Toward a Cross-Cultural Moral Theorizing of Aboriginal Rights

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"Aboriginal rights cannot, however, be defined on the philosophical precepts of the liberal enlightenment. Although equal in importance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society....The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal."[1] *(Chief Justice Antonio Lamer)*

Prominent non-Aboriginal political theorists who have argued for Aboriginal rights, notably Allen Buchanan and Canada's Will Kymlicka, have sometimes supposed or suggested explicitly that the advancement of Aboriginal rights in courts and other decision-making bodies requires the excision of certain elements of Aboriginal thinkers' own conceptions of their rights. This paper seeks to explore, in a preliminary way, methodologies of seeking a cross-cultural moral theory[2] of Aboriginal rights that can inform and persuade Canadian courts and legislators while remaining true to Aboriginal conceptions of the rights.

Part I introduces Charles Taylor's concept of an "unforced consensus" on human rights, arguing briefly that it provides a generally helpful model for cross-cultural rights theory, that is, for rights theory that can provide an articulate justification to those having a diversity of worldviews. Part II examines the departure of Buchanan and Kymlicka from Aboriginal conceptions of Aboriginal rights, setting out how these departures make an unforced consensus impossible and thus fail to live up to their potentially promisingly progressive character. Part III uses elements of the theories of selected Aboriginal theorists (particularly Darlene Johnston and Mary Ellen Turpel) on Aboriginal rights as collective rights in further developing a methodology of cross-cultural moral theorizing and directs us to certain warnings of Gordon Christie and Sákéj Henderson in realizing the complex task of cross-cultural moral theorizing on Aboriginal rights. Part IV argues that cross-cultural moral theorizing on Aboriginal rights can indeed inform and persuade Canadian courts and legislators, drawing on examples of their expressed need for such a theory.

I. Inter-Civilizational Dialogue and "Unforced Consensus"

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[1] R. v. Van der Peet, [1996] 2 S.C.R. 507 at 535-536.

[2] The term "moral theory" is not meant to cast the task narrowly, but refers simply to theorizing on the right or the good. The suggestion in this paper is that there are specific reasons for such theorizing to

Seemingly in large part in response to the East Asian challenge to human rights,[3] the United Nations General Assembly decided in 1998 that 2001 would be the United Nations Year of Dialogue Among Civilizations, putting the notion of inter-civilizational dialogue and cross-cultural theorizing squarely on the world agenda.[4] The late 1990s saw a number of efforts to frame such theorizing,[5] with Canadian philosopher Charles Taylor notably developing the concept of an "unforced consensus" on human rights.[6] In this section, we can draw on Taylor's concept to frame a need for and basic approach toward cross-cultural human rights theory, but we might even more preliminarily frame our encounter with this concept with two prefatory points.

First, an openness to some sort of inter-civilizational dialogue is not entirely new, and more inter-civilizational dialogue goes on than one might realize, though it may have been undertaken only by those under threat. For example, in the context of comparative Chinese-Western philosophy, recent analysts have noted that while contemporary Chinese philosophers have engaged with and developed a range of responses to Western philosophers, likely doing so in response to Western power,[7] Western philosophers have only more recently more seriously engaged with Chinese philosophy. Over the longer haul, Western study of Chinese philosophy has been "in the fossilized form of texts translated from Chinese by nonphilosophical sinologists specializing in ancient Chinese culture."[8] This example would, one might suspect, hold up in other cross-cultural contexts.[9] Members of less politically powerful cultures have tended to engage with the philosophical work of more politically powerful cultures, but more politically powerful cultures have tended to study others as more historical phenomena. Cross-cultural theorizing, thus, has gone on to a greater extent than sometimes presumed, but in a one-sided form. This one-sided

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[3] We ought not, of course, to leave out of the story the academic *zeitgeist*, today even more spirited, of Samuel Huntington: Samuel Huntington, "The Clash of Civilizations" (1993) 72 Foreign Affairs 22; Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Shuster, 1996). John Rawls also addressed related themes in the 1990s: John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993 & rev. edn. 1996); John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999). Here there is of course a further intellectual linkage to discourse theory and theories of deliberative democracy. Themes related to inter-civilizational dialogue or cross-cultural theory have thus rapidly become a major presence in academic discourse over the last decade.

[4] For background, see generally Ken Tsutsumibayashi, "Fusion of Horizons or Confusion of Horizons? Intercultural Dialogue and Its Risks" (2005) 11 Global Governance 103.

[5] *E.g.*, Hans Küng & Karl-Josef Kuschel, (eds.), *A Global Ethic: The Declaration of the Parliament of the World's Religions* (London: SCM Press, 1993); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995); Hans Küng, Global Responsibility: In Search of a New World Ethic (New York: Continuum, 1996); Hans Küng, *A Global Ethic for Global Politics and Economics* (Oxford: Oxford University Press, 1997); Richard Falk, *Predatory Globalization: A Critique* (Cambridge: Polity Press, 1999);

[6] Charles Taylor, "Conditions of an Unforced Consensus on Human Rights" in J. Bauer & D. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 124.

[7] Nicholas Bunnin, "Introduction" in Chung-Ying Cheng & Nicholas Bunnin (eds.), *Contemporary Chinese Philosophy* (Oxford: Blackwell, 2002) 1 at 2.

[8] Chung-Ying Cheng, "Recent Trends in Chinese Philosophy in China and the West" in Chung-Ying Cheng & Nicholas Bunnin (eds.), *Contemporary Chinese Philosophy* (Oxford: Blackwell, 2002) 349 at 353.

[9] In the Aboriginal context in Canada, the Aboriginal theorists whose work we will examine in Part III both develop their work in a manner highly attentive to and phrased substantially in terms responsive to

form, however, has a particular salience with respect to something like Aboriginal rights, in that the claim for rights comes from the less politically powerful culture, thus seeking the sort of cross-cultural theorizing that has been less common.

Second, cross-cultural moral theorizing need not be considered a demand of globalization *per se*. The need to develop moral theory that draws on and responds to the demands of substantially different worldviews arises also internally within the state. To take an example that has nothing new about it given its roots in older debates about religious toleration but that Lucas Swaine is in the process of reinvigorating, a secular liberal state may need to engage in a sort of cross-cultural moral dialogue with members of fundamentalist religious groups. As Swaine puts it, there may be prudential reasons to engage in such a dialogue in order both to attain peace with theocratic groups and to maintain definitively the legitimacy of the governmental order, which comes into question when it fails to explain itself to all of its citizens.[10] The need for cross-cultural moral dialogue can arise internally, without reference to globalization, and is an ordinary requirement of governance.

The challenge of cross-cultural rights theory is to seek agreement on practical conclusions amongst holding a variety of background worldviews. As Taylor describes it in his 'unforced consensus' conception, we can hope for a "meeting of very different minds, worlds apart in their premises, uniting only in the immediate practical conclusions".[11] This meeting will involve "[a]greement on norms, yes, but a profound sense of difference, of unfamiliarity, in the ideals, the notions of human excellence, of rhetorical tropes and reference points by which these norms become objects of deep commitment for us."[12] The background differences, Taylor tells us, can themselves be a source of strength, offering the possibility of mutual learning and borrowing.[13] This learning and borrowing can be consistent with the unforced nature of the consensus sought because Taylor embraces a rich understanding of the sorts of traditions between which there will be dialogue, such that each can draw on the "possibilities of reinterpretation and reappropriation that the tradition itself contains".[14]

Although Taylor explicitly offered this account of an 'unforced consensus' only in 1999, there is little doubt that it has deeper grounding in his previous philosophical work. Perhaps the best indicator of this is that Ken Tsutsumibayashi was able to develop something much like Taylor's account of unforced consensus from Taylor's previous work on recognition even without any explicit reference to Taylor's work specifically on cross-cultural theory.[15] This grounding in Taylor's previous work makes clear part of the justification for cross-cultural theory. As Tsutsumibayashi

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[10] See Lucas Swaine, "A Liberalism of Conscience" in Avigail Eisenberg & Jeff Spinner-Halev (eds.), *Minorities Within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 41 at 47-55; see generally Lucas Swaine, *A Liberalism of Conscience: American Liberalism and Theocratic Communities* (New York: Columbia University Press, forthcoming).

[11] Taylor, "Conditions of an Unforced Consensus", *supra* note 6 at 143.

[12] *Ibid.* at 136.

[13] *Ibid.* at 136.

[14] *Ibid.* at 142.

[15] See Tsutsumibayashi, *supra* note 4 (not referring to Taylor, "Conditions of an Unforced

describes it, Taylor's earlier argument on the politics of recognition[16] suggests that the politics of identity will develop in its more destructive forms in the absence of a "fusion of horizons"[17] that shows a real respect for (in the sense of a genuine attempt to understand and engage with) the values of diverse groups, as resentment will breed at the lack of recognition shown to cultures that their members consider of abiding value.[18] In other words, refusal to engage in a project of cross-cultural moral theory can be tantamount to a denial of the worth of particular cultures.[19]

We should note at once a possible ambiguity in Taylor's project, as between one seeking agreement merely on "practical conclusions" and one seeking at least some agreement at the propositional level supporting these conclusions. Tsutsumibayashi's development of Taylor makes clearer Taylor's desire for a "fusion of horizons" that would pay some regard to the propositional level, and Taylor himself would seem to presume as much when he speaks of the potential borrowing processes that might occur between cultures in the course of the dialogue.[20] We will return implicitly to this problematic in later sections, tending to urge more attention than in the "practical conclusions" model of cross-cultural theory to the propositional level, but not, in the course of this short paper, having the scope to address all of the questions that will logically arise concerning, for example, any guidance for this borrowing. In the parallel questions arising in the context of judicial transnationalization,[21] may it be simply a *bricolage*,[22] a borrowing of concepts as they seem to fit, or must there be some further principles developed concerning when borrowing may reasonably take place?[23] Taylor's model leaves much scope for further development, but it does at least provide some model of cross-cultural theory with which we can work for the present.

Do Taylor's claims, however, establish the necessity of cross-cultural moral theory? Some theorists who purport to be liberal theorists of multiculturalism, after all, indicate their readiness to challenge the very worth of particular cultures. First, the assimilationist option is never wholly absent in the writings of prominent theorists and even if they intend it to be a rarity, they phrase their discussions in ways reasonably raising concerns amongst oppressed cultures, as some examples illustrate. As Joseph Raz puts it, "it has to be admitted that liberal multiculturalism is not opposed in

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[16] Charles Taylor, "The Politics of Recognition", in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25.

[17] Taylor draws the concept from Hans Gadamer's hermeneutics (Hans-Georg Gadamer, *Wahrheit und Methode* (Tübingen: Mohr, 1975) but "reformulate[s] [it] into a social scientific tool": Tsutsumibayashi, *supra* note 4 at 105.

[18] Tsutsumibayashi, *ibid.* at 105-107.

[19] Such denial can also be an assault on the lives of individual persons: consider honestly the implications of Taylor's insight that "[t]he gender definitions of a culture are interwoven with, among other things, its love stories, both those people tell and those they live", making the point that even something that has oppressive elements may still crucially presently frame identities in deep ways, arguing at least for care in imposing demands for instant change: Taylor, "Conditions of an Unforced Consensus", *supra* note 6 at 139.

[20] Taylor, *ibid.* at 136.

[21] Cf. Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv. Int'l L.J. 191.

[22] Cf. Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale L.J. 1225 at 1237-38, 1285-1306.

[23] Cf. Roger P. Alford, "Misusing International Sources to Interpret the Constitution" (2004) 98 Am. J.

principle to the assimilation of one cultural group by others."[24] In at least extreme cases, some of these theorists are also ready to see suppression of particular cultures.[25] Most shockingly, Susan Moller Okin wrote without much explanation that it might be better that some cultures "become extinct",[26] though she has later attempted to temper this language and what she claims have been misinterpretations.[27] These particular sorts of argument, of course, are subject to misinterpretation and surely demand substantial efforts by the theorists in question to develop at length models concerning how to strike a very difficult balance between a reality that some, probably all, groups have some oppressive elements in their cultures, an often ignored fact that most groups have internal interpretive resources that can over time overcome that, and a historical legacy that is replete with terrible oppression of many of the minority groups that now seem to be put yet again under the gun of liberal theory.

Taylor has provided an important counterpoint to attitudes that threaten to reawaken disrespect for minority cultures. His argument explicitly points to a sort of presumption of value: if different cultural and religious traditions have emerged and served humanity well over the centuries, the logical assumption is that there might be something of value in these traditions that has enabled them to respond to human needs.[28] So, there seems at least some powerful normative reason for a project of cross-cultural moral theory.

However, even those not entirely convinced by such a normative claim are subject to a strategic argument. The East Asian challenge to human rights makes clear the possible implications of a refusal to undertake cross-cultural theorizing: the risk that cultural traditions not consulted will advocate non-compliance with any framework developed. Swaine warns of similar dangers internally with respect to religious groups to the extent that they feel disregarded by a liberal, secular state.[29] To the extent even less powerful groups do have some power, they may deploy it counter to the aspirations of any efforts to impose another authority. A refusal to undertake cross-cultural moral theorizing thus spells discord and, taken further, threatens peace. Indeed, Huntington's argument, sometimes taken to be an argument that intercivilizational warfare is inevitable, actually included from the outset an aspiration that, aside from short-term efforts based on a recognition of the reality of inter-civilizational conflict, the world seek longer-term strategies for dialogue so as to promote peace in the longer term.[30] We can interpolate from these broader arguments to a strategic argument in internal contexts: any refusal to undertake cross-cultural moral theory may lead to conflict and even upset peace.

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[24] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995) 182.

[25] *Ibid.* at 184-85 (allowing for suppression of cultures if they themselves are oppressive, without entirely clear indications of what standards of oppressiveness will apply).

[26] Susan Moller Okin, "Feminism and Multiculturalism: Some Tensions" (1998) 108 Ethics 661 at 680.

[27] Susan Moller Okin, "Multiculturalism and Feminism: No Simple Questions, No Simple Answers", in Avigail Eisenberg & Jeff Spinner-Halev (eds.), *Minorities Within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 67 at 69-70.

[28] Taylor, "Conditions of an Unforced Consensus", *supra* note 6 at 139, 143-44. Cf. M. Oakeshott, "Rationalism in Politics" in *Rationalism in Politics and Other Essays* (London: Methuen, 1962) 1; Raz, *Ethics in the Public Domain*, *supra* note 24 at 179-80, 204-205.

[29] Swaine, "A Liberalism of Conscience", *supra* note 10.

Is Taylor's model implicitly overly optimistic about the prospects for consensus? Is it a saccharine assumption to believe that there could be agreement on norms without agreement on the background propositions?[31] Such questions obviously need more analysis than space constraints permit here, but reasons do suggest themselves in support of the helpfulness of Taylor's model, even if ongoing challenges will continue to contribute to our understanding on these matters. First, following Taylor's point, the richness of the interpretive resources available within actual cultural traditions far exceeds the limited scope some are inclined to ascribe to other cultures, making for very real possibilities of overlap between possible interpretative streams. Second, although there are certainly conflicting human interests and even serious differences amongst perceptions of interests, there are also important cross-group interests or common goods around which convergence can take place. As suggested already, we will implicitly problematize and reinterpret Taylor's model even as we employ it in our discussion, but there is no inherent reason to assume it cannot apply and, indeed, much reason to think it can. The cross-cultural dialogues, of course, will not be easy, and ought not to be. Any claims based on playful *bricolage* will need to stand up to demands for principled argumentation, and we need a seriousness of purpose in dealing with deep cross-culturally controversial questions, or we inevitably sell some deep tradition short.

Thus, in suggesting the relevance of analytical frameworks of cross-cultural moral theory to Aboriginal rights discourse in Canada, this paper does not suggest the peculiarity, but the normative normalcy of the appropriate discourses that need to take place around the subject of Aboriginal rights. Cross-cultural moral dialogues on Aboriginal rights are to be pursued not out of any atypicality in relation to Aboriginal rights but as a (normative and/or strategic) requirement of governance in communities of difference.

II. Buchanan and Kymlicka vs. Aboriginal Conceptions

Dominant political theory concerned with Aboriginal rights in the North American context, and the Canadian more specifically, does not fit well with such a demand for cross-cultural moral theory. Leading non-Aboriginal theorists, notably Allen Buchanan and Canada's Will Kymlicka, have sometimes supposed or suggested explicitly that the advancement of Aboriginal rights in courts and other decision-making bodies requires the excision of certain elements of Aboriginal thinkers' own conceptions of their rights. In this section, we can survey briefly in what ways they have done so, see how their approaches make an unforced consensus approach impossible, and conclude with the realization that their approaches, perhaps counter to their intentions, essentially maintain an imposition on Aboriginal communities of outsiders' conceptions of Aboriginal rights.

Both of these theorists see themselves, and in many respects would be described, as well-intentioned, motivated in part to justify what Buchanan calls "the need to honor the valid claims of indigenous peoples to rectification of past injustices and their

continuing effects".[32] And Buchanan's recent chapter specifically on rights of indigenous peoples as part of his broader theory of just international law might initially even seem like an exercise in cross-cultural moral theory, seeking practical conclusions that can be supported by all. A dominant theme in this section is an effort to reject approaches that rest Aboriginal rights on the moral rights of collectivities, with Buchanan saying that "[t]o assert that indigenous collectivities, or any collectivities, are the possessors of moral rights is not only implausible; it is also entirely *unnecessary* from the standpoint of devising institutions for protecting the interests of indigenous peoples."[33] Claiming to make use only of arguments from individual moral rights, Buchanan then argues for intrastate autonomy of indigenous peoples, with reestablishment of self-governance thus serving as a modality of rectification that he argues can provide nonpaternalistic protection to indigenous peoples and can protect indigenous peoples from the disruption of losing their indigenous customary law without freezing the law in some specific embodied form.[34]

Kymlicka, from his early writings, has been substantially motivated by the situation of Canada's First Nations. For example, an attempt to demonstrate the legitimacy of certain protections for Aboriginal groups is a central theme of his first book, *Liberalism, Community and Culture*,[35] and he argues for Aboriginal self-government even where it requires some adjustment to liberal rights analysed without reference to culture, accepting, for example, some limits on the voting rights of non-Aboriginal Canadians who move into Aboriginal territories.[36] However, even from that book, we can get a sense of the potential gulf between even his more sympathetic approach and the views of many Aboriginal citizens, even at the same time that it might be seeming to advocate a form of cross-cultural theory. Rejecting Taylor's arguments for equal treatment of communities, Kymlicka writes that it is "incoherent" and rejects any moral status for communities themselves.[37] Moreover, in an attempt to explain why the approaches of many Aboriginal theorists have been misguided insofar as they have deployed theories departing in various ways from standard liberalism, Kymlicka writes that non-liberal arguments "are not very strong *politically*, for they do not confront liberal fears about minority rights",[38] rapidly deferring to a characterization of the *realpolitik* in which "[f]or better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand."[39]

What is wrong with all of this seemingly progressive writing that arguably promotes the precise sort of cross-cultural moral theory Taylor suggested? This is a complex question, requiring a complex answer. We must examine carefully how the approaches of Buchanan and Kymlicka would actually implied continued restraints on Aboriginal First Nations, but it takes several steps to get to this conclusion.

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[32] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003) at 249.
[33] *Ibid.* at 256.
[34] *Ibid.* at 257.
[35] Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989).
[36] *Ibid.* at 151-52.
[37] *Ibid.* at 241-42.
[38] *Ibid.* at 153.

First, there is a profound difference at the level of principle between what Buchanan and Kymlicka assert about collective rights and what Aboriginal peoples themselves seem to believe. We might consider, for example, the language of the *Draft Declaration on the Rights of Indigenous Peoples*, in the negotiation of which indigenous peoples have been substantially represented. Most of the rights in that instrument are held by "indigenous peoples", with only some attributed to "indigenous individuals", and a number of rights are explicitly identified as collective (either in addition to or in place of being individually held).[40] Although these are set out as manifesto rights (which might be thought more legal in form than moral), the cumulation of collective rights must eventually be taken as indicative of propositions that collectivities can hold moral rights. And Aboriginal theorists writing on indigenous rights have tended to write in ways fitting with this interpretation. For example, Mary Ellen Turpel (now Justice Turpel-Lafond) wrote in a prominent article: "Although indigenous people are individually affected by the denial of collective human rights, the source of their suffering is generally inseparable from the oppression experienced by the people as a group."[41] We could pull up additional examples of this sort, but the point is probably already clear. Such statements affirm the existence of collective human rights, the precise concept Buchanan and Kymlicka tend to reject. Buchanan and Kymlicka, then, arguably reject propositions about collective rights explicitly articulated by documents representing the views of indigenous peoples.

Both Buchanan and Kymlicka argue that an approach rejecting moral rights held by collectivities is necessary for the sake of philosophical coherence.[42] Kymlicka also offers an additional rationale, implicitly claiming that, for example, a litigation approach based on claims to the holding of collective moral rights would be a strategic mistake and one that would meet with little success at the Supreme Court of Canada.[43] With all due respect to their sophisticated bodies of work, however, we can question both of these defences of their approaches.

First, although space limitations preclude a full development of the point here, it is actually not philosophically incoherent (and at least not possible to claim such incoherence without a fuller development of the claim going well beyond what Buchanan, Kymlicka, and others have provided) to argue for collective moral rights, even beginning from central premises of Western philosophical traditions.[44] Analyses

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[40] Draft United Nations Declaration on the Rights of Indigenous Peoples (1994), UN Doc. E/CN.4/Sub.2/1994/56, at 105 (1994). See especially arts. 6 (a collective right to live as distinct peoples), 7 (collective and individual rights against ethnocide and cultural genocide), 8 (collective and individual rights to develop identities), 32 (collective right to determine own citizenship), 34 (collective right "to determine the responsibilities of individuals to their communities.")

[41] Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L.J. 579 at 584.

[42] See discussion of this point above. Kymlicka, more than Buchanan, does refer to some other authors who have argued for collective moral rights but only in citations and without any attempt actually to explore their arguments: *Liberalism, Community and Culture, supra* note 35 at 153.

[43] *Ibid.* at 154

[44] Although Kymlicka in many respects seems to be deploying the interpretative resources of the Western tradition in a manner much more open to Aboriginal claims insofar as he reinterprets demands for equality to provide an argument against inequalities resulting from culture (LCC generally), one could apply quite the contrary interpretation on the particular issue of collective human rights. On this

of collective rights have been underdeveloped,[45] but I have argued at length elsewhere that the existence of collective moral rights is, on a deeper analysis, actually logically demanded by standard accounts of rights within Western traditions.[46]

Second, Kymlicka's claim concerning appropriate political strategy might inoffensively seem like simply a pragmatic suggestion aimed at the successful advancement of Aboriginal claims, and one might even try to frame it as an approach to successful cross-cultural moral dialogue in which, in Taylor's phrase, we achieve a "meeting of very different minds, worlds apart in their premises, uniting only in the immediate practical conclusions".[47] But Kymlicka's strategic suggestion is at odds with the broader urging of Taylor's theory of cross-cultural dialogue to seek mutual understanding, since Kymlicka's strategic demand essentially demands surrender to the historical pattern of oppressed groups having to explain themselves in the oppressor's (literal and metaphorical) language. We will later see that the Supreme Court of Canada itself, whatever faults one might find with its jurisprudence, does not make this same demand.[48]

Moreover, the real problem is that different propositional content on this issue ultimately means a difference on the practical conclusions. As I have developed at greater length elsewhere,[49] Kymlicka's argument that there can legitimately be certain collective legal rights (although he never likes the term and prefers simply to speak about group-differentiated rights),[50] but only if based directly on the advancement of individual moral autonomy,[51] has practical implications for various issues. In particular, it tends to lead rapidly toward Kymlicka's well-known distinction between "external protections" and "internal restrictions", which says that group-differentiated

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restrictive than some of the theorists to whom he refers (in particular, note that Ronald Dworkin's account of rights, sometimes reputed to be about putting the individual above the collectivity, allows for the existence of group rights without ever developing the concept: *Taking Rights Seriously* (London: Duckworth, 1978) 82, 91n.; Dwight G. Newman, "Collective Interests and Collective Rights" (2005) Am. J. Jurisprudence (forthcoming) at n1.). Theorists who have reasoned about how minority cultures engage in so-called "reactive culturalism" (Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), under which more conservative interpretations of a tradition emerge in response to external challenges, could analyse whether the same phenomenon applies to liberal political theorists, though, for some reason, they have not typically been ready to analyse themselves in the same way in which they are ready to scrutinize the Other.

[45] Linda Cardinal, "Collective Rights in Canada: A Critical and Bibliographical Study" (2001) 12 Nat. J. Const. L. 165 at 165 (writing in 2001 that "There are still no comprehensive studies of the anthropological, historical, legal, philosophical, or social and political foundations of collective rights.)

[46] See especially Newman, "Collective Interests and Collective Rights", *supra* note 44. See also Dwight G. Newman, "Putting Kymlicka in Perspective: Canadian Diversity and Collective Rights" in Stephen Tierney (ed.), *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice* (London: Ashgate, forthcoming. My doctoral thesis pursues these issues at much greater length ("Community and Collective Rights", about to be submitted for a D.Phil., Oxford University Faculty of Law). This claim, it should be noted, need not be at odds with theoretical understandings of rights in the Western tradition; indeed, many theorists' writings (some of them are cited in "Collective Interests and Collective Rights", *supra* note 44) contain stray, undeveloped references to "group rights" that my theoretical development can flesh out.

[47] Taylor, "Conditions of an Unforced Consensus", *supra* note 6 at 143.

[48] See Section IV, below.

[49] See note 46, above.

[50] *E.g.*, Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), 35

rights may be to protections against outsiders but not to policies restricting insiders.[52] The presumable result is to recommend against, for example, regimes that permit Aboriginal groups to take steps to protect their cultures or religions that may have somewhat restrictive effects on their own membership,[53] even when preservation of the Aboriginal culture and spirituality will be to the great benefit of the membership, thus seemingly recommending against some of the provisions developed in contemporary Canadian Aboriginal self-government agreements.[54] Buchanan's theory seems to have similar implications, in that he implicitly suggests that there can be no alteration to the standard bundle of individual human rights in the context of indigenous self-government,[55] something arguably at odds with the very point of self-government that allows a different balancing of human values.[56] The implication of this realization is that the propositional content of the argument here is not simply irrelevant background. Cross-cultural moral theory on certain Aboriginal rights issues will be viable and promote the aims of cross-cultural theory only with the richer notion of cross-cultural theorizing that looks also to the propositional content of the theorizing and is thus willing to pay attention to Aboriginal worldviews and propositional claims concerning matters like collective human rights.

III. Retrieving Aboriginal Conceptions of Rights

A meaningful cross-cultural moral theory project in the Aboriginal rights context needs actually to engage seriously with Aboriginal perspectives. It is thus vital to engage with Aboriginal theorists in a manner going beyond mere footnotes that suggest the alterity of their position.[57] Although the task of this paper is one of outlining methodology rather than actually undertaking the engagement, in this section, for illustrative purposes, we can draw briefly on the writings of Darlene Johnston and Mary Ellen Turpel on Aboriginal rights as collective rights. Revealing the ongoing dialogical challenges, however, we can also see that other Aboriginal theorists' views can point to a challenge going beyond simply an engagement with Aboriginal perspectives on collective rights.

As a preliminary note, we should realize of course that the aim should not be seen as the retrieval of "an (authentic) Aboriginal conception", thereby forcing rich thought and complex traditions into one simple (perhaps even historically frozen) form. Even some Aboriginal theorists themselves have risked encounters with this snare. For example, Darlene Johnston's 1988 essay, "Native Rights as Collective Rights", unfortunately spoke in broad-brush terms: "Native people view their relationship with the land as central to their collective identity and well-being. Within the native world

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[52] Kymlicka, *Multicultural Citizenship*, *supra* note 50 at 35.

[53] See Kymlicka, *Liberalism, Community and Culture*, *supra* note 35 at 196-98 (launching his now-classic attack on the practices of certain Pueblo groups that sought to defend their traditional spirituality); cf. Newman, "Putting Kymlicka in Perspective", *supra* note 46.

[54] See Newman, *ibid.* (identifying the acceptance of provisions in modern self-government agreements in Canada that seem to permit First Nations to defend their spirituality, showing disagreement with Kymlicka's position).

[55] Buchanan, *supra* note 32 at 261.

[56] See Newman, "Putting Kymlicka in Perspective", *supra* note 46.

view, people and land and culture are indissolubly linked."[58] Hopefully we would recognize that we cannot meaningfully seek *the* "native world view"; even writing in 1988, Johnston wrote in an earlier context arguably unwilling to recognize complex dialogues within Aboriginal thought itself, though hopefully just in a semantically flawed way, as she also acknowledged the variety of Aboriginal communities.[59] There are arguably parallels in, for example, Chinese philosophy, in which some earlier Chinese philosophers "sought to determine the essence of Western philosophy and the essence of Chinese philosophy",[60] or at least sounded as if they were constructing such generalizations, in order to promote at least the beginnings of dialogue. As with that phenomenon, we treat Aboriginal theorizing most seriously if we are ready today to "distinguish between what is valuable and what should be disregarded in the works considered", being ready to leave as part of history cruder attempts at characterizing *the* interpretation of any complex tradition.[61]

The views of some Aboriginal theorists, like those of Johnston and Turpel, will be reasonably accessible to those from non-Aboriginal traditions. Johnston specifically frames much of her argument in "Native Rights as Collective Rights" based on the writings of non-Aboriginal theorists, while trying to incorporate Aboriginal perspectives on rights, thus herself engaging in a sort of fusion of horizons.[62] Turpel has pursued her argument in the familiar framework of legal jurisprudence of the United Nations Human Rights Committee,[63] and she has written about views on Aboriginal rights in the context of s. 15 of the *Charter* as co-author with non-Aboriginal constitutionalist Peter Hogg.[64] Some theorists have, of course, been bolder and demanded non-Aboriginal attention to, for example, the legal content of Anishinable fables,[65] although the particular author in mind there has still written in a fairly familiar legal form. One of the challenges in cross-cultural moral theorizing, of course, is to communicate ideas in a form that has the potential to persuade those initially or potentially opposed to them, without by choice of form sacrificing the very content of the ideas meant to be expressed. We can add a complexity, then, to the practise of cross-cultural moral theorizing, which we might call *dialogic form–substance tensions*. Seeking a "fusion of horizons" or, as we have described it earlier, propositional overlap brings this challenge to the fore. It is not, we must admit, one having easy answers. We need to be aware that seizing upon those theorists whose views are initially most accessible because communicated in forms transcending to the other cultural tradition may be all to the good if they have simply been especially able to communicate the theory at stake, but there are dangers that one might be dialoguing only with a watered-down version of the original tradition and/or with some particular elite representation of that tradition. If either of those dangers applies (and I make no claim that they necessarily do here), one may lose some of the very objects of cross-cultural moral theory.

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[58] Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1988) 2 Can. J. L. & Jurisprudence 19 at 32.
[59] *Ibid.* at 31-32.
[60] Bunnin, *supra* note 7 at 2
[61] *Ibid.*
[62] Johnston, *supra* note 58 (engaging with writings that include those of François Chevrette, Julius Grey, Owen Fiss, Michael McDonald, Frances Svensson, Ronald Garet, and Robert Cover).
[63] Turpel, *supra* note 41.
[64] Peter W. Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187.

This first challenge shares something important in common with the next, which is one concerned with the methodology of engagement when involved in cross-cultural moral theory. Kymlicka, as we have earlier noted, has developed a sophisticated and extensive body of theory. Yet, having seen the importance of Johnston's contribution on collective rights sufficiently so as to include it in a collection he edited,[66] Kymlicka nonetheless declines to engage with the content of her views. He either simply repeatedly including them in a (repeated) footnote as an example of a communitarian theory,[67] thus slapping a label onto Johnston's view, or co-opts them into a subsidiary argument allegedly manifesting a failure to attend to Kymlicka's favourite distinction between external protections and internal restrictions.[68] Both approaches, of course, manifest what is in some respects considered solid academic practice, manifesting an ability to draw and apply distinctions in a manner seeming to prove the superiority of one's position over that of rival academics. But cross-cultural moral theory demands something more (as arguably does a better academic practice), needing a fuller sort of engagement with the views of Aboriginal theorists whose work one might otherwise try to dismiss with quick distinctions of Western academic practice.

Johnston's piece is not specifically "communitarian"; it is rather an engagement with the writings of a number of theorists to attempt to show ways "to ground collective claims in a rights-based theory"[69] and then to argue that native communities can make rights claims as collectivities. Johnston does discuss communitarian theories in the early pages of her article, but ends up drawing simply more general insights concerning common goods, and goes on to use a number of other theoretical perspectives that are not inherently communitarian. She goes on eventually to develop important implications of an attitude attendant to collective rights in terms of possession and enjoyment of traditional lands. In the process, she offers views on the relationship of individuals and collectivities, which Kymlicka glosses over as "rais[ing] familiar questions about the priority (moral, ontological, formative) of the individual and the community, and hence about the relative priority of individual rights and collective rights"[70] before retreating to his standard refusal to discuss collective rights as a concept. Cross-cultural moral theory demands a more extended engagement.

Turpel presents some Aboriginal perspectives concerning collective rights in the communicative framework of a discussion of legal jurisprudence of the United Nations Human Rights Committee.[71] In a later piece co-authored with Peter Hogg,

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[66] An edited form appears as chapter 8 of Will Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995).

[67] For repetitions of this same footnote, see: Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 207n.; Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001) at 19n.; Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 2002) at 373n.

[68] Will Kymlicka, "Introduction" in Kymlicka (ed.), *The Rights of Minority Cultures*, *supra* note , 1 at 14.

[69] Johnston, *supra* note 58 at 19.

[70] Kymlicka, "Introduction", *supra* note 68 at 14.

she advances an interpretation of the highly contested[72] s. 25 of the *Charter*, claiming first (and somewhat surprisingly) that s. 25 was developed without any contemplation of its use in relation to Aboriginal self-government,[73] but that it gives reason to interpret legal rights of Aboriginal governments in light of Aboriginal traditions, thereby justifying some deference to Aboriginal conceptions of rights (which would ideally be set out in Aboriginal Charters).[74] Turpel's arguments, then, carry forward some of the characterization of Aboriginal conceptions of rights. They also pinpoints other specific points of legal interaction on which there needs to be cross-cultural moral theorizing. Something like s. 25 of the *Charter* can form a specific focus for a circle of discussion. That said, there are dangers, evident in Turpel's own approach to the question, in choosing such a focus. To the extent one might interpret s. 25 in terms of framers' intent (to which Turpel first referred), one would be at risk of surrendering cross-cultural moral theorizing to the power dynamics at play at a particular historical moment of constitution-drafting. To the extent one might interpret s. 25 only with reference to traditional legal modalities, one risks entrenching power dynamics of our current historical legacies. Cross-cultural moral theory demands an active moral re-engagement in our shared search for understanding.

Cross-cultural moral theory will also be a dynamic process, one with potentially shifting objectives. Transition toward engagement with Aboriginal understandings of certain rights as collective may become just a beginning. Gordon Christie has recently put the argument that translating Aboriginal rights into group rights or rights of group autonomy represents just a beginning, for there remains danger so long as one is interpreting them in terms definable in Western traditions, and that the real challenge lies in opening to fuller Aboriginal self-definition of their rights.[75] Sákéj Henderson's writings might illuminate, as well, a more general challenge of undertaking dialogue in the limited forms of languages that embody different worldviews within the languages themselves.[76] A project of cross-cultural moral theory is like group quiltmaking in the pursuit of a progressive unenfoldment of yet undiscovered cloth — and all the more valuable for these complex dynamics.

IV. Need for a Cross-Cultural Moral Theorizing

Some will be daunted by the complexities of cross-cultural moral theorizing. But there is no alternative. Judicial organs actually stand in need a cross-cultural theory in any dispute involving parties from different cultures, for they need a theory that can explain to both sides of a dispute why one party has won and the other lost (or some combination thereof on different issues). On some issues, this need is lessened where the law itself can stand as a cross-cultural theory for how disputes are to be resolved. But in disputes concerning Aboriginal rights, no such easy answer presents itself. First, part of what is at stake is what or whose law should apply; in many Aboriginal

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[72] For a helpful recent summary of some of this contestation and uncertainty, see Jane M. Arbour, "The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003) 21 Supreme Court L. Rev. (2d) 3.

[73] Hogg & Turpel, *supra* note 64 at 214.

[74] *Ibid.* at 214-16.

[75] Gordon Christie, "Law, Theory, and Aboriginal Peoples" (2003) 2 Indigenous Law Journal 70.

[76] See James [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 Alberta L.

rights contexts, the very issue is whether Canadian or Aboriginal sovereignty appropriately applies, so there must be recourse to some other form of explanation concerning what law applies.[77] Second, even if there were cross-cultural agreement on the application of some particular corpus of law, the relevant bodies of law on Aboriginal rights are sufficiently open-textured that no judicial body could apply them and actually reach legal results without applying further legal and moral principles. Section 35 'affirms existing rights' without reference to sources for these 'existing rights'.[78] Section 25 poses complex interpretive puzzles that demand thorough-going theoretical analysis.[79] We could multiply the examples, and we would amplify the point that these are bodies of law demanding moral theory for their application. Third, particular legal doctrines within the corpus of law related to Aboriginal issues in Canada, where they are more clear, actually demand some sort of cross-cultural moral analysis. We might name, amongst others, principles of interpretation that address the meeting of minds between different cultural groups in treaty formation and the like,[80] alterations to rules of evidence to accommodate Aboriginal oral history materials,[81] consultation requirements,[82] and, generally, the legal principles concerned with the concept of "reconciliation"[83]—as well as Chief Justice Lamer's call in the epigram to this paper for theories of Aboriginal rights that reconcile liberalism and the other moral frameworks needed to understand Aboriginal rights.[84] There can be no escaping the need for forms of cross-cultural moral theorizing in the context of judicial consideration of Aboriginal rights.

One danger, of course, is that the application of cross-cultural analysis will be asserted to attempt to guise opinions with additional legitimacy, but not actually be practised, thereby undermining the claimed legitimacy. Some, including Henderson, have expressed concerns alleging that Supreme Court assertions concerning a search for reconciliation have on occasion become a tool demanding surrender of Aboriginal rights without reconciliation from the other side.[85] There obviously needs to be very careful analysis of the terms of reconciliation. However, the mere fact that a principle of reconciliation does not always support an Aboriginal position does not, of course, mean that it is no longer a principle of reconciliation. So, there needs to be a further analysis on such matters.

We should further note briefly that the sometimes expressed preferences for governmental negotiation over judicial approaches[86] offers no escape from the need for cross-cultural moral theorizing. Legislators, or more particularly executive officials, need guidance in what positions they should pursue in consultation or negotiation, and the reconciliation of Aboriginal rights with the array of other rights and public policy concerns at stake in any such context is precisely what cross-cultural moral theorizing is about.

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85 *E.g.*, Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993.

We have, in this paper, seen just some gestures toward a broader theory of cross-cultural moral theory. Its practice in the Aboriginal rights context can fit within a broader discipline that is the subject of growing study and of which we have tried to further, in some slight ways, the methodology, but it will take place ultimately only through very careful engagement, informed by principles of cross-cultural moral theory, on complex and challenging issues, as between the work of Aboriginal and non-Aboriginal scholars, thinkers, and peoples. In its own way, we can envision and hope that this conference might be part of such a process.