

Untangling Equality-Based Arguments for Indigenous Rights

Dwight G. Newman*

NOTE: As will be apparent, I am still working on this paper, but I make this draft available to offer the chance to read something of the argument apart from the oral presentation. I look forward to any discussion and comments.

I. Introduction

A prominent stream of normative argumentation for legal protection or entrenchment of Indigenous rights has sought to root that argument in a conception of equality.¹ This stream commences particularly with Will Kymlicka's seminal *Liberalism, Community, and Culture*.² Although the argument developed there has gone on to serve as the basis for a wider body of "liberal multiculturalist" theory concerned with protecting various cultural rights,³ that work originally used as its primary example the rights of Indigenous peoples, with Kymlicka arguing for group-differentiated rights for Indigenous communities based on a liberal egalitarian argument grounded in Ronald Dworkin's model of equality of resources.⁴

The historical context in which Kymlicka wrote may, as a matter of intellectual history, serve as a partial explanation of why this type of argument has been prominent in discussions of Indigenous rights. Kymlicka wrote partly in response to Canadian government proposals of the late 1960s that envisioned seeking social and economic equality for individual Aboriginal persons by dismantling much of the different treatment of Aboriginal communities and simply integrating Aboriginal persons into a sort of social and economic mainstream. These

* B.A. (Reg.), LL.B. (Sask.), B.C.L., M.Phil., D.Phil. (Oxon.); Associate Professor of Law, University of Saskatchewan; Honourary Senior Research Fellow, University of the Witwatersrand School of Law; Visiting Scholar, McGill Faculty of Law (August to December 2009); Dwight Newman: <http://homepage.usask.ca/~dgn971> I thank the Social Sciences and Humanities Research Council of Canada for Standard Research Grant funding for my "Theorizing Aboriginal Rights" program, from which this paper is one product. Comments welcome at dwright.newman@usask.ca

¹ A note on terminology: I use the term Aboriginal where the discussion is more specific to the Canadian context (as this is the terminology of the relevant Canadian constitutional provisions) and Indigenous when there is no specific connection to the Canadian context. That discussed is not the only moral theory stream of argumentation for Indigenous rights. Amongst others, James Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) begins from Charles Taylor's "politics of recognition" in arguing for a new practice of constitutionalism with room for Indigenous rights. Duncan Ivison's *Postcolonial Liberalism* () seeks a redefinition of "public reason" in a manner that creates spaces for Indigenous rights. Courtney Jung's *The Moral Force of Indigenous Politics* (Cambridge: Cambridge University Press, 2008) roots its argument in historic injustices that have structured patterns of oppression and discrimination.

² Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon, 1989).

³ Kymlicka further develops his account in *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) and subsequent works. See also Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 2002).

⁴ Dworkin develops this account in the classic articles: Ronald Dworkin, 'What is Equality? Part 1: Equality of Welfare' (1981) 10 *Philosophy and Public Affairs* 185; Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10 *Philosophy and Public Affairs* 283. These and other relevant pieces make up Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000).

government proposals met with major protests from Aboriginal Canadians themselves, who saw them as a continuation of past assimilation endeavours in a manner that would eliminate Aboriginal cultures.⁵ Sufficiently powerful advocacy for Aboriginal difference attained constitutional entrenchment of Aboriginal and treaty rights in the course of Canadian constitutional reforms in 1982, with s. 35 of Canada's *Constitution Act, 1982* providing that basic "recognition and affirmation of Aboriginal and treaty rights", and s. 25, this latter provision part of the *Canadian Charter of Rights and Freedoms*, providing some insulation of those rights from being affected by the *Charter*.⁶ However, even by the time that Kymlicka was writing in the late 1980s (and even now), there was a powerful current of commentary suggesting that these protections were a violation of the equality of individual citizens. Kymlicka thus sought to show those committed to equality that their commitment actually implied the very group-differentiated rights against which they argued.⁷

Patrick Macklem, in some senses, wrote within the same intellectual historical context. Amidst criticisms of judicial activism that grew during the 1990s and associated criticisms of the Supreme Court of Canada's expansionist articulation of Aboriginal rights under s. 35 of the *Constitution Act, 1982*—reaching even a certain point of violence in 1999⁸—Macklem published in 2001 the monumental *Indigenous Difference and the Constitution of Canada*.⁹ This work, received to significant acclaim in many circles,¹⁰ seeks to explain, based on certain generalized factual circumstances of Aboriginal communities in Canada, why it is that Indigenous difference should give rise to the sorts of constitutional protection that it has in the Canadian Constitution.¹¹ To a lesser degree, Macklem also builds upon this argument to comment on some more specific issues within the Aboriginal rights jurisprudence that had arisen from s. 35 to that point in time.

To some degree, Macklem adopts Kymlicka's argument, doing so relatively explicitly in parts of his book.¹² However, Macklem's argument is, in some ways, quite distinct in a manner that his more detailed engagement with Aboriginal rights jurisprudence permits or even invites. Macklem engages in a more contextual defense of different Aboriginal rights rights, which include claims to a right to maintain Aboriginal cultures, to Aboriginal title over certain territories, and to some degree of Aboriginal self-government. Macklem writes near the outset of his project a sentence whose first half makes this explicit, before turning back to the general framework of equality-based argumentation: "Although the reasons why interests associated with

⁵ A major protest work was Harold Cardinal, *The Unjust Society* (1969).

⁶

⁷

⁸ This was in the context of the Supreme Court of Canada's decision in the *Marshall* case that year and is well discussed in Ken Coates, *The Marshall Decision and Native Rights* (Kingston: McGill-Queen's University Press, 2000).

⁹ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

¹⁰ It won the 2002 Canadian Political Science Association Donald Smiley Prize and the 2002 Canadian Foundation for Humanities & Social Sciences Harold Adams Innis Prize. It also received overwhelmingly positive comment in book reviews: *e.g.*

¹¹

¹² See *e.g.* Macklem, *supra* note 9 at 72ff.

indigenous difference merit constitutional protection are relatively distinct, they share a common feature: each appeals to a principle of equality.”¹³

I have situated this stream of literature within a historical context partly to illustrate that it is theory that has direct practical implications, but my purpose here is not to engage in intellectual history but to examine the equality-based argument for Indigenous rights as expressed particularly in Macklem’s work, although with later implications for Kymlicka’s. I will argue that Macklem is very much right to identify the possibility of a pluralistic argument, with potentially different groundings in relation to rights claims to cultural protection, to land, and to self-government. In fact, he would have been more right to carry through on this pluralistic possibility than in the claim he goes on to in grounding each of these arguments ultimately back in equality. Indeed, this later decision to ground each argument in equality, I will argue, elides distinctions between different conceptions of equality in a manner that masks tensions in his argument that arise from inconsistent normative commitments in the different parts of the argument.

To do so, in Part II, I further set out the different claims Macklem makes in relation to equality and its implications for the different Aboriginal rights at issue. I will seek to show that the discussions of equality in the different contexts refer to significantly different conceptions of equality. In Part III, I will argue that these different conceptions entail inconsistent normative commitments and, in the course of doing so, I will seek to respond to a major objection to my critique that I will call the “Harmless Homonym Defense”. In Part IV, I will argue that my critique of Macklem’s mode of argumentation has implications for Kymlicka’s argument as well. In Part V, I will begin to sketch some implications of adopting a more thorough-going pluralistic normative foundation for Indigenous rights.

II. Macklem’s Equality-Based Arguments

Although Macklem’s argument touches on other sorts of Aboriginal rights also constitutionally entrenched, arguments on three matters are of particular interest: those for constitutional protection of cultural practices, land rights, and Aboriginal self-government. These three areas of rights have led to very most significant discussions in the Canadian Aboriginal rights jurisprudence. They are also the three areas in which Macklem most explicitly frames equality-based arguments. At the outset of the endeavour, Macklem asserts that equality will be an “organizing principle” to his argument.¹⁴ He makes more explicit the intended equality at that early stage, asserting that constitutional law is about distribution of power and that “an equal distribution is a just distribution.”¹⁵ Although he is rapidly attentive to work that has highlighted a reality that equality is often put on both sides of an argument, and that the real questions may

¹³ *Ibid.* at 5.

¹⁴ *Ibid.* at 28.

¹⁵ *Ibid.*

be about “which equality?”,¹⁶ he explicates that issue as driving a concern with the criteria for equality of distribution¹⁷ rather than the more thorough-going challenge into which one might frame it. To this, we shall return, but let us turn, in at least summary form, to his more specific equality-based arguments.

In the area of cultural rights, Macklem draws explicitly upon Kymlicka’s argument, premised on equality of respect and concern as interpreted into an equality of resources model.¹⁸ The basic argument here is that “[c]onstitutional recognition of the value of Aboriginal cultural difference furthers equality by distributing protection of cultural interests to those who otherwise lack the resources necessary for cultural reproduction.”¹⁹ Macklem also puts the point in an even more tempting form: “Attaching constitutional significance to Aboriginal cultural difference facilitates the reproduction of Aboriginal cultures and helps to redress the social inequality between Aboriginal people and non-Aboriginal people.”

This argument comes near the end of a longer chapter discussing, amongst other matters, the Supreme Court of Canada’s test for protected cultural practices in its 1996 decision in *R. v. Van der Peet*,²⁰ so it is actually just a few pages later that Macklem is offering his equality-based argument for land rights. In the context of land rights, Macklem writes that “[a] commitment to distributive justice demands a definition of occupation that does not privilege non-Aboriginal use and enjoyment of land to the exclusion of Aboriginal modes of use and enjoyment.”²¹ His argument for Aboriginal title is based to a degree on prior occupation of land by Aboriginal communities, this being consistent with the doctrine of common law Aboriginal title as developed in Canadian case law and by such important writers as Kent McNeil.²² However, admitting that there could be questions put about the moral force of prior occupation (given the prevalence of end-state-based theories), Macklem nonetheless argues that lands that were under the prior occupation of Aboriginal communities are appropriately subject to Aboriginal title claims because “[a] focus on equality splits the difference.”²³ The claim is that so long as prior occupation matters to claims to land by non-Aboriginal persons (which Macklem takes as widespread in the relevant legal systems, something arguably subject to more challenge than he allows²⁴), then prior occupation should be a basis for Aboriginal title claims, with any other position manifesting unequal treatment.²⁵

¹⁶ *Ibid.* at 31. He cites Douglas Rae, David Cooper, and Peter Westen. I would take the point to have been more prominently, and perhaps more powerfully, stated by Amartya Sen, most recently in *The Idea of Justice* (Cambridge: Belknap, 2009) at 291-93.

¹⁷ Macklem, *supra* note 9 at 31-32.

¹⁸ *Ibid.* at 71-74.

¹⁹ *Ibid.* at 74.

²⁰ *Ibid.* at 56-62.

²¹ *Ibid.* at 77.

²² Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

²³ Macklem, *supra* note 9 at 85.

²⁴

²⁵ Macklem, *supra* note 9 at 85-86.

In the context of issues related to sovereignty and Aboriginal self-government, Macklem is actually explicit in making use of two conceptions of equality. He argues that an identification of the historical wrongs in relation to Aboriginal sovereignty flows from a formal conception of equality, with the original exclusion of Aboriginal nations from those accepted as asserting sovereignty over parts of North America and the refusal to recognize those Aboriginal nations' inherent sovereignty violating that conception.²⁶ For the sake of clarity, he goes on to describe it: "formal equality requires that all potential recipients of a distribution be treated as formal equals unless a valid reason exists, related to the good in question, for differential treatment."²⁷ However, in discussing what he considers to be the present wrong of denying Aboriginal self-government claims (which may be simply a form of self-government within the state rather than an outright sovereignty), Macklem suggests turning to what he calls "substantive equality", with "a commitment to substantive equality mandat[ing] an examination of the concrete material conditions of individuals and groups in society and the ways in which state structuring can ameliorate adverse social and economic circumstances."²⁸ He actually declines to make his conception of substantive equality more specific, stating that a commitment to examining material conditions "need not entail an embrace of equality of result [but might] include commitments to equality of respect and equality of resources."²⁹ Macklem then asserts that "[t]he justice of the distribution of sovereignty in North America should be assessed by reference to both substantive and formal demands of equality".³⁰ And, indeed, there is a reason why he wishes to incorporate both conceptions. The formal conception serves to distinguish Aboriginal communities from other non-Aboriginal communities that have also faced hardships, with Macklem concluding that constitutional recognition of Aboriginal self-government can act to rectify a denial of formal equality in the past in a way that it would not do with non-Aboriginal communities (such as African Americans).³¹ The substantive conception grounds an argument that constitutional recognition may ameliorate economic and social conditions for Aboriginal communities today;³² in a footnote, Macklem hints at the fact that this argument may receive a better reception from the public.³³ He also seemingly gives it some degree of priority because he appears to recognize that self-governing institutions may not improve the condition of a particular group in some cases, although he is not entirely clear on this point as he goes on to say that substantive equality nonetheless provides a grounding for constitutional recognition of Aboriginal self-government.³⁴

This selective focus on Macklem's equality-based arguments does not, of course, do justice to the rich texture and sweeping reach of his work in actually getting into the details of the case law, something notably absent from most recent theoretical work on Indigenous rights.³⁵ There should be no doubting the significance of *Indigenous Difference and the Constitution of Canada*

²⁶ *Ibid.* at 121

²⁷ *Ibid.* at 120.

²⁸ *Ibid.* at 126.

²⁹ *Ibid.* at 126-27.

³⁰ *Ibid.* at 128.

³¹ *Ibid.* at 129-30.

³² *Ibid.* at 128.

³³ *Ibid.* at 128n.

³⁴ *Ibid.* at 128

³⁵ For example, none of the works in note 1, above, discusses any case for more than a few lines.

in helping to frame arguments for the constitutional recognition of Aboriginal rights in the Canadian Constitution. Nonetheless, I believe there is a significant unanalyzed tension within the work, identifiable specifically in this discussion of its equality-based arguments for Aboriginal rights.

III. The Inequality of Different Equalities

My concern, in particular, is that the different conceptions of equality at play entail inconsistent normative commitments. That different conceptions of equality could do so, of course, comes as no surprise. Amartya Sen’s ongoing discussion of how almost every political theory seeks equality of something makes clear that different theories each seeking equality of something could be dramatically different theories.³⁶ And Macklem, as noted earlier, is at least apparently alive to this issue.³⁷ His underlying assumption would appear to be that the particular conceptions of equality he adopts, applied within the spheres at issue, function harmoniously. If his opening and closing claims about equality being an organizing principle of his argument, about each of his arguments being defensible in terms of “a principle of equality”, and his apparent suggestion that his overall argument is geared to the implementation of a unified conception of equality of power do not quite mesh with the slight variations of conception introduced in the different arguments, the defense would presumably be that he plays on a harmless homonym for a good didactic purpose of facing down those who challenge Indigenous rights in the name of equality. This Harmless Homonym Defense would admit to the use of slightly varying conceptions of equality in different parts of the argument but claim that these particular conceptions do not entail anything inconsistent, with the result that the rhetorical advantage of using a homonym to describe different principles is of no particular concern.

With respect, I do not think this defense can stand, and despite the seemingly innocuous suggestion that the different conceptions of equality to which Macklem refers could function harmoniously—a claim that I admit may appeal to many “liberals”³⁸ and that would fit with parts of the Canadian constitutional text³⁹—I will put the argument here that his argument is trapped in a certain degree of inconsistency. I will do so in two ways. First, I shall offer an argument that takes Macklem’s categories—cultural rights claims, land claims, and self-government claims—as constituting neatly divided classes of rights but argue that within each category we can find wedge cases that raise the possibility of an inconsistency within the equality claims made just for that right. Second, I will argue that the categories are not as neatly divisible as Macklem presumes and seek to show that even greater problems arise once we put the equality claims from the different areas in overlap and interaction.

³⁶ Sen, *The Idea of Justice*, *supra* note 16 at 271-73.

³⁷ Macklem, *supra* note 9 at 31-32.

³⁸

³⁹

First, let us begin with cultural rights claims, which the Supreme Court of Canada has enunciated in a particular form of Aboriginal communities' rights to carry on certain cultural practices.⁴⁰ The main underlying argument, apart from a briefer seemingly rhetorical reference to redressing social equality between Aboriginal and non-Aboriginal people,⁴¹ is that an equality of resources model requires that a cultural community facing more challenges maintaining itself as a context of choice for individuals needs additional support for its ability to do so.⁴² One wedge case here is a claim for a right to carry on a cultural practice that has negative effects on some members within the community, thereby working against individual equality even at the same time that it enhances the equality of the Aboriginal community overall with other Canadians. Macklem will be torn by this wedge case between two conceptions that his discussion here has masked thus far, with the decision being between a principle of equality of resources for groups or of equality of resources for individuals. [There is more to say on this example that I will develop in the oral presentation.]

Second, in the context of land claims, Macklem's argument is that failing to recognize a title claim deriving from prior occupation by an Aboriginal community violates formal equality if non-Aboriginal individuals in some circumstances have gained certain property rights through prior occupation. Although this formal equality principle seems straightforward as stated, a wedge case can nonetheless test whether Macklem actually intends that this formal equality principle should govern or whether there is some other principle of equality (or something else) at stake. Consider the situation where an Aboriginal community in prior occupation was nonetheless not itself in first occupation. In the United States, the Navajo of the southwestern United States were originally a migrant community of Athabaskan peoples from northwestern Canada, and their migration to what would later be the southwestern United States displaced prior Hopi occupation. In Canada, the Inuit of the North were Thule peoples who displaced the Dorset peoples in prior occupation as they moved across the Arctic from west to east. In these cases, would Macklem continue to extend his formal equality principle so as to deny the land claims of Navajo and Inuit communities? And, if not, what is the real principle underlying land claims?

Third, in the context of claims to self-government, Macklem's admission of two different principles of equality points immediately to some relevant sorts of wedge cases. If, in particular circumstances, granting self-government to a particular community will retrospectively undo a formal inequality that was imposed at some past point in time (the historic dimension of the inequality raising its own issues that are better discussed elsewhere⁴³), but its effects would not promote the socio-economic condition of members of that community today, then the substantive equality conception points in a different direction than the formal equality conception. Macklem's introduction of equality issues from two different points in time also points to the

⁴⁰ This is the mode of interpretation in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and succeeding cases.

⁴¹ Depending what "social equality" means in that reference, it introduces another principle of equality again.

⁴²

⁴³

challenges of a scenario where self-government would be to the greater advantage or disadvantage of a present generation compared to a future generation. Macklem's equality principles need significantly more fleshing out if they are to do the work of addressing these sorts of cases that otherwise suggest tensions even within the arguments in each section.

Moreover, a second major dimension to the discussion needs to be the overlap between the categories that Macklem establishes. Although rights to carry on cultural practices, rights to land, and rights to self-government may appear distinguishable and separable, there will inevitably be overlaps between them. To take just one example for the moment, some land rights claims are actually simply extensions of claims to carry on cultural practices that involved exclusive occupation of certain lands. If these sorts of overlaps arise, the question must be raised of which principles of equality will govern in the scenarios that raise these overlaps. In the particular example I have just put, does the fact that there is a land claim dimension call for the use of principles of formal equality, or does the cultural dimension call for the application of equality of resources? The latter, after all, permits deviations from formal equality where such deviations permit the better achievement of equality of resources.⁴⁴ If such overlaps are more widespread as between these three spheres, as I would argue that they are,⁴⁵ then such questions become all the more extensive. When there are overlaps between the various different equality principles that Macklem appears to have put on the table—equality of resources for groups, equality of resources for individuals, formal equality today, formal equality at some historic moment, substantive equality today, and so on—there will naturally be further wedge cases that arise and further differentiations between these different conceptions of equality.

Macklem's assertion of various equality-based groundings for the constitutional protection of different Aboriginal rights has an attractiveness to it. However, his attempt to argue that a shared equality principle militates for this constitutional entrenchment ultimately elides distinctions in a manner that unfortunately undermines the coherence of his normative justification.

IV. Returning to Kymlicka's Argument

The conclusion thus far has been in the specific context of Macklem's argumentative structure and might seem to have no particular implications for Kymlicka's argument, which one might see as consistently based on an equality of resources model. And it would appear to be so, so long as one is talking about cultural rights of certain kinds. That argument is itself subject to

⁴⁴ That claim is arguably too sweeping. Someone could arguably consistently adhere to an equality of resources model and affirm that some formal equalities can be overridden while also insisting on certain spheres of relatively inviolable formal equality; that would be put to the test, of course, if the only way to correct an inequality of resources in a certain scenario involved a violation of formal equality in one of these spheres.

⁴⁵

various objections.⁴⁶ A recent argument by Jonathan Quong, notably, would challenge whether an equality of resources account can support the conclusions Kymlicka reaches on the basis of an “expensive tastes” objection, within the technical terms of equality of resources as a version of luck egalitarianism.⁴⁷

Drawing on the discussion of the tensions within Macklem, I wish to raise a further worry that draws on the point that Kymlicka, although developing a unified theory of cultural rights based on a particular version of equality, makes room on a pragmatic basis for the very kinds of extensions that Macklem engages in. Kymlicka does not defend land rights for Aboriginal communities solely on the basis of equality of resources for cultural protection but also out of aims of creating an economic base for Aboriginal communities to overcome different types of socio-economic disadvantage.⁴⁸ Kymlicka does not defend Aboriginal self-government solely on the basis that it is a necessary cultural protection but also on historically unjust assertions of sovereignty unequally over Aboriginal communities.⁴⁹ Thus, other principles of equality are arguably present in some of Kymlicka’s argumentation along some of the same lines as in Macklem’s. The question that might arise, of course, is whether these other references introduce any kind of genuine tension or are just more glancing references that admittedly are not in line with the main account but simply should not have been made. If this latter position holds, we would appear to be in an unfortunate position that now excludes additional, commonsensical arguments. But the tensions between conceptions of equality otherwise reemerges, in some ways just as it did with Macklem.

V. Toward a Pluralistic Normative Foundation for Indigenous Rights

[I will speak at the presentation on where this leaves us and what it implies for accounts of the normative foundations of Indigenous rights.]

⁴⁶

⁴⁷ Jonathan Quong, “Cultural Exemptions, Expensive Tastes, and Equal Opportunities” (2006) 23 J. Applied Phil. 53.

⁴⁸

⁴⁹