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ARTICLE

Reconciling the Clash: A Comparison of the Australian and Canadian Legal Approaches to Burdening Indigenous Hunting Rights

ALICE SOWRY*

In the context of rising support for strong legislative protections of animal welfare, the continued practice of Indigenous hunting rights may be perceived as inconsistent with the provisions aimed at preventing cruelty to animals. This article will deal with the question of how the protection of hunting rights granted by the common law doctrine of Native title may continue if new animal welfare standards are to be accommodated for. Three possible solutions are analysed in the context of both Australian and Canadian law. First, modifications to traditional hunting methods could minimise cruelty while allowing hunting to continue. Second, Indigenous hunting rights could be extinguished altogether by animal welfare standards. Third, animal welfare standards could include exemptions for the continued exercise of Indigenous hunting. The analysis of these possible resolutions to the conflict confirms the importance of consultation with Indigenous communities, in order to be inclusive of the Indigenous perspective on animal welfare.

I Introduction

Rising public support for legislative protection of animal welfare has raised difficult questions about the compatibility of these standards with particular traditional hunting practices. This article will examine the nature of the Indigenous hunting rights at stake in comparison with the varied justifications for animal welfare protection. This issue is most pertinent to Australia, where tougher legislative protections for animal welfare were

* BA(Hons), DipLang, LLB student at the University of Otago. The author studies Politics and French in addition to Law. This article was written in her third year of study. The author wishes to thank Associate Professor Jacinta Ruru for her insightful feedback and encouragement throughout the writing process.

introduced in Queensland in 2012 after public outrage at "cruel" Indigenous hunting methods.[1] This article will compare the various approaches in Australian states, alongside the Canadian legal approach. Although Australia and Canada share a common settler history and similar legal systems operating at both the federal and state/provincial levels, there are significant differences in legal approaches taken to overriding Indigenous hunting rights in order to promote the public interest. Many traditional Indigenous hunting methods are viewed as illegally inflicting cruelty upon animals in Australia, although this depends on a particular state's panimal welfare legislation. In contrast, animal cruelty offences in Canada are part of the federal Criminal Code, and these provisions do not apply to the types of animals usually hunted. Separate regulations pertaining to hunting operate on the provincial level in Canada and burden Indigenous hunting rights only where they can be justified.[2] Still, these regulations are generally environmental, and animal welfare concerns are yet to interfere with hunting rights in Canada as they are in some Australian states. This article will first address the existing statutory regimes in both countries. Then, given the lack of case law on this particular issue, offer an analysis of three possible resolutions to the conflict between Indigenous hunting rights and animal welfare standards.

II The Nature of Indigenous Hunting Rights

A *Australia*

The rights of Aboriginal peoples and Torres Strait Islanders to hunt is expressly provided for in the Native Title Act 1993[3] and has been confirmed in subsequent case law.[4] The traditional practices of hunting, fishing, and foraging[5] hold great importance in many Indigenous Australian communities for various reasons. Some communities rely on hunting wildlife as a source of food.[6] However, the spiritual dimension of hunting is one of the principal reasons that Indigenous communities still practise it today as:[7]

> … hunting [allows Indigenous peoples] to express profound environmental knowledge stretching back over many generations, and continually reinforces their beliefs in the spiritual value of such knowledge; it is also an important medium of education, whereby both spiritual and ecological knowledge is handed on to succeeding generations.

Traditional hunting in Australia involves the killing of many different native species, and it has been estimated that 1,600 dugongs, 200,000 mutton-birds, and 20,000 salt and

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1 See Animal Care and Protection and Other Legislation Amendment Act 2012 (Qld), pt 3. See also Sarah Dingle and Lesley Robinson "Cruelty Exposed" (9 March 2012) ABC Radio Australia <www.radioaustralia.net.au>.

2 *R v Sparrow* [1990] 1 SCR 1075 at 1077I-J.

3 Native Title Act 1993 (Cth), s 223.

4 *Yanner v Eaton* [1999] HCA 53, (1999) 201 CLR 351.

5 In this article, the term "hunting" will be used to collectively refer to all of these practices.

6 Marcus Barber and others "The persistence of subsistence: qualitative social-ecological modelling of indigenous aquatic hunting and gathering in tropical Australia" (2015) 20 (1) Ecology and Society 60.

7 Elspeth Young *Caring for Country: Aborigines and Land Management* (Australian National Parks and Wildlife Service, Canberra, 1991) at 111.

freshwater turtles die each year as a result.[8] However, it is important to note that the remoteness of many Indigenous communities means that extensive data is not available.

B *Canada*

The Canadian courts have generally recognised various sources as granting Aboriginal people the right to hunt and fish, including treaties made between the Crown and different Indigenous groups. These rights are not necessarily required to form part of Aboriginal land titles,[9] meaning that the traditional hunting rights in Canada "arise from an Aboriginal title and can exist independently of a territorial aboriginal claim".[10] The Constitution Act 1982 strengthens the recognition of what it terms "existing rights", which includes these hunting rights granted as part of Aboriginal title.[11]

The exercise of Aboriginal hunting rights varies across Canada, depending on the Indigenous group in question. Inuit have a well-known history of hunting whales for subsistence.[12] Other tribes, such as the Mikmaq and the Innu, hunt wildlife including caribou and moose.[13] Similarly, to Indigenous groups in Australia, hunting is considered an important right not only for subsistence but also for serving the cultural and spiritual needs of the community.[14]

III Animal Welfare Legislation as it Applies to Traditional Hunting

The purpose of animal protection laws is to safeguard animals from harm caused to them by humans.[15] However, there is a difference between the approaches of *animal welfare* and *animal rights*:[16]

> Animal welfare refers to the objective of improving the living conditions of non-human animals insofar as this is possible without fundamentally altering the framework of interactions between humans and other animals… [it] is often contrasted to the concept of animal rights, which rejects the imposition of any suffering and thereby challenges virtually all existing human practices utilizing animals.

The *animal welfare* approach is reflected in the legal status of animals in Australia and Canada, as detailed below. This approach generally aims to outlaw animal cruelty, defined

8 Dominique Thiriet "Out of the 'too hard basket' – Traditional hunting and animal welfare" (2007) 24 EPLJ 59 at 59.

9 Desmond Sweeney "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 UNSWLJ 97 at 107.

10 PG McHugh "Maori Fishing Rights and the North American Indian" (1985) 6 OLR 62 at 74.

11 Constitution Act 1982, s 25, being schedule B to the Canada Act 1982 (UK) 1982.

12 Nancy Doubleday "Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law" (1989) 17 Denv J Int'l L & Poly 373 at 379.

13 Russel Barsh and Sakej Henderson "Biodiversity and Canada's Aboriginal Peoples" in Svein Jentoft, Henry Minde and Ragnar Nilsen (eds) *Indigenous Peoples: Resource Management and Global Rights* (Eburon Academic Publishers, Delft, 2003) 45 at 46.

14 At 45.

15 Peter Sankoff "The Protection Paradigm: Making the World a Better Place for Animals?" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia* (2nd ed, The Federation Press, Sydney, 2013) 1 at 4.

16 Andrew Brighten "Aboriginal Peoples and the Welfare of Animal Persons: Dissolving the Bill C-10B Conflict" (2011) 10 Indigenous LJ 39 at 42.

as causing unnecessary pain to an animal. Preferring a welfare perspective over a rights-based framework reflects the legal position that animals are still viewed as lesser to humans, as their fundamental interests are not similarly protected. The two positions are often conflated because anti-cruelty laws create the impression that animals have a right to be free from suffering. Anti-cruelty laws would conflict with traditional hunting practices if the particular methods used are determined to be cruel by the relevant legislative definitions. However, the adoption of animal welfare means there is flexibility in what is defined as cruelty—there is generally a distinction made between necessary (that which is legally permitted) and unnecessary suffering. This means that traditional Indigenous hunting would be restricted on the basis that it causes unnecessary suffering to animals, rather than by the right of animals to be not hunted altogether.

A *Australia*

In Australia, each state has its own statutory regime to protect animal welfare. For the purposes of this article the most relevant provisions in each piece of legislation are those which could affect traditional hunting.

The Acts governing animal welfare standards in the Northern Territory[17] and Queensland[18] are of interest because they both contain specific provisions relating to the relationship between animal welfare and traditional hunting. The use of culture, religion, or traditional practices is expressly excluded as a defence to animal cruelty in the Northern Territory.[19] In Queensland, up until 2012, the legislation provided exemptions for acts that would otherwise be defined as cruel if they were performed under either Aboriginal tradition or Torres Strait Islander custom.[20] The Act was amended in 2012, following an investigation into perceived cruelty to dugongs and sea turtles by Indigenous hunters, prompted by political pressure from animal rights activists.[21] The current legislation now provides that an act committed in the exercise of native title rights is no exemption to being considered an act of animal cruelty.[22] However, this does not extinguish traditional hunting rights altogether. Queensland enacted a new provision to allow for an exemption when an animal is killed in the exercise of native title rights "if the [killing] act is done in a way that causes the animal as little pain as is reasonable".[23] This new provision creates uncertainty over whether certain traditional hunting methods may legally continue or must be modified to meet the new standards. This demonstrates the difficulty in reconciling the conflict of rights where the law is unclear. The particular situation in Queensland will be analysed in greater depth later in this article.

The Animal Welfare statutes in other Australian states do not specifically refer to traditional hunting. It is likely in these states that traditional hunting will be treated similarly to recreational hunting, meaning that the cruelty provisions apply unless there is a specific defence. In New South Wales, Tasmania, Victoria and Western Australia, the statutes all provide that hunting in a way that minimises cruelty (defined in various ways

17 Animal Welfare Act 1999 (NT), s 79.
18 Animal Care and Protection Act 2001 (Qld), s 8.
19 Animal Welfare Act (NT), s 79(2).
20 Animal Care and Protection and Other Legislation Amendment Bill 2012 (Qld) (explanatory note) at 1.
21 Dingle and Robinson, above n 1.
22 Animal Care and Protection Act (Qld), s 8.
23 Section 41A(2).

depending on the specific state legislation) may provide an exception to prosecution for cruelty.[24]

B *Canada*

The Canadian Criminal Code deals with cruelty to animals at the federal level.[25] The key distinction from the Australian position is that animal cruelty provisions in Canada do not apply to wildlife, and so have little effect on the animals usually hunted by Indigenous groups.[26] This is because animal cruelty is conceptualised as a property offence in Canada, rather than an offence against the animal itself. A failed proposal (Bill C-10B) seeking to apply the Criminal Code to wildlife occurred in 2003.[27] The debate over Bill C-10B is similar to the situation in Queensland in 2012 where a proposed resolution to the conflict of rights failed to acknowledge the Indigenous perspective—this will be analysed in Part III.

Although the present Criminal Code does not apply to hunting, there are many examples of regulations (generally at the provincial level) which limit hunting rights. There are various cases in Canada to demonstrate that the Aboriginal right to hunt may be qualified. The most important of these is *R v Sparrow*. This case held that regulations could limit Aboriginal hunting rights granted under s 35 of the Constitution Act 1982 if the infringement was justifiable.[28] The test essentially allows the government to regulate hunting rights if those regulations have a valid objective and the actions taken to implement the regulations are consistent with the "special trust" relationship between the Crown and Canada's aboriginal peoples.[29] Most of the limitations placed on traditional hunting rights are to satisfy particular environmental objectives, and are not concerned with animal welfare. However, it is important to note that "there is a distinction between the extinguishment of an aboriginal title and regulation of incidents in that title".[30] This means that any regulations which could go as far as to end the exercise of traditional hunting rights would be invalid under the Constitution Act 1982, as it is the supreme law of Canada.[31] It remains unclear what would happen if provisions similar to those in Queensland were introduced in Canada, which allow for hunting if pain to the animal is minimised.[32] Implementing such regulations would require Indigenous people to modify traditional hunting methods in many situations, conflicting with the right's sheer existence.

IV Three Possible Resolutions

In their current form, the law in both Australia and Canada appears uncertain as to whether Indigenous hunting rights may co-exist with animal welfare standards. This

24 Prevention of Cruelty to Animals Act 1979 (NSW), s 24(1)(b); Animal Welfare Act 1993 (Tas) s 4(1); Prevention of Cruelty to Animals Act 1986 (Vic) s 6(1)(b); and Animal Welfare Act 2002 (WA) s 22(b).
25 Criminal Code RSC 1985 c C-46, ss 444–471.
26 Brighten, above n 16, at 43.
27 At 40.
28 *R v Sparrow*, above n 2, at 1077I-J.
29 At 1079D.
30 *Calder v Attorney-General (British Columbia)* [1973] SCR 313, [1973] 4 WWR as cited in McHugh, above n 10, at 73.
31 Constitution Act 1982, being schedule B to the Canada Act 1982 (UK) 1982 c11.
32 Animal Care and Protection Act (Qld), s 41A.

section is concerned with the analysis of three possible scenarios in which the law could be clarified. The first scenario being that traditional hunting methods could be modified will be analysed in the greatest depth as it purports to reconcile Indigenous hunting with the promotion of animal welfare in the most balanced way. The second scenario addresses what might occur if Indigenous groups were unhappy with the idea of modifying their traditional practices. The third scenario deals with the current position in Canada and will analyse the potential discriminatory impact upon Indigenous peoples.

A *Would modifications to traditional hunting methods be an acceptable solution?*

Current Queensland legislation specifically allows Indigenous hunting rights if the methods exercised "...cause the animal as little pain as is reasonable".[33] The Act gives examples of acts and omissions that fail to satisfy the standard for an exemption—these include injuring the animal to prevent its escape,[34] and causing the animal to die from starvation or dehydration.[35] The amendments made in 2012 followed the release of a video showing the use of the controversial hunting methods against a turtle, and so the specificity of s 41A(3) appears to target those methods.[36] If Indigenous groups were to modify their hunting methods so as to be permitted by s 41A(2), a balanced compromise between the continuity of tradition and the promotion of welfare may be found.

Dominque Thiriet provides a detailed analysis of the desirability of modifying the traditional methods of hunting and concludes that:[37]

> ... in most cases where the purpose of the hunt is traditional but the killing methods have no inherent cultural value, modifying the methods will not detract from the tradition. In such cases, it would be unnecessary, unjustifiable and unreasonable to continue using methods which inflict or are likely to inflict pain on animals in preference to humane alternative methods.

The argument here is that if hunting is only valuable because it serves a cultural purpose, then the ability to modify the method would apply to situations such as hunting for subsistence. It could be difficult to determine how the method of hunting ought to be changed however. This is where the issue of uncertainty in the law becomes pertinent, as it would be necessary to determine which alternative methods of killing animals are permitted by the law. This is difficult as the legislation only gives a non-exhaustive list of what is *not* permitted.[38] Even if there is a possibility of changing hunting methods in order to make them more humane, the challenge lies in ensuring communities embrace these changes. This could be a problem, particularly in the context of public outrage and targeting of Indigenous practices in Queensland in 2012. The rushed nature of the amendments did not allow for adequate consultation with affected Indigenous communities, and so this may have had an impact upon their willingness to adapt to the

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33 Section 41A(2).
34 Section 41A(3)(a).
35 Section 41A(3)(d).
36 Dominique Thiriet "Out of Eden: Wild Animals and the Law" in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia* (2nd ed, The Federation Press, Sydney, 2013) 226 at 239.
37 Dominique Thiriet "Tradition and Change – Avenues for Improving Animal Welfare in Indigenous Hunting" (2004) 11 JCULR 159 at 172.
38 Animal Care and Protection Act (Qld), s 41A(3).

new law.[39] The failure of legislators to ascertain the response of Indigenous communities to the requirements of new legislation affecting their way of life is serious. This is because some Indigenous communities may be willing to suggest and lead changes themselves as has been done in the past in relation to sustainability issues,[40] where others may not share the same understanding of animal welfare laws.[41] It must be understood that there are likely to be significant differences within and between different Indigenous groups, which necessitates consultation with many communities.

To determine whether modifying the methods of traditional hunting is the best way to resolve the conflict with animal welfare, more information about the nature of Indigenous hunting is needed. The extent to which the method of hunting has cultural value will vary between communities and over time. The difficulty of fully appreciating the various Indigenous perspectives on hunting means that such an examination is beyond the scope of this article. Thiriet argues that "the significant changes to hunting practices [outlined in her article]… do not affect the legitimacy of the relevant traditions".[42] However, it seems premature to conclude that this will apply in the same way to the variety of Indigenous groups that could be forced to change their hunting practices under the new Queensland scheme—such a conclusion does not appear to be founded on extensive consultation with affected communities. Although there is some evidence that many Aboriginal and Torres Strait Islander people supported the measures taken in Queensland,[43] it remains uncertain whether affected communities have formed a consensus. This is vital in determining whether modifying traditional hunting methods should be treated in the most balanced way to reconcile the clash with animal welfare standards, and the lack of evidence of the Indigenous perspective means that this resolution should not be treated as the ideal solution to the matter.

In Canada, Indigenous groups may be required to modify their hunting practices if similar animal welfare legislation were to apply to hunted wildlife in Canada as in Australia. The ability to regulate Indigenous hunting for conservation aims was established in *Sparrow* and it is likely that the prevention of animal cruelty would similarly constitute a justifiable infringement on aboriginal rights.[44] It is already established in Canada that hunting may be modified in order to comply with safety and conservation regulations,[45] which prescribe the necessary changes.

In contrast, modifications required by the Queensland legislation are not prescribed and therefore it is unclear what is expected of affected Indigenous groups. Drawing an analogy between the existing regulations and animal welfare is difficult given that welfare standards desire far greater level of interference with the right to hunt, and issues with compliance arise by the lack of prescription. The following sub-paragraph will analyse whether animal welfare specifically could be an acceptable justification for interfering with Indigenous rights.

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39 Agriculture, Resources and Environment Committee *Animal Care and Protection and Other Legislation Amendment Bill 2012: Report No 5* (Parliament of Queensland, July 2012) at 6.

40 Fernando Ponte, Helene Marsh and Richard Jackson "Indigenous Hunting Rights – Ecological Sustainability and the Reconciliation Process in Queensland" (1994) 29 Search 258 at 261.

41 Department of Agriculture, Fisheries and Forestry *Perceptions of Animal Welfare among Indigenous communities* (September 2006).

42 Thiriet, above n 37, at 171.

43 (19 June 2012) 412 QLDPD 744.

44 *R v Sparrow*, above n 2, at 1077J.

45 *See R v Morris* 2006 SCC 59, [2006] SCR 915 at [82].

(1) A critique of the animal welfare justification for interference with traditional hunting rights

Whether it is acceptable to require Indigenous groups to modify their hunting methods in the name of promoting animal welfare requires a deeper examination of the strength of *animal welfare* as a justification for doing so. As mentioned earlier in this article, animal welfare is distinct from animal rights.[46] Protection for animal welfare requires distinctions to be made between necessary and unnecessary suffering.[47] 'Necessary' suffering is determined as such in relation to human activities that are viewed as important enough to override concern for any harm it does to animals. The production and consumption of animal products is so ingrained within many human cultures that any attempt to outlaw it altogether would probably fail. While there are campaigns against commercial farming practices in order to force them to modify their methods, it could be argued that Indigenous groups' practices are significantly more likely to be the target of law reform. This is because a non-Indigenous person may take the view that traditional methods of hunting are 'unnecessary' where alternative humane methods exist, as it is difficult to comprehend the importance of cultural traditions from an external perspective. Moreover, it is easier for an outsider to find justifications for the necessity of other potentially cruel practices (such as the economic benefits of factory farming) as they are likely to participate in or benefit from those practices in contrast to traditional hunting. The justification of animal welfare allows for some animal suffering in relation to human activities, yet the activities defined as 'necessary' perhaps depend upon one's cultural perspective, meaning the law could operate to disadvantage Indigenous peoples because their perspective is not shared by the majority.

B *Indigenous hunting rights are restricted by animal welfare standards*

Where the traditional method of hunting itself has cultural significance, it is more difficult to resolve the situation unless animal welfare was determined to take precedence over Indigenous hunting rights.[48] The current legislation in Queensland prioritises animal welfare, as certain traditional methods of hunting dugongs[49] and sea turtles[50] would be prohibited by the Act.[51] Causing certain Indigenous communities to change their hunting methods restricts how they exercise their rights under native title—that is, if the change undermines the cultural significance of the hunt. Moreover, it may be that Indigenous communities are unwilling to revise tradition even if alternative humane methods are available in the circumstances. Where modification to traditional hunting methods is not possible, Indigenous peoples who practise cruel hunting methods would be liable under the various Australian statutes. This could create problems in relations between Indigenous peoples and the State. Groups who conceive the relationship between humans

46 Brighten, above n 16.

47 Wendy Adams "Human Subjects and Animal Objects: Animals as 'Other' in Law" (2009) 3 J Animal L & Ethics 29 at 34.

48 Brighten, above n 16, at 72.

49 RE Johannes and JW MacFarlane *Traditional Fishing in the Torres Strait Islands* (CSIRO Division of Fisheries, Clayton, 1991) at 25.

50 At 63.

51 Animal Care and Protection Act (Qld), s 41A(3).

and animals differently to the state legislators developing animal welfare laws would likely view the prohibition of traditional practices as unwarranted.[52]

Realistically, it remains unlikely that the legislative regimes will have such a far-reaching impact upon Indigenous groups who hunt. This is because most traditional hunting, particularly in Australia, takes place in remote areas which are difficult to monitor, and therefore animal welfare law enforcement is impractical and not a priority for the relevant authorities.[53] Thus far it is unclear how the Indigenous hunting practices in Queensland (which received significant attention in 2012) have been impacted by potential liability to cruelty. The introduction of the amendment was accompanied by a 12-month 'grace period' for Indigenous hunters, meaning those who would otherwise be subject to prosecution received a warning instead during this period.[54]

In contrast to Australia, a perceived sensitivity around this conflict makes practical interference with traditional hunting rights unlikely in Canada. The fear that the 2003 Bill C-10B would have exposed Indigenous groups to prosecution for their hunting activities led the Canadian Senate to propose an exemption for Aboriginal peoples alongside Bill C-10B.[55] This exemption was envisaged as operating in a similar manner to the law in Queensland at the time.[56] The trajectory of this failed Bill C-10B illustrates why cultural sensitivity creates a general reluctance towards interfering with the Indigenous traditions in Canada. The exemption was worded to make explicit the protection of the right of Indigenous groups to hunt using their traditional methods.[57] Although it is accepted in many Canadian provinces that Indigenous hunting rights may be burdened by conservation and safety regulations,[58] those same regulations equally apply to non-Indigenous hunters. The Bill C-10B proposal would have had a disproportionate impact on Indigenous hunters by targeting the traditional methods used, therefore the fact that the exception amendment was proposed alongside it reflects a general concern for respecting traditional Indigenous hunting practices in Canada.

C *Indigenous hunting rights remain an exception to animal welfare standards*

The final potential resolution is that Indigenous peoples' traditional hunting rights should be specifically exempted from animal welfare legislation. This is essentially the position in Canada and was the position in Queensland up until 2012. As previously discussed, this position no longer seems possible in Australia. The situation in Canada is interesting as the current animal welfare standards as they relate to cruelty are contained within the Criminal Code.[59] As previously noted, the Code does not apply to wildlife and thus traditional hunting is not affected. However, this position remains subject to change, as demonstrated by the Bill C-10B proposal as well as many related proposals to strengthen

52 DH Bennett, "Some aspects of Aboriginal and non-Aboriginal notions of responsibility to non-human animals" (1983) 2 Australian Aboriginal Studies 19 at 23.

53 Steven White "Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?" 35 FL Rev 347 at 359.

54 "Cruel indigenous hunters to face penalties" (13 September 2012) Sydney Morning Herald <www.smh.com.au>.

55 Brighten, above n 16, at 41.

56 At 48.

57 At 49.

58 *R v Sparrow*, above n 2, at 1079D.

59 Criminal Code RSC 1985 c C-46, ss 444–471.

protection of animals against cruelty.[60] This article's previous discussion of Bill C-10B showed that an exemption for Indigenous peoples exercising their hunting rights formed part of the debate. The idea of this exemption in law is worth analysing as a possible resolution to the conflict with animal welfare.

First, the rationale for exempting Indigenous hunting from animal welfare standards relates to the broader rationale for recognising aboriginal rights and native title generally. The recognition of native title in Australia is based on the need to eliminate the previous discriminatory law that denied Indigenous peoples the right to occupy their traditional land and practice their traditional laws and customs.[61] In Canada, the recognition of Aboriginal rights is based on the existence of activities that are integral to the distinctive Indigenous culture.[62] Clearly in both countries the recognition of native title rights allowed Indigenous peoples the right to continue cultural traditions such as hunting. The recognition of Native title and Aboriginal rights can justify the exemptions from laws such as animal welfare standards because those laws encroach upon the practice of traditional activities.

Secondly, the benefits of such an exemption were noted by Canadian politicians during the Bill C-10B debates in 2003, as they emphasised that traditional hunting practices ought to be considered "reasonable and generally accepted" despite the harsher standards for animal cruelty.[63] Section 35 of the Constitution Act 1982 was relevant as the House of Commons claimed it would ensure the protection of traditional hunting rights.[64] An exemption for Indigenous peoples would have been consistent with the generous and liberal interpretation of aboriginal rights that was made necessary under the *Sparrow* framework.[65]

Although an explicit exemption is not yet required in Canada due to the failure of Bill C-10B, it remains a possibility for resolving any conflict with animal welfare should the issue be raised again. This is in contrast to Australia, where exemptions for traditional hunting have been all but eliminated. Although the Australian position seems to have originated from a concern for animal welfare above all else, exemptions for traditional practices can still be critiqued from an Indigenous rights perspective. Brighten argues that the proposal of an exemption in Canada would have implicitly associated Indigenous peoples with animal cruelty, as it could be inferred that their hunting practices were inherently cruel.[66] According to this view, there could be severe political implications for Indigenous peoples where non-Indigenous peoples may backlash against the perceived entitlement of Indigenous groups to be cruel.

This would not appear to harm Indigenous peoples in the Canadian context as the protection afforded to their rights is broad according to current interpretations of s 35 of the Constitution Act 1982.[67] Harms to the way Indigenous peoples are perceived generally in the public discourse are more difficult to define. Comparing Canada to Australia could provide a guide to the effect of exemptions, where outrage in Queensland in 2012 was directed at Indigenous groups who were viewed negatively for cruel hunting that did not attract legal consequences. However, it is important to note that the Australian cultural

60 Brighten, above n 16, at 41.
61 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.
62 *R v Van der Peet* [1996] 2 SCR 507 at [46].
63 Brighten, above n 16, at 49.
64 At 49.
65 *R v Sparrow*, above n 2, at 1077E.
66 Brighten, above n 16, at 51.
67 *R v Sparrow*, above n 2, at 1077E.

context and the place of Indigenous peoples within it is vastly different to Canada. Australia did not recognise native title rights until 1992,[68] and unlike Canada, Indigenous peoples in Australia do not enjoy recognition within the constitutional framework of their country.[69] Therefore, if animal welfare laws were to apply to wildlife in the future, it could be argued that the possibility of exemptions for Indigenous hunting in Canada may not engender the same harmful discourse around Indigenous practices as was the case in Australia. This may depend on whether animal welfare protections for wildlife are strengthened, but the failure of Bill C-10B indicates this is not a priority in Canada.

V Conclusion

The clash between Indigenous hunting rights and animal welfare is a difficult issue to resolve. Australia and Canada differ on the question of whether animal welfare is a sufficient justification to burden Indigenous hunting rights. Although there is flexibility in the ability to regulate hunting rights in both jurisdictions, animal welfare standards may be considered differently as the degree of interference with the hunting rights required may undermine the very purpose of the existence of the right—which is to allow the continuation of cultural traditions.

The common thread in the analysis of all three possible resolutions is that Indigenous perspectives on the issue are sorely lacking in the secondary literature and in the consultation required of governments before enacting restrictive legislation. In contrast, the concept of animal welfare is determined in accordance with the majority's understanding of what constitutes appropriately necessary suffering of animals, which is not inclusive of Indigenous understandings.

This conclusion is perhaps most relevant to Australia given the recent changes in Queensland which directly affect Aboriginal peoples and Torres Strait Islanders. However, growing popular support for legal protections for animals means that this debate is likely to be re-canvassed in Canada in the future. All three possible resolutions to the conflict could be implemented there, and in that situation, Canada should prioritise consultation with Indigenous communities to ascertain how they would be affected by any future animal welfare laws.

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68 See *Mabo v Queensland (No 2)*, above n 61.

69 George Williams "Removing Racism from Australia's Constitutional DNA" (2012) 37 Alternative LJ 151 at 151.