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Is there room in liberal theory for Aboriginal rights as understood by Aboriginal peoples?

### **Purpose**

In what follows, with the valuable assistance of philosopher Dale Turner, I respond to the following questions:

1. Does the conceptual framework of liberal theory in 2007 have room for Aboriginal understandings of their inherent rights?
2. If presently there is no room in liberal theory for Aboriginal rights as understood by Aboriginal peoples, what needs revision so that liberalism is compatible with these rights?

### **Introduction**

According to political philosopher Will Kymlicka, Canada's Aboriginal people must accept the political reality that their Aboriginal rights are not theirs to define. Non-Aboriginal judges and politicians have the power to "protect and enforce" Aboriginal rights. They do so presently presuming a liberal theory which understands them "...as matters of discrimination and/or privilege, not of equality." Consequently, Aboriginal rights must be understood as "...an essential component of liberal political practice."<sup>1</sup> Aboriginal rights will only be secure if they can be seen from the non-Aboriginal perspective (i.e. liberalism) as consistent with, rather than competing with, liberalism. The challenge, which Kymlicka undertakes on their behalf, is to show the fit between liberalism and Aboriginal rights.

Aboriginal people may view Kymlicka's efforts as well intentioned. Like Dale Turner, they may thank Kymlicka for liberalism's most generous attempt to accommodate Aboriginal rights. However, requiring Aboriginal peoples to fit their rights within the normative framework of an importantly different philosophy (i.e. metaphysically, epistemologically and axiologically) can reasonably be viewed as another unjust imposition. It assumes superiority for non-Aboriginal philosophy relative to Aboriginal philosophy analogous to other non-Aboriginal superiority assumptions.

The writings of Aboriginal legal scholars such as John Borrows and Sakej Henderson, demonstrate the accuracy of Kymlicka's description of Canada's political reality. The dominant culture assumes its normative framework without recognizing the assumption. However, the assumption is glaringly obvious to Aboriginal people whose understanding of their rights arises in a different philosophical context. They also see superiority is assigned liberal theory's normative landscape. Hence, they recognize the likelihood that greater legitimacy will be attached to Aboriginal rights liberalism generates will be assigned greater legitimacy than their understandings of their rights.

Does liberalism's inherent superiority presumption have to be an insurmountable impediment to justice for Aboriginal peoples? If Aboriginal peoples show that their rights really are consistent with liberal theory, aside from unjustly compelling Aboriginal peoples to justify their rights in a normative framework that they believe is basically flawed, does not Kymlicka's recommendation produce more justice than injustice? Suffering a little injustice in order to enjoy a lot of justice seems reasonable. My expectations of getting justice out of injustice are

not great. My understanding of Aboriginal philosophy suffices to make me pessimistic that accounts of Aboriginal rights based upon current liberal theory would require non-Aboriginal respect for the full set of rights Aboriginal peoples believe they have. In other words, Aboriginal rights as understood by Aboriginal peoples cannot fit comfortably within liberal theory. However, I argue here that liberal theory does justify prohibiting non-Aboriginal interference with Aboriginal peoples in their exercise of the Aboriginal sovereignty they claim they have.

### **The Context**

Since 1967, Canada's Aboriginal peoples have been provided with four liberal theory based accounts of Aboriginal rights and a new/renewed relationship with Canada's non-Aboriginal governments. The Trudeau/Chretien **White Paper** offered Indians the justice of equal citizenship in Canada and its attendant promise of equality in well-being. Alan Cairns offers *citizens plus*, -equal Canadian citizenship and something extra which acknowledges Aboriginal difference. Will Kymlicka offered a nuanced account of minority rights to create a space for Aboriginal 'nations' within the Canadian state. The 1996 **Report of the Royal Commission on Aboriginal Peoples** called upon Canada to renew the nation-to-nation relationship with Aboriginal peoples and to acknowledge and respect the Aboriginal right to 'sovereignty' and treaty rights. Also, it provided an account of the way Aboriginal nations will exercise sovereignty in relation to federal and provincial sovereignty.

According to Dale Turner, these proposals are inadequate. Explicitly, he claims they do not accommodate Aboriginal peoples' understandings of their rights. Implicitly, he argues that none of the relationships recommended would move Aboriginal and non-Aboriginal peoples into a just relationship. For Turner, liberal theory's consistent failure to accommodate Aboriginal rights does not prove it is unable to do so. He is not convinced that Aboriginal understandings of Aboriginal rights are incommensurable with liberal theory. Rather the failure to date provides evidence for the need for Aboriginal participation in the attempt to make room for Aboriginal rights in liberal theory.

I unqualifiedly concur with Turner's conclusion that equal citizens, *citizens plus*, and special minority rights cannot adequately explain Aboriginal rights. This is the case whether one reasons from within liberal theory, as I do, or from Aboriginal understandings of their rights, as Turner does. Answers to my questions emerge as I compare my reasons for rejecting the three proposals with Turner's. The comparison reveals important similarities and differences between the two normative standpoints. It shows there are justice components of the liberal framework which oblige Canada's governments to respect Aboriginal sovereignty. And, it demonstrates that liberal theory does not permit Canada to determine the scope and content of Aboriginal sovereignty.

### **Turner's Criteria**

Dale Turner's analysis and assessment of recent Canadian attempts to define Aboriginal status are contained in his recent book *This is Not A Peace Pipe: Towards a Critical Indigenous Philosophy*.<sup>2</sup> Like other indigenous scholars, Turner maintains that liberalism has not yet accommodated Aboriginal rights. He explains how liberalism is employed by politicians (Pierre Trudeau and Jean Chretien), political scientists (Alan Cairns and Tom Flanagan) and political philosopher (Will Kymlicka) to justify eliminating, ignoring or transforming the rights of Aboriginal peoples. They do not offer Aboriginal peoples a just relationship; -as he puts it, a

peace pipe. As I put it, liberalism as represented in these proposals appears to support the non-Aboriginal right to continue violating Aboriginal rights. Since liberal theory upholds the rights of individuals and nations and prohibits violating these rights, liberalism's support for them must be illusory.

Turner is open to liberalism being commensurable with what Aboriginal rights are. The criteria which identify liberalism's failures also allow us to recognize success. He explains his criteria as he exposes the problems with the **White Paper**. The **White Paper** fails to (1) address the legacy of colonialism (2) consider the sui generis nature of indigenous rights (3) question the legitimacy of the initial formation of the Canadian state (4) acknowledge that Aboriginal participation is presupposed by a workable 'theory' of Aboriginal rights. (15) A fuller account of each criterion emerges as he explains the inadequacies of *citizens plus*, national minorities, and RCAP's recommendations.

### **The legacy of colonialism**

Turner's first criterion requires that an account of Aboriginal rights demonstrates understanding of colonialism, that is, its practice of domination and its contribution to political discourse. The meaning and content of Aboriginal rights cannot be understood without understanding "...first how colonialism has been woven into the normative political language that guides contemporary Canadian legal and political practices. Colonialism has stained the legal and political relationship..." (30) Marginalization (physical, political and social) silenced Aboriginal voices. Consequently, history does not reflect Aboriginal understandings and their understandings are not represented in the normative political language which in the past and in the present determines Canadian legal and political practice. Unpacking the meaning and effects of colonialism creates intellectual space for Aboriginal voices. Hence, by undermining colonialism, Aboriginal peoples can return to "...their rightful place in the relationship between Aboriginal peoples and the Canadian state..." (31)

While assessing liberalism's efforts to accommodate Aboriginal rights, Turner exposes how non-Aboriginal control of political discourse invariably fuels colonialism. The 'White Orthodoxy,' assumed in the White Paper and defended by Tom Flanagan, permeates Canadian-Aboriginal rights discourse whether implicitly or explicitly. Its non-Aboriginal superiority assumptions means nation-to-nation relationship language is rendered meaningless. This results in a discourse with no place for a political relationship, Indian land ownership, treaties and a fiduciary relationship. (34-5) Each of these notions is essential to explain Aboriginal understandings of their rights. So, how are Aboriginal voices to be heard and their philosophy to become part of political discourse? Must liberal discourse continue to make colonialism invisible and allow non-Aboriginal governments to remain in denial?

The following sentences from the **White Paper** illustrate how political discourse avoids confronting colonialism. "Many of the Indian people feel that successive governments have not dealt with them as fairly as they should. They believe their lands have been taken improperly or without adequate compensation, that their funds have been improperly administered, that their treaty rights have been breached." (136) These sentences report the *subjective* experiences of Indians. They are not admissions of unjust activities. The government is not acknowledging government wrong doing past or present. Unless the reality of colonialism is affirmed, injustice remains unacknowledged. Hence, the government has no obligations. It is responding to beliefs and feelings (their sense of grievance), not to its unjust activities. However, if colonialism is

confronted, liberal theory's justice principles reject **White Paper** equality as unjust. Liberal theory's ontological account of the rights of individuals and nations and of treaty rights is not consistent with the notion that acts of parliaments create or destroy them. The law can acknowledge and protect or violate these rights, but it is not their source.

If liberalism takes the *White Paper's* ahistorical starting point and does not see colonialism or if it takes Flanagan's defense of liberalism's superiority assumptions and calls colonialism just, as Turner claims, the legacy of colonialism is not addressed. However, as indicated in the injustices acknowledged by Cairns and Kymlicka, liberalism's normative structure does call past colonialism oppression (Cairns and Kymlicka) and present colonialism unjust (Kymlicka). When the injustices are seen, one discovers that an ahistorical context for the discussion of or the account of Aboriginal rights is mistaken. The historical starting point seems to have produced support among non-Aboriginal scholars for what Flanagan calls 'Aboriginal Othodoxy.' So, liberals can divest themselves at least partially from the superiority presumption.

### **The sui generis nature of Aboriginal rights**

According to Aboriginal understandings of their inherent rights, they are not based in nor created by non-Aboriginal action. As Turner puts it, these rights "...flow out of indigenous nationhood and are not bestowed by the Canadian state." (7) Therefore, the origins, the scope and the content of Aboriginal rights are dependent upon Indigenous ways of life and Indigenous understandings. If this is true, the absurdity of non-Aboriginal politicians and legal scholars defining such rights from within liberal theory becomes clear. They lack the knowledge presupposed by the task and the materials they use are inappropriate. Understanding the basis for the rights, one understands the multiple injustices resulting when the federal government or Supreme Court define Aboriginal rights. Non-Aboriginal awareness of the injustice is facilitated by imagining Aboriginal people displacing liberal theory's rights and imposing *their* rights. Imagine Aboriginal peoples making Canada's social, political and economic institutional structure consistent with Aboriginal rights over the protests of non-Aboriginal people. Non-Aboriginal Canadians would argue from within liberal theory that they are being oppressed. Aboriginal peoples are unjustly imposing their way of life and values on others. Presumably the liberalism which supported these justice judgments by non-Aboriginal people supports similar justice judgments by Aboriginal peoples in similar circumstances.

Turner is right that White Paper liberalism "...embraces a set of attitudes towards equality, sovereignty, and history that reinforce the view that the recognition of Aboriginal rights is an obstacle to, not a requirement for, a just political vision of Canada." (31) In particular, the intelligibility of its equal citizenship recommendation rests upon Aboriginal peoples having somehow 'lost' their sui generis sovereignty right and also 'lost' their treaty relationship with the federal government. Although the federal government has certainly pretended that Aboriginal peoples have lost both, liberal theory's notions of sovereignty, rights and justice mean it is impossible to justify claims that Aboriginal peoples no longer have inherent rights or treaty rights. For liberal theory, consent legitimizes sovereignty. Canada's political and legal discourse now explicitly concurs with Aboriginal peoples that Aboriginal sovereignty is sui generis. Since the required consent has not been given, there is no basis in liberal theory for claiming that Aboriginal peoples have lost their sovereignty or that the Canadian state now exercises legitimate sovereignty over Aboriginal peoples and their lands. Liberal theory protests an act of Canada's parliament that purports to create the right to govern another nation and any

government actions based upon it. Canada cannot escape liberal theory's unjust verdict. Liberalism joins Aboriginal peoples in declaring unjust Canada's complex legal structure which defines them and unilaterally determines their rights.

Full understanding of the sui generis nature of Aboriginal rights and seeing the ongoing existence of Aboriginal sovereignty is problematic for liberal theorists. As Turner explains, Cairns and Kymlicka in their efforts to accommodate Aboriginal rights also presuppose an underlying non-Aboriginal sovereignty. Their historical accounts demonstrate non-Aboriginal sovereignty is imposed without consent and, as liberalism requires, they call the imposition unjust. Yet, they do not question the legitimacy of (1) non-Aboriginal sovereignty and (2) underlying non-Aboriginal sovereignty. These justice questions are as important from the point of view of liberal theory as they are from Turner's standpoint. If Canada's underlying sovereignty is not legitimate, then liberals who assumed it is have wrongly concluded Aboriginal sovereignty today is not the sovereignty they had at contact.

The notion of underlying non-Aboriginal sovereignty employed in Supreme Court judgements to justify constraints on Aboriginal rights is important for both Cairns and Kymlicka. Canada's underlying sovereignty means it exercises full sovereign powers. Its sovereignty constrains (Cairns) or confers (Kymlicka) Aboriginal 'sovereignty'. The legitimacy of non-Aboriginal sovereignty is examined in the discussion of Turner's third criterion. At this point in the argument, it is important to indicate that *underlying* non-Aboriginal sovereignty is premised upon non-Aboriginal sovereignty. Therefore, if the legitimacy of non-Aboriginal sovereignty is problematic, then so is underlying non-Aboriginal sovereignty.

The sui generis nature of the Aboriginal right to sovereignty seems to have implications for the right to underlying sovereignty. If underlying sovereignty can be meaningfully applied, would it not apply to Aboriginal sovereignty? Non-Aboriginal sovereignty is not sui generis. The only foundation for legitimate sovereignty in Canada is Aboriginal sovereignty. Liberal theory allows Aboriginal sovereignty to be the source of legitimate non-Aboriginal sovereignty. But, how does it legitimize non-Aboriginal sovereignty becoming underlying sovereignty? How does Canada acquire the right to constrain Aboriginal sovereignty? Canada's underlying sovereignty is an important premise in both Cairns' and Kymlicka's arguments. If Aboriginal sovereignty cannot reasonably be viewed as the basis for Canada's underlying sovereignty, then their proposals do not seem to be supported by liberal theory.

### **The legitimacy of the initial formation of the Canadian state**

The **White Paper** ignores the formation of the Canadian state. The history of the relationship is supposedly irrelevant to understanding either the current or the just political status of Indians. And, it is irrelevant to determining the legitimacy of the Canadian state. It simply assumes the legitimacy of non-Aboriginal sovereignty and the non-existence of Aboriginal sovereignty. Neither assumption can be questioned given its ahistorical starting point. Cairns is more aware of the historical relationships. However, he does not allow his knowledge of history to shake his confidence in the legitimacy of non-Aboriginal sovereignty and the non-existence of Aboriginal sovereignty. As Turner explains, for Cairns "...the sovereignty of the Canadian state is a given, an absolute and not up for negotiation in the political relationship." (41) Furthermore, Aboriginal peoples are *within* Canada; they are not legitimate nations. James Tully eloquently expresses liberalism's requirement for an Aboriginal basis for Canadian sovereignty, if that sovereignty is to be something more than ongoing colonial oppression.<sup>3</sup> Cairns only sidesteps

legitimacy questions because he moves from his historical account to answering the question of what should be done now without realizing that the historical account establishes some starting points for answering that question. Liberal theory cannot provide the right answers, if one does not position the question in the context which reveals all that is morally relevant to determining the answer.

Turner's third criterion is explained and its significance demonstrated in discussing Kymlicka's efforts to make room for Aboriginal rights in liberal theory. Kymlicka's fits Aboriginal rights into liberal theory via the notion of minority rights. Minority rights are a component of the justice account of liberal theory. As Turner points out, minority rights misrepresent Aboriginal rights, in particular, the notion cannot recognize the legitimacy of indigenous *forms* of political sovereignty. He notes that Aboriginal sovereignty in this context means "the special relationship Aboriginal peoples have with their territories." (151) Because minority rights are special rights attaching to groups *within* a state, a minority rights interpretation subsumes Aboriginal rights and hence Aboriginal sovereignty "...within the superior forms of sovereignty held by the provincial and federal governments." (57) The rights resulting from being subsumed within Canada's governments and the special relationship that is Aboriginal sovereignty will not be the same. Therefore, minority rights cannot respect Aboriginal peoples and their rights. A minority rights approach presumes an underlying sovereignty of non-Aboriginal governments which legitimizes the right of these governments to constrain and/or overrule Aboriginal sovereignty. But, if we have heard Aboriginal voices, and if we remember what they have told us about their relationship to the land, then we realize that overruling Aboriginal sovereignty is impossible. They could never transfer such authority; it is non-transferable. Hence, non-Aboriginal overruling of Aboriginal rights pertaining to their relationship to the land can never be legitimate, even if there is some legitimacy to non-Aboriginal sovereignty.

If the minority rights interpretation is so inconsistent with Aboriginal sovereignty, why further engage Kymlicka's proposal? Turner claims "I am going to engage Kymlicka's version of liberalism and show that it is not tenable *unless* it recognizes Aboriginal understandings of political sovereignty." (59) Turner's engagement with Kymlicka's liberalism brings Aboriginal understandings of political sovereignty into the discussion and he helped me discover the depth of the legitimacy challenge. However, I am unable to see how Kymlicka's version of liberalism can become tenable with the assistance of Aboriginal participation. If Turner means Kymlicka's liberalism provides the context in which Aboriginal peoples can make visible the nature of their rights and non-Aboriginal participants in the political discourse will quietly withdraw the notion of minority rights, then engagement with Kymlicka's liberalism is valuable indeed. Unless Turner wants non-Aboriginal people to be the ones to discard Kymlicka's liberalism, I am puzzled that he is not discarding Kymlicka's liberalism and remains open to the possibility that what he calls "liberalism's last stand" can be transformed into a peace pipe.

Kymlicka's nuanced account of minority rights initially looks promising. He distinguishes cultural and national minority rights. Canada's founding nations have been incorporated into a single state, thereby becoming national minorities. Moreover, "...the political relationship today is premised on the fundamental political recognition of equality between the incorporating national minorities." (64) Kymlicka must be credited for incorporating into liberalism recognition of Aboriginal peoples as founding nations, and the present equality of their political status. These insights are necessary to move the discussion of Aboriginal rights

forward. However, as Turner demonstrates, a national minority rights analysis and justification of Aboriginal rights is at least one step backward. It fails to accommodate Aboriginal understandings of their rights. From Turner's position in Aboriginal understandings and mine in liberal theory, the problematic notion is incorporation. Turner's arguments show Kymlicka's incorporation is not consistent with Aboriginal peoples *now* having sui generis Aboriginal rights. I show that incorporation problematizes the equal political status of the founding nations. Incorporation seemingly justifies claiming Aboriginal peoples have lost Aboriginal sovereignty (as Turner is employing the term) and the nation-to-nation relationship.

For Kymlicka, incorporation explains and ultimately legitimizes the creation of the Canadian state and it explains the current political status of the founding nations. Although Aboriginal peoples were once sovereign and their incorporation was involuntary, Kymlicka nonetheless maintains that incorporation succeeds. Justice is irrelevant. A single state was created and the founding nations each acquired a new political status, namely national minority. Can liberal theory allow justice to be silent regarding unjust incorporation? Does unjust incorporation not mean the state is not legitimate? Can liberal theory uphold either the rights of persons or the rights of nations and not protest involuntary incorporation? Since these rights are fundamental tenets of liberal theory, it seems incorporation cannot succeed. The single state cannot be a legitimate state. But, if it is not, has the political status of Aboriginal nations been altered? Does the unjust exercise of illegitimate non-Aboriginal sovereignty have ontological consequences for their Aboriginal rights? Obviously they have been violated, but do they remain intact to be exercised fully when the oppression stops?

Liberal theory does not have the means to whitewash unjust incorporation. The unjustly incorporated retain their nation status and their right to sovereignty in a manner analogous to the way an enslaved person retains their human right to freedom. There is never a point at which the enslavement or the exercise of unjust sovereignty becomes just. Liberal theorists may pretend that Aboriginal peoples have lost their nationhood and right to sovereignty, just as they pretend that after a certain time the bike that Bill stole from me is the legitimate property of his grandchildren rather than my grandchildren. However, liberal theory's normative framework does not contain the means to justify either pretense. Governments which profess commitments to liberal theory have created laws which prohibit Aboriginal peoples' exercise of sovereignty and do not permit my grandchildren to drive off on the bike. However, the normative framework of liberal theory justifies neither legal prohibition.

Turner raises many problems for Kymlicka's notion of incorporation. Of particular importance is that incorporation renders the notion of a nation-to-nation relationship not only irrelevant but meaningless. Aboriginal peoples are *within* the Canadian state. There is only one *real* nation. And, when this nation is created, there does not seem to be room within it for Aboriginal rights as Aboriginal peoples understand them. The Aboriginal right to self-governance he asserts on behalf of Aboriginal peoples would be rejected by them. It does not understand their right to sovereignty as "the special relationship Aboriginal peoples have with their territories." and would not ensure non-Aboriginal recognition and protection of this right.

Liberalism's basic commitments to the individual together with an account of equality which justifies a government's obligations to the disadvantaged and a presumed equality of the founding nations has not provided an argument in support of Aboriginal peoples exercising their inherent rights. Perhaps Kymlicka had no intention of showing that liberal theory justifies Aboriginal peoples exercising such rights. Like Cairns, his intention might be to offer

Aboriginal peoples the most that liberal theory can justify and to encourage non-Aboriginal governments to move into a more just relationship with Aboriginal peoples. However, I have shown that in rejecting incorporation, liberal theory has more to offer than Kymlicka's national minority rights.

Liberal theory challenges both incorporation and the legitimacy of the Canadian state. Aboriginal nations were not incorporated into a legitimate non-Aboriginal state although they would be necessary to its creation. Liberal theory, no less than Aboriginal understandings, requires treaties based in Aboriginal nation status, sovereignty, and willingness to share. But, the treaties which give non-Aboriginal people access to the land and a non-Aboriginal sovereign a territory over which to have jurisdiction did not transfer non-transferable Aboriginal sovereignty to the new sovereign they created. Therefore, the nation-to-nation relationship which made the treaties possible continues.

I may attach more significance to Turner's willingness to retain the notion of national minority rights than it merits and I may wrongly interpret him as accepting Kymlicka's notion of incorporation when revised by Aboriginal participation. However, I think that both notions are essentially problematic for Aboriginal peoples' understandings of their rights as I hear Turner explaining them. These notions make invisible too many morally relevant differences between Aboriginal peoples and the English and French. The three do not participate in the same ways in the creation of the Canadian state. Therefore, I see little value in muddying the discussion of sui generis Aboriginal rights by employing Kymlicka's notions.

### **A workable 'theory' of Aboriginal rights in Canada must include the participation of Aboriginal peoples**

The whole of Turner's critical discussion of non-Aboriginal liberal-based attempts to provide accounts of Aboriginal rights serves to establish the truth of and need for this criterion. If only Eurocentric philosophy is critiquing and revising liberalism's conceptual framework to define Aboriginal rights, failure is inevitable. Good intentions are irrelevant. Aboriginal rights are sui generis rights which they had and have and which flow out of their way of being in the world. Hence, Aboriginal philosophy, not liberal theory, is their place of origin. My liberal-theory based critiques of the proposals Turner rejects show the non-Aboriginal constructions are also problematic for liberal theory. What Turner claims are essential aspects of Aboriginal understandings of their rights are also morally relevant within liberal theory. Moreover, the justice components with which they connect are arguably accorded more importance in liberal theory than the parts providing the basis for liberalism's failed peace pipes.

Turner maintains Kymlicka's theory can be interpreted in a way that at least makes room for Aboriginal peoples to speak for themselves. Kymlicka's acknowledgment of the injustice of the incorporation process for Aboriginal nations means that "...we have to reassess the validity of Aboriginal incorporation in a much fuller investigation. It is not enough to leave the investigation with the claim that the incorporation was unjust and that therefore the Canadian state should accord Aboriginal peoples special rights to rectify past wrongs.... This is an important first step for liberalism, but it is only a first step."(68-9) My concern with Turner's generous assessment of Kymlicka's theory is that Aboriginal peoples are burdened with more liberal notions (national minority and incorporation) in terms of which they are to provide an account of their rights. Are they more likely than sovereignty and rights to fit comfortably within Aboriginal philosophies?



When word warriors engage Kymlicka's theory, they must begin by challenging his accounts of the founding nations and incorporation. Turner's detailed critique of Kymlicka demonstrates that it is important that word warriors engage this theory. However, this is because they see and are able to explain its inadequacies to non-Aboriginal politicians and scholars. He has not established so clearly that word warriors can find a space for Aboriginal rights in Kymlicka's theory. Does the needed space exist in a theory in which the only rights Aboriginal people **can** have are so profoundly unlike the rights they have?

Turner discusses his participation criterion primarily in the context of a discussion of RCAP. RCAP is not referred to as one of liberalism's peace pipes, nor is it outrightly rejected. Its account of colonialism and the injustice of non-Aboriginal thinking, action and policy regarding Aboriginal peoples are appropriate starting points for discovering the just relationship which is sought. Past and present colonialism are acknowledged, and so is justice's requirement that it be eliminated. The legacy of colonialism seems to be addressed. (Criterion 1) Its normative landscape contains, as Turner presumably believes it should, the nation-to-nation relationship, inherent Aboriginal rights and treaty rights. It recommends renewing the treaty relationship. The notion of a nation-to-nation relationship is to provide the starting point for understanding Aboriginal rights and the implied equality of nations in this notion is explicitly asserted and further clarified in the Aboriginal principles (i.e., mutual recognition, mutual respect, sharing, and mutual responsibility) which are to govern the relationship. The sui generis nature of indigenous rights seems to be upheld. (Criterion 2)

RCAP understands that the treaty relationship allowed for the creation of the Canadian state and alone can be the source of its legitimacy. It recommended that Canada's governments recognize Aboriginal peoples are nations vested with the right of self-determination. So, RCAP addresses important aspects of criterion 3. However, Turner explains that the qualifications it attaches to Aboriginal governance reveals problems with its account of the legitimacy of the Canadian state. It describes Aboriginal peoples as "...having the right to opt for a large variety of governmental arrangements *within* Canada, including some that involve a high degree of sovereignty...." (79). Hence, it presumes the legitimacy of non-Aboriginal underlying sovereignty thereby not adequately challenging the legitimacy of the initial formation of the Canadian state. I would add that RCAP's detailed account of the nation-to-nation relationship in terms of core and periphery areas of jurisdiction makes the same problematic assumption.

Turner explains RCAP's failure to satisfy the third criterion in terms of its failure to satisfy the Aboriginal participation criterion. From a distance, it seems inconceivable that RCAP fails in this respect. The Commissioners appear to allow for equal representation of Aboriginal and non-Aboriginal voices. Aboriginal participation in discussions providing the basis for the report and in the production of the report was extensive. Turner, a researcher for the commission, claims Aboriginal voices were heard in stage one of the commission's work. However, in stage two, when the commission "...attempted to consolidate the material from the hearings and research with the existing legal and political practices of Aboriginal public policy ... Aboriginal voices seemed to disappear, at least from the perspective of the Aboriginal commissioners and commission employees."(76)

## **Conclusion**

I believe that the above discussion of liberalism's most recent attempts to accommodate

Aboriginal rights and Turner's criteria supports answers to my two questions.

1. Does the conceptual framework of liberal theory in 2007 have room for Aboriginal understandings of their inherent Aboriginal rights?
2. If presently there is no room in liberal theory for Aboriginal rights, what specifically needs revision in order to create a space in liberal theory so that it justifies their rights as they understand them?

My response to the first question is straightforwardly implied by the argument above. There is no convincing evidence that presently liberal theory's account of rights in the dominant political and legal discourse Turner examines has room or can make room for Aboriginal rights. However, it does not follow from liberal theory's resistance to Aboriginal rights that the work of Turner's word warriors is less necessary to the survival of indigenous peoples than Turner claims. Without word warriors non-Aboriginal scholars will be less likely to turn liberal theory on itself. Liberal theory does not justify an Aboriginal understanding of rights. But, liberalism, in 2007, can provide a very long series of arguments in support of the claim that Canada's governments are obliged to cease violating and begin respecting the Aboriginal rights Aboriginal peoples understand they have. Because they help me see what is so obvious to them, Aboriginal word warriors Taiaiake Alfred, John Borrows, Sajej Henderson, Lorraine Mayer, Patricia Monture-Angus, and Dale Turner enable me to keep adding to the chain. Turner's begins his introduction with Wittgenstein's words "We are struggling with language. We are engaged in a struggle with language."<sup>(3)</sup> In the struggle to remove the very real language barriers to a just relationship between Canada's Aboriginal and non-Aboriginal peoples, this is as true for non-Aboriginal as Aboriginal philosophers.

My second question regarding revisions to liberal theory is not so easily answered. I am not singling out specific components of liberalism for revision on the basis of extensive evidence that they are obstacles or that they hold some promise. However, Turner's arguments and mine from within liberal theory suggest the notion of nation and the rights of nations and the distinction between legal justice and moral justice could usefully be explored in the dialogue Turner believes is important. I am hopeful that the struggle with language from within liberal theory when thinking about Aboriginal rights will become less muddled and more fruitful as we become clearer about the moral landscape for this discussion. As we remove morally irrelevant notions, for example equal citizenship and minority rights, we move closer to having a moral landscape containing only that which is morally relevant to the discussion. If only the relevant 'players' are on the stage, we will be positioned to assess whether liberalism and Aboriginal understandings of their rights are commensurable.

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1. Will Kymlicka, *Liberalism, Community, and Culture*. Oxford: Oxford University Press, 1989, 154.

2. Dale Turner, *This is Not A Peace Pipe: Towards a Critical Indigenous Philosophy*, Toronto: University of Toronto Press, 2006. (Bracketed page numbers refer to this book.)

3. James Tully, "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada," in *Aboriginal Rights and Self Government*. Eds. Curtis Cookd and Juan D. Lindau, Montreal & Kingston: McGill-Queen's University Press, 2000, p. 49.