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BENEVOLENT GRANDFATHERS AND SAVAGE BEASTS: COMPARATIVE CANADIAN CUSTOMARY LAW

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INTRODUCTION

This essay seeks to explore one of the more recent and innovative understandings of customary law, one which begins by locating it as a basic element of every legal system. Law is established and evolves in societies through the lived experience of its members, and is fundamentally determined on an ongoing basis according to the norms which those actors use as a guide to their choices. This is true regardless of what measure of technical codification a given society has built onto the base that customary law provides; whether in a social setting, a sentencing circle, a legislature or a court of law, it is these fundamental beliefs and biases that structure the outcomes.

Where customary norms have been overlaid with other structures, such as courts, however, the availability of equally valuable alternative potential norms risks being concealed, arguably to a much greater degree than in a society that retains a more consensus-driven and organic legal structure. Where this overlay exists, the fundamental structure at law's core is camouflaged from view, appearing neutral, since it is written into the presuppositions with which members of that society approach the law. Furthermore, even where this danger has been recognized in the abstract, practical difficulties often arise in the process of identifying which of one's norms have been assumed to embody the only viable option.

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Cultures whose legal systems have developed based upon different normative contexts may provide comparative opportunities that both help to expose contextual assumptions and offer alternatives for the critical evaluation and improvement of the moral foundations of law and society — an evolution which is arguably essential to the continued relevance and justice of any society's legal system. Comparison may be especially useful between societies with markedly different metaphysical understandings, since the norms that rely on these constructions are likely to contrast so dramatically they will be easily recognizable.

This essay examines the specific historical and contemporary normative constructions of hunting law among the James Bay Cree of Northern Quebec, and seeks via contrast to make clear the analogously subjective nature of the understandings embodied in Canadian wildlife law and legislation. Finally, it asks how we might use this awareness of alternate legitimate outcomes to address shortcomings in Canadian wildlife law and to effect reforms that will improve the justice system in this area.

I. CUSTOMARY LAW AND NORMATIVE FRAMEWORKS

This paper is largely informed by the latest work of Jeremy Webber, "The Grammar of Customary Law."¹ Webber does not restrict himself to the traditional, narrow definition of customary law (i.e., law as practiced in Indigenous societies); rather, he adopts the inclusionary stance advocated by theorists such as Lon Fuller and Gerald Postema, in which customary law is seen to underlie and inform even the most strictly codified legal systems. John Borrows agrees that "customary law is still important in the development of common law reasoning."² Because one of the main ideas of customary law is that legal principles develop as a result of the interaction between order and practice that take place as participants in legal orders live out their lives, each of these orders is necessarily built upon the experience, negotiation and adoption of certain legal principles over others. Codified legislation and judicial decisions are made based on a society's distinctive norms; the norms themselves emerge from and develop through the practices of the people who live within that society.³

John Borrows has adopted J.H. Merryman's definition of a legal tradition: "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught."⁴ As an aspect of a culture, a legal tradition can be distinct from the legal system of the state if the latter does not recognize the force of that particular tradition.⁵ This is especially likely to occur in states that are made up of a number of historically distinct cultures, each of which has developed and in many cases continues to develop its own norms. States such as Canada, which have more than one legal tradition, are identified as legally pluralist. Bor-

1. Jeremy Webber, "The Grammar of Customary Law" (2008) [forthcoming] [Webber, "Grammar"].

2. John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa, Ont.: Law Commission of Canada, 2006) at 83 [Borrows, *Indigenous Legal Traditions*].

3. Webber, "Grammar", *supra* note 1 at 1; see also his "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L. J. 167.

4. J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, Ca.: Stanford University Press, 1985) at 1.

5. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 1. For an examination of the interrelationships between legal traditions, legal orders, and legal systems, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Ma: Harvard University Press, 1983).

rows helpfully observes that “[l]aws can arise whenever interpersonal interactions create expectations about proper conduct” and that the transmission of traditions, including legal traditions, is inextricably linked to a culture’s “configuration of language, political structures, kinship, clan, economic systems, social relations, intellectual methodologies, morality, ideology and the physical world” in which its people live.⁶

Webber is ultimately critical of what he sees as an overemphasis on the pragmatic dimensions of customary law in Fuller and Postema’s arguments: though one of law’s most important express functions is undeniably the coordination of human affairs, to take this criterion as a sufficient determinant of the substantive choices made in an order’s structure and operation is misleading, given the array of possible and equally workable solutions available in any given case.⁷ The provisional resolution of disagreement for the purpose of preserving a functioning social system is undeniably essential,⁸ but the very system of resolution that a legal order adopts necessarily relies upon built-in value judgements which are often invisible to the people who use it. These judgements are not recognized as such, but are taken for granted as foundational. The availability and feasibility of other alternatives has been lost from conscious awareness. This paper pursues the argument that the moral systems that underpin these value judgements and determined such choices in the first place must be recognized and retrieved for re-examination on a conscious level, both in order to maintain the integrity and relevance of a given legal system by ensuring its adaptability to future generations of participants and to avoid inadvertently and inappropriately imposing these normative structures on our understandings of and interactions with members of other legal orders, especially those with a traditionally disadvantaged colonial relationship to our own. One way of fostering this recognition is via comparison of the details of our own system with those of other legal orders, the members of which have chosen different values to inform their ways of living together; Indigenous systems of law, in particular, are often far enough removed from our own experience to reveal the ultimately contextual nature of many principles we take as foundational.⁹ As John Borrows reminds us, “it is important to note that, like Indigenous legal traditions, Canada’s broader legal traditions also rest upon unwritten cultural assumptions;”¹⁰ he notes that the Supreme Court of Canada itself has explicitly recognized “an historical lineage stretching back through the ages, which aids in the consideration of underlying constitutional principles ... [that] inform and sustain the constitutional text: they are the vital un-stated assumptions upon which the text is based” and are “not merely descriptive but are also invested with a powerful normative force, and are binding upon both courts and governments.”¹¹

This paper will examine some of the customary laws of the James Bay Cree — more specifically, those related to hunting and animal stewardship, and the norms that inform these laws’ adoption and use; this framework will then be used to draw out and compare ele-

6. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 7.

7. Webber, “Grammar”, *supra* note 1 at 1.

8. At the same time, the continuing existence of multiple interpretations and perspectives on an issue within a legal system not only does not disqualify the existence of a “law” in respect of the issue, it contributes to the ultimate strength and vitality of the legal order as an ever-developing entity. See, for example, Borrows, *supra* note 2 at 15: “incongruity and differing interpretations are not signs that the community does not have law. To the contrary, multiple perspectives on a legal tradition are a sign that the tradition is vibrant and strong; it allows those with opposing viewpoints to maintain a relationship within the tradition.”

9. Webber, “Grammar”, *supra* note 1 at 2, 25.

10. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 15.

11. *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at para. 54.

ments that play a structurally analogous role in Euro-Canadian law and jurisprudence regarding wildlife management in Canada.

Specifically, I would argue that, much as the Cree have traditional stories that embody and explain the principles by which they govern their hunt, the text of Canadian law also reveals metaphors that point to an underlying justificatory narrative that we unconsciously consult in our determination of the 'right' way to protect, interact with, and utilize the animals which share our land. Borrows is strongly critical of the Western legal tendency to overgeneralize the differences between aboriginal and common law and thus to neglect the latter's cultural role, as well as its effects. Whereas in the Canadian legal narrative, "Aboriginal principles and traditions appear overly subjective and 'non-legal,'" Borrows suggests that "a fair account of the similarities and differences between Aboriginal and common law legal systems would pay equal attention to the cultural aspects of each form of law."¹²

Webber argues that to examine any legal order solely in terms of its success in coordinating human interaction is to strip it of the essential normative components that make up the content of law which actually has meaning for its participants. Mechanisms that serve to facilitate a choice among alternative possible norms are a basic requirement of any society that is going to last long enough to deserve the name. At the same time, divorcing these mechanisms from the norms that both result from and inform them rules out the possibility of a full understanding of the context in which these processes operate, and consequently the ability to make full use of a given set of norms in the way that participants do — to anticipate the actions of others and apply the rules appropriately to each situation in reasoned ways that serve to advance one's own agendas in the ongoing maintenance and development of the norms themselves.¹³ Both Webber and Postema emphasize the importance of practice or conduct as providing both the raw material for norms and the process by which they are determined; although the process is governed by reason, this reason must find expression in interaction in order to justify its continued acceptance, or to evolve in more appropriate directions.¹⁴

Coordination is a necessary condition of a good legal order, but it is not a sufficient one; the process by which coordination takes place and the ends to which it leads must also be taken into consideration and evaluated on the basis of merit.¹⁵ And merit will be defined in a particular society with reference to the norms that have been explored, tested and adopted in practice, leading to a feedback loop of value refinement. Webber goes on to outline the ways in which both legislation and judicial decisions can be seen as expressions of these norms that are determined at an interpersonal level by the citizens of the order; not only the material that these institutions possess to work with, but the very procedural structure by which they act, are necessarily determined by the previously defined values of the groups over which they exert power.¹⁶ And this power, once exercised, results in formulations that quickly become subject to the ongoing lived experience of participants, who inevitably modify their ultimate meaning through shifts in moral understanding that are brought about by this interaction of principle and process. As in his earlier papers, Web-

12. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto, Buffalo and London: University of Toronto Press, 2002) at 16 [Borrows, *Recovering Canada*].

13. Webber, "Grammar", *supra* note 1 at 6, 8.

14. *Ibid.* at 7; Gerald J. Postema, "Implicit Law" (1994) 13 *Law & Phil.* 361 at 363, 365.

15. Webber, "Grammar", *ibid.* at 8.

16. *Ibid.* at 9.

ber argues for the defining role of human agency in the ultimate direction and content of the law.¹⁷ Furthermore, it is the substantive values of individuals, communities and cultures that drive how this agency is deployed. This realization provides the metaphor for the title of Webber's paper: he compares this sublevel of normative considerations to a grammar, one which is inevitably and inescapably being used whenever we deploy language (and, by extension, law).¹⁸ The fact that a functioning legal system requires the determination of a common rule says nothing about what that rule will ultimately be; correspondingly, rules to address the same situation differ widely across cultures that are driven by different norms.¹⁹ The grammar of their law is fundamentally different.

Postema identifies the existence of “conceptually sophisticated, but often transparent, deliberative framework[s]” in each society that “do not figure in the content of desires, goals, or principles of choice, but rather structure and delimit the deliberative domain in which such factors are used by agents to arrive at rationally grounded decisions” and provide the necessary common background of understanding of how the world works and the appropriate possible solutions from within which to debate the ultimate choice to be made.²⁰ Webber elaborates upon this concept by suggesting that this framework is inescapable, in the sense that in order to communicate or even think one must make use of one's own frameworks, because they are embedded in language itself — a language learned from one's culture and subject to its preferences. This does not mean, however, that it is not important or useful to attempt to expose the contextual nature of some of our more deeply hidden norms, and one of the best ways to do this, as mentioned, is to undertake comparisons across cultures whose members have made different choices. Indigenous legal orders, as Webber demonstrates, often do not possess the same structural need for impersonal enforcement as Western ones do, relying instead on “deliberation, diplomacy, and mediation” for consensus-building, which may eliminate the need to impose an outcome on anyone.²¹ Contrary to the stereotypical perception of Indigenous legal orders as collectivist, the norms that drive the consensus-seeking process are arguably informed by a high level of respect for individual agency. Webber powerfully suggests that these models might provide inspiration for a genuinely pluralist society — one in which multiple, truly self-contained legal orders could coexist and “allow for divergent understandings, permit significant normative autonomy among sub-units, and foster cohesion through practices of negotiation and consensus-building, rather than through authoritative interpretation and imposition of a centralized order.”²²

Webber identifies three levels of normative determination: the coordination of human interaction, the grammatical “language” structure used to express norms in a legal fashion, and the debates that utilize that grammar to negotiate the resolution of a particular situation.²³ The second and third levels operate as somewhat of a feedback loop; core elements of the solutions arrived at in the particular debates can become encoded as normative content in the level of grammar, precisely because there will always be a range of possible so-

17. *Ibid.*

18. *Ibid.* at 23.

19. *Ibid.* at 12.

20. Gerald J. Postema, “Salience Reasoning” (2008) 27 *Topoi* 41 at 46.

21. Webber, “Grammar”, *supra* note 1 at 25.

22. *Ibid.* at 29.

23. *Ibid.* at 38.

lutions in any real-life situation.²⁴ In a judicial context, this is one (greatly simplified) way to think about the difference between the law and the facts; cases are decided on the facts, which in turn serve as precedents that structure the ways in which the law develops and can be deployed. This process must be ongoing and perpetual if a society's law is to remain relevant and just. To draw upon Nietzsche, pragmatic truths become absolute as we lose awareness of their original social function,²⁵ and the most extreme of absolute truths are the ones that have become so formative to the way in which a particular society thinks that they are no longer capable of being subject to examination on a conscious level — at least, not without a genuine commitment to maintaining awareness of the existence (if not content) of these truths so that when alternatives are encountered through the process of interaction with other societies, the limitations of one's own 'base model' become explicit.

A. Stories

An important step in the process of identifying the norms inherent in our own legal system is the realization that these elements may be articulated in ways that do not conform to the rationalistic, objective forms of reasoning which Western law tends to privilege and value. Many Indigenous peoples, when asked to describe their law, will do so in the form of a traditional story which is not immediately evident to the Western hearer as an embodiment of legal principles. Borrows notes that Indigenous laws, "commonly deriving from an oral tradition, enunciated in songs, stories and ceremonies," are often seen as custom rather than law by outsiders who fail to recognize that many of these norms and traditions had consequences which gave them more than just moral force.²⁶ By recognizing that our own law is described in terms that point to a series of underlying narratives, we might move one step closer to recognizing the values which drive its production.

Webber suggests we begin with the acknowledgement that "non-indigenous law too draws on metaphor, myth, and narrative."²⁷ The very language we use to describe and justify our laws and legal system reveals an understanding based on stories we have told ourselves as a society. These stories change, gradually or suddenly, as our values shift and are developed through the experience of living with them.²⁸

Perhaps this has been phrased best by Robert Cover:

A legal tradition ... includes not only a *corpus juris*, but also a language and a mythos — narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behaviour. They build relations between the normative and material universe, between constraints of reality and the demands of an ethic. These myths establish a repertoire of moves — a lexicon of normative action — that

24. *Ibid.* at 39, 40.

25. Friedrich Nietzsche, *The Will to Power: In Science, Nature, Society and Art*. (New York: Random House, 1968).

26. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 4.

27. Webber, "Grammar", *supra* note 1 at 31.

28. For a fascinating discussion of the ways in which this process might happen, see the developing literature on constitutional moments: good resources include Sujit Choudhry's edited volume, *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006) and Mark Tushnet's "Misleading Metaphors in Comparative Constitutionalism" (2005) 3(2-3) *International Journal of Constitutional Law* 262-68.

may be combined into meaningful patterns culled from meaningful patterns of the past.²⁹

While Western myths used to depend largely on Christian religious narratives, they have moved toward a secular but “strongly charged aesthetic”³⁰ that is recognizable in such fundamental legal definitions as personhood, objecthood and which objects are susceptible to ownership and in what way. Innate ideas of what is beautiful, good, right, valuable and worth protecting find expression in the realities of legal rules that permit or regulate the cutting of trees, treatment of animals, obtainment of a marriage licence, guardianship of a child and refusal of medical life support for oneself or another, to name just a few. These convictions are what have shaped the historical development of our law and what continue to shape it even as they themselves evolve with changing economic, social and cultural realities. Myths or narratives provide a cohesive storyline by which people can apply their society’s norms to a given situation. A storyline helps create familiarity with and foster effective use of the norms by providing “the relative importance of particular norms... [and] a range of examples of the norms in action, thereby furnishing models for how the norms should be applied,” as well as giving “salience and a memorable quality to certain norms, which can then be retained, internalized, and sometimes made a focus of identification and allegiance.”³¹ These same functions are also served by common Indigenous practices surrounding narratives, such as “pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing and the use and importance of place and geographic space.”³² Colin Scott summarizes the process nicely: “As the weft of experience entwines the warp of culturally available categories, narrative is the weaver.”³³

We are often unaware of the extent of the role that norms play in our judgements. In order for a society to perpetuate itself, it must find a way to instil basic beliefs in its members. In a society with no encoded legislative framework, the role of myth, narrative and stories becomes more obvious. Indeed, much of the initial confusion of Westerners seeking to understand the customary law of Indigenous societies arose from the fact that when asked about their law, Native peoples have tended to respond by referring to things like creation stories. For Westerners accustomed to the expression of an abstract legal rule, it has often been very difficult to identify how these stories relate to a prescriptive social order, even though their own systems may actually involve similar narratives that play an analogous role.³⁴

B. Metaphysics

Even if we manage to learn to read legal principles in story form, additional barriers to cross-cultural understanding remain. It is not only our values, but the very metaphysics of

29. Robert Cover, “Nomos and Narrative” (1983) 97 Harv. L. Rev. 4 at 9.

30. Webber, “Grammar”, *supra* note 1 at 32.

31. *Ibid.* at 33.

32. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 12.

33. Colin Scott, “Spirit and Practical Knowledge in the Person of the Bear among Wemindji Cree Hunters” (2006) 71(1) *Ethnos* 51 at 51 [Scott, “Spirit and Practical Knowledge”].

34. John Borrows acknowledges and seeks to address these difficulties in understanding by expressly drawing analogies between the Canadian common law system of case law governed by precedent and the customary law of traditional Indigenous societies, specifically that of the Anishnabek of Ontario. He attempts to illustrate the parallels between the systems by retelling several traditional Anishnabek stories in a case-law style that will be more familiar to those who have been trained in the common law. See Borrows, *Recovering Canada*, *supra* note 12.

how people perceive realities, such as the passage of time or the independent existence of spirits, that are implicated in how we structure our interactions and affairs. Anishinabek legal conceptions of property ownership, for example, are substantively different than those of Western legal traditions; for the former, land can be held for sustenance purposes, but this does not imply that the owner can do whatever he or she chooses with the 'property'. Rather, the land is literally understood as a mother to the Anishinabek people.³⁵ Thus, the very rocks themselves are recognized as having legal rights, which implies personhood: "Their active nature means rocks have an agency of their own which must be respected when Anishinabek people use them. It would be inappropriate to use rocks without their permission because the action would oppress their liberty."³⁶ This understanding goes beyond an Aboriginal tendency to acknowledge the role of narratives and even beyond differences in the stories of law themselves, to a basic difference in belief about the way the world works. Colin Scott has noted how root metaphors become implicit in descriptions of experience, so that we become blind to our own metaphysical paradigms even as we retain awareness of those of other societies.³⁷

The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality. Borrows provides examples: early Christians explained human settlement of the Earth as emerging from Mesopotamia, where they believed the Garden of Eden was located, whereas the Ojibway thought of humankind's source as Michilimackinac Island in the Great Lakes; also, "[t]emporally speaking, Christianity, Islam and Judaism have tended to view time as being linear, progressing, and 'marching on' ... [while o]ther cultures such as the Maya, Ainu or Cree have thought of time as being cyclical and repetitive."³⁸ Methods of understanding Indigenous cultures that impose categorical identifications which do not correspond to realities as envisioned and expressed by those cultures themselves are doomed to inadequacy. Irving Hallowell explains that since Western thinking categorically identifies "persons" as synonymous with humans,

The same identification is implicit in the conceptualization and investigation of social organization by anthropologists. Yet this obviously involves a radical abstraction if, from the standpoint of the people being studied, the concept of "person" is not, in fact, synonymous with human being but transcends it ... [I]f, in the world view of a people, "persons" as a class include entities other than human beings, then our objective approach is not adequate for presenting an accurate description of "the way a man, in a particular society, sees himself in relation to all else." A different perspective is required for this purpose. It may be argued, in fact, that a thoroughgoing "objective" approach to the study of cultures cannot be achieved solely by projecting upon those cultures categorical abstractions derived from Western thought. For, in a broad sense, the latter are a reflection of *our* cultural subjectivity. A higher order of objectivity may be

35. Borrows, *Recovering Canada*, *supra* note 12 at 39.

36. *Ibid.* at 38.

37. Colin Scott, "Science for the West, Myth for the Rest? The Case of James Bay Cree Knowledge Construction" in Laura Nader, ed., *Naked Science: Anthropological Inquiry Into Boundaries, Power and Knowledge* (New York: Routledge, 1996) 69 [Scott, "Science for the West"].

38. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 115 and n. 356.

sought by adopting a perspective which includes an analysis of the outlook of the people themselves as a complementary procedure.³⁹

Furthermore, it may be that it is this Indigenous metaphysical notion of the “relatedness” of all that exists that fuels the impulse to adjust to both human and non-human aspects of nature, an impulse which “underpins Native American ethical thought and axiology.”⁴⁰

The fundamentally different base metaphysics of Indigenous societies can provide a rich opportunity for the recognition and evaluation of our own deepest beliefs;⁴¹ yet, when approaching with such a different mindset, it is difficult as a Westerner to claim to have arrived at a reasonably certain understanding of this alternative system of norms without risking a colonial arrogance that may recognize the differences between the two systems and yet still in many ways misconstrues the ultimate framework of the unfamiliar society. Another society may have made a different normative choice in an area where we took for granted our own as the only possible conclusion; it is not enough, however, to end our exploration here and assume that though the end result was different, the two societies must have arrived at their respective determinations in a similar way. And it is a matter of some debate whether a true understanding of another society’s metaphysics can ever really be achieved by an outsider; it may be that the conscious ongoing maintenance of an awareness of fundamentally significant differences which we cannot ever really grasp is the best we can do in terms of respecting another society’s understandings. Continuing to build upon previous understandings of other legal orders is key, of course, but at the same time we must resist the temptation to think we have arrived at a full understanding, or that, given the ever-evolving nature of law and custom within all societies, we ever can.

Natalie Oman provides a vivid example of such a disconnect in basic frameworks of understanding in a case where both parties failed to recognize the existence of an alternate interpretation of the same events. In 1872, the Gitx̱san village of Kitsegulka on the west coast of BC was accidentally burned down by white miners.⁴² In response, the Gitx̱san blocked the minors’ trade goods from passing on the Skeena River, a major trade route. Negotiations ensued with BC’s Lieutenant-Governor; historical records indicate that the Gitx̱san understood the meeting as analogous to one of their own feasts — gatherings traditionally used, among other purposes, to resolve intratribal legal disagreements — with the requisite feast elements of an explanation of the offence told by way of story in order to contextualize it, the sharing of oral histories, the receipt of gifts from the miners to signify responsibility for wrongdoing and recognition of Gitx̱san jurisdiction, a signed agreement to confirm mutual respect for each other’s sphere of authority, and a celebration of the successful consensus. The colonists, on the other hand, understood the process as a meeting at which grievances were recited, the bizarre Gitx̱san insistence on singing and storytelling was humoured, a token sum was paid to end the blockade, a statement was signed to this effect and a symbolic show of force was made to discourage future interference with colonial activities.

39. A. Irving Hallowell, “Ojibwa Ontology, Behavior and World View” in Stanley Diamond, ed., *Culture in History: Essays in Honor of Paul Radin* (New York: Columbia University Press, 1960), 19 at 21.

40. Robert Bunge, *An American Urphilosophie: An American Philosophy BP (Before Pragmatism)* (Maryland: University Press of America, 1984) at 94, emphasis in original.

41. Webber, “Grammar”, *supra* note 1 at 37.

42. Natalie Oman, “Paths to Intercultural Understanding: Feasting, Shared Horizons and Unforced Consensus” in Catherine Bell & David Kahane, eds. *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 70-71.

The effect of divergent background understandings becomes even more insidious when one considers that in cases of power imbalance, such as the one described above, the unconscious imposition of the more powerful group's standards of value and worldview inherently limits the number of available solutions to a problem.⁴³ "[T]he standards of value of the more powerful party generally define the reality that is admitted as imaginable."⁴⁴ The disadvantage that this reality poses to the marginalized group is generally immediately apparent, but often the negative consequences to the dominant order are also substantial, if more subtle, as discussed later in this paper.

Iris Marion Young goes so far as to deny the possibility of putting oneself in another's place with any sort of accuracy or moral respect, given the extent of differences in perspective across cultures.⁴⁵ If true, however, this inability gives rise to problems when one considers the implications of moral judgements — the types of decisions that both result from and lead to the further development of our cultural system of norms. Some theorists, Young among them, have suggested that we refrain from making these judgements, but at least some types of judgements are inevitable if one is to function in a social world. Even an awareness that our judgements are informed by cultural and personal experience cannot lessen the force of judgement itself. Fundamentally, there can be no neutral position; as much as the range of possible beliefs available to others are dictated by their culture, so too are our own choices constrained by our circumstances. Thomas Morawetz points out that this inevitable situatedness effectively rules out the possibility of subjecting one's own certainty to the same kind of critical evaluation that can be made of the convictions of others: "what could I use to check my picture of the world and my practices as a whole but my picture of the world and my practices?"⁴⁶ Webber makes a similar point, noting that there are likely to be strengths and weaknesses in any society's normative framework, but that our ability to compare our own on an equal footing with that of others is constrained by the fact that "we can only discuss these comparisons in language. We can never get outside language. We can do our best to translate across languages, but whatever we say is inevitably afflicted by the limitations — and the strengths, and the normative overtones — of the tools we use to say it."⁴⁷

These restrictions do not mean, however, that we should abandon all efforts at understanding. Charles Taylor has attempted to develop a methodology by which intercultural understanding might be or become attainable with his concept of "sharing horizons," in which certain similar metaphysical and moral (and by extension, legal) ideas between two cultures, however few they might be to begin with, can serve as a platform from which to gradually develop accurate understandings of more radical foreign beliefs through dialogue with these others.⁴⁸ As Oman points out, "[t]he dialogical process that gives rise to a meta-language of negotiation in this situation provides the participants with the opportunity to discover a broader horizon against which their home conceptual systems can be

43. Oman, *ibid.* at 72.

44. Oman, *ibid.* at 86. Borrows argues that "[a] Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions", *Indigenous Legal Traditions*, *supra* note 2 at 114.

45. Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought" (1997) 3(4) *Constellations* 354.

46. Thomas Morawetz, *Wittgenstein and Knowledge* (Amherst, MA: University of Massachusetts Press, 1978) at 134.

47. Webber, "Grammar", *supra* note 1 at 42.

48. Charles Taylor, "Understanding and Ethnocentricity" in *Philosophy and the Human Sciences*, vol. 2 of *Philosophical Papers* (Cambridge, UK: Cambridge University Press, 1985).

more revealingly located in relation to the conceptual systems of others.”⁴⁹ Webber would seem to agree with the possibility of this type of gradual-assembly model: “[t]here are areas of overlap in experience, analogies among our attempts to make sense, which can serve as starting points for mutual understanding.”⁵⁰

By retaining a conscious awareness of the existence of alternative possibilities, then, we can best position ourselves so as to be able to take advantage of opportunities that arise for us to build another level of understanding onto our conception of a different culture and its law. For Oman, acknowledging “alternative *legitimate* (whether comprehensible or not) standards of value — and the world-views they underpin ... [allows] the possibility of outcomes that challenge the assumptions and expectations of both parties.”⁵¹ And as Webber reminds us, even if these values and their underlying metaphysics never become comprehensible, our necessary inability to evaluate them impartially makes it inappropriate to impose our own.⁵²

Lest one think that this incremental process could someday lead to a complete fusion of understanding between two cultures, however, Oman reminds us that “any understanding that is reached is necessarily transitory, since it is an understanding of finite aspects of a living culture that is heterogeneous, contested and changing.”⁵³ Even as one culture develops and improves its understanding of another’s laws, that law is evolving to remain relevant to current circumstances.

Many theorists, then, seem to advocate the examination and recognition of modes of law in other cultures as a means to foster a conscious awareness of our own legal norms, especially those rendered invisible by unrecognized narrative and assumed universal metaphysics. The question then becomes how to proceed from this recognition in the inevitable process of substantive moral evaluation in a way that maintains the enlightenment gained via this hard-won awareness of alternative possibilities. There are two issues here — the search for a genuine understanding of another culture’s law, and the possibilities for the ways we come to understand it to serve in the ongoing development of our own system. The latter process draws on the lives of those in other legal systems to provide a broader base of material.

Clearly, it is important to develop and maintain an awareness of the normative and metaphysical differences that underpin alternative systems of law so as to avoid operating from a position of misunderstanding, or worse, one which mischaracterizes what these differences actually mean when seen through an alternate worldview, thereby marginalizing a disadvantaged culture. It should be noted that there is also a significant and perhaps deadly disadvantage to the dominant culture in this mischaracterization. In *Recovering Canada*, Borrows argues for the need to incorporate First Nations legal principles into the law of the state, not only for the benefit of Indigenous people, but because their laws include knowledge that would greatly benefit and improve the dominant legal system. Essentially, he ar-

49. Oman, *supra* note 42 at 82.

50. Webber, “Grammar”, *supra* note 1 at 42.

51. Oman, *supra* note 42 at 86 [emphasis in original].

52. Webber, “Grammar”, *supra* note 1 at 42. A detailed discussion of the arguments surrounding the possibility of objective moral improvement through cross-cultural comparison of narratively arranged norms, see Satya P. Mohanty, *Literary Theory and the Claims of History: Postmodernism, Objectivity, Multicultural Politics* (Ithaca: Cornell University Press, 1997).

53. Oman, *supra* note 42 at 74.

gues that First Nations systems of law can and will continue to exist independently of their recognition by Canadian courts, but that “Canadian law cannot be truly independent until it more fully receives non-colonial sources of law.”⁵⁴ Even more fundamentally, “Law can become unjust and irrelevant if it is not continually reviewed and revised,”⁵⁵ and one of the best ways for a legal tradition to ensure that it continually strives not just for maintenance but a higher level of moral worth — by its own standards and those of other cultures — is to draw upon those other cultures in order to gain awareness of the broadest possible range of understandings and corresponding options for solutions to a problem. A universal moral standard, much like a comprehensive understanding of another culture’s normative framework, is likely an unattainable moving target, but again, this is no excuse for abandoning the effort at self-improvement.

II. JAMES BAY CREE LAW

A. Narrative/Metaphysical Differences

One of the major areas of Indigenous law that has and will likely continue to provide insights into the development of a corresponding common law concern is the natural environment. This section of the paper will explore those insights by examining the laws of the James Bay Cree that deal with the hunting and management of wildlife, taking special note of the moral and metaphysical assumptions that ground these directives.

In order to examine these legal principles with any degree of accuracy, it is important to remain aware of the problems of alternate metaphysics. Even once we succeed in accepting that another culture uses a different set of narratives and their corresponding metaphors, it is easy to forget that these metaphors are often just as effective in describing an external reality, as evinced by the empirical results of management efforts based on these alternative constructions. Colin Scott argues that once we disassociate these results from our own implicit metaphors, which we have come to exclusively identify as “scientific,” it becomes apparent that Cree management techniques based on constructions that we would regard as mystical or nonliteral are, empirically speaking, just as effective.⁵⁶ Scott identifies the Western tendency to think that any correspondence between scientifically defined management success and “mystical” paradigms is merely fortuitous;⁵⁷ however, Native cosmologies have developed in the ways that they have precisely because they have proven a useful standard in practice for the management goals of the people who employ them, and are subject, like Western science, to modification and adjustment where they prove to be inaccurate (the norm-practice feedback effect described above). The next parts of the essay describe some of the specific accepted goose and bear hunting practices of the James Bay Cree and attempt to identify the norms that have influenced their adoption.⁵⁸

54. Borrows, *Recovering Canada*, *supra* note 12 at 13.

55. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 14.

56. Scott, “Science for the West”, *supra* note 37.

57. *Ibid.* at 71.

58. Beaver are also a major Cree resource, but their harvesting patterns have been complicated by the economic pressures of the fur trade, in ways that are beyond the scope of this essay to discuss. The hunting territory debate is addressed well in Charles A. Bishop & Toby Morantz, eds., “Who Owns the Beaver?: Northern Algonquian Land Tenure Reconsidered” (1986) 28 (special issue) *Anthropologica* 1.

B. Relations with Game Animals

The Cree discussed in this essay, the James Bay Cree, are a specific group who inhabit an area to the east and southeast of James Bay and southeast of Hudson Bay. They can be further divided into modern community-based settlements: Waskaganish, Eastmain, Wemindji, Chisasibi, Whapmagoostui, Nemaska, Waswanipi, Oujé-Bougoumou, and Mistissini. Historically, these communities were comprised of two broadly different social formations. One was the small winter hunting group, made up of a few families — in Mistissini “two to five commensal units, which are generally nuclear families”⁵⁹ — which generally travelled great distances to access scarce and widely scattered resources and operated largely in isolation. The other was the summer gathering of the larger band, an exercise which facilitated band social interaction and allowed for the effective hunting of seasonally available animal resources such as geese, which migrate across the territory twice a year in the spring and fall.

Among the Cree, animals are said to communicate with humans, if one is willing to read their signals. Trends in animal populations are understood as intentional communications to the hunters.⁶⁰ Ronald Niezen notes the existence of Indigenous linguistic constructions that emphasize that animals ultimately control the hunt, and that success therefore depends upon respectful modes of action.⁶¹ When an animal becomes scarce or can no longer be successfully hunted in any particular area, its absence is read as an expression of that animal’s unwillingness to be caught — an attitude which may be to the result of displeasure with the hunters’ over-harvesting of that area and concomitant failure to allow the animals a respectful amount of space: “Cree hunters’ discrimination of population trends is expressed in terms of the animal’s readiness to give itself. To take too much when the animal is signalling a growing avoidance of or anger towards hunters is to undermine the relationship, to disrespect the animal.”⁶² Rotational resting of hunting territories is understood to allow time not only for the species to repopulate, but to overcome anger toward the hunters so that they are willing to make gifts of themselves once more. Territories can be under-harvested, as well: “if animals want to be caught and are not hunted ... they have fewer young and more easily succumb to diseases or predation.”⁶³ The obligation, then, is to provide the appropriate conditions for the animals to flourish. This understanding of the need for humans to respect animals is an expression of an overarching law of respect and belonging that governs relations within and among the Cree and the rest of the world — both its animate and inanimate elements. Therefore, as Robert Brightman tells us, “the moral commitments and antagonisms that hunters experience with their prey are as pertinent to our understanding as their knowledge of animal habitat and biomass.”⁶⁴ Even the most esoteric hunting prac-

59. Adrian Tanner, *Bringing Home Animals: Religious Ideology and Mode of Production of the Mistissini Cree Hunters* (New York: St. Martin Press, 1979) at 22.

60. Harvey A. Feit, “Hunting and the Quest for Power: The James Bay Cree and Whitemen in the Twentieth Century” in R. Bruce Morrison & C. Roderick Wilson, eds., *Native Peoples: The Canadian Experience*, 3rd ed. (Toronto: McClelland & Stewart, 2004) 101 at 109 [Feit, “Hunting and the Quest for Power”].

61. Ronald Niezen, *Defending the Land: Sovereignty and Forest Life in James Bay Cree Society*. (Boston: Allyn and Bacon, 1998) at 26-27.

62. Scott, “Spirit and Practical Knowledge”, *supra* note 33 at 64.

63. Feit, “Hunting and the Quest for Power”, *supra* note 60 at 106.

64. Robert Brightman, *Grateful Prey: Rock Cree Human-Animal Relationships* (Berkeley: University of California Press, 1993) at 3. Brightman’s book deals more explicitly with the Rock or Missinippi Cree of northwestern Manitoba, but is referenced here to the extent to which the practices he describes parallel those of the James Bay Cree.

tices are explained by the Cree as “instrumental procedures that secure desired objectives by taking realistic account of the objective characteristics of animals.”⁶⁵

More specifically, Cree paradigms contrast with Western Cartesian dualities (such as culture/nature, natural/supernatural) by assuming the essential similarity and interconnect- edness of people and animals, who are able to meaningfully communicate with each other across species boundaries. The Cree root metaphors thus lead to “moral standards of positive reciprocity,” reflected in hunting behaviours that emphasize respect and generosity.⁶⁶ Animate/inanimate is another duality that is largely incomprehensible in the Cree world- view; it is not so much the case that rocks are seen as alive, in the sense that the “attribu- tion of life to the non-living is not what occurs in a world perceived as so many different modalities of life, of emergence ... [but that] figurative practice is rather to understand the differences among beings in the world as variations on the underlying themes of life in community.”⁶⁷ Feit tells us that not only are all elements of the universe living, they are also volitional; the operation of the world is thus predictable to the extent that one is able to predict the actions of intelligent persons, a complex order that is “neither of mechanis- tic determination nor of random chance.”⁶⁸

Legally speaking, the stewardship system of hunting group leaders must be understood in the context of certain constructions of the ability to own property. Specifically, the land it- self is often not subject to individual ownership in a Western sense; notions of territory tend to shift with the fluidity and movement of more important subsistence resources such as game. A broadly equitable nominal right is said to exist for all Cree to harvest subsistence resources in any area (in contrast with economic resources, and subject to the practical re- quirements of seasonal movement and settlement across vast stretches of resource-poor ter- ritory, especially as one looks further north).⁶⁹ Associated with these rights, however, are significant responsibilities to sustain oneself in a manner that is not detrimental to the re- sources themselves or to others who rely on them. Feit describes the result as a “commu- nity of responsibility” in which rights are exercised according to a personal restraint that takes account of the needs and desires of others in the community.⁷⁰ In practice, the stew- ardship system allows for effective and respectful resource management by drawing upon the expertise of those whose skill and respect at hunting have been recognized by their peers. Ronald Niezen describes the “control of areas of land and resources as a conditional form of authority derived from social recognition of skills and responsibilities,” and a man- ifestation of the key principles of stewardship and sharing.⁷¹ Each steward manages a ter- ritory, the assignment of which is overseen by the Elders, and which is generally associated with a particular Cree community. In practice, the steward of an area would most likely have been raised there, allowing him to develop an intimate knowledge of the land and animals that inhabit it. Often, he is said to have “inherited” the stewardship of the land from an elder (who may or may not have been kin) who has passed on his knowledge by teaching the current steward. Tanner describes Mistassini land as “divided into hunting

65. *Ibid.* at 33.

66. Scott, “Science for the West”, *supra* note 37 at 74.

67. Scott, “Spirit and Practical Knowledge”, *supra* note 33 at 61.

68. Feit, “Hunting and the Quest for Power”, *supra* note 60 at 103.

69. See, e.g., Tanner, *supra* note 59 at 183.

70. Feit, “Hunting and the Quest for Power”, *supra* note 60 at 107.

71. Niezen, *supra* note 61 at 16.

territories, each of which is associated with an individual who has usufructuary rights by inheritance, by gift, or by establishing long-term occupancy.”⁷² At the same time, “territory ownership is not based on any attachment to land as such;” rather, it is linked to notions of rights to harvest resources, which were complicated by the introduction of beaver fur as a product sought for trade rather than use.⁷³ The steward’s authority is exercised in the name of the community and the common interest.⁷⁴ Fikret Berkes points out that the “presence of social constraints and collective community interest help avoid the pitfalls of the ‘tragedy of the commons’”⁷⁵ despite the lack of formalized property ownership.

Laws relating to territorial rights are necessarily entwined with those concerning hunting. Animals differ from other types of resources in that they are capable of movement, especially in the case of nomadic species. Due to the centrality of hunting to the Cree lifestyle, Indigenous conceptions of property ownership developed so as to complement the migratory realities of this key subsistence activity. These conceptions are expressed as normative rules governing access to resources, in terms of the conduct of social relations within and between hunting groups. The property relationship “exists in the context of a flexible system of geographic movement and inheritance, such that the central qualification of an owner is the fact of his leadership of a hunting group;”⁷⁶ supernatural relationships with animals (such as divination, hunting magic, and animal friendship), provide

...the ideological link between the short-term rules of access to resources within the territory and the group notion of a ‘permanent’ relationship which is said to exist between a group leader and the area he habitually uses. The relationship of hunters to the animals may sometimes be likened to having “friends” or “pets” among those animals which inhabit the particular region, but in relation to strangers, that is to people outside the potential members of the individual’s hunting group, its relevance is, in effect, that of a relationship to the land area itself, and comes close to the general concept of land ownership.⁷⁷

Tanner explains that to the Cree, the activity of hunting has multiple levels of significance.⁷⁸ In the first instance, it is about the use of animals for the provision of material needs; underlying this purpose, however, is a second understanding based upon the social relations between the animals themselves, natural forces, and humans, with whom the animals are understood as having personal relationships. The ideal human-animal relationship model is one where the expressed respect of the human for the superior position of the animal leads it to give itself to the hunter as a gift. This dual understanding of reality, from the perspective of the animal and of the Cree, is often embodied in myths that tell of individuals marrying or going to live among animals that the individual suddenly perceives as human. To the Cree, these men and women are still thought to have an accurate perception of reality — it is just that their reality has become classified by animal categories of un-

72. Tanner, *supra* note 59 at 22.

73. *Ibid.* at 183.

74. Feit, “Hunting and the Quest for Power”, *supra* note 60 at 107.

75. Fikret Berkes, ed., *Common Property Resources* (London: Belhaven, 1989) at 92.

76. Tanner, *supra* note 59 at 187.

77. *Ibid.* at 189.

78. *Ibid.* at 136.

derstanding rather than human ones (e.g., home = beaver lodge rather than tepee).⁷⁹ Some of these myths also serve as the source of ritual actions involving animal materials, which serve to establish or improve communication between the two levels of reality.⁸⁰ But Tanner also reminds us that we must be “careful in assuming that the modern Cree accept at face value the existence of this second level of reality. To the extent that the myths constitute a form of belief, they indicate a state of affairs that existed in the distant past.”⁸¹

The requirement for interspecies respect is taught and reinforced by certain rituals, such as abundant feasting at the opening of the goose hunting season and the generous sharing of the proceeds of the hunt, which are meant to symbolize human generosity and thus invoke a corresponding largesse in the animals. The animal gift of its body for human sustenance incurs corresponding obligations in the hunter; the process is “a complex social and moral relationship of reciprocity in which the outcome of the hunt is a result of the mutual efforts of the hunter and the environment.”⁸² Scott argues that this generosity in feasting leads literally to animal generosity (hunting success) by reinforcing the cooperation of hunters with “shooting bosses” who manage territories effectively: “[w]hen hunters respect animals in certain practical ways, such as strategic self-restraint in hunting, an ecological scientist might conclude that the sustainability of animal ‘gifts’ is verifiably enhanced.”⁸³ Harvey Feit also describes the Cree understanding that animals allow themselves to be killed and eaten as a gift: “[h]unting is not in this view solely an application of human labour to passive resources” and animal generosity in giving these gifts must be paralleled in the sharing of food with other humans in order to continue.⁸⁴ David Smith observes that “maintaining good relationships with other humans has always been extremely important in an immediate way, for reasons of practical survival. Disruption in the human social community also redounds to cause a breakdown in communication with the animals — a dominant motif in stories.”⁸⁵

Ideas about power are important to the Cree; as discussed above, power is “linked to status, hunting leadership, and to the stewardship of hunting territories” and is often seen as manifested in the ability to acquire accurate knowledge about future hunting success through dreams and traditional practices like scapulamancy.⁸⁶ This power is less about control and more about openness to information that will predict future events accurately and therefore allow for hunting success; “humans do not ultimately control life, but intimately and respectfully link their thought and action to other power beings who create the conjectures of life.”⁸⁷

79. See Tanner, *ibid.* at 136ff. for a good description of this phenomenon.

80. See Tanner, *ibid.* at 137.

81. *Ibid.*

82. Feit, “Hunting and the Quest for Power”, *supra* note 60 at 102.

83. Scott, “Spirit and Practical Knowledge”, *supra* note 33 at 52.

84. Harvey A. Feit, “The Enduring Pursuit: Land, Time and Social Relationships in Anthropological Models of Hunter-Gatherers and in Subarctic Hunters’ Images” in Ernest S. Burch, Jr. & Linda J. Ellanna, eds., *Key Issues in Hunter-Gatherer Research* (Oxford: Berg Publishers Inc., 1994) at 421-40 [Feit, “The Enduring Pursuit”]. See also Feit, “Hunting and the Quest for Power”, *supra* note 60 at 105.

85. David M. Smith, “World as Event: Aspects of Chipewyan Ontology” in Takako Yamada & Takashi Irimoto, eds., *Circumpolar Animism and Shamanism* (Sapporo, Japan: Hokkaido UP, 1997) 67 at 77. Though Smith is referring specifically to the Chipewyan, his point also applies to the Cree worldview.

86. Feit, “The Enduring Pursuit”, *supra* note 84 at 435.

87. *Ibid.*

Driben, Auger, Doob, and Auger also echo the idea that animals are understood as people, with the result that

...the relationship between the Cree and Ojibwa and the animal-persons they pursue is governed by the same ethical considerations that govern human relationships. Their encounters with animals are framed as encounters with persons, and the interpretations (of those encounters) use as analogues, the commonplace social mechanisms, such as coercion, sexuality and gift exchange to express how those encounters can be transformed into mutually beneficial social relationships.⁸⁸

Tanner describes the existence of multiple models of social relationship within the broad understanding of human-animal relatedness: friendship, love (sexual or familial), or enmity (which operates in a context of coercion or a hierarchical structure, rather than the reciprocal model implied by the first two). Animals, like people, have souls that can and do exist separately from their bodies, an attribute that requires humans to interact with them according to certain patterns.

i. The Goose Hunt

The migration of the geese takes place in early fall and late spring, when the Cree summer groups are gathered together. The men divide themselves into hunting groups, each one of which is overseen by the legal authority of a “shooting boss” who is responsible for managing the hunt in a specific area of the Cree territory. These bosses decide where the hunt will be undertaken on any particular day, based upon the need to rotationally “rest” territories in order to avoid having the geese associate any particular area with danger and thus begin to avoid it. The bosses also oversee the use of techniques such as landscape arrangement, decoys, goose calls, and blinds, precautions likewise taken to ensure that the geese do not realize the hunters are present and thus learn to associate certain details with danger.⁸⁹

This management system is based upon Cree ideas about goose intelligence and capacity for communication and learning, which may seem unfamiliar or anthropomorphic to the Western reader; its efficacy, however, is demonstrated by the fact that in certain designated areas, such as the outer islands, Cree who cannot participate in the traditional hunting groups due to year-round modern employment are permitted to hunt when they are able (as opposed to those areas where hunting must occur at the times and in configurations that are overseen by a goose boss). In these areas, the number of geese that return each year to feed has consistently decreased, whereas in other, traditionally managed areas it has remained constant.⁹⁰ Feit writes that “inter-species communication is indicated by the intelligent response of animals to the efforts of hunters;”⁹¹ similarly, Cree belief in animal intelligence has its roots in a long history of observation of behaviour. Territorial rotation is also explained as a practice which “respects” the geese by leaving most of the lakes and marshes for unmolested rest and feeding.

88. Paul Driben *et al.*, “No Killing Ground: Aboriginal Law Governing the Killing of Wildlife Among the Cree and Ojibwa of Northern Ontario” (1997) 1(1) *Ayaangwaamizin* 91 at 101.

89. The goose hunt is described in detail by Scott, “Science for the West”, *supra* note 37.

90. *Ibid.* at 79; for further evidence of the effectiveness of Cree management techniques, see Feit, “Hunting and the Quest for Power”, *supra* note 60 at 110.

91. Feit, *ibid.* at 103.

The fact that the Cree describe the above reduction in goose numbers on the uncontrolled islands as a result of the geese ‘punishing’ these casual hunters for failing to respectfully allow space and time for the flocks to rest and feed does not lessen the empirical validity of the description of the result. The Cree effectively and accurately use this understanding to predict where the geese will stop coming. The description itself is also continuously subject to modification based on new empirical data; “the hunting situations referred to are themselves key interpretants of the appropriate extent and application” of metaphors of human leadership, speech, and other qualities.⁹²

ii. The Bear Hunt

Different types of animals invoke different moral and metaphysical associations. The Cree worldview features an understanding of different types of life as existing along a continuum, with the different animal species conceptually located at different points along this scale. The black bear “is the paramount symbol of the imperative for respect” in the Cree system of reciprocity, due to its powerful nature and perceived similarity to humans.⁹³ In fact, when it comes to intelligence, bears are thought to be the equals, or even the betters, of humans. Brightman notes that different strategies must be employed to hunt bear than are used to trap rabbits, for example; little ritual is involved with hunting the latter, which falls much lower on the chain of respect, while the former is the subject of intense preparation and ceremony. “The existence of particular modes of interaction is based on the understood character of the animal; reciprocally, the character of the animal is built up in terms of the role it plays in human social life.”⁹⁴ Tanner indicates that bear hunting often exemplifies the ‘ideal’ of the Cree hunt: the animal’s location is known in advance, meaning that sufficient ritual preparations can be made, and though a bear could easily attack and possibly kill a human, attacks happen very rarely — a reality that reinforces the idea that the bears are willingly sacrificing themselves as offerings to the properly respectful hunter, since they, unlike many other animals, arguably have the ability not only to prevent their death but to reverse the relationship by killing the hunter.⁹⁵

Bears can be seen as resembling humans in many ways; they can walk upright, make human-sounding vocalizations (Scott refers to a shot bear “crying”), and eat the same omnivorous diet. These resemblances merge with ideas about the bear’s power; it is the only animal that poses the same deadly threat to hunters as hunters do to it. Other animals might be just as intelligent as humans, but only the bears are powerful enough to reverse the relationship of killing and eating. A breach of hunting etiquette, when it comes to the bear, could quite easily invoke an attack on the offending hunter, which is likely to be fatal. Scott describes how “[a]n accident on the ice that ended in a drowning two winters earlier had been attributed (among other possible factors) to the victim’s participation the previous summer in killing a bear whose meat, due to improper butchering in hot weather, had spoiled.”⁹⁶

Hunting practices are governed by a “respect born of necessity;”⁹⁷ if the appropriate behaviours are not observed, hunters will not be successful in retrieving game. One of these

92. Scott, “Science for the West”, *supra* note 37 at 80.

93. Scott, “Spirit and Practical Knowledge”, *supra* note 33 at 64.

94. Brightman, *supra* note 64 at 34.

95. Tanner, *supra* note 59 at 146.

96. Scott, “Spirit and Practical Knowledge”, *supra* note 33 at 57.

97. Brightman, *supra* note 64 at 103.

requirements involves killing game animals quickly and humanely, so as to minimize their suffering. Another is verbal circumspection in referring to the animal killed, especially in the presence of the carcass. Brightman describes a continuum of respectful circumlocution, with the bear at one end and the hare and fish at the other. When bear are hunted during the winter, they are typically located in their dens. Hunters then talk or sing to the bear until it emerges, groggy from hibernation, and is shot. The bear might be asked for its forgiveness and addressed as “grandfather,” a further indication of Cree notions of relatedness with animals and the especial similarity of such intelligent animals to humans.⁹⁸ This term is also indicative of the nature of those relationships; the animals nurture the hunters by providing sustenance, and the Cree are in turn appropriately respectful of their wisdom and the self-sacrifice involved in providing this care. Offerings of meat and tobacco are often burned to produce smoke that rises up to the spirits as an indication of thanks. This giving — animals of themselves, and humans of gifts — perpetuates an endless cycle of reciprocity that echoes Cree ideas about the structure of the universe. Animal products that are not eaten and do not have a utilitarian purpose are respectfully treated in other ways — for example, the practice of suspending skulls, antlers and bird bills from tree branches to prevent inadvertent carelessness leading to disrespectful treatment.⁹⁹

This practice is also linked to traditional Cree ideas that animals taken in the hunt, if properly treated, are either reincarnated or regenerate themselves. Historically, this belief in regeneration, coupled with ideas of the success or failure of the hunt as determined by the animals themselves, led to the killing of large numbers of animals at one time — such as all the beaver in a lodge or most of the caribou in a herd — since the Cree understood that their actions had no power to effect the total number of animals available. Limiting kills would not be rational, since the number of animals caught could only be manipulated by respectful hunting and ritual practice. Tanner indicates that “[t]he Waswanipi conceive the practice of limiting kills by rotational use of hunting tracts as an obligation that the human hunter owes to the prey;”¹⁰⁰ Brightman seems to contradict him by suggesting it might have been seen as disrespectful to decline an animals’ offer of itself. This may be an example of a territorial distinction, but given that Tanner also describes Mistassini understandings of game as reincarnating and undepletable, perhaps these understandings can be differentiated by the fact that Brightman is referring to animal encounters on territory that is in use — given the availability of a safe option to retreat to, the argument that an animal that appears in an active hunting territory is offering itself for use becomes that much stronger. Additional numbers of game animals were thus seen as a direct result of spiritually motivated activities (“respect”), rather than from the Western perspective of breeding stock availability. In both cases, the result can be described as “limiting kills = more animals,” but the metaphysical understanding of the process and hence the motivation underlying the restraint is markedly different. Thus, the traditional Cree experience contributes to the argument that “the labor process itself is integrally symbolic to the degree that it is organized by categories and propositions that are not mechanically deducible from human biology, available technology, or the envioning ecosystem.”¹⁰¹ There are also ways in which killing or trapping many animals at a time might actually have benefited their overall numbers; as in the case of the beaver, uncontrolled population growth leads

98. *Ibid.* at 115.

99. *Ibid.* at 118-19.

100. *Ibid.* at 282.

101. *Ibid.* at 292.

to numbers that “exceed the amounts of quality food or the number of sites where colonies can be located, so that the health of the animals deteriorates and they fight each other for lodge sites.”¹⁰² Taking large numbers of animals from one location at once, then leaving it for a long period of recovery while the hunters rotated through other areas, was also the most efficient practice in terms of Cree labour, given the vastness of the territory and the scattered dispersal of animal resources.¹⁰³ Scott describes another understanding that impacted total kill numbers: success might be due to respectful preparation and animal generosity, but overwhelming or unusual success was seen as dangerous for the hunter and a possible sign of his impending death, therefore leading to a desire to limit one’s harvest. “An extensive symbolic and ritual repertoire balances signs and circumstances”¹⁰⁴ of each extreme, either of which risks the hunter’s death, and leads to an awareness of “the twin necessities of acting alertly and decisively in accepting animal gifts, but taking only what is needed and given. This ambiguity demands attentive judgement, and responsibility.”¹⁰⁵

Ultimately, the traditional model of understanding would have to be modified with the introduction of European settlers and technology, but such a need does not negate the effectiveness of the original model in the conditions for which it was developed. Webber brings this point to its conclusion, arguing:

not that indigenous societies were infallible stewards of their resources ... Like any other society, indigenous peoples could exhaust a resource as a result of miscalculation, the discovery of a destabilizing new technology, ruinous competition with other groups, or pressures caused by resource commercialization or population displacement following European settlement. My point is rather that a wide range of structures for regulating resources appears to be consistent with sustained economic activity over time.¹⁰⁶

Cree myths function as narratives that consolidate and articulate the principles identified above. The interconnected nature of all life is embodied in stories that identify the first animals as transformed humans, with literal kinship relations to the first people. Brightman states that “[s]ince Crees say that bears and beaver are closer in their attributes to human beings than other species, it might be expected that some myths would assign these animals human or humanoid ancestry.”¹⁰⁷ In addition to being understood in terms analogous to caring relatives, the Cree sometimes also refer to the hunt using metaphors that connote a sexual relationship between hunter and prey. Human sexual encounters in dreams are interpreted as a premonition of a successful hunt. Scott also indicates that the act of consuming meat is often metaphorically expressed as associated with the intimacy of a sexual relationship, specifically in the justification of the consumer/consumed dichotomy.¹⁰⁸

Love, of course, is not the only way people relate to each other, which also holds true for relations with animal persons. The Rock Cree of Manitoba believe that “hunting medicine”

102. Harvey Feit, “The Cree of James Bay, Quebec, Canada” in Milton Freeman, ed. *Endangered Peoples of the Arctic: Struggles to Survive and Thrive* (Westport, Connecticut: Greenwood Press, 2000) 39 at 41.

103. Tanner, *supra* note 59 at 191.

104. Scott, “Spirit and Practical Knowledge”, *supra* note 33 at 64.

105. *Ibid.* at 65.

106. Webber, “Grammar”, *supra* note 1 at 20.

107. Brightman, *supra* note 64 at 40.

108. Scott, “Science for the West”, *supra* note 37 at 76.

can be used to bewitch animals and force them to come to the hunter's trap or within range of his rifle.¹⁰⁹ The use of this medicine is considered morally objectionable, both because it fails to respect the animal's free will and ability to punish disrespect by withholding itself, and also because it is believed that no one else in the area will be able to kill any animals and may starve to death.

Some would level accusations of anthropomorphism against the Cree tendency to describe animal behaviours in the same terms as human practices, but Scott argues that as Western science progresses, scientists are beginning to take note of the fact that these types of descriptions may be more objectively accurate than was previously thought. Evidence is being amassed that speaks to a complex communicative structure within species. Furthermore, their non-Western metaphorical structure often allows the Cree to produce an explicit level of rational knowledge that scientists have been unable to reach, due both to insufficient practical engagement and the fact that "because of their preferred metaphors, they lean toward mechanistic models of population dynamics, rather than understandings that also take account of animal perception, intelligence, learning, and social organization, without which it is impossible to anticipate animal response to changing conditions."¹¹⁰ While the argument has been made that this knowledge does not lead to the targeting of 'goal ranges' for population and kills, this fact does not necessarily make it unscientific; in fact, modern Western wildlife management has recently moved away from this sort of "system management" toward a model of "relational sustainability" similar to that of the Cree — a much more complex objective which relies on continuously adjusting feedback mechanisms rather than exact numerical goals.¹¹¹ Finally, as Scott argues:

To see only the religious dimension of animism is to assert that the major categories and root metaphors underwriting animism, its very ontology, are inherently mystical. This is untrue. The unities, distinctions and relationships posited within an animistic worldview are as capable, epistemologically, of coming to 'objective' knowledge as they are of producing religious propositions — and indeed are likely to do both simultaneously.¹¹²

III. CANADIAN WILDLIFE LAW

Having identified some of the narratives and metaphysical assumptions of Cree law, we may now be in a better position to return to an examination of our own legal system, in search of normatively distinct elements that play the same essential structuring role. As a parallel to the Cree laws governing hunting and wildlife management discussed above, the next section of this paper will explore the engendering narratives and development of Canadian wildlife law, including the extent to which it informs and is informed by other areas, such as property law and legal personality.

Some critics would deny that norms can play the same role in a legal system with courts and legislatively enacted statutes as they do in more fluidly responsive customary law so-

109. Brightman, *supra* note 64 at 192. Tanner also refers to the coexistence of an adversarial model of human-animal relationships alongside ideas of friendship and love (see Tanner, *supra* note 59).

110. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 63.

111. *Ibid.* at 63.

112. *Ibid.* at 62.

cieties. In part, this position has to do with how one defines customary law; Webber identifies Fuller's tendency to vacillate between a broader formulation that allows for the customary nature of any law expressed in social practice, and a more limited understanding that disqualifies norms which have been ruled upon by legislative or judicial authority.¹¹³ What the latter definition fails to recognize is that normative options determined by more consensus-driven methods are still *determined*, despite any differences in the nature of the authoritative body, the ways in which it achieves or maintains that authority, and the methods by which it uses that authority (e.g., by persuading consensus rather than imposing maxims). In addition, judicial or legislative enactment does not "fix" Canadian common law, any more than the agreements of the Cree people do theirs. The Privy Council has explicitly denied that the law can or should remain static; in order to remain just and relevant, it must be a "living tree."¹¹⁴ Even if this idea had not been so dramatically declared, its operation is evident in the very process of judicial interpretation of precedent and legislation, and legislative amendment of enacted law. Judges are no less the product of their society's normative structure than any other citizen; as beliefs shift in response to the perpetual application of chosen norms which is part of the practice of living in society, so do the interpretive choices judges make, either in a subtle progression or via repudiation of an obsolete norm that has proven unacceptable in practice. Webber explains the parallel process in legislation: the very authority of the legislature is normative to begin with, and legislation generally modifies and is responsive to prior legal expressions, often customarily influenced ones. Legislators are also products of their society and make decisions which are broadly representative of that society's evolving legal needs and desires. Finally, post-enactment legislation is "quickly 'customized' — overtaken by the process of interpretation and application, elaborated and extended," and future refinements build upon these customarily-applied extensions, gradually creating something entirely new.¹¹⁵

A. Introductory Frameworks

Tina Loo's definition of "nature" as a social construction articulates one of this essay's underlying premises: cultural classifications serve to render such complex and abstract concepts intelligible to individuals, yet by doing so they also "impose an ideological order on the world"¹¹⁶ that is neither self-evident nor universally shared. By failing to recognize that a choice has been made, we fail to recognize the existence of alternate and potentially superior formulations. Loo also notes the invisible conditioning role of language: it embeds certain convictions which then go unquestioned as a basis for understanding, explaining and acting in the world. The feedback loop of belief and practice also exists here, since "states of nature are cultural manifestations of the interplay of people's impact on the environment and their conceptualization of nature."¹¹⁷ By asking if "the relegation of these fact-value questions to 'technical' experts systematically distort[s] the important values and ethical questions that are necessarily embedded in the environmental questions under

113. Webber, "Grammar", *supra* note 1 at 4.

114. *Reference re: British North America Act, 1867 s. 24*, [1929] J.C.J. No. 2,

115. Webber, "Grammar", *supra* note 1 at 9.

116. Tina Loo, *States of Nature: Conserving Canada's Wildlife in the Twentieth Century* (Vancouver, BC: UBC Press, 2006) at xiii.

117. George Warecki, "Review of Loo, Tina, *States of Nature: Conserving Canada's Wildlife in the Twentieth Century*" *H-Canada, H-Net Reviews* (June 2008), online: Humanities and Social Sciences Online <<http://www.h-net.org/reviews/showrev.php?id=14568>>.

consideration,”¹¹⁸ Donald Brown raises one of the problems that has become evident in modern society. We might also ask how sentiment relates to these embedded values, given Loo’s insistence that sentiment as much as science has been responsible for the content and path of wildlife work in the twentieth century.¹¹⁹

To answer the questions posed above, we must return to the roots of wildlife law in Canada to understand how it has evolved. Being a colony, this task requires that we look beyond the country itself, to ideas imported with the European colonists, which were based on a different sort of lifestyle.

Game law, from the beginning, has been inextricably entangled with real and personal property ownership; animals are necessarily located on the land, and there has often been a strong tendency to regard them as an adjunct to it in a similar way to immovable resources. This perception becomes problematic, of course, since even relatively sedentary animals are free to move across artificially designated human territories in ways that tree or mineral resources, for example, are not. As long as the European colonists remained clustered in small areas, land that was subject to individual private ownership could be effectively differentiated from the vast unclaimed territories where animal resources could be hunted.¹²⁰ As the settlers expanded, however, tensions inevitably increased between those who owned the land itself and those who wished to exercise what they saw as their right to partake in the local commons of wild animals. Gilbert and Dodds suggest that the early North American emphasis on free access might have been a reaction to the prior treatment of the lower classes in England, whose members were restricted from hunting by the underlying feudal ownership of all territory by the monarch after William the Conqueror imposed the system in 1066.¹²¹ Sovereign ownership was exercised to grant privileged upper-class landowners the right to possess any game killed on the land they were granted. Lower-class subjects were effectively barred from hunting by trespass laws. Therefore, even if landowners did not have absolute rights in the living wild animals on their territory, their ability to prevent others from hunting on their property meant that there was nowhere for lower-class subjects to legally exercise any residual common property right in the game. Thus, “the right of killing was annexed to the soil although the landowner did not own the animals while they were living.”¹²² This situation probably contributed to the development of the view of hunting as a sport; wealthy landowners had little need of the game for subsistence use, seeing it rather in terms of recreational value. The lower classes were further disadvantaged by early regulatory management activities intended to benefit upper-class landowners — rather than the animals or their habitats, which were not generally seen as having an intrinsic value in their own existence and only a secondary value in terms of use for food and clothing.¹²³ The views that informed early legal sanctions regulating wildlife, therefore, understood animals as either game to be hunted for the sport of the wealthy or vermin to be exterminated because they were in competition with humans for other

118. Donald A. Brown, “Ethics, Science, and Environmental Regulation” in Allan Greenbaum, Alex Wellington & Ron Pushchak, eds., *Environmental Law in Social Context: A Canadian Perspective* (Ontario: Captus Press, 2002) 346 at 347.

119. Loo, *supra* note 116 at 7.

120. Note that this understanding was possible, of course, only because the newcomers were slow and reluctant to recognize Native rights and interests.

121. Frederick F. Gilbert & Donald G. Dodds, *The Philosophy and Practice of Wildlife Management*, 3ed. (Malabar, Florida: Krieger Publishing Company, 2001) at 6.

122. *Ibid.* at 19.

123. *Ibid.* at 2.

game.¹²⁴ An aristocratic landowner would no more stand for a wolf depleting the numbers of deer on his land than he would a poaching peasant, which led to bounties for predator animals alongside seasonal and territorial game limits on more desirable species, both of which were ultimately designed to increase the numbers of game animals available for those who controlled all the territory on which they might possibly exist.

Since it was not members of the aristocratic classes who made up the vast majority of those who left Europe for the New World, it would seem to make sense that a different understanding of game management quickly developed in Canada. The nature of early settlement life was also vastly different from that in the civilized world of England; in order to live in their often harsh new environment, colonists relied upon its natural resources and needed to be able to exploit those to their fullest for survival. Animals, therefore, were understood mainly as a local commons. As settlement became more extensive and established, however, and with the introduction of significant commercial pressures such as the fur trade and its associated hunting technology, populations were significantly depleted and the assumption (and its associated narratives) of the new world's infinite natural resources had to be correspondingly re-evaluated. By this time, the nature of life in North America had changed enough to allow for the development of a sport hunt, though admittedly one which differed markedly from the aristocratically centered practice in feudal England. Unlike in Great Britain, subsistence users of wildlife resources in Canada maintained a strong presence at the turn of the century and were correspondingly able to articulate their needs and desires in such a manner that the burgeoning legislative movement toward centralized resource control could not ignore their interests, despite the government's desire to do so. Modern Canadian narratives of wildlife values reflect this multiplicity of generating interests. Different interests led to alternative parallel ethics, which still exist in different forms and degrees of overlap. At any given moment, there is more than one story competing for validation.

The ideology of the "sportsman's creed" was often drawn upon by the Canadian government in its quest to transform the popular understanding of wildlife from a local commons to a national one that was held in trust by the government and managed for the greater good of the Canadian people. The latter model "asserted that wildlife was simply too important to be eaten. It was meant to serve a larger purpose, namely, elevating the human condition by providing sport and diversion for modern men."¹²⁵ If true, this perspective could serve as both impetus and justification for laws like the prohibition on selling game meat for food: restriction served the public good, since by the turn of the century the consumption of wild game supposedly "signalled one's primitiveness and geographic and social marginality."¹²⁶ Laws limiting the use of technology in hunting could appeal to the sporting concepts of justice or fair play, values that relied upon a lifestyle with a guaranteed food supply. John Sandlos describes the influence of Warburton Pike, a British author and explorer who traveled and hunted widely in northern Canada, in helping to spread the idea that native hunting practices were wasteful; his "immensely popular travel narratives such as *The Barren Ground of Northern Canada* (1892) and *Through the Subarctic Forest* (1896) revealed an attitude toward wildlife that was typical of the Victorian era: a strong attachment to a hunting code of ethics that abhorred the wanton slaughter of the abattoir and

124. Loo, *supra* note 116 at 15.

125. *Ibid.* 116 at 27.

126. *Ibid.* at 26.

favored the more sporting pursuit of a nimble quarry.¹²⁷ While it may seem somewhat surprising from a modern perspective in which naturalists and animal rights activists are often the key champions of developments in the conservation movement and sport hunters are vilified as wasteful and even amoral, in the late nineteenth century it was the sport hunters who, when faced with the reality of dwindling wildlife stocks, “effectively lobbied for legal reforms to deal with the problem.”¹²⁸ Thus, the story of the hunt as a sport became symbiotic with the development of the story of wild animals as a government responsibility. While the former idea has fallen largely out of favour in the popular imagination, it is clear that the latter succeeded in being established; though it may be overstating the case to say that ownership at common law is vested “in the state in its collective sovereign capacity as a representative of all its citizens,”¹²⁹ especially in the Canadian North where people frequently exercise their modern right to hunt in the sparsely settled territory, it is certainly true that the federal and provincial governments exercise a much greater degree of control over wildlife management and hunting than they once did and that, by and large, this control is seen as legitimate and even necessary for the good of modern animal populations.

The game-vermin dichotomy also seems to have made its way across the Atlantic Ocean. Some of the first legislation passed in the colonies took the form of bounty laws offering rewards for animals which were seen to interfere with human interests.¹³⁰ Early settlers arguably had an even higher stake than English recreational hunters in ensuring that their competition with natural predators for desirable species was limited.

Given their similar sources, one might expect American and Canadian wildlife law to be more broadly alike in their history and present incarnations than is presently the case. The differences, which lie mainly in methods of control, might be explained in part by the distinct set of story-driven values which underlies each country’s development of law. Greenbaum makes the case that Canadian environmental law is closer to what he calls the British “compliance model” than the American “sanctioning approach,” with its heavier reliance on the adversarial courtroom process. Vogel suggests this might be due to a higher level of deference to British civil servants by the country’s business executives,¹³¹ which would stem from the historical class system in that “the rising capitalist class had to accommodate itself to a state still dominated by an aristocratic upper class; the businessman aspired to be a gentleman. In the United States, capitalists formed the ruling class almost from the outset, and tended to look down on civil servants.”¹³²

Along with the recreational sport hunting model, the development of an urban lifestyle in Canada arguably enabled the development of another parallel narrative of the natural world, one that is commonly identified as the “wilderness ethic” — the tendency to think

127. John Sandlos, “From the Outside Looking in: Aesthetics, Politics, and Wildlife Conservation in the Canadian North,” (2001) 6(1) *Environmental History* 6 at 10 [Sandlos, “From the Outside Looking In”].

128. Douglas O. Linder, “Are All Species Created Equal — And Other Questions Shaping Wildlife Law,” (1988) 12 *Harv. Env’tl. L. Rev.* 157 (Hein Online) at 161.

129. Gilbert & Dodds, *supra* note 121 at 19.

130. Loo, *supra* note 116 at 153.

131. David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca, N.Y.: Cornell University Press, 1986).

132. Allan Greenbaum, “A ‘Law and Society’ Approach to Environmental Law” in Allan Greenbaum, Alex Wellington & Ron Pushchak, eds., *Environmental Law in Social Context: A Canadian Perspective* (Concord, Ontario: Capetus Press, 2002) 2 at 18.

of both nature and wild animals as an idealized “other,” of the natural world as pristine and unsullied, and as unaffected by human actions and history. The extent to which this very essay, as a product of its culture, tends to speak in terms of a distinction between the natural world and civilization demonstrates the longevity and strength of this classification. William Cronon argues that the nature-culture duality is harmful because it locates us, as people, as external to the natural world and “cultivate[s] a way of seeing and being that precludes forging a truly sustainable relationship with the environment.”¹³³

B. The Canadian Evolution of Wildlife Narratives

i. Religion — Good Versus Evil

The conceptual division of animals into “good” and “evil” — reflected most dramatically in the bounty system for animals classed as vermin — was significantly informed by religious ideas, most notably those of Christianity, the dominant religion of the colonists. Such moral divisions applied conveniently to the hunt in England, where vilified predator animals directly competed for the most desirable sport game, such as deer. Though the lower-class colonists would not import the practical implications of this division, they would have been exposed to the ideas due to the prominent role of the Church in the daily life of all classes in early England — ideas that would then be reinforced by the experience of struggling to maintain an existence in competition with natural predators. Religious values also served to justify man’s right to use wildlife resources for his own benefit, whether that benefit was food or sport. This sense of entitlement persisted despite the growing realization that wildlife resources in Canada were not infinite and were going to require some sort of management to be sustained at levels sufficient for either type of hunt. Beginning in 1904, Jack Miner applied scriptural justifications for human wildlife utilization to make the further argument that such a privilege required a corresponding acknowledgement of a responsibility to maintain populations. The creator of a private Ontario goose sanctuary, Miner spoke out against the thoughtless exploitation of animals in favour of a God-given dominion under which humans were obligated to care for the animals they made use of. Wildlife and nature were ultimately meant “for man’s use and for man to control,”¹³⁴ as outlined in Methodist scripture: “God gave ‘man ... dominion over the fish of the sea, and over the birds of the sky ... and over all the earth, and over every creeping thing that creeps on the earth.’”¹³⁵ Far from identifying wild animals as having a sterile utilitarian value, however, “much of the power of Miner’s message lay in its appeal to emotions.”¹³⁶ He understood that if people developed a sentimental attachment to these animals, they might ultimately care more about them and that public opinion might thereby shift in ways that government policy and legislation could not ignore. Miner’s religiously grounded ideas also differed from later ecological understandings in a manner that aligned peculiarly with a particular Cree understanding: he believed that although humans had responsibilities toward the animals they used, man could not extinguish a species. If extinction occurred, it was at God’s will.¹³⁷ He also articulated a hierarchy of values for wildlife that assigned

133. Loo, *supra* note 116 at 2; William Cronon, “The Trouble with Wilderness; or, Getting Back to the Wrong Nature” in William Cronon, ed., *Uncommon Ground: Rethinking the Human Place in Nature* (New York: W. W. Norton & Co., 1995) 69.

134. *Ibid.* at 68.

135. Genesis 1:26, Loo, *ibid.* at 28.

136. Loo, *ibid.* at 66.

137. *Ibid.* at 79.

them different degrees of morality and intelligence, again based on the Bible: according to Genesis, only the “good” animals had reason, while predators were described as robbing humans of what was rightfully theirs. Deer should have been “preserved for man’s food and use, and not for the sport of a herd of rapacious wild beasts.”¹³⁸

Gilbert and Dodds also note the differential attitudes toward particular species as a possible reflection of actual practice, especially among those such as farmers and hunters who live in more intimate relation with the natural world. Trappers, for example, “tend to see wildlife as an economic entity to be managed to provide maximum numbers of animals for harvest and optimum numbers for habitats,” and predators who compete for prey resources are not well tolerated.¹³⁹ As the twentieth century progressed, this division of attitudes produced correspondingly arbitrary legal distinctions that resisted the move toward reliance on environmental science narratives. The government was perfectly happy to use new science to justify its interventionist management measures in regards to historically desirable species, but had little use for such suggestions when it came to traditionally maligned animals: as Tina Loo notes, “[w]hereas other kinds of wildlife became the common property of the federal or provincial state, predators remained part of a local commons into the 1960s and ‘70s.”¹⁴⁰ Statutory bounties contributed to the problem; “[e]ach wolf skin, pair of coyote ears, or hawk’s wing that was submitted to the authorities for cash payment only reinscribed the distinction between good and bad animals that lay at the heart of North Americans’ folk taxonomy.”¹⁴¹ These bounties continued through the twentieth century as a part of provincial law, administered by game departments and, for a long time, “constituting one of their largest ... yearly expenditures.”¹⁴² Provinces gradually moved away from a generalized bounty in favour of training government-hired men to kill predators. Scientific reports were produced by wildlife biologists that suggested the management of predator populations according to broadly similar goals as those that had been established for animals seen as useful, but the broader attitudes of society demanded that the lethal control of “bad” animals remain largely unchanged.¹⁴³ In order for the scientific suggestions to be accepted in respect of predator animals, a narrative that assigned a different moral rather than merely technical value to these species would be required.

Ecological arguments about population dynamics were insufficient to convince Canadians that bounties should cease, especially for those who lived in close contact and proximity with predator animals and experienced the effects of their competition for prey resources. “Ecology might have deemed that predators be left in peace, but human sentiments — curiosity, fear and greed — often proved equally, if not more, powerful in determining their fate.”¹⁴⁴ Sentiment, however, could also be used to turn the tide of policy in the opposite direction. In the 1960’s, the work of wildlife authors such as Farley Mowat and Bill Mason “managed to crystallize and mobilize an emerging sentimentality about predators,” especially among the urban population.¹⁴⁵ The noble conduct of Mowat’s wolves made an implicit argument for the morality of nature, and Mason’s documentaries aimed to demonstrate

138. *Ibid.* at 84.

139. Gilbert & Dodds, *supra* note 121 at 48.

140. Loo, *supra* note 116 at 152.

141. *Ibid.* at 153.

142. *Ibid.*

143. See Loo, *ibid.* at 170-72.

144. *Ibid.* at 158.

145. *Ibid.* at 152.

the values of a canine moral universe that he saw as broadly analogous to that of humans. Though they may have been guilty of significantly anthropomorphizing the wolves, these portrayals succeeded in invoking people's sympathy and helped to turn the tide of bounty hunting and attempted extermination toward a model of respectful coexistence that recognized the ecological argument that the balance of nature required a certain predatorial presence. Mowat and Mason also challenged conventional understandings of animals in general by presenting them as individuals, rather than entities subject to ownership as property. Loo criticizes this portrayal as ultimately detrimental to the realization of an interconnectedness between humans and nature, however; she argues that it served to reinforce the abstract nature of wildness by failing to locate the wolves within the bounds of a habitat or ecological community that human action could be perceived to concretely affect.¹⁴⁶

ii. Scientific Ecology

Some scientists would argue that it is a waste of time to examine historical value models in relation to wildlife, since its legal management today is clearly based upon scientific principles developed around unbiased data to produce the most objectively effective management methods. Brown explains that “[s]cience and its derivative technologies attempt to describe objectively, through an empirical methodology, facts and relationships between facts, and the laws of nature that govern the universe.”¹⁴⁷ The value of the scientific method lies in its ability to effectively evaluate the ways in which a particular environmental goal might be achieved, but it hides a corresponding danger in that the goal itself must necessarily be chosen in accordance with an ethical framework that is arbitrary in respect to the facts themselves. Brown notes the tendency of environmental scientists to analyze empirical facts within a value formula embodied in the legislation under which the research is conducted, inevitably biasing the results on a deep level. Implicit value choices include the determination of what is considered a useful object of study, what kinds of animals are worthy of having their habitat included in an environmental impact assessment, the burden of proof and level of detail required in such assessments, and even the amount of government resources to be expended on any particular project. He reminds us that “what one sees is usually a product of cultural tradition; there are no acts of pure perception that are not dependent on prior value choices.”¹⁴⁸ It is therefore disingenuous to assert that animal populations can be most effectively managed by relying on an objective assessment of bare technical data that has been separated from complicated and subjective moral assessments, because the very process of gathering and reporting that data is itself utterly dependant on a certain set of fundamental values that are taken for granted. In order to operate in the world, one must choose from among a finite number of possible actions, but it is almost always the case that the chosen path is based on a coherent vision of how the world *works* in its most basic metaphysical sense. Therefore, the “facts” themselves often defy objective analysis, both because their collection might rely on subjective assessments such as aesthetic attractiveness and because systems of scientific understanding are often no more than high-level guesses about how the world works, guesses that are based on metaphors which are constantly being developed and may or may not prove accurate when tested in

146. Loo, *ibid.* at 213.

147. Brown, *supra* note 118 at 347.

148. *Ibid.* at 348.

real-world situations.¹⁴⁹ The difficulty lies in recognizing these metaphors as such, and not just as acontextual descriptive terms.

The superiority of science-based management has itself become a narrative, one that asserts that we have made significant progress toward divorcing ourselves from a reliance on subjective and complicating value systems. The dismissal of values is problematic because an assumption that values are interchangeable fails to recognize that “values are not only subjective preferences, but also have an objective content — that is ... they are capable of being judged to be sound or unsound ... [and as to] which beliefs are morally superior.”¹⁵⁰

The scientific narrative also generates its own descriptive metaphors. Scientists “use mechanical metaphors when they talk of the environment as having energy flows, or of having nutrient or material cycles, and they employ market metaphors when they talk of investing in the environment or the decline in biological capital.”¹⁵¹ Brown identifies the modern prominence of economic terms of reference in the form of cost-benefit analysis of environmental phenomena. The very presence of multiple alternative configurations, discussed further below, ought to alert us to the fact that these data collection systems cannot serve as an unbiased reflection of reality, but too often this reality goes overlooked. Scientists in general are technically trained to restrict their analysis to qualitative issues and to “critique the mathematical model exclusively on a scientific-mathematical basis, omitting any critique of the transformation of the qualitative values into quantitative terms”¹⁵² and thereby implicitly reinforcing the value assumptions which were used to assemble that qualitative data in the first place. This approach results in overlooking significant possibilities for the improvement of accurate understanding, which is important because even if we can never reach a place of objective accuracy in respect of understanding the external universe, we cannot abandon the attempt to move ever closer to one, as discussed in the first section of this essay. For example, much early wildlife data was gathered using methods that were based on the assumption that scientific knowledge of wildlife would be directed toward enabling the sustainable exploitation of animals as a use value, whether that use was food and clothing or human sport. Thus the scientific model both relied upon and participated in the evolution of value models such as usefulness. The attainment of an objective viewpoint was a myth.

The perceived neutrality and authority of the scientific discourse provided a tempting rhetoric for the Canadian government to use in justifying policy decisions. This misconception helped to contribute to a gradual shift in the nature of governmental involvement, which began with regulatory controls and limits on numbers and types of kills and gradually moved toward a post-Confederation interventionist impulse “aimed at actively managing populations and habitats to increase numbers.”¹⁵³ The movement is demonstrated by the gradual alteration of the types of legislation enacted; Upper Canada’s first laws restricting game harvests were passed in 1829, while by 1887 acts such as the *Rocky Mountain Parks Act*, with its specific mandate for the “protection and preservation of game, fish, [and] wild birds generally,”¹⁵⁴ clearly demonstrate a more proactive role for Canadian government,

149. *Ibid.*

150. *Ibid.* at 350.

151. Feit, “Hunting and the Quest for Power”, *supra* note 60 at 104.

152. Brown, *supra* note 118 at 355.

153. Loo, *supra* note 116 at 212.

154. Gilbert & Dodds, *supra* note 121 at 87.

which had begun to take direct responsibility for maintaining and increasing certain populations and controlling others, rather than merely seeking to limit the harvest with measures such as off-seasons and bag limits. The move toward a professional, scientific and systematic model also eroded the influence of local knowledge and once again altered the assumptions about property ownership in the animals; the understanding of wildlife as a local commons managed by those who directly relied upon the animals was largely abandoned in favour of “a provincial or national commons, subject to regulations framed by a distant centralized bureaucracy.”¹⁵⁵ This conceptual framework may have also contributed to the generalized rather than specific and personal understanding of wildlife and probably helped fuel the “external wilderness” ethic discussed below. The use of the scientific models also meant that animals were often referred to in terms of populations or “factors” which could be manipulated across politically defined jurisdictions,¹⁵⁶ a linguistic model that implicitly enables an impersonal understanding which becomes clear upon critical examination.

Within the broader framework that privileges scientific analysis, several different narratives of how nature works can be observed. When compared with each other, these alternative understandings demonstrate the ultimately subjective nature of each model and help to indicate how metaphysically unfamiliar conceptual structures such as that of the James Bay Cree might conceivably function just as effectively to structure knowledge into forms that make it useful for some (also subjectively determined) purpose. Loo claims that

...beginning in the 1920s, ecologists started to move away from holistic views of the environment that explained changes in terms of evolution and toward a self-regulating “balance of nature.” They also rejected conflict, or more precisely, the Darwinian struggle for survival, as the central dynamic of the natural world.¹⁵⁷

The dominant position of the conflict metaphor was supplanted by a mechanistic view of nature as a machine functioning according to logic of economics — a system with producers, consumers, and decomposers, described in terms of a flow of energy and its carrying capacity for particular populations and levels of harvest. The concept of carrying capacity was imported from an economic style of understanding, a fact that arguably weakened the model by importing assumptions that led to the failure to take account of “social factors that might limit population size, much less of whether maximum growth was always desirable.”¹⁵⁸ Donald Worster characterizes the resulting language and attitude as “agronomic” one, in that they refer to wildlife in terms of “crops” and “yields,”¹⁵⁹ which both reinforced and was reinforced by the now-familiar understanding of nature as grounded in its ultimate usefulness to man (regardless of the changing objective of that use value). Conservation work in the far North also progressed under an economic development model, with the federally-established Canadian Wildlife Service given jurisdiction to manage local

155. Loo, *supra* note 116 at 212.

156. *Ibid.* at 212.

157. *Ibid.* at 144. Note, however, that it is only as a central dynamic that these ideas are rejected; indeed, many evolutionary understanding based on a Darwinian model exist in today's science in a broadly unaltered form.

158. *Ibid.* at 145.

159. Donald Worster, *Nature's Economy: A History of Ecological Ideals*, 2nd ed., (New York: Cambridge University Press, 1994) 291 at 312.

populations — a further example of discrediting the knowledge of local hunters in favour of centralized bureaucratic management.¹⁶⁰

Scientific understandings could also be employed by recreational hunters to advance the official recognition of their goals for wildlife. Conservation organizations such as Ducks Unlimited Canada arguably owe much of their past success to the fact that they justified their operations with assertions based upon a mainstream contemporary view of the environment: “[a] wetland was ‘a factory without a roof,’ a unit of production that could be managed scientifically to maximize outputs for the recreational benefit of urban hunters.”¹⁶¹ Negative attitudes toward predators could also be justified with reference to the economic model of animal ecology by “casting wolves, coyotes and cougars as ‘limiting factors’ that required human management.”¹⁶² Opponents of predator bounties, however, could also turn to science for a justificatory narrative, such as “the metaphor of the natural world as a ‘community’ of organisms, each with its own role and niche, linked to each other through the food chain.”¹⁶³ Again, the availability of competing narratives within the scientific discourse perhaps should have served as a more obvious red flag to those who championed the movement based on its supposed attainment of objectivity.

The “community of organisms” description was both informed and developed by a movement toward a more holistic understanding of how ecosystems operated, one that involved a shift in focus from conservation of individual animal populations to the protection of integrated ecosystems as they had developed in geographically distinct areas (which might or might not have any correlation to political borders). This recognition contributed to another shift in legislative style, as the government retreated from the heavily interventionist position which had seen its agencies managing specific population numbers in artificially delineated areas, such as parks, toward a non-interventionist policy that Loo feels gained full expression in the 1980s.¹⁶⁴ In order to preserve healthy ecosystems, modern protective legislation seeks to protect animals, such as endangered species, “regardless of how ‘useless’ they may be in the sense of failing to provide economic benefits to man;” thus, contemporary wildlife law is broader than much of that which existed in the past, in that ecosystem management is governed not by economic considerations but the “scientifically-based goal of optimum sustainable population defined as the maximum population of a species that can be maintained consistent with preserving the integrity of the ecosystem.”¹⁶⁵ The underlying value of animals as human use factors had shifted in favour of an acknowledgment that even predator “vermin” might have a role to play in a balanced and integrated ecosystem, and even the idea that animals, whether predator or prey, might possess an innate value in their own existence. It is interesting to note that these beliefs developed at the same time that Christian religion lost much of its hold over the popular imagination. Scripturally-based understandings like Jack Miner’s lost ground to arguments such as those implicitly made in the growing body of wildlife literature that described animals as individuals with inner moral lives very similar to those of humans. Good/evil animal taxonomies were also eroded by the realization that concepts of “usefulness” like

160. Loo, *supra* note 116 at 128.

161. Loo, *ibid.* at 193, quoting term from Richard Rajala, “The Forest as Factory: Technological Change and Worker Control in the West Coast Logging Industry, 1880-1930” (1993) 32 *Labour/Le Travail* 73.

162. *Ibid.* at 155.

163. *Ibid.*

164. *Ibid.* at 148.

165. Linder, *supra* note 128 at 164.

Miner's are unjustifiably anthropocentric, a shortcoming which became obvious with the advance of alternate criteria of usefulness, e.g. to other animals or in the broader ecosystem.¹⁶⁶ Hunter notes the intersection of this recognition with traditional Aboriginal understandings: "many philosophers have argued that the environment deserves our respect and protection for its own sake, independent of any benefit humans derive from it ... other living things — and even the systems those living things are a part of — possess intrinsic value, which humans have a duty to respect. While this view has not received widespread acceptance in the law, it reflects views held by many aboriginal groups."¹⁶⁷ Another structural understanding of evolution also developed in accordance with these new conceptions: rather than arranging species in a hierarchical construction like a pyramid, evolution could be understood to function more like a sphere. "As the points on the surface of a sphere are equidistant from the center, all forms of life have evolved an equal distance from their origin. The idea that evolution constitutes an order that has culminated in man is a religious conception, not a scientific one."¹⁶⁸ Like all scientific metaphors, this one both reinforced and was reinforced by its parallel moral understanding. It is important to note that these metaphors have not replaced one another in a linear process: their degree of objective accuracy is a matter of ongoing debate and while certain formulations move into and out of general acceptance, there is invariably more than one plausible alternative available at any given moment; similarly, many of the models this essay describes continue to exist alongside one another in some form. The myth of the "big bad wolf" still exists to a degree in the popular imagination, if no longer as an uncontested social reality.

iii. Wilderness Aesthetic

Ideas of an integrated ecological community also fed back across a more strictly aesthetic understanding that paralleled and in some ways informed the goals of the scientific management movement. Historical understandings of wildlife and nature as "other," as described above in Cronon's work, are linked with the colonial idea of Canada as empty, as a pristine wilderness with a certain intrinsic "wildness" value. Though its emergence may have led to the ultimate preservation of certain animal populations, "conservation was not a politically neutral and principled effort to preserve living things but was intimately associated with the civilizing ideology of the late colonial period in Canada."¹⁶⁹ Sandlos argues that government preservation efforts, especially those associated with northern herd animals like bison and caribou, were the product of "an aesthetic and technical and thus antisocial and nonrelational ... idea of landscape as a wilderness, as resource producing factory, and as elemental North."¹⁷⁰ The scientific mode of discourse provided a convenient set of objectively framed goals that could be utilized in policy discourse, rather than acknowledging that conservation was informed by a national idealism that understood wilderness as an idealized aesthetic object, one that could be contrasted to traditional native relational styles of understanding which were largely necessitated by Indigenous hunters' reliance on the animals with which they live as a major source of their food, clothing and tools.

166. Loo, *supra* note 116 at 83.

167. David Hunter, James Salzman, & Durwood Zaelke, *International Environmental Law and Policy*, 3rd ed. (New York: Foundation Press, 2007) at 105.

168. Linder, *supra* note 128 at 172.

169. Sandlos, *supra* note 127 at 6.

170. *Ibid.* at 6.

The story of pristine emptiness, especially in the far North, has been utilized by politicians such as Diefenbaker, with his Northern Vision of the upper latitudes as Canada's commons, waiting to be tapped for its natural resources.¹⁷¹ Alongside and sometimes in conflict with this story, however, were ideas of management and conservation that developed based on the ethical relationship between people and nature — ones which did not require a human use value in order to make something worth protecting. The latter understanding may have gained its first expression in the bourgeois search for authentic experiences in the form of an encounter with the primitive, as a reaction to the stresses and limitations of a civilized modern life, the hunt perceived as an opportunity to regain a primeval masculinity.¹⁷² Loo specifically identifies a backlash against the ideology of efficient use as “socially and spiritually debilitating,” in favour of an anti-modernist reverence for the natural world.¹⁷³ This criticism of use value, of course, is disingenuous; the sport hunt and wilderness tourism used animals for human benefits just as the subsistence hunters did, despite the different methods and values. Wilderness tourism, at least, contained the seeds of a certain reverence for the innate aesthetic values of wild territory and animals. The narratives surrounding both these activities, to the extent that they existed at the relevant times, also contributed to the establishment of such conservation measures as national parks and closed seasons on hunting for certain types of game.

According to Sandlos, “the bureaucratic movement to protect wildlife in Canada was flexible enough to accommodate both the antimodernist desire to preserve wildlife as the most visible remnant of an authentic but fading wilderness and the modern faith in bureaucratic management as a means to cultivate and manage wildlife populations for recreational and commercial purposes.”¹⁷⁴ He cites a 1965 Canadian Wildlife Service publication on the agency's caribou conservation program, which not only made technical arguments for preservation but utilized aesthetic rhetoric to describe the tundra as “a land of awesome, naked distance, where the grandeur of the empty land dilutes the mind's ability to comprehend.”¹⁷⁵ The federal government thereby justified its restrictive northern wildlife policy regime

as much by an appeal to the aesthetic of a pure and uninhabited nature as ... by a scientific demonstration of objective circumstances. Indeed, the obvious shortcomings of the early biological work on caribou and wood bison populations left biologists with little choice but to construct a crisis in their prose and photographs by juxtaposing images of native “slaughter” of wildlife with those of undefiled bison and caribou herds that could only be saved by the rational hand of state management. In the end, what was being “saved” was as much the appearance of a benevolent state acting in the interests of a pristine nature as a viable population of herd animals. The association of federal wildlife policy in the North with an uncorrupted and inviolate nature thus provided the necessary

171. Loo, *supra* note 116 at 127.

172. *Ibid.* at 30, 33.

173. *Ibid.* at 30.

174. John Sandlos, *Hunters at the Margin: Native People and Wildlife Conservation in the Northwest Territories* (Vancouver: University of British Columbia Press, 2007) at 11 [Sandlos, *Hunters at the Margin*].

175. Fraser Symington, *Tuktu: The Caribou of the Northern Mainland* (Ottawa: The Queen's Printer, 1965) at 24-25.

moral impetus for the extension of bureaucratic control and scientific management within the region.¹⁷⁶

In the above excerpt, Sandlos notes how the Native presence was ideologically managed in those instances when it became necessary to admit that the wilderness was not, after all, devoid of human presence; Indigenous hunters were either cast as engaging in wasteful slaughter driven by a primordial bloodlust, or as former inherently conservationist “ecological Indians” who had since been corrupted by the influence and technology of the white man. Either way, “the presence of unruly Native hunters in Canada’s hinterland regions was inimical to the implementation of modern and scientific wildlife management intended to produce a useable surplus of wild game,”¹⁷⁷ and to the continuing existence of the unspoiled wilderness.

The common thread among these implicit narratives, as noted above, is their broad distinction between nature and culture: their location of the human as external to the natural. Cronon argues that this understanding is problematic because it allows people to avoid taking responsibility for the ways in which their actions help or harm these deified yet ultimately foreign natural landscapes.¹⁷⁸ What is needed in order to enable genuinely effective conservation (which many people would agree is an ethically superior legal goal) is a sense of connectedness in which people “see themselves as part of a larger ecological whole.”¹⁷⁹ Aldo Leopold suggests a need for the development of a “land ethic” that would recognize that humans, too, are a part of an ecological community and must “govern their actions ... in a less anthropocentric way, and one that value[s] the integrity of the whole community over the welfare of any one part.”¹⁸⁰

Cronon and Leopold did not invent this narrative possibility; it can be found developing through Canadian history. As noted above, popular wildlife fiction like Mowat’s *Never Cry Wolf* helped to convince people to care about wildlife — even traditionally vilified species — by anthropomorphizing them as human-like moral beings rather than as vermin or as property subject to ownership. Though personification may have been a necessary first step toward bridging the gap between self and wild other, critics dismiss it as ultimately ineffective due to its failure to locate the animals as part of an intimately connected world which daily human life could be understood to affect and be affected by. The “wild” was still precisely that: an external aesthetic reference with little daily relevance.

Andy Russell and Tommy Walker, twentieth-century wilderness-guides-turned-activists, serve as examples of the possibilities for further development of the story of human relatedness to nature. For Walker, living in the wilderness promoted an ethical way of life by visibly demonstrating the consequences of one’s actions and necessitating cross-cultural connections for survival; “[p]reserving nature and attending to one’s relationship with it was thus a way of cultivating better dealings with other people.”¹⁸¹ Andy Russell filmed a documentary on the grizzly bear, emphasizing the animal’s role in the ecosystem and re-

176. Sandlos, “From the Outside Looking In”, *supra* note 127 at 23.

177. Sandlos, *Hunters at the Margin*, *supra* note 174 at 12.

178. Cronon, *supra* note 133.

179. Loo, *supra* note 116 at 207.

180. *Ibid.* at 156, referring to Aldo Leopold, “Thinking Like a Mountain” in *A Sand County Almanac, with Essays on Conservation from Round River* (1949), reprinted in (New York: Ballantine Books, 1970) and Aldo Leopold, *Game Management* (1933) reprinted in (Madison: University of Wisconsin Press, 1986).

181. Loo, *ibid.* at 201.

relationships with other animals and its habitat and ultimately expressing that wildlife can get along without humans, but not vice versa. “[W]hat Russell was asking people to do ... was make biological values a part of the decision making about land use and allocation.”¹⁸² He believed that an attitude of superiority and God-given dominion, and the fear which he saw as ultimately responsible for measures like predator bounties, were equally damaging to the possibility of advancing a healthy and mutually beneficial relationship with nature.¹⁸³ For both Walker and Russell, the emphasis was on experience: a genuine respect for nature would require that people actually live in it, which would in turn necessitate making certain kinds of use of natural resources (vastly different types of uses, however, than the ones undertaken by distant city-dwellers caught in the tension between seeing nature as pristine vastness or a resource factory). Pragmatic use of immediate natural resources and participation in the natural world would erode the nature/culture duality and promote social integrity along with environmental integrity. “Acknowledging and incorporating human needs and values in conservation ... would clarify their choices and their implications. Moreover, acknowledging that conservation has and should serve human interests would highlight the extent to which nature and culture are interconnected, and diminish the alienation that is the cause of so much environmental destruction.”¹⁸⁴

C. Modern Implications

Canadian hunting and wildlife law has evolved through the years to keep pace with changing social normative understandings. When wildlife was valued exclusively as a source of food and clothing, only those species whose flesh was eaten or fur was worn received protection under the law. As wildlife came to be seen as a source of recreation or amusement, as aesthetic symbols, as objects of ethical concern, or as part of a complete ecosystem, the number of species protected under the law went from a handful to thousands. Thus, the choice of species protected by law is influenced by the values society attaches to wildlife.¹⁸⁵

The importance of subjective assessment persists in a modern context. The degree of protection provided for any particular species is largely determined by where it falls upon the above scale of values. Thus, Hein argues, pets and livestock animals enjoy similar protections to other types of personal property, game animals are subject to provisions designed to sustain desired annual yields, animals that play a symbolic role in the human imagination will be broadly protected and species that are understood less in terms of intrinsic human benefit and more according to the value of their role in ecosystem diversity and maintenance are protected only when their numbers have been sufficiently depleted to jeopardize this presence.¹⁸⁶ Concrete legislative changes, however, have been and will continue to be made as our social values evolve; the former BC Department of Fish and Game’s transformation into the Department of Fish and Wildlife¹⁸⁷ is one small example of the broader historical policy shift from recreational values to environmental ones and is a clear indication that the government is at least partially conscious of the practical importance and implications of the Canadian people’s subjective understanding of such abstract concepts.

182. *Ibid.* at 205.

183. *Ibid.* at 206.

184. *Ibid.* at 214.

185. Linder, *supra* note 128 at 169.

186. *Ibid.* at 175.

187. Loo, *supra* note 116 at 210.

IV. INTERSECTIONS & IMPLICATIONS

The contention that genuinely effective wildlife management will require a practical understanding of the idea that man is intimately connected with the natural world seems suspiciously parallel to the worldview of the James Bay Cree, who understand themselves as subject to the same external forces as the animals which they rely on to serve their needs and interact with as part of interconnected relational world. Russell's admiration for the grizzly bears he filmed, a respectful acknowledgment of the power of these top-level predators, is much closer to the sacred yet still utilitarian relationship between the Cree and the bear than to the revulsion and fear of early settlers who saw them as evil vermin to be destroyed, or to the city-dweller's anthropomorphized idealization of an animal he had never encountered. Russell's understanding, like the Crees', relied upon a respectful mode of coexistence that recognized humans and animals as part of the same ecosystem, where the actions of one species would inevitably affect both the other and itself. Walker strongly believed that living in nature — experiencing it — was the best way to live a truly moral human life. The emphasis on experience is paralleled by the reports of contemporary Cree, who often report that leaving the settled reserves for a life in the bush, even temporarily, leads to a sense of empowerment and self-worth, as well as a practical understanding of the impacts of each of their choices, and revolutionizes both their relationships with others and their own self-understandings. Russell argued that in order for people to ensure their future, they would have to recognize that it was “tied to that of all other associated forms of life.”¹⁸⁸

Given their similarities, there would seem to be a strong possibility that understandings like Walker and Russell's were influenced by contact with Native ideas. Neither spent time among the James Bay Cree, but many other Indigenous societies have similar understandings of the natural world. Walker spent much of his time in the company of the First Nations whom he employed in his guiding business as guides, cooks and wranglers, and relied on them for both their local ecological knowledge and their companionship.¹⁸⁹ If modern arguments for an integrated wildlife ethic have indeed been inspired or influenced by Native understandings, arguably this result could serve as an example of the improvement of Western ideas via the incrementally progressive understanding of metaphysically foreign cultural concepts argued for in the first section of this essay.

Even if it is not the case that Walker and Russell's understandings were enabled by a progressive process of developing metaphysical understanding of other cultures — that is, if these understandings were available to us all along — the fact that post-colonial Canadian culture is drawing on First Nations ideas for the improvement of wildlife law in both moral and practical terms would seem to validate the argument that other cultures, especially those which have arrived at fundamentally different normative and metaphysical understandings from our own, provide rich opportunities not only for the conscious consideration of previously unrecognized alternative moral choices but also for the opportunity to objectively improve our own moral position. Whether or not a genuinely objective moral state of perfection actually exists, the process of continually striving to better our society in pursuit of this goal is essential to the continued justice and relevance of law and government.

188. Andy Russell, “What is Wildlife Management?” in Andy Russell Fonds, Whyte Museum, M153, file 232.

189. Loo, *supra* note 116 at 195.