RIGHTS GONE WILD

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In the Western democracies charters of rights abound, for cheap moralizing has become the order of the day.

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1. Introduction

(a) The Appearance of Right-to-Hunt Acts

Grumbling about the advent of the *Canadian Charter of Rights and Freedoms* twenty-three years ago, Bob Samek observed that we hadn't bled, struggled or even asked for it, didn't need it, hadn't a clue what it meant, and would not – except maybe for the lawyers and judges among us – benefit from it. He argued as well that it was misconceived, clichéd and badly written as well.

But at least in 1982 we knew that the *Charter* had arrived; government-sponsored public spectacles and cheerleading national media made sure of that. It is not clear that even that much can be said for the subject of this paper, the right-to-hunt legislation that has recently crept almost unnoticed into provincial statute books. Within the past three years, the provincial legislatures of Canada's three most populous provinces have lengthened our list of legal and political liberties by affirming that the capacity of humans to stalk and kill non-humans for enjoyment is among the former's cherished fundamental rights. British Columbia's *Hunting and Fishing Heritage Act*,[2] quoted here in full, will serve as an instance of this curious development:

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[1] "Untrenching Fundamental Rights" (1982) 27 McGill L.J. 755 at 761.

[2] S.B.C. 2002, c. 79 (in force November 2002).

> WHEREAS hunting and fishing are an important part of British Columbia's heritage and form an important part of the fabric of present-day life in British Columbia;
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> WHEREAS hunters and anglers contribute to the understanding, conservation, and management of fish and wildlife in British Columbia;
>
> WHEREAS hunting and fishing should be recognized as legitimate forms of recreation and as legitimate tools with which to effectively manage the fish and wildlife of British Columbia;
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> THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:
>
> 1. A person has the right to hunt and fish in accordance with the law.

Modeled on an act passed by Ontario's legislature five months previously – which sported similar preambular sentiments[3] and an identical section 1[4] – British Columbia's right-to-hunt legislation does not appear to be limited to declaring the rights of residents of that province, or even of Canadians. Rather, like Ontario's statute it proclaims that the right to hunt is among the rights of *persons*. And like Ontario's act, B.C.'s legislation passed the provincial legislature with all-party support. Indeed both statutes met with but a single dissenting vote, in each case from an urban-based MLA.[5] A month after British Columbia bestowed this general right to hunt, Québec's National Assembly discovered and affirmed the same freedom. However, Québec went a step further than either British Columbia or Ontario, supplementing its new-found right by making it an offence for anyone to knowingly hinder someone's exercising his or her legal right to hunt, for instance by disturbing or frightening the huntees.[6]

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[3] Except that it did not claim that everyday life in Ontario had a fabric.

[4] *Heritage Hunting and Fishing Act 2002*, S.O. 2002, c. 10 (in force 27 June 2002).

[5] In Ontario the single dissenting vote was cast by Marilyn Churley, the NDP member from Toronto Danforth. In British Columbia it came from Jeff Bray, the Liberal member from Victoria-Beacon Hill.

[6] *An Act to amend the Act respecting the Conservation and Development of Wildlife*, S.Q.2002, c. 82, s. 3 (in force 19 December 2002). It appears that the Québec Bill passed unanimously. Certainly no one spoke against it. The vote was oral and there is no indication in the record of the debates of anyone saying anything other than "adopté": Québec *Hansard*, 36th Leg., 2nd Sess.,19 Dec. 2002.

This was not the first anti-hunter-harassment legislation in Canada. Several other provinces had passed such legislation in the mid-1980s. However, Québec's anti-hunter harassment legislation is the first to be expressly linked to a right to hunt.

One should also note the existence of a right-to-hunt bill in the *Yukon: Heritage Hunting and Fishing Act,* Bill 103, Legislative Assembly of Yukon, 31st Ass., 1st Sess. (first reading 29 March 2004).

So the great majority of Canadians now live in a province that has seen fit to legislatively vouchsafe to them a general right to hunt and fish (and, in the case of Québec, trap). These rights have been conferred with little fanfare, little media attention, little scholarly scrutiny, little public awareness (at least in cities), and, as this paper will suggest, little thought.

Arguably this absence of public attention or academic analysis is just as it should be, since, at least as one line of thinking would have it, right-to-hunt statutes do not actually *do* anything, or at least anything of legal consequence *stricto sensu*. The statutes only grant a right to hunt *in accordance with the law*. That is, at least according to their sponsors, right-to-hunt acts are symbolic and do not alter legal outcomes. Before they were enacted, persons had the right – or, if you want to get Hohfeldian about it, the privilege – to hunt, but of course this was tightly regulated by law. For starters, one had to have a license (obtainable only after taking a training course) and be of a certain age; and further, one could hunt only in certain places, only with certain weapons, not from an aircraft or moving vehicle, not while impaired, only at certain times of the day and year, and only while dressed in prescribed colours. Also, one could legally hunt only certain species, sometimes only a certain sex or size of that species, and even then kill only so many of them. In addition to these state-enacted regulatory controls, one's liberty to hunt did not override private property rights.[7] Nor did that freedom override the ability of others to turn to the common law – for instance actions in negligence or nuisance – to seek remedies for harms to them caused by hunting and its externalities. Proponents of right-to-hunt statutes professed to change none of this. Having a statutory right to hunt would not mean that persons would no longer need to acquire a license or could henceforth engage in trespass in pursuit of their quarry. Right-to-hunt legislation, in other words, would have less effect than the *Canadian Bill of Rights*.[8]

That being the case, it may be fair to claim that, given the manifest legal and social ills in the world, provincial proclamations of a right to hunt are not deserving of much attention. Since they are intended to be wholly symbolic and, in a sense, transitory and paralegal, they might be thought to have an ephemerality comparable

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[7] Or at least not entirely. There are statutory provisions which alter the common law by according hunters and anglers the right to enter onto private property while engaging in those practices unless the owner of the property has posted signs expressly forbidding that activity. See, for instance, New Brunswick's *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1, s. 80 (10). Nova Scotia has gone further. It allows anglers (but not hunters) the right to engage in what would otherwise be trespass, even if the landowner objects: *Angling Act*, R.S.N.S. 1989, c. 14.

[8] S.C. 1960, c. 44. Of course all legal rights, even those in the *Charter*, are in some respects limited by law. *Charter* rights are of course explicitly limited by s. 1 (and many of them are potentially override-noverridden by s. 33). They may also be limited when they clash with other *Charter* rights, or even with the same right held by another person.

to the statutes recently enacted by most provinces declaring a Holocaust Memorial Day.[9] Perhaps all that is worthy of note is that provincial legislatures have started using the statute books for the rhetorical statements that used to be expressed merely as house resolutions. Once upon a time, such essentially emblematic gestures as an acknowledgement that the Holocaust occurred and that it was a very bad thing, or that hunting was a commendable pursuit and people were entitled to engage in it within the bounds of the law, might have taken the form of resolutions of the legislature. That is, they might have been voted on (usually with unanimous support) and win mention in *Hansard*, but they would not be expressed as statutes. However, the new style of symbolic legislative gesture appears to be to pass a statute, one with the same structure as British Columbia's *Hunting and Fishing Heritage Act:* a parade of "whereas's" – e.g., whereas the Holocaust happened, whereas it was a terrible thing, whereas it should never be forgotten – followed by a single substantive section, which in the case of Holocaust Memorial Day legislation simply says that there shall be a Holocaust Memorial Day every year. Such statutes cost nothing; no moralizing could come more cheaply. Holocaust Memorial Day is not elevated into a public holiday and the statutes neither commit the government to spending a penny to celebrate it nor saddle any ministry or other official with any responsibility to do anything to assist in its observance. It is no easy chore to imagine circumstances in which such statutes would be justiciable.[10]

Conceivably, right-to-hunt legislation is the same sort of feel-good statute: a group hug between the legislature and hunters, but of no greater legal significance (though perhaps of slightly higher status) than if the legislature had simply passed a resolution that hunting was a laudable activity.[11] If that is the case then an article analyzing it is of no more import than one devoted to the Holocaust Memorial Day acts.

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[9] *Holocaust Memorial Day Act*, 1988, S.O. 1988, c. 25; *Holocaust Memorial Day Act*, S.B.C. 2000, c. 3; *Holocaust Memorial Day Act*, S.N.S. 2000, c. 1; *Holocaust Memorial Day and Genocide Remembrance Act*, R.S.A. 2000, c. H-10; *Holocaust Memorial Day Act*, C.C.S.M. H68; *Holocaust Memorial Day Act*, S.N.L. 2001, c. H-4.1; *Holocaust Memorial Day Act*, S.S. 2001, c. H-4.001. The Federal Government enacted a similar statute last two years ago: *Holocaust Memorial Day Act*, S.C. 2003, c. 24.

[10] But it is interesting to try. Ponder this scenario. Canadian Holocaust Memorial Day legislation has been remarkably specific in defining what the Holocaust was. It stipulates that the Nazis (not the Germans) killed 6 million Jews. An issue might arise, say in a prosecution for communicating hate propaganda, as to the number of Jews killed in the Holocaust. For instance someone might claim that the figure was 5½ million. Is it now the case, thanks to Holocaust Memorial Day statutes, that the number has for legal purposes in Canada been irrebuttably set at an even 6 million?

[11] There have been legislative resolutions respecting the right to hunt in Canada, especially respecting the seal hunt: *House of Commons Debates*, 4th Sess. 30th Parl. (5 March 1979) at 3795 (James McGrath); *House of Commons Debates*, 1st Sess., 32nd Parl. (9 February 1982) 14797 (James McGrath). Both were unanimously approved.

Nevertheless, I have elected to write about it. Even if right-to-hunt legislation's significance turns out to be merely symbolic, it is worth pausing to note which symbols the government elects to statutorily rejoice in and which it does not. Provincial legislatures have so far not chosen to affirm or commemorate a statutory right to go bowling, collect stamps, or wear green clothes, but they have now legislatively acknowledged a right to hunt and fish. It may be worth asking why; after all, even the "purely symbolic" Holocaust Memorial Day legislation did not enter the statute books without at least a little public controversy. In some provinces, Armenian groups protested that, if there was to be a day and a statute to mark the Shoah, then fairness and equality dictated there should be one to memorialize the Armenian genocide of 1915.[12] To date, however, the wish for an Armenian Genocide Day has not been granted, and it will not be, not least because by doing so governments would alienate the ethnic Turkish vote. Symbols count, and government action to take note – statutorily, even if non-justiciably – of one phenomenon but not another counts a fair bit.

Furthermore, regardless of legislators' intent when speaking or voting in favour of the statutory recognition of a general right to hunt, we may turn out to be mistaken in thinking that such governmental acts can be consequence free. This is principally due to the loaded word "right", which cannot easily be shorn of the potent, even if often ill-defined, meaning that lawyers and courts are disposed to accord it. Even without endorsing the broad *Charter*—doubting theme of this paper's epigram, one can accept that the state's granting of fundamental rights – or even governmental actions which gesture toward the form of such grants – is a serious business which should not be resorted to without sustained thought and broad public debate. Thus, while legislatures might understandably be attracted to "right" because of the term's valorizing rhetorical cachet – one thinks here of such relatively recent legislation as Ontario's *Environmental Bill of Rights*[13] or *Victims' Bill of Rights*,[14] which on inspection are substantively elusive (and arguably empty[15]), but which have evocative titles – they should think twice before employing that term.

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[12] Other genocides, not to mention various mass enslavements, forced diaspora and sundry other atrocities, also suggest themselves as candidates for a commemorative day, and the list seems certain to lengthen.

[13] S.O. 1993, c. 28.

[14] S.O. 1995, c. 6.

[15] Mark S. Winfield, "A Political and Legal Analysis of Ontario's Environmental Bill of Rights" (1998), 47 U.N.B. L.J. 325 and Elaine Hughes & David Iyalombe, "Substantive Environmental Rights in Canada" (1999), 30 Ottawa L. Rev. 229. The Northwest Territories was the first Canadian jurisdiction to take this step: *Environmental Rights Act*, S.N.W.T. 1990, c. 38. The following year the Yukon put an Environmental Bill of Rights in its *Environment Act*, S.Y. 1991, c. 5.

A related problem with the promiscuous exploitation of "right" is that the proliferation of legal rights – the growing tendency to cast any claim that X is a good thing in the form of a statement that people have a right to X – may function to dilute and cheapen those core 18th-century rights that are central to personhood, especially the right to life. (That is presumably the sort of sentiment which crossed the reader's mind when I mentioned the possibility of a statutory right to go bowling.) This serves to remind us that the increase of legal rights of which right-to-hunt legislation is an instance is simply one part of a more general propagation of "rights talk" in social and moral discourse, a growth which sees purchase of some consumer products resulting in the acquisition of a piece of paper that, while it might once have been called a warranty or guarantee, is now labeled an owner's bill of rights. This article will not engage with that broad phenomenon but rather will focus on the specific issue of statutory rights, and in particular granting "rights" in statutes that are supposed to possess only symbolic value.

It is my sense that of the two concerns I have identified with the haphazard granting of rights in symbolic statutes statutes – (1) the fear that they might turn out to be more than merely symbolic, and (2) the fear that they might operate to cheapen those rights that really matter – the former is the more significant. It is certainly the more amenable to proof, and one (admittedly pretty modest) recommendation that will emerge from this paper is that if provincial governments do find themselves carried away by the urge to express their love for hunters they should stick to the model of Holocaust Memorial Day legislation, in which "right" makes no appearance. That is, they should take rights sufficiently seriously so as to avoid littering the statute books with them quite as freely as they have recently been inclined to.[16]

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[16] The action of the Newfoundland and Labrador in this regard should be noted. On 6 July 1999 that province issued a press release that promulgated a sort of mission statement with respect to the outdoors, chessily entitled *Our Smiling Land* (http://www.gov.nf.ca/releases/1999/drr/smiling.htm). This includes a "Declaration of Rights of Newfoundlanders and Labradorians to the Use of the Outdoors" and this includes the following:

> The Government of Newfoundland and Labrador hereby declares and affirms the traditional privileges and freedoms of hunting, angling and the gathering of wild foods by the citizens of this Province.

The notion of a declaration of rights to use of the outdoors may be an instance of the cheapening proliferation of rights, but at least it is not a statutory one.

Nova Scotia's contribution should also be noted. Unlike Newfoundland and Labrador, and in line with B.C., Ontario and Québec, Nova Scotia chose to celebrate hunting in a statutory form. However, Nova Scotia did not deploy the word "right". It did not even enact something that looked like a substantive provision. Rather, by S.N.S. 2001, c. 46 it added sub-s. (ba) to the interpretation provision of its *Wildlife Act*, R.S.N.S. 1989, c. 504:

> s. 2 The object and purpose of this Act is to . . .
>
> > (ba) recognize that angling, hunting and trapping are valued and safe parts of the heritage of the Province and that the continuing opportunity to participate in those activities will be maintained in accordance with this Act and regulations . . . .

What I do in the rest of this article is first to offer some suggestions as to why we have recently witnessed the arrival of a statutory recognition of a general right to hunt in Canada. The answer here turns out not to be monocausal; rather, a curious concatenation of forces seems to have operated. I look as well at "the official story" – that is, the reasons provincial legislators have offered as justification for the passage of this legislation. There is nothing here in the nature of reports of law reform commissions, government white papers or election platforms. Right-to-hunt acts did not arise as the result of any international treaty or extensive domestic consultation process.[17] The main source of official justification for the passage of right-to-hunt acts is to be found in the debates of the three provincial legislative assemblies that passed such acts, and accordingly I will offer a brief summary of these. Finally, as noted above, I conclude the paper with a note of concern about such legislation, suggesting that, principally because of its exploitation of the term "right", its effect might, at least somewhere down the road, extend beyond the purely symbolic role claimed for it at its inception.

(b) Brief Interpolation on Animal Welfare and Legal Change

But before I do that I offer this note situating right-to-hunt acts in the context of other recent Canadian legislative initiatives which bear on non-humans. In particular, it is interesting to contrast the success of right-to-hunt acts with the fate of the other main animal-related legislative effort in recent years, one which did capture a measure of public notice: the attempt to reform the *Criminal Code*'s outdated animal cruelty provisions. The same period that saw the advent of a legislative acknowledgement of a human right to kill non-humans saw an ongoing effort by the federal government to update the country's chief animal cruelty prohibition, which had not been significantly altered since Victorian times. Starting with a discussion paper in 1998 and a bill the following year, the Chrétien government proceeded to try repeatedly to get Parliament to improve this dated part of the *Criminal Code*, principally by increasing the penalty for the offence of cruelty to animals. However, these bills never managed to pass. Thanks to vigorous lobbying by animal use interests – lobbying which included portraying the originators and supporters of the bills as internationally-funded animal liberationists with hidden agenda and terrorist proclivities[18] – the initiative to reform these archaic *Criminal Code* provisions had been effectively

[17] In fact British Columbia's *Hunting and Fishing Heritage Act* is a rare instance of a private member's bill finding its way into law, only the second such since 1984.

[18] Standing Committee on Justice and Humans Rights, 37th Parl., 1st Sess., 16 October 2001, testimony of Alan Herscovici, Executive Vice-President, Fur Council of Canada, at pp. 2-3.

stalled.[19] The proposed revisions were in fact relatively modest ones, but they met with vigorous opposition from the members of the former Alliance and Progressive Conservative parties. The fact that recurring efforts by a majority government did not suffice to bring them into law contrasts markedly with the statutory recognition of a right to hunt, which, as noted, garnered all-party support and minimal opposition.

This is worth noting because it might easily be assumed that increasing societal interest in animal welfare has resulted in greater legal protection for non-humans. In some countries this is so. In recent years countries of the European Union have enacted legislation that has significantly bettered the lot of non-humans, especially in industrial agriculture and related activities such as transportation. In 2002, the year that Ontario, British Columbia, and Québec were enshrining the right to hunt, Germany went the other direction and added animal protection to its constitution.[20]

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[19] A brief summary. The 1999 bill (Bill C-17, *An Act to amend the Criminal Code (cruelty to animals, disarming a peace officer and other amendments) and the Firearms Act (technical amendments)*, 2nd Sess., 36th Parl., 1999) was not vigorously pursued and it died in the House of Commons when the federal election of 2000 was called. The proposed amendment was re-introduced in 2001 (Bill C-15, *An Act to amend the Criminal Code*, 1st Sess., 37th Parl., 2001) and passed by the House of Commons three times. It was rejected twice in the Senate, and when it reached the Senate after the Commons passed it for the third time it was stalled there and died in November 2003 when the new Liberal leader Paul Martin dissolved Parliament. It was introduced yet again in March 2004 (Bill C-22, *An Act to amend the Criminal Code (cruelty to animals)*, 3rd Sess., 37th Parl., 2004) and quickly passed by the House of Commons, but the Senate stalled it yet again so it expired when the federal election of June 2004 was called.

At the date of writing it remains unclear whether it will be introduced yet again during the 38th Parliament which began meeting in the fall of 2004. However, the new Minister of Justice, Irwin Cotler, has suggested that his legislative priority is human rights; such a priority does not bode well for non-humans.The amendments were reintroduced in the 38th Parliament in slightly modified form. On 16 May 2005 the Minister of Justice, Irwin Cotler, introduced Bill C-50, *An Act to amend the Criminal Code in respect of cruelty to animals*, 38th Parl., 1st Sess., 2005.

For helpful commentary on the attempts to reform the animal cruelty provisions of the *Code* see Lynn Letourneau, "Toward Animal Liberation?" (2003) 40 Alta. L. Rev. 1041, F.C. DaCoste, "Animals and Political Community: Preliminary Reflections Prompted by Bill C-10" (2003) Alta. L. Rev. 1057, and John Sorenson "Some Strange Things Happening in Our Country" (2003) 12 Soc. & Leg Stud. 377, and Christina Skibinsky, "Changes in Store for the Livestock Industry? Canada's Recurring Proposed Animal Cruelty Amendments" (2005) 66 Sask. L. Rev. 173. .

[20] But not by employing the term "right" and not in a way which would prohibit most existing uses of animals. What the votes in the Bundestag and Bundesrat did was to add "and the animals" (*"und die Tiere"*) to Article 20a of the German constitution, which required the state to protect the dignity of people. Germany was not the first country to offer protection to non-humans in its national constitution; Switzerland had done so in 1992.

It is too early to tell what the effect of protecting animals in the German constitution will be. In the past, some aspects of the existing animal protection law, the *Tierschutzgesetz*, have been held ineffective because they appear to conflict with certain constitution rights. Now that animals themselves are mentioned in the constitution it may turn out that it will be harder to override the provisions of the *Tierschutzgesetz* in an anti-animal direction.

New Zealand[21] has outlawed experimentation on primates and England and Wales have recently banned the fox hunt.[22] On the North American legal front, however, things for non-humans are getting worse, not better. Although there have been a few pro-animal legal initiatives in the face of (mostly foreign) consumer pressure – such as a European boycott of Canadian furs that resulted in limits on the types of traps used in this country to catch fur-bearing animals[23] – both in statute books and in their material lives, the situation for non-humans in Canada is either standing still or getting grimmer. The statutory acknowledgement of a right to hunt is an instance of the latter.

2. Some Context, With Gestures toward a Causal Account

Insofar as this section purports to offer the "real" explanation for the appearance of right-to-hunt acts, or at least to set out some context that has a causal spin to it, and the next section purports to summarize the official explanation for the statutes, there is bound to be some overlap between the two parts. Legislators are likely to speak truthfully at least some of the time. Despite the overlap I find it helpful to keep the two parts separate. This part thus attempts the essentially sociological task of offering some context for the appearance of right-to-hunt acts in Canada. The next part summarizes the justifications advanced by legislators.

(a) Back in the U.S.A. – Hunter Harassment

Perhaps the first thing to note about the emergence of pro-hunting legislative initiatives is that Canada is not alone here. Although the United Kingdom Parliament has recently acted to limit hunting,[24] the legislative trend in the United States in recent

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[21] *Animal Welfare Act 1999* (N.Z.), 1999 No. 142, s. 85. Canada, on the other hand, is the only industrialized western democracy that lacks a national statute focusing on scientific experimentation on non-humans.

[22] The much debated *Hunting Act 2004* (U.K.), 2004, c. 37 passed the House of Commons on September 15, 2004, and on 16 November 2004 the Commons rejected a series of proposed amendments by the House of Lords. Because this was the second time the Commons had passed that bill within a year it could become an act of Parliament without the concurrence of the House of Lords. It came into force in February 2005. The statute outlaws the hunting of wild mammals with dogs, which will mean the end of the traditional fox hunt. Scotland had enacted a comparable but not identical ban two years previously: *Protection of Wild Mammals (Scotland) Act 2002*, asp 2002, c. 6.

As another instance of the fact that Europe and North America seem to be moving in opposite directions when it comes to hunting non-humans, Montana recently moved to allow hunting of certain animals with the aid of dogs, a practice which had not previously been permitted: Montana H.B. 32, passed on 26 March 2003.

[23] See for example s. 4(4)(f.1) of Reg. 84-124 passed under New Brunswick's *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1 and its equivalent in other provinces.

[24] *Supra* note 22.

years has been in a pro-hunting direction. Of particular interest here is a 1998 amendment to the Constitution of the State of Minnesota:

> Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall forever be managed by law and regulation for the public good.[25]

That amendment did not employ the term "right", but subsequent amendments to U.S. state constitutions in recent years have used that word. There are now ten American states with constitutional protections for hunters.[26] Of course, observing that there have been comparable developments in the United States does not amount to explaining why the right to hunt has made an appearance in Canada. It simply locates the Canadian development as part of a broader North American trend.

A related statutory development is worth noting here, especially because, at least in Québec, it is closely tied to right-to-hunt legislation. Starting in the 1980s, 48 American states passed anti-hunter harassment statutes.[27] These were in ostensible response to the activities of animal liberationists who went into the woods in hunting season with the avowed goal of scaring quarry away from its pursuers. A number of Canadian provinces followed suit.[28]

There is much to be said about such legislation, particularly from the point of view of possible constitutional challenges based on the infringement of rights of freedom of speech or expression – a matter which has been litigated in the United States, with inconsistent results in lower courts and as yet no resolution by the Supreme Court. That will not be pursued here. I mention anti-hunter harassment statutes simply by way of noting this widespread, pro-hunter legislative phenomenon that took place in the years leading up to the appearance of right-to-hunt legislation.

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[25] *Constitution of Minnesota*, Article XIII, § 12 (adopted 3 November 1998).

[26] Alabama, California, Louisiana, Minnesota, Montana, North Dakota, Rhode Island, Vermont, Virginia and Wisconsin. Here is Wisconsin's constitutional provision, which is very similar to B.C.'s statute:

> The People have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law. (*Constitution of Wisconsin*, Art. I, § 26, April 2003.).

[27] Most of these are conveniently collected by the Animal Rights Law Project at http://www-animal-law.org/huntharass/index.html.

[28] In the U.S. anti-hunter harassment legislation took the form of stand-alone statutes. In Canada it was expressed as additions to existing wildlife statutes, e.g., *Wildlife Act*, R.S.A. 2000, c. W-10, *Wildlife Act*, R.S.N.W.T. 1988, c. W-4; *Wildlife Act*, R.S.N.S. 1989, c. 504, s. 38. These statutes raise interesting freedom of expression issues, since some of them go so far as to make it an offence to disturb a person who is preparing to hunt with the intention of dissuading that person from hunting.

(b) The Cancelled Spring Bear Hunt – a Charter Right to Kill?

Ontario's right-to-hunt legislation was the first to appear, and one quite specific piece of context for that statute is that province's 1999 cancellation of the spring black bear hunt,[29] which resulted in a court challenge by the Ontario Federation of Hunters and Anglers (OFAH) and the Northern Ontario Tourist Outfitters Association (NOTO) based on, among other things, the argument that the *Canadian Charter of Rights and Freedoms* should be interpreted so as to grant a general right to hunt. The story in brief is that, in a rare (at least in Canada) concession to the animal welfare lobby, in 1999 Ontario's Harris government brought in a regulation under the *Fish and Wildlife Conservation Act*[30] which eliminated the spring bear hunt. The hunt had come under attack from largely urban-based animal welfare advocates for being unfair, since in spring the bears' natural wariness was reduced by hunger, making them easy pickings for hunters. In addition, killing female bears at a time when their children were still dependant on them was perceived as likely to result in the death by starvation of orphan bears – and even though this might not threaten the population of black bears, which was estimated to be doing pretty well, it seemed inhumane.

OFAH and NOTO launched an application for judicial review, arguing that the regulation canceling the hunt was *ultra vires* since, under the relevant statute, the government had no right to limit the killing of bears based only on fairness or animal welfare grounds. The applicants maintained that under the *Fish and Wildlife Conservation Act* hunting seasons might legitimately be curtailed or cancelled due to conservation or safety concerns, but not on the grounds that a particular hunt was too easy or inhumane. They supplemented that by claiming that hunting was a form of expression and thus protected by s. 2(b) of the *Charter* and that their s. 7 rights were accordingly being violated. The litigation got side-tracked on procedural and evidentiary matters[31] and, though technically still alive, is moribund – with the applicant's claim that the *Charter* includes a right to hunt remaining undecided.[32]

One reason it is undecided is that Ontario's conservative Conservative government, repenting of its pro-animal lapse, sought to appease the offended hunting

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[29] Ontario Regulation 670/98, made 4 March 1999.

[30] S.O. 1997, c. 41.

[31] *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (1999), 43 O.R. (3d) 760 (S.C.J.); (2001), 196 D.L.R. (4th) 367 (Div. Ct.); [2002] O.J. No. 1445 (C.A.); leave to appeal to the Supreme Court of Canada refused, [2002] S.C.C.A. No. 252 (27 June 2002). Although the *Charter* argument remains unadjudicated, except for a decision that it crossed the threshold of being a triable issue, Abella J.A., who wrote the judgment of the Ontario Court of Appeal, did observe that "Concerns regarding animal welfare, include humane and ethical hunting practices, fall squarely within the policy and objectives of the *Fish and Wildlife Conservation Act*." (para. 45).

[32] Another Ontario case has, however, recognized that the *Charter*'s guarantee of freedom of expression might extend to practices which are harmful to non-humans. In *Xentel DM Inc. v. City of Windsor,*

lobby by giving it by way of statute a weaker (because not constitutionally entrenched) version of what it was seeking from the courts but probably would not have received – *viz.* a right to hunt. Or at least so I suggest. The government never claimed that its right-to-hunt legislation was an attempt to placate persons aggrieved by the disappearance of the spring bear hunt but, given the timing, it seems fair to suggest that one possible explanation for the statutory grant of a right to hunt, at least in Ontario, is simply that it was an attempt by the government – which did not want to do a flip-flop on the spring bear hunt — to make amends with the hunting lobby.

(c) The Right-to-Farm Movement

The fifteen-year period from 1986 to 2001 saw the appearance in all Canadian provinces of farm practices legislation that had the effect of insulating agricultural activities from suits in nuisance,[33] and in some provinces from negligence actions and municipal by-laws as well.[34] The right-to-farm movement, spurred by a growing number of land-use conflicts arising from urban sprawl (and the mega sprawl of urban values), was successful in capturing legislative protection for farming and related activity. In some instances this "related" activity was notably distant from the core aspects of farming. For instance, in Québec the legislation also operates to protect slaughterhouses.

This legislation, which has in fact worked to reduce the number of nuisance actions brought in respect of agricultural practices,[35] has been supported by the claim that rural values and their attendant activities – while perhaps no longer shared by the majority of the Canadian population – are of particular worth and should be accorded special legislative support to protect them from the common law, whose "reasonable person", while perhaps recently becoming somewhat less of a "reasonable man", has at the same time become a "reasonable city dweller". Interestingly, in the context of this paper, this legislation has even taken the form of a statute brandishing the word "right": British Columbia's farm protection statute is the *Farm Practices*

[2004] O.J. No. 3656 (S.C.J.) the court struck down a civic by-law which would have banned exotic animal acts in circuses within municipal boundaries. Gates J. found that the city was motivated by animal welfare concerns but held that "circus life constitutes a distinctive culture, one aspect of which is the unique bond and integration between humans and different species of animals" (para. 137) and that curtailing exotic animals acts would interfere with the right of circus folk to express that unique tradition.

[33] The first of these was New Brunswick's *Agricultural Operations Protection Act*, S.N.B. 1986, c. A-5-2. The last to be enacted was Newfoundland and Labrador's *Farm Practices Protection Act*, S.N.L. 2001, c. F-4.1.

[34] E.g., *Farm Practices Act*, S.N.S. 2000, c. 3.

[35] See Jonathan Kalmakoff, "'The Right to Farm': A Survey of Farm Practices Protection in Canada" (1999) 62 Sask L. Rev. 225.

Protection (Right to Farm) Act.[36] The word "right" does not in fact appear in the substantive provisions of that legislation. It is confined to the title and further corralled by brackets – a right of the titular, parenthetical variety. Still, in connection with right-to-hunt acts it does bear noting that legislatures are beginning to think of rural values as things that merit protection by the granting of rights.

A good deal could be said about right-to-farm statutes. In particular, it is possible to speculate that while the statutes were sold as means to protect the threatened family farm and its traditional way of life, their true function has been to operate as a general subsidy —— free externalities!! — to industrial agribusiness.[37] I will not pursue that here. It suffices to suggest that the arrival of a right to hunt might be viewed as simply one aspect of a growing movement of rights to do country things.

(d) The Right to Bear Arms

All right, in Canada we don't have one, yet. However, reaction by the opponents of the Government of Canada's gun control registry certainly generated a measure of right-to-own-a-gun rhetoric, and this roughly coincided with the appearance of right-to-hunt legislation in provincial legislatures. Analysis of recent American pro-hunting legislation has demonstrated that one of the strains of argument used by its proponents is that it reinforces the right to bear arms, since the activity of hunting works to produce a weapon-savvy populace capable of effectively exercising its second amendment rights and also likely to be more effective contributors to national defence.[38] I raise the possibility that the same sentiment is at work in Canada.

(e) Supplementing (and Containing?) the First Nations Right to Hunt

It may not be a coincidence that provincial legislatures saw fit to confer a general right to hunt in the aftermath of judicial recognition of similar rights in the context of aboriginal right[39] and treaty[40] litigation. Certainly the non-native backlash against the exercise of such rights – from the Fraser River to Big Cove — is a matter of pub-

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[36] R.S.B.C. 1996, c. 131.

[37] By way of aside, it is interesting to note that in the United States, legislation which was genuinely aimed at preserving the family farm (by limiting some aspects of industrial agribusiness) has recently been declared unconstitutional on the grounds that it violates the dormant commerce clause: *South Dakota Farm Bureau v. Hazeltine*, 340 F. 3d 583 (8th Cir. 2003), *cert. denied* (U.S. May 3, 2004). That is, while it may be legitimate for a state to favour rural values over urban ones, it has been found unconstitutional for a state to favour the family farm over the corporate one.

[38] James Whisker elaborates these arguments in his book *The Right to Hunt* (Bellevue, Wash.: Merril Press, 1999), an extended argument in favour of recognition of a constitutional right to hunt in the United States. See in particular, chapter 10, "The Right to Hunt and National Defense".

[39] *R. v. Sparrow* [1990] 1 S.C.R. 1075.

[40] *R. v. Marshall* [1999] 3 S.C.R. 533.

lic record, and it seems fair to speculate that one pertinent bit of context for the legislative conferral of a general right to hunt is the judicial conferral, or at least acknowledgement, of a specific one.

(f) Forestalling Animal Rights

A final piece of context that seems worth mentioning is that of animal rights. This is a concept that was once on the periphery of discourse pertaining to non-humans but which is, or at least is perceived to be, inching closer to the respectability of the core. A possible contributing factor in the adoption of right-to-hunt legislation is that it is an effort to pre-empt any formal adoption of statutory rights for animals by erecting a roadblock in the form of a freedom that seems radically inconsistent with such a right – *viz.*, the right to kill them. Since rights, once enacted, are next to impossible to repeal, a statutory right to hunt stands as a considerable roadblock in the way of any movement advocating a legal right to life for non-humans.

Of course, many of those who have been in the forefront of the animal liberation movement do not base their pro-animal claims on rights, and some, such as Peter Singer, are very explicit about this. Nevertheless, they are frequently perceived as doing so, and the phrase "animal rights" is commonly perceived to be the central plank in animal activists' platform, partly because it is easily distorted and mocked: "They want to give cockroaches the right to vote!" As some evidence of this it is worth pointing out that much opposition to the recent efforts to update the animal cruelty provisions of the *Criminal Code* took the line that such revisions were cover for hidden animal rights agenda. For instance Alliance MP David Anderson opposed the attempts to reform the *Code*'s animal cruelty provisions because, in his view, the proposals revealed a hidden political agenda to change the centuries-old legal position of animals as property.[41] Conservative MP Inky Mark claimed in the Commons that "this bill is not about cruelty to animals legislation. This is a bill that moves toward the humanization of animals in this country."[42] Mark queried whether the proposed amendments amounted to "a human rights bill for animals".[43]

As noted above, the attempts to revise the *Code* in an animal-friendly direction were defeated, and a major part of that defeat was the success of the amendment's opponents in portraying it as an animal rights initiative. It seems significant that this defeat of a so-called animal rights law reform proposal coincided with the adoption of a statutory anti-animal right in provincial legislatures.

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[41] *Hansard, House of Commons Debates*, 1st Sess., 37th Parl., vol 137, p. 7979 (6 December 2001).

[42] *Ibid.*, at p. 7975. He went on to note that "once we take this out of the property section of the criminal code and start perceiving animals from the perspective of humanity, then we are really on the slippery slope to something we may regret down the road."

[43] Standing Committee on Justice and Human Rights, 37th Parl., 1st Sess., 16 October 2001, p. 18.

3. The Official Story

In this section I offer a decoction of the justifications put for the statutory grant of a general right to hunt. The sources here – in default of the royal commission reports, departmental studies, public consultations, law reform commission reports or white papers that precede and accompany much legislation – are the reported debates of the legislatures of Ontario, British Columbia, and Québec in relation to the statutes in question. Overwhelmingly these debates consist of comments in support of the bills; MLAs from all parties strove to outdo one another in encomionizing a statutory right to hunt. To some extent the justifications offered in the different provinces overlapped, which is not unsurprising given the statutes' similarity. In particular the Ontario and British Columbia debates are markedly similar in content, though the Ontario debates seem somehow ruder and less formal in style than the B.C. ones, and more sprinkled with heckling and other hints of casual deportment.[44] However, the content of the different provinces' debates is not entirely interchangeable; in addition to the overlaps there are also some notable regional variations.

(a) A Word about the Words

While I will not essay any full-bore discourse analysis of the debates in question, I cannot resist the temptation – before offering a synopsis of the justifications advanced by legislators for supporting a statutory right to hunt – of making two brief overview comments about the vocabulary and mode of speech used to discuss the bills. The first is that the debates were filled with hunting stories. Many legislators, particularly those in Ontario and British Columbia, devoted the bulk of their official remarks in the legislatures to little more than recounting some hunting adventure in which they had participated, often in their fondly-remembered youth. These remarks commonly took the general form of, "one of my most cherished memories is of the time my dad, my uncle, my brother[45] and I went bear hunting. It was great. I support the bill."[46] Especially in Ontario, these sentimentalized stories consumed such a significant part of the debates that reading *Hansard* gives one the impression that those sessions at Queen's Park must have involved turning the lights down low and sitting cross-legged around a campfire swapping yarns of huntin', shootin' and fishin'. A

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[44] Refer to Ontario's right-to-hunt debates on May 27, 28 and 29 and June 5 and 12, 2002.

[45] The stories are frequently highly gendered. In Ontario one government member speaking in support of this bill made the point that "fishing contributes to male bonding". Wayne Wettlaufer, Ontario *Hansard*, 37th Parl., 3rd Sess., 29 May 2002.

[46] In Ontario, the Minister introducing the bill for debate devoted the bulk of his remarks to recounting such stories: "There I was, up with Josh, my six-year-old son. He was fishing away and a fish came up and . . . ." When interrupted and asked what the stories had to do with the legislation, his reply was, "It's hunting and fishing, and that's what this bill is about." Jerry Ouellette, Ontario *Hansard*, 37th Parl., 3rd Sess., 27 May 2002.

much-repeated justification for hunting is José Ortega y Gasset's insight that "one does not hunt in order to kill; on the contrary, one kills in order to have hunted."[47] However, the truer lesson from the Ontario and British Columbia *Hansards* appears to be that one hunts in order to be in a position to tell hunting stories.

Scholars interested in the normative legal sway of narrative will find fertile ground in these debates, which come across as an unbeatable example of government by chatauqua. From a purely formal point of view these hunting stories might appear digressive in nature, and indeed several members prefaced their remarks with some apology or prayer for indulgence for the tale to follow. However, that should not mask the stories' true bonding and consensus-building function. It seems that for many legislators the most persuasive justification they could offer in support of a general right to hunt was to recount a hunting or fishing anecdote, and then follow that with a simple statement that they supported the bill. The leap from the "is" of the tale of the pursuit to the "ought" of support for the bill was not often spelled out explicitly; evidently it did not need to be.

The second drive-by observation I would make about the discourse in the legislative debates around right-to-hunt legislation relates to the observation by animal liberationists that the true nature and extent of the violence visited upon non-humans by humans is systematically masked by language which hides that violence.[48] Thus, one harvests or culls seals rather than killing them. One dines on pork rather than on the corpse of a pig. One wears leather rather than the skin of a cow, and so on. Again, a lot might be said here and I offer only the confirmatory observation that in over a hundred single-spaced pages of mostly justificatory debate about the right to hunt non-humans in Ontario, British Columbia, and Québec, the word "kill" (or its French cognate) does not once appear. That is, legislators can speak for many hours about the goodness and importance of hunting without ever mentioning the "k" word. Rather, much is said about the importance of a right to "harvest", "dispatch", "cull", "take", "take down", "bring down" and "get" bear, deer, moose and so on.[49] As one

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[47] José Ortega y Gassett, *Meditations on Hunting*, trans. Howard Wescott (New York: Scribner's, 1972), 110-11. This work was written in 1942 as a prologue to Edward, Count Yebes, *Veinte Años de Caza Major [Twenty-Years a Big Game Hunter]*, which was published the following year. Ortega's introduction was published in Spanish and other languages several times on its own, but it was not until 1972 that it appeared in English.

[48] For a book-length exploration of this theme see Joan Dunayer, *Animal Equality: Language and Liberation* (Derwood, Md.: Ryce Publishing, 2001).

[49] There were other, more colloquial euphemisms, as the following quotation reveals:

> "I would say that my fondest memory would be when I was growing up on the farm just outside Peterborough . . . . I would be sitting with my father with the trusty old .22 that used to hang over the doorway on the farm, sort of sitting on the rail fence and poking back a few groundhogs . . . ." (John O'Toole, Ontario *Hansard*, 37th Parl., 3rd Sess., 29 May 2002.).

member noted in the British Columbia debates: "One of the big challenges when you're hunting for big game is that after you find the animal and knock it down, then the work begins."[50] There was even a statement, in the context of deer hunting, of "being able to bring home a big rack."[51] Here the deer is not only metonymized by becoming only a big rack but, following that displacement, is further accorded the pleasantry of simply "being brought home".

But I lie when I say that the word "kill" makes no appearance in the debates about a statutory right to hunt. It does, however, never appear in the context of human hunters killing. Rather, as one MLA noted in the Ontario debates:

> There have been many people who have literally been killed. I know one individual who swerved to avoid a deer and ran into the ditch and hit a culvert and died.[52]

In other words, in the legislative debates in support of a right to hunt, deer kill humans. Humans, on the other hand, just bring deer home.

More could be written about the discourse of the *Hansard* reports of right-to-hunt legislation, but I turn now to an account of the substantive points made about that legislation, the great majority of which were arguments in support of the bills.

(b) Conservation

The most frequently-voiced justificatory rationale was conservation – the claim that hunting was essential to prudent and effective wildlife management. The claim was repeatedly made that hunters are the true (though, alas, often unacknowledged) environmentalists who, partly through their self-interested care for habitat preservation, but principally by the beneficial activity of killing, conserve populations of wild animals.

> Hunters are conservationists and are key to sustaining our wildlife populations in healthy conditions. Hunters put more time, effort and money into conservation and environment programs than any other people. Hunters, fishermen and farmers are the original environmentalists.[53]

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[50] Dennis MacKay, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 9, No. 8, 4069 (28 October 2002).

[51] Kevin Krueger, B.C. *Hansard*, 37th Parl., 3rd Sess. Vol. 9, No. 16, 4249 (4 November 2002).

[52] Ernie Parsons, Ontario *Hansard*, 37th Parl., 3rd Sess., 27 May 2002.

[53] R. Gary Stewart, *ibid.*

In the Québec debates it was noted that with the disappearance of the great predator species it was important that humans take over the job of killing the prey species so as to maintain a balance in nature.[54]

Of course, killing will not generally benefit the individual animal that is killed, but the claim here took the form of asserting that hunting can be a useful tool to see that weak individuals are removed from certain populations and that the strong survive and breed, thus ensuring fitter general populations of prey species.[55] The obvious objection here is that, unlike non-human hunters, who do tend to select the weakest victims, human predation tends to seek out the strongest, fittest targets – the deer with the big racks – and that the long-term effect of that activity is to weaken the gene pool of prey species. There is, in short, a legitimate dispute (into which I will not enter here) about the effects of hunting on the populations of prey species. However, this dispute played no role in the debates about right-to-hunt legislation. There was, in short, no informed debate about the real effects of human hunters on prey species and the environment. Indeed there were some laughably erroneous statements, such as the unchallenged claim that no species of wildlife has been threatened or endangered by hunting since before World War I.[56] In short, perhaps because the proposed legislation was viewed as symbolic rather than substantive, the argument that hunting helps the environment, while it was frequently made, was advanced in a notably unscientific fashion.

An additional angle here was that in an age of privatization and cutbacks (in particular, fewer government fish and game wardens), the conservationist effect of hunting has the potential to supplement and even replace governmental conservationist initiatives. Hunting is privatized conservation. In Ontario this was the occasion for a few opposition party digs at the government for having cut back on game wardens in the first place,[57] but that did not alter the general all-party harmony on the point that guaranteeing a right to hunt was good for the environment. It was further claimed that this would have particular benefits for First Nations communities, who have an economic dependence on certain quarry species.[58] That is, granting a general right to hunt to the population was a pro-First Nations move since it would help to preserve and make healthier the species which are hunted, which in turn will help Indians who depend on such species for sustenance.

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[54] David Whissell, Québec *Hansard*, 36th Leg., 2nd Sess., 19 December 2002.

[55] See for instance Patrick Bell, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 8, No. 11, p. 3789.

[56] Bill Bennett, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 8, no. 4, p. 3578 (27 May 2002). This would come as news to the rhinoceros, the polar bear and the bighorn sheep.

[57] Ernie Parsons, Ontario *Hansard*, 37th Parl., 3rd Sess., 27 May 2002, Caroline Di Cocco, *ibid.*

[58] Bill Belsey, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 8. No. 11, p. 3792 (7 October 2002).

(c) The Family that Kills Together

Another much-stated theme is that hunting is a generator of family togetherness, and especially that it is unbeatable for bridging otherwise impregnable intergenerational gaps. In short, right-to-hunt legislation was pro-family legislation. Of course this was a common subtext in the remarks of those MLAs who chose to justify their support for the bill by recounting a hunting tale, for such tales commonly had a family theme,[59] but the claim was also made explicitly and repeatedly that hunting is great for (presumably human) family togetherness.

(d) Enshrining Tradition (or, White Folks Have Heritage Too)

Related to the assertion that protecting the right to hunt will promote family bonding was the claim that it is an ancient tradition, and moreover one that is currently under threat. In the view of our legislators this tradition was no matter of a mere few hundred years. Rather, we were informed that "[o]ver history, since the dawn of man, we have been hunters and gatherers . . . ."[60] One member was content to be more specific than simply "dawn of man" and offered the claim that we have been hunting for 2.5 million years.[61] However, the ancient tradition was perceived to be under attack, and right-to-hunt legislation would protect it by guaranteeing "the right that our forefathers took for granted."[62]

There were a number of interesting sub-themes here. One was to pick up on the ancient constitution of Britain (there were references to the Magna Carta[63]) and the argument that the right to hunt is one of the ancient liberties of a free people. Of course this is the angle that Blackstone in his *Commentaries* took on hunting, and particularly with respect to the game laws enacted in England starting in 1671. In Blackstone's view, hunting was one of the Saxon liberties and restrictions on that

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[59] And those that did not have a family theme had a buddy theme. There was surprisingly little evocation of the solitary hunter. Tales of the solitary hunter are frequently associated with a trope that valorizes the hunting experience as a near-mystical one, painting the hunt as a unique, intense and irreproducible experience – the sentiment that you're never as alive as when you kill.

[60] Bill Belsey, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 8. , No. 11, p. 3791 (7 October 2002). There was a similar observation in the Ontario debates: "[H]umans have been hunters and gathers since they walked upright." Caroline Di Cocco, Ontario *Hansard*, 37th parl., 3rd Sess. 27 May 2002.

[61] Bill Bennett, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 4, No. 4, p. 1815 (12 March 2002).

[62] Harold Long, B.C. *Hansard*, 37th Parl., 3rd Sess. Vol. 9, No. 1, 3879 (21 October 2002).

[63] This, however, was in the context of the right to fish: Mike Hunter, B.C. *Hansard*, 37th Parl., 3rd Sess. Vol. 9, No. 1, 3883 (21 October 2002). There is nothing in the Magna Carta about hunting.

activity were a key element in the tyranny of the Norman yoke.[64] As noted by one B.C. MLA, the right to hunt was a general right of persons.

A second interesting sub-theme of the argument based on tradition relates to First Nations. Both the Ontario and British Columbia legislators noted that the courts, in construing the confirmation of aboriginal rights in the *Charter* (especially in *Sparrow*[65]) and treaty rights (*Marshall*[66]), had granted broad rights to hunt to First Nations peoples. As the following two quotations from the British Columbia *Hansard* show, the enactment of right-to-hunt legislation could be justified as equality-minded legislation which sought to put the rest of the population on a par with First Nations. This could be justified by the argument that they (the non-First Nations) had hunting traditions of their own:

> [W]hat it really does is to entrench the right of all British Columbians to fishing and hunting. That's what first First nations Nations are doing when they are coming to the treaty table. They are asking for the same right that the member . . . is suggesting we should enable all British Columbians to have. I think it's most suitable.[67]
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> • • •
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> We talk about first nations and having hunting and fishing as part of their heritage and their right. I believe it's all of our rights in British Columbia and certainly in our country . . . .[68]

Of course it is possible to perceive an element of non-native backlash in this. There were references to the extension of First Nations' hunting rights amounting to an "erosion of our [*sic*] rights in the last ten years". In this connection it is interesting to note one of the few lines of objection to the legislation voiced in any of the three provincial legislatures. In Ontario, NDP member Gilles Bisson argued that the legislation might affect aboriginal rights and that the government thus had a constitutional obligation to consult First Nations about it pursuant to the *Charter*, an obligation it had not fulfilled. Receiving no satisfaction on this point, he went so far as to propose an amendment which would take the form of adding to the Ontario bill a clause that stipulated that nothing in its grant of a general right to hunt to the entire popu-

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64 William Blackstone, *Commentaries on the Laws of England*, 14th ed. (London: A. Strahan, 1803), vol.II at 414-15 . (vol. 11, ch. 27).

65 *Supra* note 39.

66 *Supra* note 4039.

67 Hon. Patrick Bell, B.C. *Hansard*, 37th Parl., 3rd Sess. Vol. 8, No. 11, 3791 (7 October 2002).

68 Blair Lekstrom B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 8, No 11, 3794 (7 October 2002).

lace would ever operate to derogate from aboriginal persons' right to hunt.[69] This proposal met with the counter-argument from the Minister that the proposed amending clause was unnecessary, since no court would ever apply the legislation in such a fashion. The amendment was soundly defeated and the NDP's concerns for the aboriginal right to hunt did not keep it from supporting the unamended bill.

(e) Country Matters

Related to the view that hunting is an ancient tradition of all peoples is the claim that it operates to support a key aspect of a rural way of life which is under attack by urban values. Both in the Ontario and British Columbia debates there were numerous statements to the effect that, while city folk might not know it, hunting was central to a country existence. However, it was a way of life that was under threat by urban values:

> It is this mentality of those who are separated from the realities of the acts that is setting the moral and public standards of acceptance for rural activities.[70]

The Ontario and B.C. debates in particular were replete with statements from rural MLAs to the effect that city folk didn't know where their food came from, were out of touch and were inclined to impose their values on country-dwellers.[71] There was little effort by urban MLAs to take issue with this. Mostly they seemed to sit silently and allow themselves and their constituents to be painted as out-of-touch city folk. The most that urban MPs could muster by way of response was the occasional feeble attempt to claim that city dwellers were not as bad as all that. As the member for Victoria put it:

> I believe that people in rural B.C. are very intelligent, very passionate people. I believe that people in urban B.C. are very passionate, very intelligent people.[72]

A sub-theme here, voiced by a couple of members in British Columbia was that the right to hunt would reinforce a right to *organic* meat. The claim was made that, in the absence of the ability to hunt, our access to meat would be limited to the commer-

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[69] Ontario *Hansard*, 37th Parl. 3rd Sess., 5 June 2002.

[70] Ken Stewart, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 9, No. 1, 3879 (21 October 2002).

[71] In fact such comments were not limited to rural MLAs; they came from the representatives of smaller urban centres as well. Wayne Wettlaufer, a Conservative MLA from Kitchener Centre, spoke in favour of the Ontario bill. Following the obligatory recounting of his early memories of fishing with his father and grandfather he noted that such recollections would not be available to "a tree hugger from the city of Toronto, who thinks the sun rises in Markham and sets in Mississauga and doesn't know what a fish looks like, other than what they get down sat the local fish market . . . ." (Ontario *Hansard*, 37th Parl. 3rd Sess., 29 May 2002).

[72] Jeff Bray, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 9, No. 8, 4071 (28 October 2002).

cially produced, hormone- and antibiotic-laced products available in supermarkets, and that in order to avoid that "we should have a right to an *organic* food source".[73] The argument grounded on a fundamental right of access to organic food was not one that found voice in either the Ontario or Québec legislatures; it's a west coast right.

(f) The Economy

In all three provinces – Ontario, B.C. and Québec – the legislation was supported on the grounds that hunting contributed to the economy, both in terms of license fees and consumer purchases by all hunters, and especially by attracting tourist dollars. In B.C. the claim was made that recreational hunters and anglers contributed about a billion dollars a year to the provincial economy, in the Ontario debates the figure was given as 3.5 billion, and in Québec it was 1.3 billion.[74] In no case was the source of the statistic given.

Interestingly, in Québec the economic argument was by far the primary one. The Québec debates were far briefer than either the Ontario or British Columbia ones and display comparatively little evidence of justifying the legislation by the telling of hunting stories, or even of direct appeal to the claim that hunting is good for families. And, perhaps for obvious cultural reasons, there was no claim that it was a right which was first secured by the barons at Runymeade in 1455. Overwhelmingly the Québec legislation was justified on the basis of conservation[75] and the hard-headed claim that hunting, especially tourist dollars, was important to the provincial economy.[76]

Of course there are many other activities of greater importance to the economies of those provinces than hunting. If economic impact was really the key then British Columbia and Québec would have been better advised to enact statutory rights to ski, and Ontario a right to make cars. That is, one might have expected the economic argument in support of a right to hunt to be supported by some hard

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[73] Harold Long, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 8, No. 11, 3796 (7 October 2002). Comparable points were made by Ken Stewart, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 9., No. 1, 3880-81 (21 October 2002) and G. Trumper, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol. 9, No. 8 4073 (28 October 2002).

[74] Bill Belsey, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol 8, No. 11, p. 3791 (7 October 2002). Statement of Jerry Ouellette, Minister of Natural Resources on moving second reading of the *Heritage Hunting and Fishing Act 2002*: Ontario *Hansard*, 37th Parl., 3rd Sess., 27 May 2002. Statement of Richard Legendre, Minister of Tourism, Leisure and Sport, Québec *Hansard*, 36th Leg., 2nd Sess., 19 December 2002.

[75] For instance see *supra* note 54.

[76] In the United States, persons advocating the recognition of a legal right to hunt have maintained that the "economic argument, in the long run, may be the strongest and best of all." Whisker, *The Right to Hunt*, *supra* note 38, at 166.

evidence that the activity was, or was likely to become, in jeopardy. However, there was none of this: the argument in general was simply that hunting was good for the provincial economy (even though city dwellers might not be aware of that) and that it might be under threat, so the province should grant a statutory right to do it.

(g) Forestalling Animal Rights

It was mentioned in the previous section that a possible piece of pertinent context for the arrival of right-to-act acts is that they are an effort to steal a march on those who might push toward a legislative acknowledgement of animal rights. There was no mention in the debates on provincial right-to-hunt legislation of the perceived animal rights theme in the attempts to reform the animal cruelty provisions of the *Criminal Code*, and little overt mention of the need to pass right-to-hunt statutes to counter the animal rights crowd. However, there were occasional remarks of the form:

> I'm not a lawyer but I believe [that by passing this bill] we create a situation where those who would legally impede someone from doing what is legally correct would have a little more difficulty.[77]

That is, there was no explicit mention of internationally-funded animal rights terrorists, as there was in the context of the federal government's attempts to revise the animal cruelty provisions of the *Criminal Code*. But there were some vague references to groups that might, in some unspecified way, try to outlaw hunting, and it was suggested that by enacting a general right-to-hunt such initiatives could be foiled.

4. Careful Where You Point That Right

Right-to-hunt legislation in Canada has a curious pedigree and an interesting set of official justifications. It remains to be seen whether other provinces will follow the lead of Ontario, British Columbia, and Québec and enact such statutes. Certainly the issue is very much alive in the United States, with one more state amending its constitution by referendum in the November 2004 elections to add a right to hunt.[78] Obviously I am no great fan of right-to-hunt legislation. One obvious concern is that it is a waste of that rare commodity – time – for legislatures to be passing their days telling hunting stories, especially when the result is a statute of symbolic nature. A more significant concern, in my judgment, is that we cannot be confident that such statutes will in future be confined to the symbolic role that their progenitors and proponents claim for them. I suggested in the introduction that one hazard of writing

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[77] R. Hawes, B.C. *Hansard*, 37th Parl., 3rd Sess., Vol 8, No. 11, 3793 (7 October 2002).

[78] That state was Louisiana, where the referendum proposal gained the support of 81% of those who voted.

"right" in a symbolic statute is that, somewhere down the line, it might be accorded a more than merely symbolic effect. For instance, it might compel a decision in a law suit which is different from the decision that would have been reached in the statute's absence.

Of course any legislation runs the risk of having effects its originators did not anticipate. The problem of unanticipated effects is hardly confined to acts that take the form of grants of rights.[79] However, as will have been seen from my account of the legislative debates on the right-to-hunt bills, such bills, because they are advertised as being purely symbolic, may not be subject to the degree of legislative or committee scrutiny that a substantive statute attracts, thus increasing the possibility of unanticipated effects. Just as there was no serious discussion of the contestable claim that hunting is beneficial to the environment, there was little consideration of the circumstances in which the statute might possibly have an effect, and attempts to inoculate the Ontario legislation in that regard were defeated.[80] Of course, any subsequent attempts to argue – say, in the course of litigation – that the "right" in a right-to-hunt act is a real right would be met with an appeal to the passages in the debates in which we were assured that such was not the case. Still, I want to suggest here that the concern of unintended effects is a real one. Certainly it would not be eliminated by an appeal to *Hansard*, for while that source might be persuasive it would hardly be regarded as dispositive.

The discussions in parts 2 and 3 of this paper have, in passing, given rise to a couple of scenarios where a court might be urged to give some real effect to the general right to hunt. One of these is in an attempt to limit the effect of a First Nations right to hunt, whether that arose as a general aboriginal right or as something promised in a treaty. We have already seen that the grant of a First Nations right to hunt will have an effect on the ability of non-First Nations groups to kill as many non-humans as they might if First Nations did not have this right. There are only so many animals to go around. Obviously courts will be faced with many circumstances in which they have to draw a line between a First Nation's right to hunt and the right/privilege/entitlement of some non-First Nations groups to do the same in the same area. If non-First Nations groups are accorded a statutory right to hunt will that line be drawn in the same place that it would in the absence of such a right? Of course, the right in right-to-hunt legislation does not have constitutional status, but that does not mean that in the general process of balancing and line-drawing it will be entirely without effect.

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[79] Which is perhaps an argument against any symbolic legislation, regardless of whether it uses the term "right".

[80] *Supra* footnote 68.

Another matter mentioned above was anti-hunter harassment legislation, those statutes in force in many, though not all, Canadian provinces that make it an offence to interfere with hunters as they go about their business. The grant of a general right-to-hunt could easily affect on such matters. For instance, British Columbia has a comparatively narrow anti-hunter harassment statute, one that does not make it an offence to frighten quarry away from hunting grounds.[81] Let us imagine someone engaged, or proposed to engage in, frightening quarry away from hunting grounds in that province. Might not hunters bring a civil action against such an activity claiming damages and an injunction, and might not they argue in support of their claim that the activity was an interference with their statutory right to hunt? I do not purport to judge the effect of such an argument, only to assert that it is a plausible claim that belies the legislators' assurances that right to hunt legislation will have no effect.

It is not difficult to conjure up other scenarios where the grant of a right to hunt might be given a more than symbolic effect. Consider for instance the Supreme Court of Canada's decision in the well-known torts case of *Cook v. Lewis*.[82] There the court was prepared to reverse the onus of proof on the defendant hunters, one of whom (but not the other, though it was uncertain which) had shot the plaintiff. In his reasons in support of the judgment against the hunters, Rand J. noted that hunting was a *privilege*. Were a similar case to arise tomorrow in a province which had enacted right-to-hunt legislation, would not the defendant hunters seek to distinguish *Cook v. Lewis* by arguing that, in the years since that case had been decided hunting had been elevated from a privilege to a right, and that it followed that the anti-hunter, burden-reversing result in *Cook v. Lewis* should not be imposed today?

Obviously such an argument is hardly decisive. I don't claim that it is even very good, but it seems sufficient to hang a judicial hat on. I offer it here mainly as an illustration, one that might easily be multiplied, of the phenomenon that lawyers and judges are frequently inclined to behave as if the word right, at least when it appears in a statute, means something – that it has genuine operational traction.

The greater concern may not be that the passage of right-to-hunt acts will alter the results of future litigation, but rather that such statutes stand as an effective roadblock to any fundamental legislative reform of the legal position of non-humans. Rights, once enacted, are next to impossible to remove. If humans have been granted the statutory right to kill non-humans, then any efforts to recognize that non-humans, or at least some class of them, have a right to life has becomes considerably more difficult. Of course, no legislative initiative of that character could be expected

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[81] *Wildlife Act*, R.S.B.C. 1996, c. 488, ss. 46 and 80. The statute makes it an office offence to interfere with traps or obstruct hunters while they are actually hunting, but not to frighten away quarry.

[82] [1951] S.C.R. 830.

any time soon. It remains as utopian as the abolition of the slave trade in Africans must have seemed in the 1700s. Still, one goal of right-to-hunt legislation was to preclude such a development, and it seems unfortunate that such a development took place with so little public debate or true legislative deliberation.