendments elevate animal protection to the same level as people: "The legislation makes it possible for one to be convicted of abusing animals in the same way one would be convicted of abusing a person."³⁶⁷ Another Canadian Alliance member David Anderson has similarly

³⁶² *Ibid.* at para 15 [emphasis added].

³⁶³ Vancouver Sun, "Cruelty to Animals will bring Tougher Sentences and Heftier Fines" *Vancouver Sun* (14 March 2001) A4.

³⁶⁴ Herscovici, *supra* note 353.

³⁶⁵ DeCoste, *supra* note 11 at 1070.

³⁶⁶ Inky Mark *Hansard*, *supra* note 325 at 1610.

³⁶⁷ Larry Spencer, *Hansard* No. 82 (20 September 2001) at 1350.

condemned the animal cruelty reforms as giving animals “more protection than human beings.”³⁶⁸ In particular Anderson attempts to use animal cruelty debate as a platform for his pro-life agenda. He suggests that abortion “probably” causes fetuses to suffer³⁶⁹ as well and queries why “the government is willing to protect animal life at a level that it certainly is not extending for human beings.”³⁷⁰

Response

John Sorenson responds that any claims the proposed amendments would elevate animals to the status of humans are “deliberate misrepresentation.” To make this point Sorenson notes that: “People are not openly bought and sold, immobilized and fattened until being killed for food, murdered for amusement, or tortured in medical experiments and commercial product testing.”³⁷¹ As I’ve noted at various junctures throughout this thesis, Bill C-50 is not intended to question what Canadian society views as legitimate uses of animals. Legislators backing the bill have belaboured this point in debates surrounding Bill C-50 and its predecessors. Hughes and Meyer are critical of proposed reforms precisely because “debate about the acceptability of any particular human uses of

³⁶⁸ David Anderson, *Hansard* 126, *supra* note 325 at 1645.

³⁶⁹ Research suggests human fetuses do not feel pain up until the third trimester. The vast majority of abortions are performed during the first trimester of pregnancy. Susan J. Lee, Henry J. Peter Ralston & Eleanor A. Drey et. al., “Fetal Pain A Systematic Multidisciplinary Review of the Evidence” (2005) 294 *Journal of the American Medical Association* 947; Lawrence Finer & Stanley Henshaw “Abortion Incidence and Services in the United States in 2000” (2003) 35 *Perspectives on Sexual and Reproductive Health* 6; Childbirth by Choice Trust, “Abortion the Medical Procedure” (Toronto: Childbirth by Trust Choice, 2006), online: <http://www.cbctrust.com/medical_proc.php>.

³⁷⁰ Anderson, *supra* note 368. Gary Francione argues that abortion and animal rights create two very different ethical dilemmas. He suggests that the state can uphold animal rights without unreasonably or unjustly invading the liberties of other persons. With respect to abortion, any rights of a fetus would be bound up with the liberty of a pregnant woman (the primary right holder). He concludes that in a conflict between the rights of a pregnant woman and the rights of a fetus, that it would be unreasonable or unjust for the state to uphold the rights of the fetus while violating the liberty of the primary right holder, the pregnant woman. See Gary Francione, “Abortion and Animal Rights: Are They Comparable Issues?” in Carol J. Adams & Josephine Donovan, eds. *Animals and Women: Feminist Theoretical Explorations* (Durham: Duke University Press, 1995) 149. Carol J. Adams similarly discounts attempts to conflate animal rights and abortion. Carol J. Adams (1996), *supra* note 83.

³⁷¹ Sorenson, *supra* note 11 at 385.

animals [is] foreclosed.”³⁷² The Bill will not change the fact that animals will continue to be bought, sold, eaten, or used in painful experiments. Legal scholar Lynn Letourneau argues that the retention of the property status of animals in the proposed reforms continues to send the message that animals and their human owners are not of equal value: “In contrast to the concept of animals as property, all human beings are ‘persons’ under the law, and as persons, human beings are holders of rights.”³⁷³ One of the most important rights afforded to humans in Canada, is the right to life, liberty, and security of the *person*, as set out in s. 7 of the Canadian *Charter of Rights and Freedoms*.³⁷⁴ Human life is so sanctified in Canada, that it is illegal for a human being to consent to his or her own death.³⁷⁵ The most severe criminal penalties in Canada are reserved for humans who kill other humans. The minimum sentence for an accused convicted of (intentionally) killing another human is life imprisonment.³⁷⁶ In contrast, it is legal to kill millions of animals in Canada each year. Our treatment and mass killing of animals has prompted some authors to compare our “enslavement and slaughter of non-human animals” with the “slaughter of human beings during the Nazi Holocaust.”³⁷⁷ Yet, in Canada and elsewhere the Holocaust is widely condemned as a terrible atrocity, whereas the suffering and death we inflict on animals continues to be sanctioned under Bill C-50.

iii) Radically alters the law to the detriment of animal user groups

Critics of Bill C-50 and its predecessors argue that the reforms would work to the detriment of “legitimate” animal users such as farmers, hunters, and researchers.

³⁷² Hughes & Meyer, *supra* note 30 at 75.

³⁷³ Letourneau, *supra* note 11 at para. 15.

³⁷⁴ *Charter*, *supra* note 113.

³⁷⁵ Section 14 of the *Criminal Code*.

³⁷⁶ Section 235(1) of the *Criminal Code*.

³⁷⁷ Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (New York: Lantern Books, 2002) at xi.

Herscovici argues that the purpose of such reforms is to “bind up medical researchers, farmers, and other people involved in the responsible use of animals in a tangle of regulations and increased costs.”³⁷⁸ These increased costs he argues would effectively create a ban for humans “just trying to earn a living.”³⁷⁹ Clément Gauthier on behalf of the Canadian Council on Animal Care (CCAC) opposed Bill C-15 (Bill C-50’ predecessor) because of concerns that persons using animals for research could be prosecuted under the new provisions. He argued that those who conform with CCAC guidelines should explicitly have a defence to animal cruelty charges. Conservative member Garry Breitkreuz opposes Bill C-50 on the view that it discourages “wholesome” recreational uses of animals such as hunting and fishing.³⁸⁰

Response

Sorenson points out that the primary supporter of animal cruelty reforms, the Canadian Federation of Humane Societies (CFHS) does not oppose the use of animals in farming or research. Gardiner on behalf of CFHS has made his organization’s position quite clear:

I eat steak every Saturday night. I wear a leather belt and shoes ...I’ve killed 180,000 animals in my life by documents that I’ve signed after reading the protocols to kill them. I trap animals. I trap rats and mice ... We have to kill probably 100,000 animals a year for people who don’t want to deal with animals.³⁸¹

Shelagh MacDonald, also with CFHS confirms that CFHS accepts the use of animals in two of Canada’s largest industries: “animals for food and scientific research.”³⁸²

Anne McLellan of the Liberal party has responded to concerns that animal users in legitimized industries could be criminalized by the proposed animal cruelty reforms:

³⁷⁸ Herscovici, *supra* note 353.

³⁷⁹ Herscovici, *ibid.*

³⁸⁰ Garry Breitkreuz, *Hansard* No. 149 (May 16, 2005) at 1650.

³⁸¹ CFHS (2001), *supra* note 29.

³⁸² Sheila MacDonald, *supra* note 252.

the cumulative effect of common custom, common law, and the existence of federal, provincial and territorial laws governing animal use in different contexts concludes that the use of animals in research and industry is, without question, lawful in this country and will continue to be so.³⁸³

McLellan notes that Heather Perkins-McVey provided an opinion on Bill C-50, on behalf of the Criminal Lawyers Association that moving the cruelty provision out of the property section of the *Criminal Code* is appropriate and that “no defenses [are] lost to accused persons by this move.”³⁸⁴ As a major Liberal supporter of animal cruelty reform, McLellan gave her personal assurance that “the cruelty to animal provisions have not in the past targeted and will not in the future target persons engaged in well-recognized humane industry practices.”³⁸⁵ NDP member Joe Comartin replies that an animal user group only need look to s. 182.3(2) of Bill C-50 for assurances. This section states that for the purposes of the Bill, ‘negligently’ means “departing *markedly* from the standard of care that a reasonable person would use.”³⁸⁶

iv) Slippery slope to extreme animal rights agenda

In opposing anti-cruelty reforms Herscovici drew links between the proposed amendments and the US-based animal rights groups, Animal Liberation Front and PETA. Herscovici suggested that the proposed amendments represent a legislative campaign of “harassment, intimidation, and in some cases, outright terrorism.”³⁸⁷ Similarly Alliance Member (as he was then) Vic Toews argues the amendments reflect a hidden agenda by animal rights groups: “This is nothing about reforming the law. This is everything about adopting a radical animal rights agenda.”³⁸⁸ Alliance member Howard Hilstrom suggests

³⁸³ Anne McLellan, Standing Committee, *supra* note 270 at 0950.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ Joe Comartin, *Hansard* No. 149, *supra* note 380 at 1615.

³⁸⁷ Herscovici, *supra* note 353.

³⁸⁸ Vic Toews, *Hansard* No 165, *supra* note 359 at 1610.

that the animal cruelty amendments proposed by the Liberals represent a hidden agenda “by the anti-meat people, the anti-livestock raising people and the animal rights people as an overall umbrella group with the ultimate aim of getting rid of all hunting, all firearms and all livestock production.”³⁸⁹

Response

NDP member Joe Comartin refutes that Bill C-50 has been or will be hijacked by “extreme radical animal rights groups.” He argues that this repeated accusation is tactic to kill the bill:

It is an excuse for doing away with it. There is no basis for that. If one understands how the criminal process works, the ability to use the bill by those very small number of extreme animal rights people cannot happen. There are a number of ways within the existing court system that our public prosecutors can intervene in that kind of process and shut it down if it is ever attempted. The bill is to be used appropriately by our prosecutors to protect animals. It would not be abused. I believe that this is very clear, except in the minds of those very few people who are paranoid about the potential for abuse by extreme and radical animal rights groups. This is not about that. This is mainstream legislation that the vast majority of Canadians want.³⁹⁰

Similarly, Liberal member Derek Lee notes that animal advocates – including animal rights activists, are entitled to their differing views, as are animal industry groups. However it does not necessarily follow that such groups have “hijacked” animal cruelty reform proposal in Canada.

Government supporters, and animal welfarists have made it abundantly clear that they do not oppose normal, legalized uses of animals such as farming, animal research and hunting and fishing. Members of government who are supportive of Bill C-50 have highlighted that they have family members involved in intensive farming, and that they personally approve of such use of animals. Lawyer Lesli Bisgould, with the World society for the Protection of Animals (WSPA) has stated that Bill C-50 has already been

³⁸⁹ Howard Hilstrom, *Hansard* 82, *supra* note 367 at 1350.

³⁹⁰ Joe Comartin, *Hansard* 149, *supra* note 386 at 1620.

watered down a great deal to alleviate some of the fears of animal user groups. Bisgould adds that “quite a lot of the recommendations that some of the animal groups, including WSPA, made for the bill were not in fact adopted into this legislation. It’s not accurate that the animal groups really had much say in this at all.”³⁹¹

Gardiner, also notes that “animal rights activists have neither the statutory mandate, the police powers nor the investigation skills to succeed in prosecution.”³⁹² He goes on to explain the various criminal safeguards that would prevent animal activists in Canada from “hijacking” the reforms proposes in Bill C-50:

Seldom will a Justice of the Peace permit an individual to lay charges, especially if the charges are not first approved by a Crown Prosecutor. Crown Counsel must comply with a number of rigorous criteria before they are entitled to prosecute ... Crown counsel must be fair, independent and objective. In order to approve a charge, available evidence must be examined to determine whether there is a substantial likelihood of conviction, and if so, whether a prosecution is required in the public interest.³⁹³

John Sorenson argues that critics of animal cruelty reform in Canada have no basis for believing that animal rights groups would employ the *Criminal Code* to target industry. In fact when confronted with this concern, animal advocates have specifically stated that they would not use the *Criminal Code* to try to change animal industry practices such as farming, trapping, hunting and animal research. Liz White of Animal Alliance states:

I wouldn’t deal with those issues through the Criminal Code. First, it costs too much money. Second, if you go to court, you deal with one person under the Criminal Code, not a group of people. It doesn’t move my concerns with industry along. It deals with one individual who has committed a crime against an animal. So would I use the Criminal Code? Absolutely not.³⁹⁴

³⁹¹ Bisgould, Standing Committee (October 16, 2001), *supra* note 270 at 1605.

³⁹² CFHS (2001), *supra* note 29 at 6.

³⁹³ *Ibid.* at 7.

³⁹⁴ Liz White, Standing Committee, *supra* note 270.

Troy Seidle with Zoocheck has challenged critics of the animal cruelty reform proposals to provide a single example of the animal cruelty provisions being used by animal rights activists to bring frivolous or vexatious charges forward.³⁹⁵ In my research on Bill C-50 and its predecessors I have yet to find an example given by the naysayers.

v) Animal cruelty reform not necessary

Critics of reforms like Bill C-50 also argue that public concern about animal cruelty has been exaggerated, or that animal cruelty should not be our biggest priority. Herscovici argues that the push for reform is an illusion created by animal activists “to create a false situation, as if there were a crisis, as if we had some animal abuse crisis going on in Canada and that we must have new legislation. He suggests that “the justice department’s own polling show that [the amendments are] not a great concern to Canadians whatsoever.”³⁹⁶

On a similar note Conservative member Vic Toews argues that the media coverage on animal cruelty suggests that

somehow we do not already have laws to prosecute those who skin cats and drag dogs behind vehicles for pleasure. This erroneous idea, which has been perpetuated by animal rights groups in Canada is completely false. The animal cruelty laws on the books are good laws. They already criminalize intentional acts of cruelty against animals and there is no urgent need for that aspect of the law to be changed.³⁹⁷

Toews conceded that the *Criminal Code* penalties for such offences are inadequate, and could be raised but reiterated that the “laws themselves must not be changed in the manner proposed by the legislation.”³⁹⁸

Response

³⁹⁵ Troy Siedle, Standing Committee, *supra* note 270 at 1700.

³⁹⁶ Hercovici (2001), *supra* note 253.

³⁹⁷ Vic Toews, *Hansard* 165, *supra* note 359 at 1555 & 1560.

³⁹⁸ *Ibid.* at 1560.

NDP member Joe Comartin points out that numerous surveys have been conducted by government bodies and animal welfare groups with respect to Bill C-50 and its predecessors. These surveys have indicated that both urban and rural Canadians support the “values, conceptions and provisions”³⁹⁹ of Bill C-50. In a similar vein, Bob Gardiner with the Canadian Federation of Humane Societies argues that “many hundreds of media reports and many thousands of petitions show the public outrage at cruelty cases and the need for Criminal Code amendments.”⁴⁰⁰

B. Bill C-50 does not go far enough (animal rights)

On the other end of the spectrum are those individuals and groups who argue that moderate reforms, like Bill C-50, simply do not go far enough. In the following section I introduce the view of some animal advocates that reforms such as Bill C-50 are futile or even counterproductive.

i) Introduction to animal welfare (reform) and animal rights (abolition)

Although the majority of animal advocacy organizations in Canada have banded together in support of Bill C-50 and its predecessors, these groups often have vastly different agendas and support animal cruelty law reform for very different reasons. Earlier in this thesis I discussed humane societies, such as the SPCA, who have been involved with animal cruelty reform since the nineteenth century, and the inception of our current animal cruelty provisions. SPCAs and Humane societies have continued the work of their nineteenth century forebearers focusing today on companion animals, and the welfare of animals within existing animal industries. Recall that the Canadian Federation of Humane Societies –made up of over 100 SPCAs and Humane Societies – does not

³⁹⁹ Joe Comartin, *supra* note 386.

⁴⁰⁰ Bob Gardiner, Standing Committee, *supra* note 270 at 1660.

oppose the use of animals in food production or animal research. CFHS prides itself on working “collaboratively and cooperatively” with animal user groups to improve the welfare of animals within those industries. CFHS has been involved, for example, with developing the recommended Codes of Practice with and for industry users. Similarly, researchers in the Animal Welfare Program at the University of British Columbia are working on reducing lameness in dairy cattle (by improving flooring) and improving the cage environment for laboratory rats.⁴⁰¹

However, in Canada, and around the world, other animal advocacy individuals and organizations exist that have an agenda distinct from humane societies. Unlike the humane societies, concerned with animal welfare, these other individuals and animal organizations are more critical of legitimized uses of animals, such as intensive farming and animal research, and seek to abolish many of these uses. Animal rights proponents – or abolitionists have been influenced not so much by the reform movements of the eighteenth and nineteenth century, but by the later social movements of the 1960’s and 1970’s, such as the feminist and civil rights movements.⁴⁰² This time period saw a height in intensively-reared farm animals, and a new wave of concern for the treatment of the modern factory farm animals (rather than the working, urban farm animal of the eighteenth and nineteenth century). Ruth Harrison’s book, *Animal Machines*, published in 1964 is considered to be the ground-breaking catalyst for these emerging critiques of the factory

⁴⁰¹ UBC Animal Welfare Program, “Research” (Vancouver: UBC Animal Welfare Program), online: <<http://www.landfood.ubc.ca/animalwelfare/research/index.htm>>.

⁴⁰² Hughes & Meyer, *supra* note 30; Harold Guither, *Animal Rights: History and Scope of A Radical Social Movement* (Illinois: Southern Illinois University Press, 1998).

farm regime.⁴⁰³ One strand of this concern, the animal rights camp, emerged as more critical and radical than its welfarist/reformist predecessors.

Animal rightists, unlike animal welfarists are not primarily concerned with how we can improve the treatment or welfare of animals within our existing social and legal context. Rather animal rights proponents question the human use of animals – as food, clothing, drug testers, organ donors, or entertainment – at all. The question, for an animal rightist is not: how can we improve the welfare of the animals we use? But how do we abolish human exploitation of animals? Well-known animal rights scholar, Tom Regan, comments:

Animal agriculture, as we know it is wrong, not only when farm animals are raised in close confinement in factory farms, but also when they are raised ‘humanely,’ since even in this case their lives are routinely brought to an untimely end because of human interests rather than on grounds of preference-respecting or paternalistic euthanasia. Those who support current animal agriculture by purchasing meat have a moral obligation to stop doing so.⁴⁰⁴

In a similar vein, Francione suggests that the ownership of (non-human) animals is akin to the ownership of humans because “there is no characteristic that serves to distinguish humans from all other animals.”⁴⁰⁵ Based on Francione’s premise, which is argued and accepted by an increasing number of scholars,⁴⁰⁶ there is no justification for the human ownership and exploitation of animals:

Species alone is not a morally relevant criterion for excluding animals from the moral community any more than race is a justification for human slavery or sex a justification

⁴⁰³ Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (London: Vincent Stuart, 1964). Ruth Harrison’s critique prompted a British parliamentary committee to be formed, known as the “Brambell Committee” with the task of investigating the welfare of intensively-reared animals. See also Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (New York: Random House, 1975); Stephen R. L. Clark, *The Moral Status of Animals* (Oxford: Clarendon Press, 1977); Stanley Godlovitch, Roslind Godlovitch & John Harris, eds. *Animals, Men, and Morals: An Enquiry into the Maltreatment of Non-humans* (New York: Taplinger Publishing Company, 1972).

⁴⁰⁴ Regan, *supra* note 121.

⁴⁰⁵ Francione (2000) *supra* note 191 at xxix.

⁴⁰⁶ See Maneesha Deckha, *supra* note 81; Peter Singer, *supra* note 44; Joan Dunayer, *supra* note 121; Steven Wise, *supra* note 213; Tom Regan *supra*, note; Paola Cavalieri, *supra* note 213.

for making women the property of their husbands. The use of species to justify the property status of animals is *speciesism* just as the use of race or sex to justify the property status of humans is racism or sexism.⁴⁰⁷

Without an ethical basis to justify our current uses of animals, animal rights proponents argue that we must relinquish our human ownership and uses of animals. Canadian animal rights advocates then support Bill C-50 as a small step towards abolition of animal exploitation, whereas animal welfarists support Bill C-50 as a moderate reform that will improve the lives of (some) animals (without questioning our legitimized exploitation of animals).

ii) Welfarist reform changes little

As one might guess animal rights scholars like Regan and Francione are generally unimpressed with reforms that aim to simply improve the welfare and “humane” care of animals. Both authors argue that such reforms are analogous to the concept of regulating human slavery, or treating slaves “humanely” without questioning the institution of slavery itself. Slavery, like the human exploitation is wrong, and simply improving the treatment of human slaves or exploited animals does not address the real issue:

... we do not allow ‘humane’ slavery while prohibiting ‘inhumane slavery. Although more brutal forms of slavery are worse than less brutal forms we prohibit human slavery in general because humans have an interest in not suffering *at all* as a consequence of use as property of others.⁴⁰⁸

Along the same lines Regan advocates not for “bigger cages” but “empty cages.”⁴⁰⁹

iii) Exemptions allow for unquestioned cruelty

Francione argues that when “normal” practices are authorized we are precluded from asking whether the normal activities are cruel – in the ordinary sense of the word -

⁴⁰⁷ Francione (2000), *ibid.*

⁴⁰⁸ *Ibid.* at 89.

⁴⁰⁹ Tom Regan, *Animal Rights, Human Wrongs: An Introduction to Moral Philosophy* (Maryland: Rowman & Little Field Publishers, Inc., 2003) at 97.

or from questioning whether they are truly necessary. Francione is referring to animal cruelty statute phrases such as “unnecessary cruelty” and “without lawful excuse.” Both phrases are found in Canada’s current animal cruelty provisions, as well as Bill C-50. The reproduction of such phrases in Bill C-50 means that institutionalized forms of animal cruelty – such as factory farming, and animal experimentation – will continue to be protected by the law. As noted earlier in this thesis, the leading Canadian case on animal cruelty, *R. v. Menard*, has determined that human consumption of animals (and animal products) and research on animals is legally necessary and therefore legal. The fact that a practice is normalized or ubiquitous is often provided as evidence that the practice is therefore not cruel. This type of reasoning is illustrated in the following statement by Gardiner: “Farmers don’t cause unnecessary harm as there are 400 million animals killed annually in Canada.”⁴¹⁰

An important note to make about Francione’s critique is that he is commenting on the American context, where explicit exemptions are commonly a part of state animal cruelty statutes. That is, the statutes do not rely on case law interpretation of “unnecessary” or “lawful excuse,” specific types of human (ab)uses of animals are exempted from the purview of legal sanction. Some laws for example specifically exempt “the professionally accepted practiced of veterinarians and scientific researchers,” or “hunting or trapping activities.”⁴¹¹ Specific exemptions are not provided in Canada’s *Criminal Code* animal cruelty provisions, or in Bill C-50. In debates on Bill C-50 (and its predecessors) animal advocates have argues strenuously against any suggestions to provide such exemptions in the proposed Bill. Animal advocates have argued that

⁴¹⁰ Bob Gardiner, Standing Committee at 1645.

⁴¹¹ Francione (1995), *supra* note 98 at 139.

exemptions would be a step backwards, and the purpose of Bill C-50 is to move forward.⁴¹² Animal advocates are right. The potential of Bill C-50 lies in the fact that there is continuing room for judicial interpretation of words like “unnecessary.” Of course animal advocates, especially animal rights activists, have been generally unsatisfied with how judges have interpreted animal cruelty thus far, there is room to evolve. This may be particularly true given Bill C-50’s shift away from the property status of animals.

iv) Animals as property is a fundamental source of animal cruelty

As noted earlier, some authors posit that the root of animal oppression is their status as property. Most notable proponent of this theory, Francione argues that so long as animals are property under the law, virtually any attempt to consider the interests of animals will result in “an unavoidable devaluation of animal interests simply because they are property.”⁴¹³ Francione is sceptical of any reforms that purport to grant animals certain rights while retaining their status as property: “It is my tentative conclusion that animal rights ... are extremely difficult to achieve within a system in which animals are regarded as property.”⁴¹⁴ Francione is hypothesizing about a scenario similar to what is being proposed in Bill C-50: greater protections for animals while continuing to regard them as property.

v) Penalties are still modest and unlikely to be imposed

Francione’s pessimism about higher penalties proposed in what he calls “welfarist reform” is strangely similar to the arguments made by conservative and animal industry critics of Bill C-50. Francione makes the argument that even the most severe penalties in

⁴¹² Liz White, *supra* note 270.

⁴¹³ Francione (1995), *supra* note 98 at 257.

⁴¹⁴ *Ibid.* at 14.

the US are modest and rarely imposed. Likewise Canadian conservatives and animal users, Francione questions whether increased penalties would really net higher sentences given that the maximum penalties under the current law are often not imposed (such as in the *Powers* case). Though some American states provide for more severe penalties, than others, Francione notes that “[i]n any event, imprisonment is hardly ever imposed on violators, and the punishment is typically a fine that is far less than the maximum that is authorized.”⁴¹⁵

vi) Welfarist reform actually increases suffering

Perhaps Francione’s primary argument for denouncing the animal welfarist position is that not only is it ineffective, but that it is actually counterproductive. First, Francione makes the point that animal welfare law and reforms have been in existence in most western countries for over the past hundred years and “have not done very much to reduce animal suffering and they certainly have not resulted in the gradual abolition of any practices.”⁴¹⁶ Francione gives the example of the recent agreement of McDonald’s to require its egg suppliers to increase the size of battery hen cages from 48 inches to 72 per hen.⁴¹⁷ Francione then refers to a remark by Peter Singer that this change has been the most significant development for animals (in the United States) since Singer wrote the first edition of *Animal Liberation* in 1975. Francione comments: “twenty-five years of welfarist reform and the best we can show is a larger battery cage. Maybe Peter finds that thrilling; I do not.”⁴¹⁸ Francione goes further to argue that animal welfarists increase suffering by cooperating with animal industry to make modest changes:

⁴¹⁵ *Ibid.* at 156.

⁴¹⁶ Claudette Vaughan, “Debating Francione” (New South Wales: Animal Liberation, 2003) at 2.

⁴¹⁷ Singer (2002), *supra* note 44 at xi.

⁴¹⁸ Vaughan, *supra* note 416 at 2.

Almost any proposed change, such as giving an extra inch of space to a battery hen, or eating only non-crate veal, can be portrayed as 'reducing suffering.' Singer's theory allows large multi-million dollar welfare organizations to come up with very moderate campaigns and then demand that we all jump on the bandwagon because this will 'reduce suffering.' Singer's theory actually encourages animal exploiters to make things as horrible for animals as they can precisely so that they can give a tiny, tiny bit – and thereby 'reduce suffering.'⁴¹⁹

Rather than improve the lives of animals, Francione argues that such reforms "actually increase suffering overall because they make the general public feel better about eating meat (or about any other animal use that is regulated to be 'humane')."⁴²⁰

Response

While I respect Francione's viewpoint, and believe his work is extremely valuable, I cannot concur with him that moderate change for animals is useless (or even counter productive). First, I believe that he fails to acknowledge some relatively significant changes that have taken place in Europe as a result of the second wave of animal advocacy. Francione is dismissive of giving battery hens "a few more inches of cage space,"⁴²¹ but fails to mention that the battery cage system has been abolished in Sweden since 1991. Sow crates have been banned in Britain since 1998; veal crates since 1990.

Francione also fails to mention Peter Singer's contribution to the Great Ape Project.⁴²² The Great Ape Project has followed an incremental strategy which has prompted a law in New Zealand banning the use of non-human hominids (chimpanzees, bonobos, gorillas, and orangutans) in research.⁴²³ The New Zealand government accepted the submission of the Great Ape Project that "hominids merit special treatment

⁴¹⁹ *Ibid.*

⁴²⁰ Vaughan, *supra* note 418 at 6.

⁴²¹ *Ibid.* at 2.

⁴²² Paola Cavalieri & Peter Singer, eds., *The Great Ape Project: Equality Beyond Humanity* (New York: St. Martin's Griffin, 1995).

⁴²³ New Zealand Animal Welfare Act, 1999, *supra* note 264.

of some sort because of their sophisticated mental abilities.”⁴²⁴ The New Zealand Act prohibits the use of non-human hominids in research, testing or product-testing unless the Director-General of Agriculture and Forestry (who is responsible for animal welfare) is satisfied that that the use “is in the best interests of the non-human hominid,” or in the interests of the hominid’s species, and that the benefits to be derived from the use “are not outweighed by the likely harm to the non-human hominid.”⁴²⁵ Singer and others specifically pursued this reform because it “would not threaten any major industry nor the diets of the majority of the population, as equal consideration for all animals.”⁴²⁶ Francione has expressed criticism about the Great Ape Project’s privileging of great apes above other animals:

The problem is one of hierarchy. It is not wise to promote a new hierarchy – humans and great apes over other animals – in place of humans over all other animals. Let's get rid of the hierarchy altogether.⁴²⁷

While I do not necessary disagree with Francione’s point that we need be concerned about animals other than the great apes, I argue that he is overly critical of the Great Ape Project and downplays the revolutionary possibilities posed by this relatively modest proposal. I agree with Peter Singer who concedes that the New Zealand law

... may be a small step forward for great apes, but it is nonetheless historic. It is the first time that a parliament has voted in favor of changing the status of a group of animals so dramatically that the animal cannot be treated as a research tool.⁴²⁸

I agree with Francione that these measures, in and of themselves, are not sufficient, but I disagree with him that such measures cannot lead to more radical change. Again I would

⁴²⁴ Rowan Taylor, “A Step at a Time: New Zealand’s Progress Toward Hominid Rights” (2001) 7 *Animal Law* 35 at 37.

⁴²⁵ New Zealand *Animal Welfare Act, 1999*, *supra* note 264 at s. 85(a).

⁴²⁶ Singer (2002), *supra* note 44 at xiii.

⁴²⁷ Vaughan, *supra* note 418 at 6.

⁴²⁸ Jim Motavalli, *supra* note 323 at 28.

agree with Singer that reform can help to achieve a more radical goal. Singer uses the aims of the Great Ape Project to illustrate this point:

If the Great Ape Project is successful in leading us to include, for the first time, members of a non-human species within the sphere of beings who we recognize as having basic rights, then it will have served to bridge the gap between humans and other species. It will then make it more feasible to extend equal consideration to other nonhuman animals as well.⁴²⁹

Plans are currently under way amongst supporters of the Great Ape Project to build on this “first step toward dismantling speciesism within the hominid family.”⁴³⁰ The Project is building on its achievements to propose a stand-alone, Non-human Hominid Protection Bill that would prevent the import or export of non-human hominids (unless in the best interests of the individual or his or her species), and would prohibit the trading as property of non-human hominids living in sanctuaries.⁴³¹ Project supporter Rowan Taylor argues that such “incremental legislative change” is absolutely crucial as research findings indicate that non-human hominids are in grave danger of becoming extinct in as little as ten years.⁴³²

Summary

In this section I have considered the views of Bill C-50’s critics. Strangely, some animal users, conservatives and animal rights proponents are aligned in their disapproval of such reforms, albeit for very different reasons. Animal users and conservatives argue Bill C-50 goes too far, while animal rights proponents maintain the Bill does not go far enough. With respect to animal users and conservatives who worry about the potentially “far-reaching” affects of Bill C-50, I have argued that their fears are largely unfounded. With respect to animal rights critics, I concur with them that the Bill is moderate in

⁴²⁹ Singer (2002), *supra* note 44 at xiv.

⁴³⁰ Rowan Taylor, *supra* note 424 at 35.

⁴³¹ *Ibid.* at 40.

⁴³² *Ibid.* at 43.

nature and not intended to address institutionalized forms of cruelty. However, I insist that all animal advocates ought to support Bill C-50 as offering foundations for significant future change. In the next section I consider one particular aspect of Bill C-50 that has fuelled criticism. Bill C-50's explicit recognition of Aboriginal rights has created further strange alliances well worth examining.

C. The Aboriginal Question

"Who writes? For whom is the writing being done? In what circumstances? These it seems to me are the questions whose answers provide us with the ingredients making a politics of interpretation."

-----Edward Said

As a woman of Cree descent, and a member of a First Nations community⁴³³ I have a direct interest in, and commitment to many Aboriginal⁴³⁴ endeavours including claims to traditional territory, treaty rights (such as hunting and fishing rights), self-governance, and the recognition of Aboriginal culture and knowledge. I am also committed to improving the welfare and status of (non-human) animals, and, in that vein have ties to various animal advocacy circles. It is from this standpoint that I am keen to consider the relationship between animal advocates and Aboriginal peoples in Canada.

In this section of the thesis, I want to address the recurrent charge – both within and outside Aboriginal communities - that animal advocates are western imperialists who

⁴³³ The author is an off-reserve member of the Sucker Creek First Nation (and Band) located in northern Alberta, which is a signatory of Treaty 8.

⁴³⁴ For the purpose of this thesis I use the term "Aboriginal" to include First Nations, the Métis and Inuit. The term Aboriginal appears to be the broadest term to inclusively refer to First Nations Métis and Inuit groups, without referring to each specific group in each instance, as this would be cumbersome. The term Aboriginal has also been adopted by various other Aboriginal groups (representing First Nations, Métis and Inuit interests) to identify themselves. See for example the Congress of Aboriginal Peoples, online: <<http://www.abo-peoples.org/>>; The Aboriginal Youth Network, online: <<http://www.ayn.ca/>>; The BC Association of Aboriginal Friendship Centres, <<http://www.bcaafc.com/>>; and the Yukon Aboriginal Women's Council, see online: <<http://www.womennet.ca/directory.php?show&5871>>. Of course I recognize and respect the ability of individual First Nations, the Métis, and the Inuit, to identify/align themselves differently or more specifically for their needs and purposes. See e.g., the Native Métis Council, online: <<http://www.metisnation.ca/>>; Native Women's Association of Canada, online: <<http://www.nwac-hq.org/>>; Inuit Tapiriit Kanatami, online: <<http://www.itk.ca/>>.

(either ignorantly or unapologetically) campaign to obliterate Aboriginal hunting, fishing, and trapping, with grave consequences for Aboriginal communities. More specifically, I focus my attention on opposition to recent attempts to reform animal cruelty in Canada, on the basis that such measures will result in the “cultural genocide”⁴³⁵ of Aboriginal peoples.

I draw on (post-colonial) feminist insights to argue that the concerns Aboriginal peoples have with respect to animal advocacy are valid, and should be addressed by animal advocates. I go onto suggest, however, that these claims are made – more often than not - by non-Aboriginal groups, for non-Aboriginal interests. These non-Aboriginal claims inappropriately equate Aboriginal uses of animals with recreational or large-scale industrial uses of animals by more economically powerful groups. These claims serve to give legitimacy to non-Aboriginal uses of animals, under a guise of concern for Aboriginal interests. At the same time, the claims construct animal advocates, as inimical to Aboriginal interests, which serve to discredit attempts at animal cruelty reform, and to preserve the status of economically powerful, animal industry groups.

i) Derogation Clause

Though Bill C-50 is a mirror image of its predecessors, in most ways, it deviates from its predecessor with the inclusion of a new “derogation clause” which states:

For greater certainty, nothing in this Part shall be constructed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.⁴³⁶

⁴³⁵ I take this phrase from Senator and Inuit hunter Charlie Watt in Kim Lunman, “Animal-rights bill could cause ‘genocide,’ Inuit senator says” *Globe and Mail* (6 November 2003) A8.

⁴³⁶ S. 182.6.

The derogation clause was added to Bill C-50 as a result of concern by various groups that animal cruelty reform would negatively impact Aboriginal rights to hunt, fish and trap. Inuk Senator Charlie Watt for example, refused to endorse Bill C-22 claiming that its impact on “traditional livelihood and harvesting would have serious ramifications for Inuit, First Nations and Métis families, whose right to hunt and fish have been recognized as far back as 1763.”⁴³⁷ The concern that Aboriginal interests/rights could be affected by animal cruelty reforms is not a trivial one. In the next part of this paper I briefly outline the claims that western/Eurocentric animal advocacy campaigns have distinctly and negatively impacted Aboriginal communities by failing to take into account distinct, Aboriginal interests.

ii) Challenging Imperialist Strategies

In 1985, Canadian broadcaster Alan Herscovici wrote a highly acclaimed book (published by the Canadian Broadcasting Corporation) entitled, *Second Nature: The Animal Rights Controversy*.⁴³⁸ In the book Herscovici argues that the animal rights movement is simply another form of European/Western imperialism oppressing Aboriginal peoples. He sets out to show how campaigns against seal hunting, and animal fur trapping, by animal rights groups, pose a “grave threat to the very survival of ... the [A]boriginal way of life.”⁴³⁹ For example, Herscovici makes the point that threats to traditional Aboriginal uses of animals also threaten Aboriginal land and resource claims:

Bringing aboriginal trappers off their hunting territories is a crucial step toward “clearing the land” for pipelines, power dams and other high-tech frontier “development” projects, and all the disruption of wildlife habitat that they bring with them ... animal rights philosophy, now unconsciously serve[s] the interests of mining consortiums and

⁴³⁷ Charlie Watt, “Animal cruelty and the Inuit” *National Post* (30 October 2004) A23.

⁴³⁸ Alan Herscovici, *Second Nature: the Animal Rights Controversy* (Toronto: CBC Enterprises, 1985).

⁴³⁹ *Ibid.* at 67.

hydroelectric developers by undermining the economies of people who still live in direct relation with the land.⁴⁴⁰

In 1990 J. Barber wrote an article condemning “animal lovers who are intent on destroying the fur trade,”⁴⁴¹ arguing that “virtually every native group in Canada thinks of the anti-fur campaign as nothing less “than the white man’s attempt at cultural genocide.”⁴⁴² Barber shows how anti-fur campaigns by animal advocates erroneously rely on capitalistic/monetary presumptions to justify their cause. For example, some anti-fur advocates cite the low income Aboriginal peoples derive from trapping to argue that the trapping is unnecessary or unworthy of concern: “If you look at the figures it turns out that one-tenth of one per cent of fur coming onto the international market comes from those northern communities ... For me that’s not a good enough reason for us to stop the campaign.”⁴⁴³ As Barber notes such simplistic calculations “ignore the reality of life in the north. For the Native people, the food value of the animal they hunt and trap far outweighs the price they receive for the pelts.”⁴⁴⁴

More recently Julia Emberley, in her book, *The Cultural Politics of Fur*, focuses her critique on the Eurocentric/imperialist campaign of a British animal rights organization, Lynx, against fur trapping in Canada. Consider the language of the following excerpt Emberley takes from a Lynx leaflet:

Because *no-one needs* a fur-coat. They are simply status symbols – *luxury* garments bought at a heavy price in animal pain and suffering. No *civilized* country should tolerate

⁴⁴⁰ *Ibid.* at 23.

⁴⁴¹ J. Barber, “Trapped” in Eldon Soifer, ed. *Ethical Issues Perspectives for Canadians* (Ontario: Broadview Press, 1997) 60. See also George Wenzel, *Animal Rights, Human Rights: Ecology, Economy and Ideology in the Canadian Arctic* (London: Belhaven Press, 1991).

⁴⁴² Barber, *ibid.*

⁴⁴³ Mark Glover of anti-fur animal advocacy group, Lynx, cited in Barber, *ibid.* at 64.

⁴⁴⁴ Barber, *ibid.* at 65. Barber’s point has been well-documented. See e.g. Hugh Brody, *Maps and Dreams* (Douglas & McIntyre Ltd., 1988); Wenzel, *supra* note 441; Simon Brascoupé, “Strengthening Traditional Economies and Perspectives” in *Sharing the Harvest, the Road to Self-reliance: Report of the National Round Table on Aboriginal Economic Development and Resources* (Ottawa: Canada Communication Group Publishing, 1993).

the cruelties of the fur trade. And people who wear fur coats should be shamed out of the belief that fur is glamorous ... join the *moral* majority. Oppose the fur trade.⁴⁴⁵

The language of the excerpt suggests that fur is a luxury item, completely insensitive or ignorant to the fact that trapping of fur-bearing animals continues to provide food, utility, clothing, cultural and social meaning for many Aboriginal communities.⁴⁴⁶ Emberley remarks, "How surprising then, that this simulated progressive movement is structured around the social residues of ... ethnocentrism."⁴⁴⁷

Recently, well-known feminist, animal advocate Carol J. Adams wrote a rather dismissive book review of Julia Emberley's, *The Cultural Politics of Fur*, stating that she is "disturbed" that Emberley is so "quick to damn the [anti-fur] movement for ignoring the impact it has on the lives of Native trappers."⁴⁴⁸ While Adams goes on in her review to make some valuable points (which I will discuss later in this paper), I cannot agree with Adams that it is "disturbing" for Emberley to critique the anti-fur movement for its negative effect on Aboriginal trappers. And here I employ my feminist background to make an analogy. To me, Adam's annoyance of Emberley's critique is like a Western feminist being annoyed at being confronted with feminisms' shameful racist and colonialist history.⁴⁴⁹

⁴⁴⁵ Julia Emberley, *The Cultural Politics of Fur* (Québec: McGill-University Press, 1997) [emphasis added].

⁴⁴⁶ George Wenzel, *supra* note 441; Brody, *supra* note 444.

⁴⁴⁷ Emberley, *supra* note 445 at 35.

⁴⁴⁸ Carol J. Adams, "Book Review: The Cultural Politics of Fur" (Spring 1998) *The Progressive Woman's Quarterly*, online: <<http://www.ontheissuesmagazine.com/sp98fur.html>>.

⁴⁴⁹ For example women of colour/racialized women, have taken (traditional) liberal feminists to task (sometimes referred to as "first wave" feminists) for focusing on white or western women's issues. Some early feminists were overtly racist. See e.g. Constance Backhouse, "Clara Brett Martin: Canadian Heroine or Not?" (1992) 5 *Canadian Journal of Women and the Law* 263; Vron Ware, *Beyond the Pale: White Women, Racism and History* (New York: Verso, 1992). Women of colour/racialized women have also been critical of radical feminists (sometimes called "second wave" feminists) for homogenizing the experiences of women, when there are inequalities and differences among women. See e.g., Angela P. Harris, "Race and Essentialism in Legal Theory" (1990) 42 *Stanford Law Review* 581; bell hooks, *Talking Back: Thinking Feminist, Thinking Black*. (Boston: South End Press, 1989). Many Aboriginal women do

It is wrong for animal advocacy groups to deny or minimize the distinctive negative impacts that some campaigns, such as anti-fur, and anti-sealing campaigns have had on Aboriginal communities. Yet, I am not suggesting that feminists and animal advocates cannot try to move beyond their racist/colonial blunders. Rather I would argue that both movements need to work towards acknowledging, and taking seriously, colonized, racialized, non-Western experiences without simply subsuming them into a Western/Eurocentric framework: "The West needs to learn how to step out of its colonial boots and start experiencing the reality of its subaltern environment and the cultures of the peoples it has disenfranchised and continues to disenfranchise."⁴⁵⁰

Nonetheless, in her review of Emberley's book, Carol Adams makes some important points that I do support. First, Adams sees Emberley's analysis as limited because Emberley "focuses on one British organization and makes it representative of all anti-fur politics."⁴⁵¹ Adams notes that such an analysis could have the effect of portraying the animal advocacy movement as "one-dimensional" and incapable of diversity and change.⁴⁵² Many contemporary animal advocates very clearly make a distinction between Aboriginal, and non-Aboriginal uses of animals.

not see patriarchy as their immediate site of oppression; colonialism and racism play a much larger role. See e.g. Status of Women Canada, *Aboriginal Women's Roundtable on Gender Equality* (Ottawa: Status of Women Canada, 2003), online: <http://www.swc-cfc.gc.ca/pubs/abwomenroundtable/toc_e.html>; Aihwa Ong, "Colonialism and Modernity: Feminist Re-presentation of Women in Non-Western Societies" (1988) 3. *Inscriptions* 90.

⁴⁵⁰ See e.g. Rhonda Johnson, Winona Stevenson & Donna Greschner, "Peekiskwetan" (1993) 6 *Canadian Journal of Women and the Law* 153; Ofelia Schutte, "Cultural Alterity: Cross-Cultural Communication and Feminist Theory in North-South Contexts" (1998) 13 *Hypatia* 53.

⁴⁵¹ Adams (1998) *supra* note 448 at 3.

⁴⁵² *Ibid.* at 4. However, I do disagree with Adam's suggestion that imperialist/Eurocentric approaches by animal advocacy groups are limited approaches of the past. While I would agree that the *majority* of animal advocacy groups are much more sensitive to Aboriginal concerns today than in the past, I don't think such approaches have been entirely eradicated. For example, it has been recently suggested to me by one white, urban, middle-class, animal advocate that if it is not possible for the Inuit to live on a vegan diet in northern Canada, then they should just move. Many animal advocates also have a very narrow definition of Aboriginal subsistence hunting, trapping and fishing.

Second, Adams criticized Emberley for homogenizing Aboriginal perspectives: “one would never know that there are Native Americans who protest the fur business and its effect on indigenous peoples.”⁴⁵³ Adams cites the Canadian-based group, the Native Animal/Brotherhood. Founder of the Native/Animal Brotherhood group, Paul Hollingsworth, has been highly critical of the non-Aboriginal, commercial fur trade in exploiting Aboriginal interests for non-Aboriginal/commercial purposes:

The fur trade is the most insidious source of prejudice against Native peoples. The Fur Institute of Canada and the government drag token Indians all over Europe to get support for the white fashion and fur industry as if natives were some sort of noble gods. In contrast, back at home, they cut education programs that could get natives out of subsistence jobs like fur trapping.⁴⁵⁴

Adams is touching on the important point that that there is a danger that Aboriginal interests can be misused by non-Aboriginal/industry groups to pit Aboriginal interests against animal advocacy interests, and obscure their own hegemonic uses of animals. It is on this note that I try – in the next section of this paper - to deconstruct concern for Aboriginal interests/rights by non-Aboriginal groups as a reason for opposing animal cruelty reforms in Canada.

iii) Deconstructing Strange Alliances

I do align myself with authors like Herscovici, Barber, and Emberley to the extent that they show the folly of animal advocates in developing campaigns that ignore or deny Aboriginal interests. Yet I do find it interesting that these types of claims are so often invoked by non-Aboriginal people (such as Herscovici, Barber and Emberley), and that it is non-Aboriginal people who seem to dominate the discourse on this issue. I am not suggesting that non-Aboriginal people have no place in trying to understand, and express

⁴⁵³ Adams, *ibid.* at 3.

⁴⁵⁴ Paul Hollingsworth, “Native People and the Fur Trade” (1989) [unpublished].

concern about issues that affect Aboriginal peoples; this sort of stance would not be consistent with a postcolonial aim to de-centre Western concerns and concepts, to deconstruct rigid binaries, and to deepen and strengthen understanding of Aboriginal experiences/perspectives.⁴⁵⁵ However, I do have concerns about the danger of Aboriginal voices and experiences being appropriated for non-Aboriginal interests/agendas.⁴⁵⁶ Alan Herscovici for example, who champions the right of Aboriginal peoples to trap in his book, fails to mention that he has a vested interest in protecting his own investment in the fur industry: Herscovici has, for many years served as an executive member of the Fur Council of Canada, and chair of the Montreal Fashion Network.⁴⁵⁷

Non-Aboriginal groups are well aware of that the Aboriginal uses of animals such as hunting, fishing and trapping, for subsistence, have the ability to garner more approval than sport/recreational hunting of non-Aboriginal groups. This sort of awareness is exemplified in the following passage in the book of a non-Aboriginal sport hunter:

We must remember that the non-hunting public does not accept deer hunting for either recreational purposes or antler collecting; the non-hunting public, however, accepts hunting when it is done to put deer meat on the table.⁴⁵⁸

In his book, *In Defense of Hunting*, non-Aboriginal sport-hunter James Swan advises other sport hunters to “consider dropping the word “sport” to refer to hunting,” since the word sport “may negative connotations.”⁴⁵⁹ He then draws on Aboriginal beliefs to justify his own sport hunting, stating that the success of a hunt depends on the consent, or “choice of

⁴⁵⁵ See Schutte, *supra* note 450 at 68; Leti Volpp, “Feminism Versus Multiculturalism” (2001) 101 Colum. L. Rev. 1181.

⁴⁵⁶ Linda Tuhiwai Smith notes the need for Aboriginal peoples to “tell our own stories, write our own versions, in our own ways, for our own purposes,” in Linda Tuhiwai Smith, *Decolonizing Methodologies* (New York: Zed Books, 1999) at 28.

⁴⁵⁷ Standing Committee on Justice and Human Rights, Evidence (31 October 2001) 2005 (Alan Herscovici).

⁴⁵⁸ Robert Wegner, *Deer and Deer Hunting: Book 3* (Pennsylvania: Stackpole, 1990) 165.

⁴⁵⁹ James Swan, *In Defense of Hunting* (New York: Harper, 1995) 274.

the animal.”⁴⁶⁰ As author Marti Kheel notes these hunters are very selective in the beliefs and knowledge they choose to “uproot” and “transplant” into their own narratives:

These writers single out hunting as the activity with the greatest instructive value. Although native cultures engaged in myriad other practices (e.g., gathering, planting, cooking, weaving, singing, dancing), no other activity is seen to have the same moral relevance.⁴⁶¹

Perhaps unsurprisingly then, when Bill C-50’s predecessors were introduced (to reform Canada’s animal cruelty provisions), Aboriginal interests were taken up, and supported by unlikely allies: Conservative members of parliament (MPs), and non-Aboriginal animal users. Canada’s right wing parties (Canadian Alliance, Progressive Conservative, and now the recent amalgamation of these two parties, the Conservatives) for example repeatedly complained that Bill C-50’s predecessors did not protect Aboriginal interests. Progressive Conservative MP Inky Mark protested Bill C-15 arguing that it would attack the hunting of wild game, and put Aboriginal communities’ traditional hunting patterns at risk.⁴⁶² Similarly, Progressive Conservative MP Jay Hill - who also has a background in the agricultural industry - opposed Bill C-15 because it would adversely affect animal user “stake holders” who he identified as medical researchers, trappers, hunters, guiding and outfitting, aboriginals, farmers and the rodeo industry.⁴⁶³

Progressive Conservative MP Gerald Keddy admonished the Liberals for failing to take Aboriginal practice into account when drafting Bill C-10:

That is how poor the legislation was ... The bill, as it existed in its previous form, would have found as punishable offences the traditional practices in the aboriginal community, the farming community and for people who practice animal husbandry ... Hopefully in the future the traditional farming practices will not be penalized.⁴⁶⁴

⁴⁶⁰ *Ibid.* at 37.

⁴⁶¹ Marti Kheel, “License to Kill: An Ecofeminist Critique of Hunter’s Discourse” in Carol J. Adams & Josephine Donovan, *Animals and Women: Feminist Theoretical Explanations* (London: Duke University Press, 1995).

⁴⁶² *Hansard* No. 82, *supra* note 367 at 1605 (Hon. Inky Mark).

⁴⁶³ *Ibid* at 1655 (Hon. Jay Hill). Sorenson, *supra* note 11, points out that Jay Hill fails to identify animals or their advocates as “stakeholders.”

⁴⁶⁴ *Hansard*, 113 (06 June 2003) at 1045-1050 (Hon. Gerald Keddy).

Progressive Conservative MP Peter Mackay refused to endorse Bill C-10 without an Aboriginal exemption stating that this would be welcome and would strike a needed balance in the Bill.⁴⁶⁵ Canadian Alliance MP Vic Toews also refused to support Bill C-10, arguing that the Bill would negatively impact “those of *us* living in rural areas, those of *us* who are living in the north, aboriginal hunters and trappers ... Let us give those hunters and trappers, farmers and medical researchers the assurance that they need that their activities are legitimate.”⁴⁶⁶

Support of Aboriginal interests by these parties is suspect given their track record on Aboriginal interests. As John Sorenson points out for example, the Canadian Alliance party (as it was then) is “rooted in fundamental Christian ideology ... has been linked to white supremacist groups, such as the Heritage Front, and its officials are frequently criticized for their racist remarks.”⁴⁶⁷ Today, of course, many of Alliance MP’s now form part of the Conservative party (our new government), since the Progressive Conservative and Canadian Alliance party merged.⁴⁶⁸

Non-Aboriginal intensive fur farmers also attempted to equate their interests with that of Aboriginal trappers in opposing proposals to reform animal cruelty laws in Canada. Executive Vice Chairman of the Fur Institute, Douglas Pollock for example, opposed Bill C-50’s predecessor on account of its potential negative impact on Aboriginal peoples. First, Pollock attempts to garner sympathy by drawing on accounts of social and economic destitution in Aboriginal communities:

⁴⁶⁵ *Ibid.* at 1305 (Hon. Peter MacKay).

⁴⁶⁶ *Hansard* 129 (29 September 2003) 1555 (Hon. Vic Toews) [emphasis added].

⁴⁶⁷ Sorenson, *supra* note 11.

⁴⁶⁸ Ardent critic of the anti-cruelty Bills Vic Toews, has just been appointed as Federal Justice Minister and Attorney General for example.

[T]hese animal rights destroyed the seal industry, and with it a part of their heritage and culture. Their community suffered severe economic and social upheaval when access to important market was lost ... evidence has shown that the devastation to aboriginal communities would be even greater if the fur industry collapsed ... These same animal extremists, want to eliminate in some cases the only economic benefit available to northern people, and to destroy the fur industry as well.⁴⁶⁹

Pollock's statement serves to blame animal advocates for the plight of Aboriginal people, and attempts to link his own concerns, as a non-Aboriginal, intensive fur farmer to the Aboriginal experience.

In a debate on Bill C-15, Richard Couture President of Chiens de chasse Québec – an organization that promotes hunting dogs draws on the necessity of Aboriginal subsistence hunting to bolster his own position: “Although hunting is practiced everywhere in Canada, is it not still a necessity, even for native people?”⁴⁷⁰ Director of Chiens de chasse Québec, Gaston Lemay, goes onto build on the link between Aboriginal and non-Aboriginal hunters drawn by Couture to argue that Bill C-15 should not “interfere with the *historic* rights and *traditions* of citizens pursuing activities such as hunting, with or without a dog ...”⁴⁷¹

In opposing animal cruelty reforms in Canada, non-Aboriginal groups, such as commercial fur farmers, and sport hunters, were eager to latch onto Aboriginal interests as though these interests could be fully equated. However this equating ignores importance economic, and cultural differences between Aboriginal and non-Aboriginal uses of animals. For example, Angus Taylor notes, in his book, *Animals and Ethics*, subsistence hunting of the Inuit, is quite distinguishable from recreational/sport hunting:

The hunting that the Inuit do is not recreational. It is no weekend outing. During the long, dark Arctic winter, when the sun is rarely to be seen and the temperatures may hover

⁴⁶⁹ Hansard No. 82, *supra* note 367 at 1800 (Hon. Douglas K. Pollock).

⁴⁷⁰ Standing Committee on Justice and Human Rights, Evidence (31 October 2001) 2005 (Richard Couture).

⁴⁷¹ Standing Committee, *ibid.* at 2010 [emphasis added].

around -35° Celsius, hunters spend hours traveling by snowmobile to areas of offshore ice to look for breathing holes used by seals. Then they stand nearly motionless above active holes, often for hours and often without success, waiting for the appearance of their prey. Ortega's maxim that 'one does not hunt in order to kill; on the contrary, one kills in order to have hunted' has little relevance here. Traditionally the Inuit hunt to kill and thereby survive.⁴⁷²

The distinctive and central cultural importance of hunting, trapping, and fishing in Aboriginal communities has also been well-documented.⁴⁷³ As David Pelly argues:

[T]he importance of the seal to the Inuit extends far beyond its economic value. The seal lies at the foundation of traditional Inuit society, the complex of material, social, spiritual, and the cultural values that define for many Inuit who they are.⁴⁷⁴

The point has also been made by Paul Nadasdy with respect to the Kluane First Nation who continue to heavily supplement their diet with meat from their hunts:

But the importance of hunting to Kluane people cannot be measured in calories alone. Hunting is every bit as important to their survival as *Aboriginal people* as it is to their physical survival. It has been *the* fundamental organizing principle of their culture, structuring and informing every aspect of their entire way of life. Everything from their technology and social organization to their beliefs and values were, and in many ways continue to be, deeply intertwined with (and given meaning by) the need to kill animals to survive.⁴⁷⁵

This point is perhaps best illustrated in the following description of Elder Pauline Mercredi of the Fond du Lac Denesuline Nation of the importance of the caribou to her community's identity, and "way of life."⁴⁷⁶ "As soon as we meet the caribou, wherever they are we

⁴⁷² Angus Taylor, *supra* note 69.

⁴⁷³ Harold Cardinal and Walter Hilderbrandt in *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Clearly Be Recognized as Nations* (Calgary: University of Calgary: Press, 2000). See also Brody, *supra* note 444; Wenzel, *supra* note 441.

⁴⁷⁴ David F. Pelly, *Sacred Hunt: A Portrait of the Relationship between Seals and Inuit* (Vancouver: Douglas & McIntyre Group, 2001) 64-65 [emphasis in original].

⁴⁷⁵ Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal State Relations in the South-West Yukon* (Vancouver: UBC Press, 2003).

⁴⁷⁶ I have adopted this term from Maori scholar Jacinta Ruru (in relation to Aboriginal uses of animals) because I think it does a nice job of articulating the way hunting (and fishing) for many Aboriginal people is in fact a way of life not only for subsistence purposes but because these practices are also bound up in cultural meanings, community identity, social relations/organization, and spirituality.

respect them ... That was our main source of food, and our clothing ... Yes we are known as the 'caribou eaters'”⁴⁷⁷

Moreover, numerous Aboriginal groups in Canada would argue that an Aboriginal perspective⁴⁷⁸ conceptualizes animals in a much different way than western/commercial users of animals do. Under an Aboriginal perspective, killing and eating animals is not cruel, nor disrespectful. Rather, hunting, for example, is viewed as a process of reciprocal exchange “between hunters and other-than-human persons.”⁴⁷⁹ It is widely believed that animals are equal, autonomous, intelligence (non-human) persons, who have chosen to enter into these relations with Aboriginal peoples for mutual benefit.⁴⁸⁰ Cree hunter and trapper, Thomas Coon explains: “I think the animals need the Cree hunter to harvest them; I think the hunter needs the animal to survive ... these two make the world turn.”⁴⁸¹ Elaborate rules, ceremonies, and rituals ensure that proper respect is given to the animals, and that the debt incurred by killing an animal is repaid.⁴⁸² A shortage of animals may be

⁴⁷⁷ Elder Pauline Mercredi, cited in Cardinal and Hildebrandt, *supra* note 473 at 46.

⁴⁷⁸ While Aboriginal communities in Canada comprise of diverse and distinctive groups, it can also be said that they share many common beliefs as well, especially in relation to non-Aboriginal groups. Similarities in belief systems are noted by Cardinal and Hildebrandt, *supra* note 473; Nadasdy, *supra* note 475; Taylor, *supra* note 69; Wenzel, *supra* note 441.

⁴⁷⁹ Paul Nadasdy, “The Gift in the Animal: Hunting, Human-Animal Relations, and Exchange Theory in Anthropology” (Notes for lecture presented to the UBC Department of Anthropology and Sociology, Vancouver, BC., March 2006) [unpublished]. See also Inuit Tapiriit Kanatami & Assembly of First Nations, “Native Spirituality” (Ottawa: National Defense, 2004), online: <http://www.forces.gc.ca/hr/religions/engraph/religions23_e.asp>. See also Taylor, *supra* note 69; Pelly, *supra* note 474; Cardinal & Hildebrandt *supra* note 473; Adrian Tanner, *Bringing Home Animals: Religious Ideology and Mode of Production of the Mistassini Cree Hunters* (St. John’s: Memorial University Press, 1979).

⁴⁸⁰ Nadasdy, *ibid*. This view is in contrast to the traditional, and more pervasive contemporary western view that humans are a species above and apart from the rest of the animal world. See e.g. Corbey, *supra* note 205; Tim M Ingold, ed. *What Is An Animal?* (New York, Routledge, 1988).

⁴⁸¹ Cited in Herscovici, *supra* note 438 at 61.

⁴⁸² Nadasdy (2006), *supra* note 479, notes for example that it is commonly believed in Aboriginal hunting communities that humans should not laugh at, make fun of, or make derogatory comments about animals; that animals should be killed quickly with minimal suffering; that meat should not be wasted; animals should not be overharvested; and that animals must be properly treated – and this treatment is dictated by what the animals deem appropriate (such as the animal’s bones being returned to their territory, or offering some of the meat to the animal’s spirit).

interpreted as a sign that animals have been disrespected or have not been properly compensated, and thus special efforts are required to “regain the animals’ favor.”⁴⁸³

Of course there are animal advocates who would argue that respect for animals cannot be reconciled with killing them. All too often such criticism is made without consideration for Aboriginal peoples at all, and their *sui generis* ties to animals.⁴⁸⁴ Or critics have a limited understanding of the Aboriginal account of human-animal relations, (and thus tend to summarily reject this conceptualization).⁴⁸⁵ Nonetheless, as Taylor notes the Aboriginal perspective is consistent with an animal advocacy position in a fundamental way:

[T]hese two versions of the concept of respect share something fundamental: each admonishes us to treat animals as ends in themselves, never simply as means. If animals really do give their consent to being killed and consumed, then it is possible for humans to kill and consume them without treating them simply as means.⁴⁸⁶

iv) Scapegoats

Groups opposed to animal cruelty reform proposals in Canada also simultaneously constructed animal advocacy groups as radical and inherently opposed to Aboriginal

⁴⁸³ *Ibid.* at 63; Nadasdy (2003), *supra* note 475 at 93. Nadasdy describes the Aboriginal view that elusiveness or shortage of animals is usually a sign that an animal has decided to tear up his/her contact/terminate his/her relationship with the Aboriginal hunter, because the hunter is not fulfilling his/her side of the bargain.

⁴⁸⁴ For example, in philosophy scholar Martha Nussbaum’s newest (415-page) book, *Frontiers of Justice: Disability, Nationality, Species Membership* (United States: Harvard University Press, 2006), she makes numerous moral claims about how humans ought to treat animals, but is notably silent on Aboriginal peoples. This is important because some of her claims would likely be contested/rejected by most Aboriginal groups. She assumes for example that it would be impossible to imagine any contract humans might make with animals as a “real contract” (at 334). She goes on to make the sweeping statement that the human killing of animals can never be conceptualized as a human “good,” and thus humans ought to be expected to flourish without killing animals (at 370).

⁴⁸⁵ I agree with Paul Nadasdy that Aboriginal accounts of human-animal relations should be taken seriously, as potentially “literally true” (as complex theories posing fundamental, and legitimate challenges to western accounts of proper human-animal relations) rather than mythical, quaint stories.

⁴⁸⁶ Taylor, *supra* note 69 at 113. Both Aboriginal and animal advocate versions reject a sharp hierarchical division between humans and animals; rather, animals are intelligent, autonomous, equal beings worthy of respect. This shared conception might be contrasted for example with intensively-reared animals who are predominantly conceptualized by industry stakeholders as production units, solely existing for human consumption. See Bisgould, King & Stopford, *supra* note 98.

interests. Yet most contemporary animal advocates, from scholars to grassroots organizations, concentrate their efforts on non-Aboriginal uses of animals. For example, nearly all animal advocates today focus campaigns on drawing attention to more corporate enterprises such as fur farms/ranches, intensive farming, and animal research.⁴⁸⁷

Many animal advocates clearly distinguish between recreational/commercial hunting, trapping and fishing, and Aboriginal hunting, trapping and fishing.⁴⁸⁸ For example, in response to concerns that anti-fur campaigns wreak havoc on Aboriginal communities, animal advocacy groups suggested that the Fur Council of Canada label “native-trapped” furs so that consumers could support that form of trapping while opposing factory-farmed/ranch fur. The Council, which also supports farmed/ranched fur refused to implement the labels.⁴⁸⁹

Prominent scholars who make animal advocacy claims very clearly state that if anyone has legitimacy in using animals, it is Aboriginal peoples. Well-known philosophy scholar Rosalind Hursthouse, for example, states:

Eskimos [sic] living in an environment where they must kill animals for food or starve might be justified in claiming that their interest in surviving overrides that of the animals they kill. Most of us cannot defend our diet this way.⁴⁹⁰

⁴⁸⁷ See for example, Animal Voices, online: <<http://www.animalvoices.org/>>; American Anti-Vivisection Society, online: <<http://www.aavs.org/home.html>>; Farm Sanctuary, online: <<http://www.factoryfarming.com>>; Farmed Animal Net, online: <<http://www.farmedanimal.net/>>; Humane Farming Association, online: <<http://www.hfa.org/>>; Last Chance for Animals, online: <<http://www.lcanimal.org/>>.

⁴⁸⁸ See e.g. Wendy Donner, “Animal Rights and Native Hunters: A Critical Analysis of Wenzel’s Defence” in Alex Wellington, Alan Greenbaum, and Wesley Cragg, eds., *Canadian Issues in Environmental Ethics* (Peterborough: Broadview Press, 1997); Marti Kheel, *supra* note 461; Rosalind Hursthouse, *Ethics, Humans and Other Animals* (New York: Routledge, 2000) 174.

⁴⁸⁹ Global Action Network, “Fur and Aboriginal People,” (Montreal: Global Action Network, 2005), online: <<http://www.gan.ca/campaigns/fur+trade/factsheets/fur+and+aboriginal+people.en.html>>. David Sztybel, “Facing the Facts of Animal Treatment: Fur” (David Sztybel, 2002), online: <<http://sztybel.tripod.com/facts.html>>.

⁴⁹⁰ Hursthouse, *supra* note 488 at 174.

Similarly, philosopher Peter Singer, renowned for advocating animal liberation, is predominantly concerned with factory farming of animals, and has conceded that the killing and use of free range animals may be justifiable in certain circumstances.⁴⁹¹ Even Tom Regan, known for taking a strong stance in favour of animal rights, argues that animals' interests may be legitimately overridden in special cases where human life is threatened.⁴⁹²

Yet, animal advocacy is constructed as hostile to and irreconcilable with Aboriginal interests. This all serves to shift our focus from less legitimate uses of animals by more powerful non-Aboriginal groups.

Conclusion

Perhaps the derogation clause in Bill C-50 will help quash concerns that Aboriginal interests will be negatively impacted by animal cruelty reforms, and both real and trumped-up conflicts between Aboriginal communities and animal advocates can be put to rest.

Interestingly, since the introduction of Bill C-50 (and the derogation clause), the rhetoric of those who critique the Bill has changed dramatically. Consider the following complaint by Conservative MP John Williams in a recent Hansard debate on Bill C-50, that Aboriginal peoples are getting "special treatment" in the new Bill:

But there is a protection for First Nations. There always seems to be a protection for them unfortunately. Because they are allowed to do whatever they want according to this if it is given to them according to the treaties and so on that they have under what is now part of our Constitution. And if that treaty allows them to be inhumane then this act allows them to

⁴⁹¹ Peter Singer, "All Animals are Equal" in Peter Singer, ed., *Applied Ethics* (Oxford University Press, 1986). Singer is concerned about the suffering of animals that are intensively reared, and that humans treat these animals as merely means to our ends (consumption). A persuasive argument can be made that wild animals hunted by Aboriginal peoples do not suffer, in the way Singer is contemplating. Moreover, Aboriginal peoples might argue that they do not treat animals as merely means to an end; rather they have a deep respect for the animals they kill; that killing and respect are not mutually exclusive concepts.

⁴⁹² Tom Regan, *supra* note 121.

continue to be inhumane. They get this special exemption and you have to ask yourself why? Why them and not us?⁴⁹³

I hope this paper has been able to help respond to John Williams' question, "why them and not us?" by putting Aboriginal concerns and interests in their historical, economic, social, and cultural context. Just as it is wrong for animal advocacy groups to focus their campaigns on Canada's most disenfranchised, disadvantaged peoples, it is also wrong for dominant groups in Canada to champion Aboriginal causes to legitimize their own exploitation of animals.

v) Reconciling the Aboriginal position with animal advocates

So, how do I propose to answer the Aboriginal question? There are no easy answers. Luckily – or conveniently – this is a question that can be postponed. There are much bigger and imminent issues at hand that ought to be the focus of the animal advocate's attention. By far the largest sites of animal oppression are factory farming and animal research. Animal advocates have more legitimacy in criticizing profitable, predominantly western, industries that are responsible for the vast majority of animal suffering and death in Canada. Animal advocates – who are often middle-class or relatively affluent white folks - lose moral high ground by condemning the traditional, cultural, and (sometimes) subsistence-based practices of Canada's first people. I agree with Canadian animal rights lawyer Lesli Bisgould who suggests that perhaps it is not the place of "descendent[s] of European immigrants to tell Aboriginal persons how to have a relationship with the earth and its inhabitants."⁴⁹⁴ This is particularly true in light of historic (and contemporary) oppression of Aboriginal people by European colonizers and their descendants.

⁴⁹³ *Hansard* No. 156 (21 November 2005) (Hon. John Williams).

⁴⁹⁴ Lesli Bisgould (2006), *supra* note 289.

Rather, I think it would be more fruitful for animal advocates to gain a better understanding of Aboriginal history and culture – from an Aboriginal perspective – generally. Moreover, and more specifically, animal advocates should make an effort to truly gain a better understanding of Aboriginal conceptions regarding human-animal relationships. Paul Nadasdy’s work in this area would be an excellent first step for example.⁴⁹⁵ With this basic level of understanding, animal advocates could attempt to build relationships with Aboriginal communities, focussing on similar interests (such as preserving wilderness) and celebrating Aboriginal traditions and practices that do not involve the use or death of animals. Viable alternatives could be posed for interested Aboriginal communities. By building relationships and trust in Aboriginal communities, animal advocates help to dismantle Aboriginal-corporate-conservative alliances. The Conservative government, and corporate/western animal industry groups would be prevented from latching onto Aboriginal interests to further their own agendas.⁴⁹⁶

PART IV: WHY WE SHOULD SUPPORT BILL C-50

Bill C-50: A stepping-stone towards change

The fact is that Bill C-50 is still not law, and while it remains off the books we are stuck with dated, and woefully inadequate animal cruelty laws. Bill C-50, though far from perfect, provides immediate, improved protection for at least some of Canada’s animals. Moreover, the reforms proposed in Bill C-50 have a reasonable possibility of being enacted in Canada in the relatively near future. To move from our current nineteenth century animal cruelty laws to outright abolition seems far-fetched (as much

⁴⁹⁵ See Nadasdy, *supra* note 475.

⁴⁹⁶ Much like wealthy fox hunter in Britain have attempting to portray fox hunting as the traditional pursuit of the working class. See The Associated Press, “The Brits Outlaw hunting with Dogs” *CBS News* (18 November 2004), online: <<http://www.cbsnews.com/stories/2004/11/18/world/main656534.shtml>>.

as I might personally be in agreement with that viewpoint). I agree with Singer that accepting reforms such as Bill C-50 does not preclude us from seeking more radical ends from the law.

An animal advocate can support the Bill while simultaneously making or advocating for more radical change. For example animal rights activists are increasingly upholding veganism as the most effective way to eradicate animal exploitation.⁴⁹⁷ There is nothing in Bill C-50 that discourages this choice. Any animal advocate is free to be vegan, and to encourage others to become vegan while also advocating for Bill C-50. Of course, I realize that Bill C-50 does not necessarily promote veganism either; for the most part the Bill does not question our human use of animals. This is obviously inadequate as an end goal for many animal advocates. I would agree that there is a need to go beyond Bill C-50 and question the institution of animal exploitation; however I would suggest that this is not an instantaneous exercise, nor does it require the rejection of Bill C-50 altogether.

Movements that aim to radically disrupt existing power relations and mainstream thought – such as the animal rights movement – tend to evolve much more slowly than its adherents would like. The women's movement is perhaps one of the best examples of this. Women's liberation or feminism did not come about suddenly or by way of a single piece of legislation. Instead the women's movement began with women fighting strenuously for basic rights we simply take for granted in Canada today: The right to personhood, the right to vote, the right to attend post-secondary education, and the right

⁴⁹⁷ Singer, *supra* note 44; Francione, *supra* note 110; Regan, *supra* note 75; Masson, *supra* note 72.

to enter male-dominated professions (such as law and medicine) for example.⁴⁹⁸ Moreover, these rights were achieved by relatively privileged women, who, by today's standards, were not particularly radical.⁴⁹⁹ Nonetheless the achievements of these seemingly moderate women have provided a platform for women's rights to evolve into more recent progressive initiatives: the right to abortion, pay equity, constitutional protection for women's equality, the development of crisis centres and transition houses for women and so on. Present-day laws that protect women from discrimination based on their sex could not have been achieved without our foremothers first successfully arguing that women were persons under the law in the late nineteenth and early twentieth century.

This example illustrates two points. First that radical re-conception of the law does not generally happen overnight. Movements that aim to change the law so radically are subject to reception of and compromise by political and legal actors, as well as the general public. Second, the type of change we view as moderate today can evolve into more radical transformation in the years to come. With respect to Bill C-50 for example, the modest proposal of moving animals out of the property section is perhaps an important step towards eliminating the property status of animals. While legislators have made it clear the Bill does not intend to radically reconceptualize animals' property status, the Bill also does not close the door to more revisionary ends. Moving animals from the property section of the *Criminal Code* is indicative of a shift in how we

⁴⁹⁸ See e.g. *re Mabel P. French* (1905), 37 N.B.R. 359; *Re Section 24 of the British North America Act, 1867*, [1828] S.C.R. 276; *Bradwell v. Illinois* (1872), 83 U.S. (16 Wall.) 130; *Edwards v. A.G.*, [1930] A.C. 124.

⁴⁹⁹ Early feminists were white women, and often of an elite or wealthy background. Some of these feminists were also clearly racist. Many women of colour and other racialized women have been critical of early feminists for these reasons. See e.g. Constance Backhouse, (1992), *supra* note 449; Vron Ware, *supra* note 449.

view animals in Canada: as sentient beings, quite distinct from inanimate property. This basic understanding and acknowledgement provides a platform to re-think whether (or to what extent) it is ethical and legal for humans to cause pain, suffering and or death to such beings. This legal and conceptual shift in animals' property status, coupled with weightier penalties will inform judges when re-considering what is meant by "necessary" vis-à-vis "unnecessary" animal cruelty, for example. The seemingly subtle changes offered in Bill C-50, in conjunction with pliable language like "unnecessary cruelty" leaves space for evolving and potentially radical change in the way we conceptualize and treat animals in Canada. It will be up to animal advocates, as it has been up to women (and other marginalized groups), to build on the law's tempered reforms.

In the meantime, I concur with Singer, who argues that "there is little point in refusing to compromise if that simply means that the animals continue to suffer without relief."⁵⁰⁰ Thinking more long term, there is room in Bill C-50 to make meaningful change for animals. Like the New Zealand Act – discussed in Part III, Bill C-50 is significant even if it's not everything advocates have hoped for; and its practical utility seems limited. The Bill would create - for the first time in Canada history - laws that explicitly recognize that animals have value beyond their property status. Liz White of Animal Alliance opines that:

What this piece of legislation does is elevate the issue in the court's mind. It signals to the judges that this is an issue that should be taken seriously. Whether it filters down to the courts depends largely on the people who take prosecutions to court but it's an excellent first step.⁵⁰¹

⁵⁰⁰ Ibid.

⁵⁰¹ Liz White, in Robin McKay, *supra* note 271 at 19.

Lawyer and animal advocate, Lesli Bisgould is supportive of Bill C-50 because of the move of animals out of the property section:

While this would not mean that animals are no longer property, it would mean that the government of Canada is saying that there are times when it is not appropriate to think of animals as property, and instead we must think of them as sentient creatures who get hurt by human actions. This is an important step in the move toward ending the property status of animals. It is part of the evolution toward animal liberation.⁵⁰²

Final remarks

As I have outlined in this thesis, Bill C-50 has some serious shortcomings. However, given Canada's current political and social climate, this bill ought to be accepted by animal advocates as a stepping stone in the right direction. While Bill C-50 may be interpreted narrowly now, there is some "wiggle room" within the Bill to allow for a broader interpretation in years to come. In the ideal (human) political and social climate I would certainly hope to see a more radical shift in animal cruelty law. However, at a practical and strategic level it is unlikely that a more radical Bill would be accepted in Canada's current political and social climate. As it is, Bill C-50 is a watered down reincarnation of many Bills that have failed to pass due to vehement opposition and lack of legislative will. What is more, despite the fact that Bill C-50 has attempted to address the concerns of its opponents, it remains unsupported by a majority of members in the Conservative party.⁵⁰³ This is significant given that the Canadian public recently voted the Conservative government into power.

Animal rights groups across Canada support Bill-50 (and its predecessors), a proposal which American animal rights lawyer, Gary Francione would likely condemn as "welfarist." Why do Canadian animal rights activists support Bill C-50? One, because

⁵⁰² Lesli Bisgould (2006), *supra* note 271 at p. 1

⁵⁰³ See my "Postscript" to this thesis.

they are hopeful of Bill C-50's promise to de-emphasise the property status on animals, and second, because Canadian animal rights groups are keenly aware of the fact that they could not hope for more from Canadian law. They know that at this moment in time, a majority of Canadians – like the citizens of Omelas – are simply not ready or able to relinquish the benefits they receive from legitimized oppression. This is evidenced in the fact that the majority Canadians continue to use and consume numerous animals and animal products despite the advent of viable alternatives.⁵⁰⁴ Obviously there is more convincing to do both in and outside the Canadian legal system. For the law's part, I agree with Canadian animal rights activist, Liz White; Bill C-50 is not an end, it is just a beginning.⁵⁰⁵ But it is a beginning ...

⁵⁰⁴ At least most non-Aboriginal folks in relatively urban centres, with a moderate income.

⁵⁰⁵ Cited by Alan Herscovici in Standing Committee (October 16, 2001), *supra* note 270 at 1615.

POSTSCRIPT

While in the midst of writing this thesis, Bill C-50 died on the order paper when an election was called in January 2005. The Bill has yet to be introduced with the Conservatives now in power.¹ Liberal Member of Parliament (MP), Mark Holland has recently attempted to put Bill C-50 back on the government's agenda. On October 30, 2006, Holland re-introduced Bill C-50 as a Private Member's Bill, Bill C-373. On a media release on Holland's official website, he states that, "failure to pass this legislation previously is a national embarrassment."²

While Holland concedes that private member bills are quite difficult to pass he is hoping that he can reach out to the public, and MPs and senators of all the Canadian parties to convince the government to re-introduce Bill C-50 as a government bill again. Holland is especially critical of a competing private member Bill, introduced to the Senate by Senator John G. Bryden. Bryden's Bill S-213, is a reincarnation of the same Bill Bryden introduced under the Liberal government in 2005, then known as Bill S-24. Holland states that Senator Bryden's bill is "nothing but a diversionary tactic on behalf of some who want to keep the status quo" and Holland vows to fight the Senate bill with "every ounce of [his] strength."³ Senator Bryden's bill has also been heavily criticized by animal rights and animal welfare organizations alike in Canada. Currently Holland's Bill C-373 is on the Order Paper in the House of Commons.

¹ This is unsurprising given that members of the Conservative party have stringently opposed Bill C-50 and its predecessors.

² Mark Holland, "Holland launches campaign for animal cruelty bill" Mark Holland's Official Website, News Release (30 October 2006), online:
<<http://www.markholland.ca/news/2006/061030animalcruelty.htm>>.

³ *Ibid.*

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