SOSC 4365 - Assignment Guidelines - Debate #1
10% of overall grade

What is this assignment?

This assignment is a debate. It is partially based on a real-world dispute and draws extensively on subject matter covered in this class.

You can choose to be a debater (option 1 explained below) or watch / read the debate and submit an essay-length written response afterwards (option 2 explained below).

What are we debating?

This is a fictional case based on a real-world dispute over the annual deer hunt that takes place in South Hills Provincial Park near St. Catharines, Ontario. The actual dispute concerned activists who wanted the deer hunt prohibited on the basis of protecting animal rights and members of the Haudenosaunee Confederacy who wanted the deer hunt to continue on the basis of their established treaty rights.

Although the government of Ontario chose to continue the deer hunt, this fictional case asks the question: what if the government had not done so? Or, to put it another way, what if the government had said that the deer actually had a right not to be hunted?

On this basis, the fictional case raises questions about: the proper application of treaty rights to animal- and nature-related issues; the scope of the "right" to be free from "unnecessary" pain, suffering, and injury; and whether or not that "right" should be applied across cultures.

The full scenario can be seen here.

Option 1: Participating in the Debate

Your team is encouraged to use what we have learned about the fundamental framework of Canadian animal law (Unit 3) and Indigenous perspectives on animals in law and society (Unit 4) to support your side. The basic arguments for both sides are already explained in the scenario, so you should use the live debate to strengthen what you see to be the best parts of this argument using what we have learned in this class (e.g., case law / precedent, legal concepts, moral reasoning, etc.) and to counter the argument presented by the opposing side using similar resources.

Remember, you don't need to choose a side that reflects your actual position – although you can do so, it is also a worthwhile exercise to explore the "opposing" point of view in a structured debate setting.

Moreover, keep in mind that "winning" does not have to be clear-cut. If it seems like your opponent has the upper hand during the debate, your best bet would be to limit the extent to which they get what they ask for. For example, one side's arguments may be accepted, but the other side may argue persuasively for a *remedy* that appears to be more of a "compromise."

If you want to participate in the debate on Tues. Dec. 6th, please sign up for a side here before the end of the day on Mon. Nov. 21st.

During our synchronous class on Nov. 22nd, time will be set aside for you to speak with your teammates in your own Zoom breakout room. That said, I recommend that you also do some advance prep in your team's forum (or elsewhere) before the date of the debate itself to determine what arguments might you advance, what readings or concepts you think will be important, and who will be speaking for various stages in the argument your team presents.

Our debate will be in our Zoom "courtroom" during our regular synchronous time on Dec. 6th.

We will follow this structure:

1. Opening Arguments
    a. Each team will have 10-15 minutes in their breakout rooms to determine what their primary arguments are. I recommend nominating a few people to present these.
    b. Presenters for each team will share their arguments in the main Zoom courtroom.
    c. Listen carefully to what the other side is saying so that you know what arguments of theirs you will need to rebut.
2. Rebuttals and Extensions
    a. Each team will have 10-15 minutes in their breakout rooms to determine how they would rebut the other team's claims and/or improve their own argument in light of what the other team has argued.
    b. Presenters for each team will share their rebuttals and extensions in the main Zoom courtroom.
3. Summation
    a. Each team will have 10 minutes to prepare "closing statements." These will be the parts of your argument you think are strongest.
    b. Presenters for each team will share their summation in the main Zoom courtroom.
4. Ruling

a. As part of our "debrief" afterwards, we will collectively consider possible judgements on the four questions posed to the Court:
    i. Has the Haudenosaunee Confederacy's right to hunt under the Nanfan Treaty been unjustifiably infringed upon by the Minister's decision?
    ii. Does *Criminal Code* s. 445.1 provide a legal basis for generally prohibiting the hunting of deer in the South Hills Provincial Park?
    iii. Does *Criminal Code* s. 445.1 apply to members of the Haudenosaunee Confederacy specifically?
    iv. Based on the points above, what remedy should this Court provide?

Please submit a reflection paper of 500 - 700 words afterwards (suggested submission date: Dec. 13th) to help the course director assess your performance.

This short paper should indicate what you contributed to your group, as well as an indication of what the strongest arguments presented were (based on either your own group's contributions or your after-the-fact reflection on other points raised). Regular essay grading criteria will apply; however, "style" is determined by any oral contributions you make, records of how you have contributed to your group, etc.

Option 2: Being "the Judge"

If you are not participating in the synchronous session, you will need to write a paper of 1500-2000 words where you are "the judge." You are, in effect, the judge answering the questions raised under "the Ruling" above.

Your paper is a 1500-2000 word write-up that indicates what determinations you would make based on the arguments presented.

If you attend the debate, your paper can consider the oral arguments presented. Remember that you should analyze the arguments / evidence and not the participants themselves (e.g., commenting on "the Applicant's characterization of s. 2(b)" and not "Johnny's rant about freedom of expression").

If you do not attend the debate, your paper will have to simply consider the arguments presented in the full scenario write-up and what you have learned from course materials or outside research. Remember, this should not be your personal opinion, but rather your assessment of the arguments / evidence presented.

Format guidelines are identical to regular essays for this class. Grading guidelines are similar insofar as this will be assessed on content comprehension, reasoning and argumentation, and style.

The suggested submission date for this assignment is Dec. 13th.

Important Policies

Submission of Assignment

Assignments should be submitted through the TurnItIn portal provided on eClass. If an alternate method of submission is necessary, it is your responsibility to ensure the assignment has been received. In normal circumstances, your assignment will be graded on eClass and returned there, as well.

As a general rule, late penalties will not be applied. However, the course director reserves the right not to accept late work or to accept it with a penalty of a letter grade reduction to the assignment in cases of extreme lateness.

Academic Honesty

In this course, we strive to maintain academic integrity to the highest extent possible. Please familiarize yourself with the meaning of academic integrity by completing SPARK's Academic Integrity module at the beginning of the course. Breaches of academic integrity range from cheating to plagiarism (i.e., the improper crediting of another's work, the representation of another's ideas as your own, etc.). All instances of academic dishonesty in this course will be reported to the appropriate university authorities, and can be punishable according to the Senate Policy on Academic Honesty.

For those adjudicating the LA&PS Writing Prize:

Please note that the instruction on page 3 regarding the word count was *explicitly provided to students as a guideline only*.

The length of this student's assignment was accepted by me without issue.

AP/SOSC4365 B - Animal Rights: Examining Socio-Legal Claims for Animal Justice

(Full Year 2022-2023)

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Student number: 217735846

Debate #1:

BETWEEN:

THE HAUDENOSAUNEE CONFEDERACY APPLICANT

- and -

THE MINISTER OF NATURAL RESOURCES RESPONDENT

Course Director: Professor Tyler Totten

York University

Debate #1

Under the Nanfan Treaty signed in 1701, the Haudenosaunee Confederacy surrendered most midwestern United States and southern Ontario regions to the British Crown. These areas include the South Hills Provincial Park. Thus, the Crown acquired the right to assert its interests in the surrendered lands. However, in exchange, the Haudenosaunee Confederacy would always have the right to use surrendered lands in a specific way, which includes continued use of their traditional hunting grounds in the South Hills Provincial Park. The Nanfan Treaty describes this use as the right to free hunt without disturbances. However, the Ontario Minister of Natural Resources and Forestry ("the Minister") issued a blanket prohibition on deer hunting in provincial parks prior to the start of the regular hunting season in the South Hills Provincial Park for directly responding to the anti-hunt demonstrations. This prohibition caused the Haudenosaunee Confederacy and its members to claim that their Treaty right to hunt in the traditional hunting grounds covered by this park would be adversely affected by the Minister's prohibition. Therefore, the Haudenosaunee Confederacy applied for a judicial review of the Minister's decision to ban hunting. The disputes between Haudenosaunee Confederacy and the Minister centred on three issues:

(1) Does The Minister's decision violate the Haudenosaunee Confederacy's right to hunt? This issue involves the conflict and balancing process between the Crown's right to use the land for its own purposes and the Haudenosaunee Confederacy's Treaty right to hunt. The latter had been recognized and affirmed by the Constitution Act, 1982, s.35(1).

(2) Does the legal basis for the prohibition on deer hunting, Criminal Code s.445.1(1)(a), apply to all deer hunting activities and exclude all possible exemptions? This question requires consideration of whether the traditional hunting activities of members of the Haudenosaunee

Confederacy would contribute to the “unnecessary pain, suffering and injury” prohibited by s.445.1(1)(a).

(3) Does Criminal Code s.445.1(1)(a) apply specifically to members of the Haudenosaunee Confederacy instead of the members of other communities? This question concerns whether the plaintiff can rely on a system free of stereotypes and a judiciary whose impartiality is not affected by certain biased assumptions.

Next, this Court analyzes and assesses the arguments and evidence presented by the Haudenosaunee Confederacy and the Minister on these three issues. The remedies would also be provided based on considering all factors.

First, this Court rejects the Haudenosaunee Confederacy’s argument for unfettered rights and agrees with the Minister’s argument that the Crown can limit the right to hunt when it asserts its “right title interest.” However, this Court believes that the prohibition violates the right to hunt of the members of the Haudenosaunee Confederacy. The reason is that the Minister, as a state actor, failed to fulfil the duty to consult with the members of the Haudenosaunee Confederacy and to provide appropriate accommodations before issuing a prohibition.

Specifically, Aboriginal and Treaty rights cannot be unfettered. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005)*, Binnie J. stated that the fundamental goal of the modern law of Aboriginal and Treaty rights is to reconcile the different and even conflicting claims or interests between Aboriginal peoples and settlers (para. 28). Thus, the interpretation of treaties must reflect the real intent of both parties instead of only the intent of the First Nations (Mikisew, 2005, para. 28). Similarly, in *R. v. Marshall* (1999, para. 14), the majority indicated that the Court is obliged to choose the interpretation that can best reconcile

the interests of the First Nation and the British Crown from among the various possible interpretations of the common intent of the Treaty-making. Thus, the rights need to be restricted depending on the specific context to some degree in order to achieve the purpose of the Treaty-making—consultation.

Moreover, Binnie J. identified three inherent qualifications of Aboriginal and Treaty rights, including the restrictions of geography, specific forms of government regulation and the Crown's right to take up land under a Treaty (Mikisew, 2005, para. 56). In the current case, the Haudenosaunee Confederacy's right to hunt would be limited by a deer hunting prohibition, which falls under the second qualification described above—the restriction from a specific form of government regulation. Correspondingly, the Crown's rights are subject to the duty to consult with Aboriginal people to accommodate their interests adequately (Mikisew, 2005, para. 56). Also, this duty must be fulfilled by the Crown before it would reduce the areas where Aboriginal members can continue to exercise their rights to hunt, trap and fish (Mikisew, 2005, para. 56). Thus, for the Nanfan Treaty, while the Crown's right to assert its interests in surrendered lands may limit the Haudenosaunee Confederacy's right to hunt, it must be predicated on the realization of the process of proper consultation.

In addition, although the duty to consult is not explicitly written in clauses of the Treaty and may be challenged, Binnie J. in *the Mikisew case (2005)* had identified the "procedural rights" of Aboriginal people involved in the consultation as a kind of implied clause (2005, para. 44 & 50). Binnie J. pointed out that the basis of this duty is the honour of the Crown, and the honour of the Crown itself is a fundamental concept governing the interpretation and application of treaties (Mikisew, 2005, para. 51). This argument is also supported by other related cases. For

instance, in *Province of Ontario v. Dominion of Canada* (1895), the majority mentioned that the honour of the Crown is pledged to the duty to Aboriginal peoples, and the minority also does not question this view (pp. 511-512). In *R. v. Sparrow (1990)*, *Delgamuukw v. British Columbia (1997)*, *Haida Nation v. British Columbia (Minister of Forests)(2004)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004)*, the Crown's honour was considered a core principle in addressing the consultation claim from Aboriginal people. Even from a realist point of view, Aboriginal people deserve the Crown's honourable conduct because they have paid a huge price. In the current case, the price of the Haudenosaunee Confederacy was to surrender much of their territory to the Crown in the midwestern United States and southern Ontario. Binnie J. called this large-scale land exchange "a hefty purchase price" (Mikisew, 2005, para. 52).

The duty to consult implicitly in the Treaty has been further recognized in subsequent treaty cases. In *the Haida Nation case (2004)*, the Supreme Court of Canada elucidated that there is a duty on the Crown to consult with and to provide possible accommodation to First Nations (MacIntosh, 2015, p. 201). It also clarified when that duty could arise. The Court noted that this duty would be triggered when the state or judiciary recognizes the existence of an Aboriginal right and when the Crown should have known that an Aboriginal right might exist and have considered taking action that might adversely affect it (MacIntosh, 2015, p. 201). In the current case, the Minister has recognized the right to hunt and the application of the Treaty to this park. Also, hunting is an important traditional way of life and a source of food for Aboriginal people, which is a well-known reality. It gives this Court reason to believe that the Minister can foresee the adverse effects of Aboriginal people's right to hunt from the deer hunting prohibition.

Therefore, the Crown's duty to consult was triggered when the Minister planned a proposed prohibition.

Furthermore, this Court does not support the Minister's argument against the Haudenosaunee Confederacy's claim that there was no proper consultation. According to the evidence provided by the Minister, she had been conducting community discussions for months about what forms of hunting activities the area often includes and what influences those activities on the park's wild animals have. Participants included hunters, animal rights activists and other community members. Indigenous communities were also one of the numerous groups that the Ministry of Natural Resources and Forestry had publicly consulted. However, these practices did not meet the specific requirements of the duty to consult with honour. As the Court in *the Delgamuukw case (1997)* (para. 186) noted, the consultation must be in good faith and substantially address Aboriginal concerns, which would go much deeper than a mere consultation; sometimes, consultation even requires the full consent of the Aboriginal people, especially when hunting and fishing regulations are involved. Similarly, McLachlin's spectrum-based concept in *the Haida Nation case (2004)* (Mikisew, 2005, para. 62) emphasized and distinguished the different degrees of consultation required to address different situations. Consultation, therefore, cannot be understood as merely a rigid action or process. Conversely, it should be placed in a specific context to be approached case-by-case in order to achieve the overall goal of the modern law of Aboriginal and Treaty rights—reconciliation. Accordingly, given the clear and established adverse effects of the hunting prohibition on the traditional way of life and access to food for members of the Haudenosaunee Confederacy, the Minister's open consultation approach are not enough to achieve a meaningful consultation process. In other

words, the public or community discussions did not substantially address the Aboriginal concerns, could not correctly deal with the relationship between the parties, and failed to advance the overall process of reconciliation.

However, what is a meaningful consultation process? Combining the arguments of Judge Binnie in *the Mikisew case* (2005, para. 64) with the suggestions of Judge Finch in *Halfway River First Nation v. British Columbia (Ministry of Forests) (1999)* (paras. 159-160), this Court concludes that a meaningful consultation process should consist of three stages. The first stage is the provision of information. That is to say, the Minister should provide the Haudenosaunee Confederacy with the necessary information in a timely manner, which includes the adverse effects on treaty rights that the Minister can anticipate from the proposed action. The second step is to solicit and listen to Aboriginal peoples' opinions once they have the information. Finally, the Minister should consider the Aboriginal peoples' representations about their interests and concerns seriously and include them in the proposed action plan. In the current case, the Minister simply placed the Haudenosaunee Confederacy on the same footing as non-Aboriginal groups in the discussions and failed to include the adverse effects brought by the hunting prohibition on First Nations in its considerations. The consequence of the public discussions also shows no intent to address the concerns of Aboriginal groups. Therefore, the public discussions, as a reconciliation form claimed by the Minister, never reached any of the above consultation stages and cannot be considered meaningful and seen as having an intent of reconciliation.

In sum, this Court held that as a state actor, the Minister did not fulfil the Crown's duty to consult before deciding to infringe on the Aboriginal and treaty rights protected by the Constitution Act, 1982, s.35(1). It is inconsistent with the honour of the Crown. The lack of

consultation would violate the Haudenosaunee Confederacy's right to hunt. As Binnie J. in *the Mikisew case (2005)* said, the treaty rights include both procedural rights, namely consultation, and substantive rights, namely, the right to hunt, fish, and trap; if the procedural duty is violated, the substantive duty is also necessarily violated (para. 57). Conversely, the Haudenosaunee Confederacy would not have veto rights over the prohibition if there was a reasonable consultation process. That is to say, the Minister can argue that the Haudenosaunee Confederacy is not entitled to a particular outcome of the consultation. As emphasized in *the Haida Nation case (2004)*, consultation does not always cause accommodation, and accommodation may or may not lead to a consensus (para. 66).

Therefore, this Court would quash the Minister's prohibition on deer hunting.

Second, although quashing the Minister's prohibition means that this case no longer involves a dispute over the application of Criminal Code s.445.1(1)(a), this Court still provides a brief analysis. This Court agrees with the position based on Criminal Code s.445.1(1)(a) of animal rights activists and the Minister, which is that animals have a legally recognized right to be free from unnecessary pain, suffering, and injury caused by hunting. However, this right of animals is not absolute. In other words, the application of Criminal Code s.445.1(1) (a) does not have universality and needs to be judged based on different contexts.

Specifically, in *R. v. Ménard (1978)*, Lamer J. A. identified two key factors for whether an act would lead to unnecessary pain, suffering, and injury prohibited by anti-cruelty law, including the materiality and necessity of the suffering; the proportionality among the suffering and the purpose (pp. 460-461 & 465). According to *R. v. Linder (1950)*, *Ford v. Wiley (1889)* and *Swan v. Saunders (1881)*, Lamer J. A. summarized that the suffering prohibited by anti-cruelty law

must substantially involve cruelly abusing or tormenting (Ménard, 1978, p.461 & 462). Thus, if a behaviour merely involves the infliction of suffering, it might not be enough to constitute cruelty in the legal sense. Also, the quantification of pain and suffering is only one factor in measuring the necessity; necessity is also related to the ends sought and the means adopted by the behaviour (Ménard, 1978, p.464 &465). That is to say, Lamer J. A. argues that pain, suffering and injury can be necessary as long as the pain, suffering and injury inflicted on the animal is proportionate to the human ends. For example, Lamer J. A. indicated that sometimes it is necessary to make animals suffer for animals' interests or to save human lives (Ménard, 1978, p.464).

In addition, the Minister's testimony shows part consistency with Lamer J. A.'s arguments above. The Minister acknowledges that it is acceptable to kill wild animals when dangerous wild animals cannot be safely removed from population centers or when there are too many animals to cause environmental problems. The Minister also emphasizes that the means of killing wild animals must cause the least possible suffering to the animals, such as the painless euthanasia adopted by the Ministry of Natural Resources and Forestry. This Court finds that the Minister legitimizes the euthanasia of wild animals by emphasizing the nature of the Ministry of Natural Resources and Forestry's actions themselves and the proportionality between its purposes and the mean employed. However, based on the contrast between euthanasia and the traditional hunting approaches of the First Nations (bows and arrows) and the practices of other public members (regular guns), the Minister argues that all hunting in the park would cause unnecessary suffering to the animals. This Court cannot agree with this argument because the Minister neglects to assess the nature of the traditional hunting approaches of the First Nations and the

proportionality between the ends and the means when he suggests that all hunting activities are illegal. Thus, the Minister's arguments for euthanasia and the traditional hunting of the First Nations are clearly based on two different assessment criteria and are thus unreasonable.

Moreover, this Court, based on the criteria established by Lamer J. A. in *the Ménard case (1978)*, held that the Haudenosaunee Confederacy's hunting activities do not constitute prohibited conduct under Criminal Code s.445.1(1)(a). That is to say, it is unreasonable to confuse the traditional way of life of the First Nations with hunting for recreational purposes by the general public. The reason is that while both Aboriginal hunting and deer hunting by the general public can cause pain, suffering and injury to wild animals, the former clearly does not constitute legal cruelty. In other words, in addition to the purpose of maintaining the ecological balance described in the testimony, the ends of the Aboriginal hunting activities include the well-known purposes of obtaining food and passing on their traditional culture. Besides, the evidence submitted by the Haudenosaunee Confederacy highlights that hunting is a traditional practice that predates the arrival of Europeans, European laws or European ideas of wild animal management. The Minister also recognizes the long history of Aboriginal hunting in her testimony. Thus, the nature of such traditional practice is clearly not for seeking cruelty, thereby not having cruelty in the legal sense. Also, this Court cannot assert that the ends and the means are disproportionate because the Minister has not provided evidence that the Haudenosaunee Confederacy has other reasonable alternatives to replace traditional hunting to achieve its hunting ends.

In contrast, the hunting activities of the general public are for sensory pleasure through the process and result of killing animals. These activities are based on cruel and violent acts and

purposes, thereby being bound to inflict pain, suffering, and injury on animals. In other words, they are cruel for the sake of cruelty. As far as the recreational purpose of hunting is concerned, the general public can easily choose other recreational activities to achieve the same result of physical and mental pleasure. As a result, the pain, suffering, and injury caused to animals by general public deer hunting are unnecessary.

Therefore, this Court held that Criminal Code s.445.1(1) (a) does not apply to the Haudenosaunee Confederacy's traditional hunting activities but must apply to deer hunting by the general public for recreational purposes.

Third, Criminal Code s.445.1(1) (a) is rarely about protecting animal rights in this case because it is primarily concerned with human interests (Deckha, 2013, p. 519). Exemptions for the industrial practices on animals and the mainstream cultural or economic uses of animals prove this point (Deckha, 2013, p. 526). By contrast, it is about racism, colonialism and stereotypes.

This Court believes that Criminal Code s. 445.1(1) (a) may result in discriminatory impact. As Deckha (2013, p.517) said, anti-cruelty law effectively targets minority practices while exempting majority practices. In the current case, both the Haudenosaunee Confederacy's hunting activities and the Ministry of Natural Resources and Forestry's practice of killing wild animals under certain circumstances may result in the same pain, suffering, and injury. However, the Minister's belief that Aboriginal hunting should be banned might be based on the assumption, which is that the killing way of the Ministry of Natural Resources and Forestry is beneficial to the civilization of human beings or is an advanced practice, but the Haudenosaunee Confederacy's hunting activities cannot bring enough benefits or is backward. This assumption

by the Minister devalues the reasons for Aboriginal hunting activities by assessing them as less important than non-Aboriginal reasons. In other words, the dominant groups or cultural majority in society represented by the Ministry would not benefit from Aboriginal hunting, including both financial and cultural interests. Therefore, Aboriginal hunting is automatically assumed to have no benefit or interest.

Moreover, this assumption of the Minister is arbitrary because it allows the Aboriginal hunting reasons to be singled out and distinguished from other killing practices. In *Church of Lukumi Babalu Aye v. City of Hialeah (1992)*, the US Supreme Court emphasized this arbitrariness of applying anti-cruelty law (Deckha, 2013, p. 529). The Court pointed out that killing animals for food is self-evident, eliminating insects and pests are justified, and euthanizing excess animals is reasonable (Deckha, 2013, p. 529). However, these arbitrary assertions do not explain why killing animals for the sake of religion needs to bear the burden of anti-cruelty law alone, and the prohibition of those acts mentioned above is also clearly in the authority's interests in anti-cruelty law (Deckha, 2013, p. 529). Similarly, although the Minister's prohibition does not directly target Aboriginal hunting, its implementation would inevitably distinguish Aboriginal hunting from other killing practices and thus carry the legal burden alone. Thus, this Court finds that the Minister's decision and arguments demonstrate a kind of inherent value judgment and a racialized application of anti-cruelty law. This Court also endorses the US Supreme Court's criticism of anti-cruelty law, which is that it has the hypocrisy of a majoritarian purpose (Deckha, 2013, p. 530).

Furthermore, the arbitrariness or double standard described above exposes the "cultural attitudes" (Deckha, 2013, p. 530) of the dominant group represented by the Minister toward

acceptable animal use. For instance, the Minister argues that killing animals by euthanasia is acceptable, but killing them with bows and arrows is not acceptable. Also, the cultural values carried by the hunting activities of the First Nations might be considered not as valuable as the settlers' culture. These viewpoints show a "civilizational hierarchy" and how this hierarchy uses anti-cruelty law as "an agent of civilization" to play a role (Deckha, 2013, p. 536 & 533). In other words, if Aboriginal hunting were classified as a prohibited act of anti-cruelty law, it would not be because of unnecessary pain, suffering, and injury but because of the cultural majority's view on legality—How civilized humans and societies should interact with animals (Deckha, 2013, p. 537). The Minister's testimony shows her belief that civilized people should not use bows and arrows to kill animals but can kill them by euthanasia and that the ends of killing animals also must be consistent with civilization standards established by settlers. Ultimately, some practices of the cultural minority are delegitimized just because they do not conform to the "civilizing missions" of the cultural majority (Deckha, 2013, p. 524).

In addition, in the context of Criminal Code s.445.1(1) (a), Aboriginal hunting is also distinguished from killing animals in industrial agriculture and animal experiments, thus privileging the acceptable practices of the cultural majority. The process of acquiring this privilege is a reproduction of colonialism, namely the attitude toward animals as one of the justifications for colonial domination (Deckha, 2013, p. 524). As Deckha said (2013, p. 516), the law is used to domesticate marginalized populations. This privilege also demonstrates a "civilizational superiority" (Deckha, 2013, p. 516) constructed by settlers, which may justify colonialist aims that "seek to eliminate and replace" indigenous communities and cultures (King, 2018, p. 117). Besides, Roberts (2010) refers to this current oppression of the hunting culture of

Aboriginal communities as neocolonialism or a dangerous form of cultural imperialism that threatens tribal sovereignty and treaty rights. It seeks to denigrate indigenous people and their culture by the rhetorics of denying the validity of indigenous hunting traditions and disregard for indigenous peoples (Roberts, 2010)). Ultimately, Aboriginal hunting violates the cultural order, thereby, the legal order (Deckha, 2013, p. 533). As Deckha (2013, p.533) points out, there is a desire for anti-cruelty law as a civilizing agent to outlaw practices that society considers immoral or backward.

Moreover, some practices are considered anomalous or deviant by cultural elites based on stereotypes, which, in turn, wrongly places Aboriginal people in opposition to animal advocates. These stereotypes usually include two aspects. One is that Aboriginal people and their traditional cultures are seen as savage, backward, immoral, and living only on meat-eating (Corman, 2016, p. 235). There is also another version, the noble savage (Corman, 2016, p. 235). That is to say, Aboriginal people are innately close to nature, which gives them the special right to eat animals (Corman, 2016, p. 235). Another is that indigenous communities and cultures are rigid or immutable, namely widespread denial of indigenous peoples' capacity for self-reflection and responsiveness (MacIntosh, 2015, p.203). As a result, Aboriginal people may be seen as a major obstacle to the animal rights movement and the main target of anti-cruelty law.

However, this Court finds that it is not the case in the accounts of some scholars, indigenous animal advocates and indigenous communities. For example, Roberts' (2010) study of the Makah whale hunt demonstrated Aboriginal communities' ability to manage natural resources. Roberts (2010) noted that changes within the community and the dramatic decline in the whale population prompted Makah to abandon whaling until the population improved. Also, Robinson,

as an Aboriginal animal advocate and vegan, uses her practice to demonstrate that traditional practice can change as society evolves and morality progresses (Corman, 2016, p. 235). That is to say, although indigenous hunting activities were shaped by a specific historical context in which they had to rely on consuming animals for their livelihood, they have more alternatives nowadays and thus have more opportunities to make certain changes. Besides, *the Mikisew case (2005)* mentioned at the beginning reflects the Aboriginal understanding of a reciprocal relationship between them and the animals. In other words, the right to use animals and the environment entails a reciprocal obligation: respecting animals and preserving the environment (Professor Totten, 2022, Lecture: Unit 4, Lesson 1). This view differs from the instrumental understanding of animals in the Western (MacIntosh, 2015, p.207).

Therefore, this Court held that the Minister could argue that the Haudenosaunee Confederacy is not currently required to maintain deer populations through hunting to promote the park's ecological balance. However, the Minister cannot, based on stereotypes, deny the value of Aboriginal hunting activities and the dynamic of Aboriginal culture, thus reproducing colonial practice and undermining the reconciliation process. Nor should The Minister simply categorize Aboriginal uses of animals as instrumental use based on Western assumptions and ignore certain overlapping values that may facilitate consensus.

In summary, this Court ruled that the Minister, as an actor of the state, failed to fulfil the Crown's duty to consult around the Treaty so that this Court would quash the Minister's prohibition. The Minister should follow the three steps identified above to re-consult with the Haudenosaunee Confederacy in good faith to fulfill the Crown's duty and to conform to the honour of the Crown. While the results may not meet the Haudenosaunee Confederacy's

expectations, it must be responsive to its concerns and address the adverse effects as much as possible. Moreover, when the Minister considers the application of Criminal Code s.445.1(1)(a), she should consider its unique racialized impact on Aboriginal communities rather than allowing stereotype-based neocolonial attitudes to make the law become a medium to entrench colonial oppression. The law should be a kind of reliance for people who seek equality instead of an agent of discrimination. Finally, The Minister may be able to draw useful experiences from Aboriginal people's respectful and reciprocal relationships with animals and the environment and promote the dialogue within and between cultures. The Minister should always follow this principle: The point of dialogue and reconciliation is not to impose an external system on either side but to find a consensus among the many uncertain and diverse alternatives.

References

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(Referencing Style - APA)