

CAN COLLECTIVE AND INDIVIDUAL RIGHTS COEXIST?*

LEIGHTON McDONALD†

[Recently it has been argued that collective rights of cultural minorities should supplement liberal individual rights. This article considers whether individual and collective rights can coexist within the same normative discourse, potentially forming complementary components of an approach to inter-cultural justice. On the basis of the approach here taken to rights and, in particular, collective rights, it is argued that prevalent claims of inevitable and endemic conflicts between such rights cannot be sustained. Not only is the assumption of pervasive irreconcilability false, but the main strategies available for coping with other situations of rights conflicts are also available in the context of conflicts between collective and individual rights. It is accepted, however, that such conflicts cannot be completely dissolved and that their resolution will often be contentious and sometimes tragic. The article concludes with a discussion of how genuine cases of conflicting individual and collective rights can be constructively approached.]

I INTRODUCTION

The question posed in the title of this article is prompted by two facets of the current debate about multiculturalism and rights. The first is the High Court's holding in *The Wik Peoples v Queensland; The Thayorre People v Queensland*¹ that pastoral leases, granted by statute for 'pastoral purposes' over vast tracts of land, do not necessarily extinguish (collective) native title rights. The judgment is clearly premised on the possibility of the two sets of rights coexisting. Yet although the court emphasised that where native title rights and pastoral rights come into conflict the former must yield, to the extent necessary, to the latter,² critics have insisted that the vindication of pastoralists' rights correspondingly requires the complete rejection of the rights of Aborigines, so that the winner takes all. Lurking within the, at times, vicious reaction to the assumption of coexistence seems to be, *inter alia*, the notion that collective and individual rights are deeply irreconcilable.³

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† BEc, LLB (Hons) (Macq), LL.M (Osgoode); Lecturer, Faculty of Law, University of Adelaide.

¹ (1996) 187 CLR 1 ('*Wik*'). I argue below that native title can be usefully understood as a right which has significant 'collective' aspects.

² *Ibid* 132-3 (Toohey J, with the concurrence of Gaudron, Gummow and Kirby JJ). As native title rights are recognised through the common law: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'), this is merely an instance of the general relationship between the common law and constitutionally valid legislation.

³ The two pastoral leases in *Wik* covered 535 and 1119 square miles respectively. In the case of the first of those leases, no pastoralist had ever entered into possession of the land. It is interesting to note that the Canadian Supreme Court has recently accepted a more generous inconsistency test

The second source of motivation for my question is Australia's periodic debate over constitutional rights which in the current round has been kicked along by the High Court's implied rights jurisprudence and, also, by attempts to link a bill of rights to the republican push. In recent times, this debate has included suggestions that collective minority rights, in addition to the familiar individual rights, be constitutionally entrenched. For example, it is not infrequently suggested that the *Constitution* should be amended to include various Aboriginal rights, such as self-government and language rights,⁴ which are generally considered to be paradigmatic examples of collective rights. Indeed, the Australian constitutional debate must, as a matter of urgency, respond to the belated recognition by Australian law that Aboriginal people lived on this land before the British claimed it for themselves. Undoubtedly the rejection of terra nullius constitutes an important step in the legal recognition of the cultural diversity which exists in Australia. It does not, however, directly confront the question of whether or not justice requires that the inclusion of certain cultural groups within the Australian polity be premised upon measures designed to protect their collective cultural endeavours.⁵ The possibilities for the development of a 'constitutionalism [for] an age of diversity'⁶ involve issues that Australians are yet to adequately grapple with.

A useful point of comparison here is Canadian constitutional law, which from its inception has been more directly concerned with cultural diversity. Not only were the collective rights of linguistic and religious minorities the only rights to receive constitutional protection under the *British North America Act 1867* (UK),⁷ but the centripetal pull of Canadian federalism has also allowed for increased cultural autonomy in Québec. More recently, the *Canadian Charter of Rights and Freedoms*⁸ has continued the constitutional protection of language rights,⁹ and has extended some protection to the rights of aboriginal peoples.¹⁰ Although Canadian courts have not always embraced the full implications of these provisions, the important questions they raise are closer to the surface in

to determine whether aboriginal treaty rights have been extinguished. In *R v Badger* [1996] 1 SCR 771; 133 DLR (4th) 324 it was held that a *treaty* right to hunt could continue on privately owned land so long as it did not interfere with the *actual* use of the land by the owner or occupier. This Canadian test for extinguishment thus relies on a factual inquiry into whether private property has been put to a 'visible, incompatible use': at 807; 350.

⁴ See Council for Aboriginal Reconciliation and Constitutional Centenary Foundation, *The Position of Indigenous People in National Constitutions: Speeches from the Conference* (1993). The draft constitution for the Northern Territory, tabled in the Northern Territory Legislative Assembly on 22 August 1996, can be understood as entrenching both individual and certain collective rights: Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development, 'Final Draft Constitution for the Northern Territory' (1996) <<http://notes.nt.gov.au/lant/fdcent.nsf?opendatabase>>.

⁵ Will Kymlicka labels such measures 'group-differentiated' rights: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) 26–33.

⁶ To borrow James Tully's phrase: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

⁷ *British North America Act 1867* (UK) 30 Vict, c 3.

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 ('*Charter*').

⁹ *Charter* ss 16–23.

¹⁰ *Charter* s 35.

Canadian constitutional jurisprudence. Further, as the *Charter* also enshrines individual rights,¹¹ Canadian law is a source of useful examples where individual and collective rights interact with one another.

The traditional liberal view has been that there is simply no need for collective rights as individual rights are sufficient to protect the wellbeing of cultural minorities.¹² A more recent view insists that, although individual rights may be important, they are patently not enough — at least with respect to some cultural groups. In so far as individual rights undervalue the importance of cultural membership or particular cultural goods — goods which can only be enjoyed collectively — they are said to ignore fundamental and important aspects of human wellbeing. It has also been argued that such aspects of human wellbeing, if they are to ground rights at all, ground ‘collective’ or ‘group’ rights.¹³

This article does not directly examine justifications of particular individual or collective rights; nor does it deal with the question of what (if any) rights should be constitutionally entrenched in Australia.¹⁴ My purpose is to examine a series of separate, though related, questions: Would it make any sense to constitutionally entrench both sorts of rights? Can individual and collective rights coexist within the same normative or constitutional discourse? How (if at all) might conflicts between collective and individual rights be resolved or managed? The task is not, therefore, to articulate a theory of inter-cultural constitutionalism, but a more modest one of examining specific issues relevant to assessments about whether collective rights and individual rights could or should be used as complementary components of an approach to multicultural justice.¹⁵

The conventional answer given by those who champion individual rights to the question of whether they can coexist with collective rights is a rather noisy ‘no’. Indeed, perhaps the major source of resistance to the inclusion of collective rights in constitutional law is the concern that they will necessarily override or undermine individual rights.¹⁶ Of course, whether or not a particular constitutional

¹¹ *Charter* ss 1–3, 6–15.

¹² It is often noted that many individual rights not only enable existing groups to flourish but create the possibility of ‘the rational, non-violent formation of new communities’: Allen Buchanan, ‘Assessing the Communitarian Critique of Liberalism’ (1989) 99 *Ethics* 852, 862.

¹³ See, eg, Denise Réaume, ‘Individuals, Groups, and Rights to Public Goods’ (1988) 38 *University of Toronto Law Journal* 1. Cf Michael McDonald, ‘The Forest in the Trees: Collective Rights as Basic Rights’ in Guy Lafrance (ed), *Ethics and Basic Rights* (1989) 230.

¹⁴ See generally Philip Alston (ed), *Towards an Australian Bill of Rights* (1994). Some of the general considerations involved in any debate over whether collective rights should be constitutionally entrenched are discussed in Leighton McDonald, ‘Regrouping in Defence of Minority Rights: Kymlicka’s *Multicultural Citizenship*’ (1996) 34 *Osgoode Hall Law Journal* 291, 312–17.

¹⁵ The Aboriginal and Torres Strait Islander Commission urges the strengthening of both the rights of Aborigines as *individuals* and their rights as indigenous *peoples*: Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995).

¹⁶ Cf Will Kymlicka, *Liberalism, Community, and Culture* (1989) 138. Dworkin’s popular theory of individual rights, derived from what he sees as the shortcomings of utilitarianism, views rights as specifically designed to trump one collective or communal goal, namely, the maximisation of utility: Ronald Dworkin, ‘Rights as Trumps’ in Jeremy Waldron (ed), *Theories of Rights* (1984) 153. I argue below that collective rights are not best thought of in this (aggregative) way.

collective right trumps another constitutional right will depend on how the constitution under consideration is drafted and will inevitably be a matter of constitutional interpretation. There might, for instance, be a simple constitutional rule holding that one set of rights automatically wins out when in conflict with another set of rights — analogous to the common law solution for resolving conflicts between native title rights and rights held under pastoral leases. This article, however, approaches the question of coexistence in a context where one set of rights does not pre-emptively trump the other.¹⁷ I want to challenge the prevalent view that coexistence is impossible on account of a 'pervasive irreconcilability'¹⁸ between collective and individual rights and that any constitutional recognition of both types of rights would give the courts 'a near impossible task'.¹⁹

It is often useful to begin negatively²⁰ — this article does not examine the institutional question of whether or not courts should be given the task of resolving the sorts of conflicts under consideration. Although I draw on examples from Canadian jurisprudence, the focus is not to examine how well Canadian courts have dealt with conflicting individual and collective rights, but the prior question of whether, by reason of these rights being systematically incompatible, this endeavour is itself misconceived or futile. Before seeking to establish that this thesis of fundamental irreconcilability cannot be maintained (Part IV), it is first necessary to outline the approach to collective rights which I take (Part II), and to explain the scope and nature of the problem of possible conflicts between collective and individual rights (Part III(A)), emphasising how this is often exaggerated (Part III(B)). Not only are a priori assumptions which postulate endemic conflicts between these two general sets of rights false, but there is every reason to believe that those strategies we have to deal with other situations of rights conflicts are also available in the context of collective and individual rights. Finally (in Part V), some potential advantages of the approach adopted, both to collective rights and conflicts of rights, for conceptualising genuine cases of conflicts are discussed.

II COLLECTIVE RIGHTS

Various conceptions of collective rights have recently been debated in the legal and philosophical literature. As the primary purpose of this article is to examine questions involving the interaction of collective and individual rights, it is not

¹⁷ This accords with the usual approach where constitutional rights are framed in general terms without any explicit guidance as to the relationship between them. A similar situation may arise where individual rights are constitutionally entrenched but such rights are said not to necessarily override particular collective rights which otherwise lawfully accrue. For example, s 25(1) of the Law Council of Australia's *Draft Australian Charter of Rights and Freedoms* is capable of such an interpretation: 'Draft Charter of Rights Released' (1995) 30(5) *Australian Lawyer* 29, 32.

¹⁸ Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (1995) 47.

¹⁹ F L Morton, 'Group Rights versus Individual Rights in the *Charter*: The Special Cases of Natives and the Québécois' in Neil Nevitte and Allan Kornberg (eds), *Minorities and the Canadian State* (1985) 71, 83.

²⁰ Michael Walzer, *On Toleration* (1997) 8.

possible to discuss and evaluate the alternatives in any detail. For present purposes, it is sufficient to explain the approach I take to collective rights. Although this approach is not beyond controversy, it does build on an influential and persuasive general conception of rights — the interest theory of rights — which illuminates the problem of conflicting rights in a direct way.

If the notion of collective rights is to be of significance, collective rights cannot be reducible to a set of individual rights. Thus, the first step in defining a collective right must be to ask in what ways a right may have some sort of collective aspect. Joseph Raz explains that, on the interest theory, an entity has a right if it can hold rights and an aspect of its wellbeing or interest 'is a sufficient reason for holding some other person(s) to be under a duty.'²¹ Before discussing how this general conception of rights suggests two distinct ways in which collective rights can be understood, it is worth briefly noting some of its important features to which it will be necessary to return below.

Raz accepts (with Hohfeld) that rights must be understood in terms of their mutual relation with associated duties.²² However, the distinctive feature of rights goes beyond that insight; rights are not merely correlative to duties, but actually *ground* or *justify* those duties. As duties may be argued for in a variety of ways, a right of one person is not necessarily the same thing as a duty on another. Rights are not, therefore, tied to determinate, unchanging duties because they logically precede the duties they entail. This gives rights a dynamic character as the duties they ground may be expected to change with changing circumstances. The interest theory of rights is also consistent with the distributive character of rights; the notion that 'some interests are so important that they should be satisfied even if no one else benefits from the exercise of the right and even if it requires some sacrifice of others.'²³ This does not mean that there can be no balancing of interests in determining whether a right exists. Since rights involve the imposition of duties on others, those burdens 'must initially be taken into account when the interests of the potential right holder and others are compared'.²⁴ All that the distributive character of rights demands is that the intrinsic worth of particular interests be taken into account in the justification of a right and its associated duties, so that the justification of the right is not simply aggregative.²⁵

²¹ Joseph Raz, *The Morality of Freedom* (1986) 166.

²² In Hohfeld's scheme of jural concepts, rights and duties are correlatives: Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1964) 65.

²³ Denise Réaume, 'Group Rights and Participatory Goods' in LaFrance (ed), above n 13, 242, 243. This structural aspect of rights appears to enjoy broad agreement. For example, Michael McDonald (who prefers the 'choice' theory of rights) accepts that the 'immediate aim of a right is the distribution of something, whether conceived as choices or benefits, rather than the maximisation of either choices or benefits indiscriminately': Michael McDonald, 'Questions about Collective Rights' in David Schneiderman (ed), *Language and the State: The Law and the Politics of Identity* (1991) 3, 9.

²⁴ Andrei Marmor, 'On the Limits of Rights' (1997) 16 *Law and Philosophy* 1, 10.

²⁵ The main rival view to the interest theory of rights is the so-called 'will' or 'choice' theory which holds that to have a right is to be able to exercise control over another's corresponding duty — right-holders are, as Hart memorably put it, small-scale sovereigns: H L A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982) 183. Thus, the ability to claim or exercise a right is seen as central to the issue of whether a right exists, so that the conditions for holding rights are readily conflated with the question of who has standing to exercise them. In

Raz's definition of rights suggests two possible senses in which rights might be said to have a collective aspect: the first focusing on the nature of the right-holder, and the second on the nature of the interest under consideration. Collective rights might be thought of as rights held by collective *agents* or as rights in relation to collective *interests*. On the first alternative, the question is whether collective agents can possess interests which are sufficient to hold others duty-bound, and turns 'on the *capacity* conditions of right-holders'.²⁶ Theorists who support the ascription of rights to collective *agents* seek, in general, to establish that certain groups have rights because the group *as such* carries its own moral value. The difficulty with this approach is that it becomes necessary to explain how conferring *ultimate* or non-derivative moral value on a group (wholly independent of its members) is consistent with the idea that 'the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality'.²⁷ Even if it were conclusively established that, ontologically speaking, the existence of a group precedes that of its individual members, there would still be a difficult question as to the implications of this for the separate *normative* question of whether such groups are of sufficient moral value to ground duties on others.²⁸ Clearly, there is a danger of groups being reified without any clear understanding of why it is appropriate to do so. Exactly what it means for a group 'as such' to have independent moral value or even how this conclusion might be established are, to say the least, challenging questions on which little progress has been made.²⁹

Thankfully it is not necessary to resolve this debate here, as the alternative way of conceiving the notion of a collective interest holds more promise. On this approach, collective rights are distinguished from individual rights on the basis that the interests which ground collective rights are not, in some significant way,

the present context, the interest theory helpfully suggests the different senses in which rights may be thought to have significant collective aspects — though the debate between the two theories cannot be entered into here.

²⁶ Leslie Green, 'Two Views of Collective Rights' (1991) 4 *Canadian Journal of Law and Jurisprudence* 315, 318. Given their focus on the ability to exercise rights, it is perhaps natural that defenders of the choice theory of rights are drawn to this approach to collective rights. See, eg, L W Sumner, *The Moral Foundation of Rights* (1987) 209; Michael McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218.

²⁷ Raz, *The Morality of Freedom*, above n 21, 194. Raz dubs this notion the 'humanistic principle'.

²⁸ Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Québec* (1991) 8; cf Carol Gould, 'Group Rights and Social Ontology' (1996–7) 28 *Philosophical Forum* 73, 75–6.

²⁹ Another possible difficulty with the agency view of collective rights, suggested by Green, is that from a political perspective it 'does not mitigate the emphasis on individualized values [eg, egoism and conflict] at all.' This is because 'it merely suggests that these values are more widely located than is otherwise thought, for in addition to individual human beings it recognizes certain groups as the originators of valid claims'. This argument is, however, overstated. The ways in which egoism or social conflict might develop through the recognition of group rights in the agency sense is difficult to predict in advance. In particular, there may be internal effects within groups recognised as right-holders which may in some circumstances serve to mitigate the overall incidence of individualistic values. The exact outcome in terms of political function cannot, therefore, be precisely predicted and is unlikely to be uniform. See Green, 'Two Views', above n 26, 326.

individualisable. Here there is no question of violating the humanistic principle as it is clear that the interests which ground rights are valuable because they are of value to individuals. What, however, is meant by a collective or non-individualisable interest?

It may be thought that what economists call public goods are goods in which we have collective interests. However, many public goods — goods which are non-excludable and non-rival in consumption³⁰ — remain capable of *individualised* consumption. If a public good is made available for one, it is also, for reasons related to its production, available in a non-competitive way to all. Yet some public goods, such as clean air, are *valuable* for a ‘completely individualisable aspect of one’s wellbeing.’³¹ Where this is so, if rights to such goods can be justified, then they can be adequately expressed as individual rights, as it would be the interests of individuals considered separately which would ground duties on others.

However, some public goods, which Green terms ‘shared goods’,³² are also distinguished by a deeper level of publicity: ‘their collective production or enjoyment is part of what constitutes their value.’³³ Thus, it becomes possible to distinguish collective rights from individual rights, not simply by asking who has the capacity to exercise them, but by understanding that the interests which ground some rights are in a significant respect *not* reducible to individual interests. Some interests are individuated in the sense that they will ground duties independently of whether or not they are shared with others, such as, for example, interests in personal security or bodily integrity. A significant part of the full value of shared goods, on the contrary, cannot be appreciated by an individual when considered without reference to the enjoyment of that good by the rest of the group.

Indeed, most of the controversial rights currently claimed by cultural minorities protect interests which cannot be enjoyed in isolation, as collective (and, typically, consensual) production is part and parcel of what makes them meaningful. For example, the value of the rights to use one’s own language and to national self-determination cannot be fully understood by a simple aggregation of the interests of individuals as their value to an individual is ‘unintelligible apart from their reference to the enjoyment of others.’³⁴ As Réaume argues with

³⁰ Public goods are defined by the coincidence of various characteristics, most notably, that if they are available to one they are available to all (non-excludability) and that consumption by one does not reduce the consumption of others (non-rivalness). These characteristics, however, admit of degrees, and public goods are thus best thought of as being on a continuum of publicity. See Maurice Peston, *Public Goods and the Public Sector* (1972) 9–20.

³¹ Réaume, ‘Rights to Public Goods’, above n 13, 8.

³² Green, ‘Two Views’, above n 26, 321.

³³ Leslie Green, ‘Internal Minorities and Their Rights’ in Will Kymlicka (ed), *The Rights of Minority Cultures* (1996) 256, 259.

³⁴ This language is taken from Jeremy Waldron, ‘Can Communal Goods Be Human Rights?’ in Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (1993) 339, 355. Michael Hartney has argued that as the value of a shared good ‘consists in its contribution to the well-being of individuals’, it is therefore reducible to the ‘severable’ interests of the members of the group producing the good: Michael Hartney, ‘Some Confusions Concerning Collective Rights’ (1991) 4 *Canadian Journal of Law and Jurisprudence* 293, 300. However, one need not deny that

respect to language rights, '[n]ot only do use, maintenance, and development of a language make up a collective enterprise, but their value lies in the process of creating and recreating language rather than any end product that might be said to be useful to individuals as individuals.'³⁵ Language and, by extension, many other cultural goods, can be seen as collective human accomplishments which are of intrinsic value from the point of view of those engaged in the enterprise.³⁶ Understanding collective rights in this way requires an appreciation of the nature of the interest at stake and why that interest is important enough to ground duties on others so as to protect some aspect of it.³⁷

Consider, for example, the interests which underlie the recognition of native title at common law. In *Mabo* it was held that the incidents of native title were to be 'ascertained by reference to ... traditional law or custom'.³⁸ However, while in theory 'Australian law can protect the interests of members of an indigenous clan or group, *whether communally or individually*',³⁹ a 'pre-existing native interest' will 'ordinarily be that of a community or group'.⁴⁰ As Deane and Gaudron JJ emphasised, native title is not 'confined to interests which [are] analogous to common law concepts', but reflects those interests central to 'the existing local social organisation' of Aboriginal societies.⁴¹ The practical result of this is that for groups where individual ownership of land is unfamiliar, native title will be recognised on the basis of 'communal usufructuary occupation'.⁴² Once it is realised that recognition of native title will generally flow from the communal usufructuary occupancy and use of traditional lands, it becomes apparent that its protection will often be concerned with various collective interests which can well be described as shared interests. On this view, what is taken to justify native title is the prior use of the land considered as an integral part of a collective cultural enterprise or form of life. Its full importance lies not merely in the instrumental value it may play for individual members of Aboriginal groups, but

individuals have interests in shared goods. The crucial point is that such interests are insufficient to ground rights, that is, to hold others duty-bound, when the importance of the collective nature of those interests is overlooked.

³⁵ Denise Réaume, 'The Group Right to Linguistic Security: Whose Right, What Duties?' in Judith Baker (ed), *Group Rights* (1994) 118, 127. Language is not merely of importance as a means of communication; it is a central marker of identity and it is this social aspect of language which can explain why interests in language ground rights to speakers of a *particular* language, rather than simply ensuring that all have access to a language. See Leslie Green, 'Are Language Rights Fundamental?' (1987) 25 *Osgoode Hall Law Journal* 639, 651.

³⁶ See generally Denise Réaume, 'Official Language Rights: Intrinsic Value and the Protection of Difference' in Will Kymlicka (ed), *Citizenship in Diverse Societies: Theory and Practice* (forthcoming).

³⁷ On Raz's definition of rights, to justify a right it is sufficient that an interest grounds *some* duties on others.

³⁸ *Mabo* (1992) 175 CLR 1, 110 (Deane and Gaudron JJ).

³⁹ *Ibid* 60 (Brennan J) (emphasis added). It is not clear whether Brennan J is making a point about the type of interest protected or, rather, about who has standing to sue. Later in his reasons, he argues that, where a sub-group or individual sues to protect rights which depend on native title, '[t]hose rights ... are, so to speak, carved out of the communal native title': at 62.

⁴⁰ *Ibid* 85.

⁴¹ *Ibid*.

⁴² *Ibid* 87, quoting *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 409–10.

also in shared interests which members of Aboriginal communities have in the continuation and development of aspects of their cultures.⁴³

Take for instance, the case of hunting or fishing practices which are well within the type of interests which might be protected by native title rights.⁴⁴ Although rights such as these are usually exercised by Aboriginal *groups*, not by the individual members of those groups,⁴⁵ they are not merely collective rights in the agency sense. These rights can play an important role in the collective reproduction and development of a culture over time, particularly where they link up with a group's identity or where, through these practices, the group lives out an important aspect of its belief system or way of life.⁴⁶ The intrinsic value of cultural beliefs or practices to an individual cannot be understood absent an appreciation of their value to the group in which they gain their meaning and through which they can be lived. If one recognises that a crucial part of the value of living in a particular culture is enjoying that culture with others who also value it highly enough to continue to participate in it, then it becomes clear that the culture is valuable in an intrinsic way — it is constitutive of a valuable way of life, precisely because it is created and shared with others.⁴⁷ Thus, there are significant components of the bundle of interests which ground native title rights that cannot adequately be captured in the language of individual rights, as they protect interests which have important collective aspects.⁴⁸

A full defence of this approach to collective rights against other views would require a separate article. Before proceeding, however, it is necessary to consider Will Kymlicka's recent claim that the whole debate over collective rights is, in the context of multiculturalism, ambiguous and tends to focus on considerations which are 'largely irrelevant'.⁴⁹ To understand Kymlicka's complaint it is necessary to briefly set out his preferred classificatory scheme for cultural minority rights. He distinguishes between the 'self-government' rights of national groups and the 'polyethnic' rights of ethnic groups — whereas national minorities are entitled to their own 'societal culture', the entitlement of ethnic groups is

⁴³ Importantly, as Deane and Gaudron JJ emphasise, 'traditional law or custom is not ... frozen as at the moment of establishment of a Colony': *Mabo* (1992) 175 CLR 1, 110. See also at 61, 70 (Brennan J).

⁴⁴ *Ibid* 85–6 (Deane and Gaudron JJ).

⁴⁵ Kymlicka, *Multicultural Citizenship*, above n 5, 45.

⁴⁶ Cf Tully, above n 6, 172.

⁴⁷ My argument here rests on the acceptance of value pluralism, though this is an assumption which cannot be defended here.

⁴⁸ I do not claim that the importance of collective interests is the only way to defend native title — there are certainly others. It does seem, however, that if native title rights are to be adequately protected, then the nature and importance of their role in fostering Aborigines' shared cultural goods must be recognised. For example, if native title protects the shared interests of Aborigines in some sort of cultural autonomy, it becomes apparent that the government's recent willingness to allow for 'just terms' compensation for the unilateral extinguishment of native title rights is misconceived. Only if the interests which ground native title rights could be considered in wholly instrumental terms, would monetary compensation for unilateral extinguishment be coherent or just. See 'Forum — *Wik*: The Aftermath and Implications' (1997) 20 *University of New South Wales Law Journal* 487, where the government's 'Ten Point Plan' is discussed and extracted.

⁴⁹ Kymlicka, *Multicultural Citizenship*, above n 5, 46.

limited to rights ensuring they are incorporated, on equal terms, into the dominant culture.⁵⁰ Overlaying this distinction is a further distinction between claims which demand 'external protections' (rights held against the larger society or other individuals or groups) and those allowing for 'internal restrictions', which, by requiring individuals to maintain cultural practices, potentially undermine the basic individual rights of group members. For present purposes, it is sufficient to note that Kymlicka believes external restrictions can be justified, but considers internal restrictions to be inconsistent with liberal principles of freedom.

Kymlicka cites two main reasons why the term 'collective right' is an unhelpful label for rights which are justified by the importance of cultural membership.⁵¹ His first substantial worry is that the term lacks explanatory power as it fails to adequately explain external restrictions, that is, 'why some rights are unequally distributed between groups, why the members of one group have claims against the members of another group.'⁵² It is thought that while the term may have relevance to the rights of individuals vis-à-vis the groups to which they belong, it has nothing to say about inter-group claims. But this is true only because Kymlicka mistakenly accepts that the debate over collective rights can be conflated with the 'debate over the reducibility of community interests to individual interests',⁵³ where the issue of reducibility is conceptualised in terms of whether groups have their own moral value. He is misled by focusing exclusively on the agency view of collective rights.

Kymlicka's reticence to enter the debate over whether collectivities have interests in the agency sense is, for the reasons previously stated, understandable. However, the short response is that the alternative approach to collective interests is simply ignored. Not only can important shared interests plausibly impose external limitations (duties on the wider society to respect such interests), but understanding how the value of an individual's interest in a shared good is at least partly constituted by joint production points to obvious reasons why the value of that good may be undermined should participation be compelled through internal restrictions.⁵⁴ It is quite conceivable, for instance, that the shared interest people have in the maintenance of their language may ground duties on the wider society to provide government funding for minority language schools, but stop short of requiring the children of native speakers of minority languages to attend those schools. Moreover, there is a very good reason for emphasising that some rights are concerned with protecting important collective interests. To promote shared goods and collective interests through the language of rights is to challenge the

⁵⁰ Ibid 27–31.

⁵¹ Kymlicka's defence of such rights is discussed below Part IV.

⁵² Kymlicka, *Multicultural Citizenship*, above n 5, 47.

⁵³ Ibid. Kymlicka is correct, however, to note that some communitarian theorists do debate the issue of collective rights in these terms.

⁵⁴ If the fact of being in something together is an important part of its value, then, in many cases, compelling participation will compromise this value.

notion — ‘popular in the individualist tradition of political theory’ — that only individualisable or divisible interests are important.⁵⁵

Kymlicka’s other argument against collective rights is more challenging. The language of collective rights, he claims, ‘suggests a false dichotomy with individual rights’.⁵⁶ Many group-differentiated rights (eg language rights) are *exercised* by individuals. Kymlicka argues that this fact is ‘morally unimportant’ as those who object to such rights do not do so on account of who exercises the rights but, rather, because such rights are group-specific.⁵⁷ However, on the interest theory of rights, Kymlicka is confusing the question of who holds a right, a question focusing on the interests which justify holding others duty-bound, and the question of who has standing to exercise that right. It is perfectly conceivable (and in some circumstances desirable) that rights grounded by collective interests be exercised by individuals, even if in many circumstances it is more appropriate for the group acting collectively to have agency over its collective rights.⁵⁸ As Kymlicka himself notes, the question of who should exercise a right depends not only on how the right is justified, but ‘often depends on practical considerations about the efficacy and flexibility of different institutions.’⁵⁹

Having said that, there are difficulties associated with dichotomising rights into collective and individual varieties, though not for the reasons Kymlicka gives. The justification of many rights does not always rest on the importance of a single interest. Rights are justified by an aspect of wellbeing, and this may be composed of a number of interests which are interrelated in complex ways. Some rights, such as the right to speak one’s native tongue, may protect both individualisable and collective interests. Even so, there are good reasons for noticing the individual and collective aspects of a particular right. Although both sorts of interests may be protected, the nature and limits of the right can only be determined by asking which interest is sufficient to ground specific duties. An awareness of the nature of the underlying interests is essential if rights are to be adequately interpreted and applied. On the interest theory of rights, a right is an intermediary step in a chain of justification which moves from interests to duties. Thus, whenever there is a disagreement over what duties a right grounds (or whether the duties grounded by two separate rights conflict), the analysis

⁵⁵ Green, ‘Two Views’, above n 26, 326. Of course, not all groups (eg corporations) will have these sorts of interests, and, even if they did, the interests may not have the weight or urgency required to hold others duty-bound. Kymlicka’s defence of ‘group-differentiated’ rights, on the other hand, grounds such rights on the importance of culture for a divisible individual interest in autonomy which can be equitably distributed. See further below Part IV.

⁵⁶ Kymlicka, *Multicultural Citizenship*, above n 5, 45.

⁵⁷ *Ibid* 45–6.

⁵⁸ The extent to which effective group agency is necessary for the protection of particular collective or group rights is a separate question I cannot enter into here. For discussion of this issue, see James Nickel, ‘Group Agency and Group Rights’ in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and Group Rights* (1997) 235–6.

⁵⁹ Kymlicka, *Multicultural Citizenship*, above n 5, 206. This is not to say that the justification of the right and the issue of whom should be given the normative powers of exercise are unconnected questions. Cf Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982) 164–5; Geoffrey Levey, ‘Equality, Autonomy, and Cultural Rights’ (1997) 25 *Political Theory* 215, 228–32.

inevitably turns to the reasons or purpose for having the right in the first place. In this way the language of collective rights emphasises crucially important interests which are too often and too easily overlooked; it shows how some of the interests people share will ground rights even where their divisible, individual interests are insufficient to do so.

A deeper level at which the two sorts of rights may be interrelated has been suggested by Raz.⁶⁰ His argument begins by noticing a puzzle surrounding the recognition of many 'individual' rights in liberal democracies: so-called liberal rights routinely receive greater protection or weight than the interests of individual right-holders appear to require.⁶¹ Raz's explanation is that the value of liberal individual rights lies not only in their importance for right-holders' individual interests, but also in their contribution to an important common good, namely, 'a common liberal culture'.⁶² Living in a society where these rights are protected is something which has a value in addition to its contribution to the protection of individual wellbeing, and that value is a common good in the sense that it serves the public interest in a conflict-free, non-exclusive and non-excludable way. Thus, in so far as the relationship between the individual's interest and the common good is 'doubly harmonious' — where '[t]he right protects the common good by protecting [the right-holder's] interest, and it protects [the right-holder's] interest by protecting the common good' — the justification of a right remains conceptually tied to the interest of the right-holder.⁶³

If correct, this sort of analysis may complicate any simplistic division between collective and individual rights. Raz does not give us a precise idea of how the notion of a liberal common culture is to be understood, but one suspects that what he has in mind is a culture encompassing a variety of social forms — forms of behaviour and belief which are widely practiced in a society — which are capable of generating an 'autonomy-supporting environment'.⁶⁴ It may thus be thought that an autonomy-supporting environment, dependent as it is on a variety of social forms, is a *shared* good for the society as a whole. Sophisticated defences of individual autonomy are not premised upon the importance of allowing isolated monads to do as they please. Rather, they emphasise the forms of social relations and interaction which individual freedom makes possible. Individual autonomy not only depends upon a variety of social forms, but an appreciation of its full value requires that at least some others also have access to

⁶⁰ See especially Joseph Raz, 'Rights and Individual Well-Being' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 29, 37; Joseph Raz, 'Rights and Politics' (1995–6) 71 *Indiana Law Journal* 27, 35.

⁶¹ For example, although the interest in free expression is often of less importance to people than interests in job security or adequate housing, it tends to be more vigorously protected: Joseph Raz, 'Free Expression and Personal Identification' in Raz, *Ethics in the Public Domain*, above n 60, 131.

⁶² The argument is not entirely clear as to whether the common good(s) merely add(s) to the *weight* of the rights or whether it is central to the initial *justification* of the rights. See Joseph Chan, 'Raz on Liberal Rights and Common Goods' (1995) 15 *Oxford Journal of Legal Studies* 15, 22–4.

⁶³ Raz, 'Rights and Politics', above n 60, 39. The distributive structure of rights is therefore not destroyed.

⁶⁴ Raz, *The Morality of Freedom*, above n 21, 391–2.

the autonomy-enhancing forms which make individual freedom possible. It is in this sense that joint participation in the perpetuation of an autonomy-supporting environment can arguably be seen to constitute part of its value. Thus, if Raz's analysis is sound, some individual rights also protect important shared interests, and the dichotomy with collective rights is an over-simplification, as many important individual rights also protect our shared interest in a liberal culture.

Although it is not possible to fully consider Raz's argument here, a number of comments are appropriate to our present concerns. First, Raz does not think all individual rights are justified by reference to the common good. 'Personal rights', such as property and consensual rights and rights to personal security, 'are justified primarily by the protection they give to the interest of the right-holder which is intrinsically valuable, and not, or not to the same degree as are liberal rights, by their service to a public culture.'⁶⁵ It is, of course, also possible that individual interests related to liberal rights may still be the reason why some duties are grounded even if their importance cannot alone explain the full extent of duties which are associated with them in liberal democracies. Second, Raz's approach does allow for the important role a *variety* of shared goods may play in grounding rights which are distinct from liberal 'individual' rights. '[O]ne particularly important type of common good', he writes, 'is the cultivation of a culture and a social ambience which make possible a variety of shared goods, that is, a variety of forms of social association of intrinsic merit'.⁶⁶ Here it is worth noting that Raz's view that a liberal culture is a common good which is conflict-free, non-exclusive and non-excludable is, arguably, overly sanguine.⁶⁷ In my view, it is, more plausibly, a good which need not serve the collective good of all in the way Raz imagines — so that liberal rights can be seen to protect one shared good among many.⁶⁸ Third, if the objection is that collective and individual rights are not really different species of rights at all — given that all rights protect, in varying degrees, both collective and individual interests — then the claim that they are pervasively irreconcilable, on the basis of recognising a new species of rights, would, I suspect, fall away. Conflicts between rights may well remain a problem, but there would not be a *special* problem raised by the recognition that minority groups may have rights grounded in the important collective interests which their members share.

⁶⁵ Ibid 262–3.

⁶⁶ Raz, 'Rights and Politics', above n 60, 36.

⁶⁷ It is worth noting that if the good of liberal culture is shared by society as a whole then there is no need to claim a right based on this interest as there is no distinction between the right-holder and the owner of the corresponding duty. See Réaume, 'Rights to Public Goods', above n 13, 13–17. It may, however, be plausible to claim that society as a whole holds a collective right against its government and duly appointed officials. See, eg, Frank Michelman, 'Is Democracy a Constitutional Right? New Turns in an Old Debate' in Philip Bryden, Steven Davis and John Russell (eds), *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (1994) 145, 156–7.

⁶⁸ See Marmor, above n 24, 12–13. As liberal culture is the culture of the dominant group in society, it will, of course, be more able to protect itself through majoritarian politics than cultural goods which are in the shared interests of members of minority cultures; so the justification for institutionalised protection of the majority's collective rights will, to that extent, be diminished.

My purpose in this article is to deflect claims that there is something *peculiar* about rights to shared goods which renders them pervasively irreconcilable with other more traditional rights usually conceptualised as individual rights; it is not to deny that the justification of some individual rights may be connected with the value those rights have for others. Further, even if one were to accept that liberal rights also protect important shared interests, it would remain the case that, if minority rights are to be adequately interpreted and their limits appropriately ascertained, one must pay close attention to the nature of the interests grounding those rights. Here I wish to respond directly to those who think that minority rights, which relate to collective or, more precisely, shared interests, cannot coexist with so-called individual rights. First, however, it is necessary to say something about how the problem of conflicting rights in general arises, and to consider how the interaction between collective and individual rights is often misunderstood.

III CONFLICTING RIGHTS

A *The Problem of Conflicts Between Rights*

It has been rightly said that 'conflicts of rights' on the interest theory, 'though not logically necessary, are in the circumstances of the real world more or less inevitable.'⁶⁹ Given the variety, complexity and competing nature of human interests, there is no reason why we should not expect rights, including collective rights, to conflict with one another. It may be that a substantive theory of rights grounds only those duties which are perfectly 'compossible' so that each can be performed without posing any hard choices.⁷⁰ However, as Jeremy Waldron explains, this would be massively improbable: many of the areas in which moral conflicts occur are exactly the areas of life in which the most important interests of individuals are implicated.⁷¹ The fact that rights are dynamic, where the duties grounded are subject to change, makes the assumption that all conflicts can be avoided even more implausible.

This conclusion can also be demonstrated by recalling that whether or not a right will impose a duty depends not only on the interests justifying the right, but also on the absence of conflicting considerations. In a practical sense, therefore, '[a] general right is ... only a *prima facie* ground for the existence of a particular

⁶⁹ Jeremy Waldron, 'Rights in Conflict' in Waldron, *Liberal Rights*, above n 34, 203, 205–6.

⁷⁰ Duties are 'compossible' where the performance of one does not affect the capacity to perform the other; that is, where it is possible or practicable for all to be performed: *ibid* 205, 445, fn 4.

⁷¹ One substantive theory of rights which seeks to establish this improbable outcome stipulates that rights are limited to so-called negative rights. Since such rights do not require any duties of positive action and, as there is no limit to the number of omissions, whatever they may be, that a person can simultaneously fulfil, conflicts become impossible. However, the recognition of collective rights renders this solution unsatisfactory; a negative right of an individual to be left alone to pursue his or her own interests may not be consistent with a similar negative right of a group to which he or she belongs. In any event, the negative rights theory is open to a host of other objections. See generally Jeremy Waldron, 'Liberal Rights: Two Sides of the Coin' in Waldron, *Liberal Rights*, above n 34, 1.

right in circumstances to which it applies.’⁷² The result is that rights are thought to exist even though they are sometimes defeated by, *inter alia*, other rights.⁷³ As rights are intermediary conclusions in a justificatory strategy which moves from the value of particular interests to the imposition of duties, disagreements as to the importance of those interests will translate into controversy over the limits of particular rights, and, thus, how conflicts between them should be resolved.

There can be no certainty, therefore, that collective rights will not conflict with individual rights. The collective rights of a group may well come into conflict with the individual rights of members, non-members of that group or, indeed, with the collective rights of other groups. It should be emphasised, however, that the problem of conflict is not unique to collective rights — conflicts are equally liable to arise between different instances of the same individual right and also between different individual rights. For example, the protection of my right to adequate nourishment may not be consistent with your similar right or, perhaps, with your (or my own) right to decent health care. Although the problem of conflicting rights is not unique to the recognition of collective rights, a number of common misunderstandings have led to exaggerated claims as to the nature and scope of the problem posed by conflicts between collective and individual rights.

B *Misunderstandings*

The liberal fear of collective rights is not simply based on the possibility that they may in some instances conflict with and, perhaps, defeat individual rights. The concern is often that they are inimical to individual rights and will inevitably undermine the moral primacy of the individual in moral and legal thought.⁷⁴

There is, however, a significant amount of exaggeration and, at times, paranoia about such claims. First, the claim that collective rights will necessarily *outweigh* individual rights misconceives not only collective rights but the notion of a right itself. Like all rights, collective rights are based on *distributive* arguments so that purely aggregative considerations will not, in normal situations, override them. The shared interests grounding collective rights are valued for their intrinsic worth, not because they are of utility for a large number of persons. Collective rights will not, therefore, win out on the strength of numbers alone. Second, it is simply wrong to say that collective rights do not respect the humanistic principle or that they undermine moral individualism — individual and collective rights are both grounded by important human interests. Third, there is no justification for the assumption that the vindication of the collective right will *always* reduce the respect accorded to individual rights. Where individual and collective rights do interact, the anticipated winner-takes-all (‘zero-sum’) outcomes are often avoided. To adopt the language of the High Court in *Wik*, the possibility that the two sets of rights might coexist should not be discounted prior to ascertaining

⁷² Raz, *The Morality of Freedom*, above n 21, 184.

⁷³ If they are *always* defeated, they cannot plausibly be thought to exist at all.

⁷⁴ See Pierre Trudeau, ‘The Values of a Just Society’ in Thomas Axworthy and Pierre Trudeau (eds), *Towards a Just Society* (1990) 357, 363.

whether in fact those rights are inconsistent in a particular factual situation.⁷⁵ Indeed, where minority groups seek to ensure their cultural security or autonomy, rights designed to protect such interests will not, in many circumstances, prefer the collective over particular individuals, but protect one group against another.⁷⁶

None of this eliminates genuine situations of conflict,⁷⁷ but enough has been said to establish that the mere recognition of collective rights will not necessarily derogate from or systematically undermine individual rights. The contrary assumption is no doubt due to a variety of factors, but two sources of misunderstanding associated with exaggerated views of the threat which collective rights pose to their individual cousins deserve specific mention.

First, a good dose of Eurocentrism often accompanies claims that non-European cultures are inherently illiberal and will inevitably seek to cramp individual autonomy.⁷⁸ As Kymlicka points out, threats to individual rights are often more apparent than real. For example, some Canadian aboriginal groups have objected to subjecting their collective rights to the *Charter* on the ground that the Canadian judiciary is unlikely to approach conflicts with individual civil and political rights with due regard for their distinctive consensual modes of decision-making.⁷⁹ Further, the assumption that non-European minority groups are particularly prone to violate the individual rights of their members needs to be tempered with a consideration of the reasons why particular disputes arise. Consider, for example, the situation of indigenous women in Canada who, unlike indigenous men, lost their 'Indian' status under the *Indian Act*⁸⁰ on marrying outside of their Bands. In 1985, amendments to the *Indian Act* effectively reinstated Indian women to their Bands. In *Sawridge Band v Canada*,⁸¹ three Albertan Indian Bands argued that the reinstatement of aboriginal women violated their collective right to self-government, which was thought to necessarily include the right of the Band to determine its membership.

Two striking considerations should structure our thinking about the issues raised by the *Sawridge Band* case.⁸² First, the situation leading to the dispute arose in part as a product of artificial and discriminatory legislation imposed upon Indian Bands by the dominant non-aboriginal society. More important, however, is consideration of the question: why might First Nation Bands wish to retain control over their own memberships, even at the expense of discriminating

⁷⁵ *Wik* (1996) 187 CLR 1, 132–3.

⁷⁶ '[T]here is,' as Kymlicka says, 'no necessary conflict between external protections and the individual rights of group members': Kymlicka, *Multicultural Citizenship*, above n 5, 38.

⁷⁷ Kymlicka cites the North American Pueblo as an example of a cultural group which has sought to restrict the individual rights of their members. He argues that the 'Pueblo have, in effect established a theocratic government that discriminates against those members who do not share the tribal religion.' He gives the example of the denial of housing benefits on account of religious differences: *ibid* 40.

⁷⁸ Cf *ibid* 94.

⁷⁹ *Ibid* 39–40.

⁸⁰ *Indian Act*, RSC 1985, c I-5.

⁸¹ [1995] 4 *Canadian Native Law Reporter* 121 (Fed Ct) ('*Sawridge Band*').

⁸² Muldoon J rejected the Band's claims, relying primarily on s 35(4) of the *Charter* which states that 'aboriginal and treaty rights ... are guaranteed equally to male and female persons': *ibid* 229–30.

against women? Thomas Isaacs has suggested that an important aspect of the problem confronting the Bands 'is a lack of substantive resources for reserve-based governments to provide adequate services and resources, such as housing to their members.'⁸³ One injustice does not justify another, but if Isaacs' diagnosis is accepted, it does raise a more general issue: when assessing the potential for collective minority rights to restrict the individual rights of group members, the majority culture is well advised to consider whether it is fulfilling its duties toward the minority and whether any threat to individual rights might be assuaged if the dominant society were to do justice to the minority culture.⁸⁴

Another source of hyperbole can arise through the mis-characterisation of particular disputes. An excellent example of this is the Supreme Court of Canada's decision in *Ford v Attorney-General of Québec*,⁸⁵ where a Québec law requiring that public signs be *solely* in the French language was held unconstitutional. The conventional interpretation of the case is that the court was faced with a clash between Québec's collective right to preserve its language and Valerie Ford's individual right to free speech to advertise in her language of choice.⁸⁶ Yet collective rights appear on both sides of the dispute.⁸⁷ French and English communities both have interests in linguistic security and the most plausible way to look at a conflict between these cultural interests, which are of equal intrinsic value, is the actual impact of Québec's law. In *Ford*, there was no evidence that constitutionally permissible bilingual signs (dominated by French) would have an adverse impact on Québec's cultural health. On the other hand, a strong case could be made that the Anglophone community (numerically smaller in Québec) was under, at the very least, the great symbolic threat of being devalued by the law.⁸⁸ Viewed in this way the decision was neither a triumph for individual rights, nor a defeat for collective rights: that stark choice simply was not at issue.

IV COPING WITH CONFLICTS

The issue I now want to address is how genuine conflicts between collective and individual rights might be approached. Some commentators have claimed that such conflicts are inevitable and endemic. Allan Hutchinson, for instance, argues that courts are given an 'unenviable task' when asked to adjudicate matters involving collective and individual rights, whose 'irreconcilability' is thought to be 'enduring and pervasive'.⁸⁹ Hutchinson claims that, in approaching this task, 'the courts and apologists for rights-talk have fallen back increasingly

⁸³ Thomas Isaac, 'Self-Government, Indian Women and Their Rights of Reinstatement under the *Indian Act*: A Comment on *Sawridge v Canada*' [1995] 4 *Canadian Native Law Reporter* 1, 10.

⁸⁴ See Denise Réaume, 'Justice between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 *University of British Columbia Law Review* 117, 140.

⁸⁵ [1988] 2 SCR 712; 54 DLR (4th) 577 ('*Ford*').

⁸⁶ Hutchinson, above n 18, 47–8, concludes that the court gave individual expressive freedom 'priority' over the collective right.

⁸⁷ Green, 'Two Views', above n 26, 325; Réaume, 'The Group Right to Linguistic Security', above n 35, 134–5.

⁸⁸ Réaume, 'The Group Right to Linguistic Security', above n 35, 135.

⁸⁹ Hutchinson, above n 18, 47–8.

on the interpretive practice of "balancing"⁹⁰ — the 'major thrust of this rudimentary methodology [being] to identify different interests, attribute respective values to them, and weigh them on a constitutional scale'.⁹¹ This process of 'balancing' is said to amount to no more than 'political haggling'.⁹²

If my arguments thus far are accepted, then we might agree that conflicts between collective and individual rights are a genuine problem, while rejecting the assertion that the two sets of rights are pervasively irreconcilable. Are there, however, techniques or strategies available by which conflicts that do arise might be resolved or, less ambitiously, made manageable? Although Hutchinson does not articulate the explanation, there are good reasons to be suspicious of simply 'balancing' collective and individual rights when they come into conflict. To understand why, it is necessary to return to the nature of rights and the problem of rights conflicts more generally.

Earlier I noted that the interest conception of rights is consistent with the widely accepted view that rights are grounded by reference to distributive, not aggregative, arguments. Indeed, rights are commonly understood as a reaction against the sort of aggregative arguments in moral philosophy which characterise utilitarianism. For many, the attraction of rights-based arguments is precisely that they avoid the trade-offs made between the important interests of individuals which are justified by the utilitarian injunction to maximise happiness.⁹³ The distributive nature of rights-based arguments means that there are at least some interests which are thought to be of such importance that they should not be traded off or *balanced* against the interests of others in the way utilitarians recommend.

We can now see the kernel of truth in Hutchinson's rejection of 'balancing' as an acceptable methodology for dealing with rights conflicts. As Waldron says:

[I]f rights themselves conflict, the specter of trade-offs is reintroduced. For in identifying those interests that are not to be sacrificed to the utilitarian calculus, we may still be picking out interests that are incompatible with one another and so reproducing in the realm of rights the very issues that we tried to avoid in the realm of social utility.⁹⁴

In other words, once we identify various interests as being *themselves* sufficient to hold others duty-bound, the abrogation of those duties seems inconsistent with the value placed on the interest which grounded the right in the first place.

Waldron offers a number of useful suggestions about how this conundrum might be approached. First, he notes that the reintroduction of the notion of trade-offs need not be accompanied by the doctrine of 'quantitative commensurability'.⁹⁵ Thus, although conflicts remain, trade-offs can be sensitively and contex-

⁹⁰ Ibid 48.

⁹¹ Ibid.

⁹² Ibid. Much of Hutchinson's book is devoted to claiming that rights-based judicial review is undemocratic. That further claim and, also, the charge of 'political haggling' directed at the Supreme Court of Canada, are beyond the scope of this article.

⁹³ Waldron, 'Rights in Conflict', above n 69, 208–9.

⁹⁴ Ibid 209–10.

⁹⁵ Ibid 211.

tually determined without the issues being elided with a utilitarian approach, where all moral reasons for action are comparable and can be directly weighted in relation to each other. It is not 'balancing' per se which is problematic — conflicting interests are, as was argued earlier, inevitable in the moral universe we inhabit. What is troubling is the combination of trade-offs with a single metric of value, as this denies that there are some human interests of intrinsic worth which cannot be simplistically traded against one another. Thus, a consideration of the relative importance of the interests or values underlying rights and their costs (the duties imposed) is a legitimate part of determining the limits of rights and their importance in particular circumstances.

Second, Waldron enlists his 'waves of duties' metaphor to illustrate how a sensitive and contextual approach to rights conflicts could be developed without being reduced to 'political haggling'.⁹⁶ As rights generate a number of different levels or waves of duties, where applicable duties are subject to change in the face of changing circumstances, 'the whole language of trade-offs ... with its resonance of callous amorality, may begin to seem less drastic.'⁹⁷ Even when duties grounded by different rights conflict, it is unlikely that *all* the duties generated by successive waves of rights-based argumentation will also conflict. The fact that some duties are not compossible does not mean that other duties owed should be allowed to lapse. In *Ford*, for example, it was accepted that expressive freedom *was* consistent with important measures aimed at protecting Québec's interest in cultural wellbeing, even if a *total* ban on bilingual signs could not be justified.⁹⁸ In a sense, however, this leads us back to where we started: 'once we concede that *some* of the duties associated with one right are commensurable with *some* of the duties associated with another, it is not clear how we can sustain a thesis of incommensurability in relation to *any* pair of the duties that they respectively generate.'⁹⁹

To partially overcome this problem, Waldron argues that it is, in some instances, worth approaching rights conflicts by looking for moral considerations 'related *internally* to one another, rather than externally in the way that a purely quantitative account of their respective importance would imply.'¹⁰⁰ Waldron cites the example of the clash between freedom of expression and the interest people have in avoiding the distress of having their constitutive or cherished beliefs undermined and argues that, at least on J S Mill's account, this conflict is 'easily resolved'.¹⁰¹ For Mill, 'the whole point of free expression is to challenge received opinion and shake up complacency'.¹⁰² To give the conflicting interest any weight would thus be to misunderstand why we consider free expression important in the first place.

⁹⁶ Ibid 212–15.

⁹⁷ Ibid 214.

⁹⁸ [1988] 2 SCR 712; 54 DLR (4th) 577.

⁹⁹ Waldron, 'Rights in Conflict', above n 69, 219–20.

¹⁰⁰ Ibid 220.

¹⁰¹ Ibid 221.

¹⁰² Ibid, referring to J S Mill, *On Liberty* (first published 1859, 1956 ed) ch 2.

Interestingly, courts are not unaccustomed to this type of reasoning. A conflict between freedom of expression and the right to equality was considered in *R v Keegstra*,¹⁰³ where the Supreme Court of Canada was asked to examine the validity of a law which made it an offence to wilfully promote hatred against groups identified by reference to colour, race, religion or ethnic origin. The majority of the Court accepted that the interest grounding the right to free expression under s 2(b) of the *Charter* was sufficient to protect unpopular, distasteful or unorthodox messages.¹⁰⁴ However, for the purposes of determining whether the law was ‘demonstrably justified in a free and democratic society’ as required by s 1 of the *Charter*, the majority held that it was permissible to consider the values and interests protected by the *Charter*’s s 15 equality rights provision.¹⁰⁵ In approaching this question, the majority (in substance) checked to see whether there was an ‘internal relation’ between the competing rights. With respect to one of the accepted rationales for expressive freedom in Canadian jurisprudence, namely, its contribution to democratic debate and values, the majority argued that this justification for the right should *not* win out over the competing right to equality, as hate propaganda was ‘wholly inimical to the democratic aspirations of the free expression guarantee.’¹⁰⁶ Moreover, ‘one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers.’¹⁰⁷ In short, the very reasons for valuing free speech pointed to how it was to be reconciled with equality. Like any complex argument of political morality, the Court’s conclusion here may be misguided or wrong,¹⁰⁸ but this sort of reasoning cannot fairly be characterised as crude ‘balancing’, let alone ‘political haggling’.

The task of identifying internal relations between conflicting rights should not, however, be underestimated — ascertaining the interests which ground and animate most rights is as difficult as it is controversial. As Andrei Marmor notes, “‘the whole point of free expression’” that Waldron adopts from Mill, may well be the point of this right for the educated majority of a democratic society; the ground for this right for an oppressed ethnic minority, or for, say, an ultra orthodox religious minority, may well be quite different.¹⁰⁹ There is, however, no reason to think that collective or shared interests will necessarily be more

¹⁰³ [1990] 3 SCR 697; 2 WWR 1 (*Keegstra*).

¹⁰⁴ *Ibid* 729; 29.

¹⁰⁵ *Ibid* 755–8; 49–51.

¹⁰⁶ *Ibid* 764; 56.

¹⁰⁷ *Ibid*. It may be thought that s 1 of the *Charter* sets an *external* limit on s 2(b) analysis. However, as the majority emphasised in *Keegstra*, the reluctance to consider the question of whether conflicts with other rights should be faced within the s 2(b) analysis itself flows from the established view ‘that the preferable course is to weigh the various contextual values and factors in s. 1’: at 734; 32. Here my use of *Keegstra* is merely to illustrate the type of reasoning available to those charged with the adjudication of rights conflicts; whether or not this is undertaken in the s 2(b) or s 1 stage of analysis is not of great significance.

¹⁰⁸ See generally Wojciech Sadurski, ‘Offending with Impunity: Racial Vilification and Freedom of Speech’ (1992) 14 *Sydney Law Review* 163.

¹⁰⁹ Marmor, above n 24, 17.

complicated or contested than interests grounding well-established liberal rights.¹¹⁰ Further, once one commits to a theory of a particular right and identifies the interests or values underlying it, then the internal relation methodology can be seen to have a useful, if circumscribed, role to play in coping with rights conflicts. It is, therefore, worth asking whether this 'internal relation' method is available in the specific case of inter-rights conflicts between collective and individual rights.

Once it is accepted that collective rights and individual rights are both grounded by important human interests, there is no principled reason why the interests protected by particular collective rights might not be internally related to interests protected by particular individual rights. Indeed, such a relation lies at the heart of Kymlicka's influential theory of minority rights.¹¹¹ Kymlicka argues that it is only in a secure and meaningful cultural context that individuals can adequately determine how to live their lives. The practices of some minorities which threaten individual rights cannot, therefore, be accommodated within Kymlicka's liberal defence of 'group-differentiated' rights as it is based on an instrumental link between culture and *individual* autonomy — culture is valuable to the extent that it provides a necessary context of choice in which individuals may lead meaningful lives. Conflicts are resolved in favour of individual rights as the whole point of the protection of minority rights is the protection of individual autonomy. On this approach, in thinking about the interests which ground minority rights and in 'singling [those interests] out for moral attention', Kymlicka is 'already thinking about the type of consideration[s] with which [they are] likely to conflict' and, thus, how such conflicts might be resolved.¹¹²

Although, for Kymlicka, rights of ethnic or other minorities which fall short of self-government rights straightforwardly yield to individual rights, his position on the self-government rights of national minorities raises a dilemma. While his theory of minority rights does not ever justify the violation of individual rights, to enforce individual rights seemingly draws him 'down the path of interference',¹¹³ and this, presumably, is directly at odds with the assertion of rights to self-government in the first place. Here Kymlicka distinguishes between the *identification* of a theory of minority rights and the *imposition* of that theory. Any intervention to enforce individual rights will be problematic as it is unclear who has the authority to do so; as with the case of foreign states, he argues that in the affairs of national minorities 'there is relatively little scope for legitimate coercive interference.' Relations between national minorities and majorities 'should be determined by peaceful negotiation, not force'.¹¹⁴

In this way, then, the problem of conflict is seemingly dissolved. However, matters are complicated when one notices that the analogy Kymlicka draws

¹¹⁰ After years of debate, are we closer to consensus on the value of the interests grounding the right to free speech, property, or life?

¹¹¹ See especially Kymlicka, *Multicultural Citizenship*, above n 5, 75–130.

¹¹² Waldron, 'Rights in Conflict', above n 69, 223.

¹¹³ Chandran Kukathas, 'Are There Any Cultural Rights?' (1992) 20 *Political Theory* 105, 121.

¹¹⁴ Kymlicka, *Multicultural Citizenship*, above n 5, 167.

between national minorities and foreign countries is far from exact. In the case of national minorities within a larger polity, it is much harder to clearly distinguish two separate jurisdictions as members of national minorities can, and sometimes do, claim dual citizenship. Further, if membership in a national minority is at least partly ascriptive or unchosen, then in granting self-government the likelihood of internal restrictions is an important moral consideration which must be addressed by the wider society. We need, therefore, to consider, much more carefully than Kymlicka does, whether members of cultural minorities should have rights to exit those groups where their individual rights are not respected. Kymlicka fails to recognise that whether or not an individual is entitled to leave their cultural group in such circumstances is inevitably a question to be faced by the group to which emigration is sought.

Consider, for example, the facts of *Thomas v Norris*.¹¹⁵ In that case Thomas had been forcibly initiated into a Coast Salish tradition known as Spirit Dancing.¹¹⁶ He did not live on a reserve and had not been (and expressed no wish to be) educated in the cultural and religious life of the Salish. It was argued that Thomas' individual rights of personal security were subject to an overriding collective right ensuring the continuance of aboriginal traditions. Hood J, however, rejected the general proposition that 'in the contest between them the individual rights of the plaintiff must automatically give way to the communal rights of the defendants.'¹¹⁷ One interpretation of *Thomas* is that it illustrates that, where membership is partly ascriptive, the right to exit is not a good enough substitute for other individual rights.¹¹⁸ But the case also illustrates that cultural immigration is a two way process, having as much to do with where an individual is going as it does with from where they have come. On the facts of *Thomas*, there was little more Thomas might have done to evince an intention to leave the cultural life of the Salish community. The outcome of the case (though not the explicit reasons given) can thus be seen as a recognition that Thomas had, indeed, left the community to which he formerly belonged.¹¹⁹

The question of whether or not cultural emigration has in fact occurred or should be allowed is not, therefore, one which can simply be ignored by the culture into which an individual claims to have migrated or in which he or she claims to have a dual membership. In these circumstances it will not be enough to say that individual rights should not be imposed on minority cultures. Conflicting duties grounded by the collective and individual interests of group members may create difficult or tragic choices; but these choices are, in many instances,

¹¹⁵ [1992] 2 *Canadian Native Law Reporter* 139 ('*Thomas*').

¹¹⁶ The Salish community is made up of a number of Indian Bands. None of Thomas' initiators were members of the Band into which he was born.

¹¹⁷ *Thomas* [1992] 2 *Canadian Native Law Reporter* 139, 160. The case was actually decided on grounds which did not require this question to be determined — that is, the comments are obiter dicta.

¹¹⁸ Green, 'Internal Minorities', above n 33, 265.

¹¹⁹ Although Hood J expressly stated that Thomas' individual rights were not 'subject to the collective rights of the Aboriginal nation to which he belongs' (*Thomas* [1992] 2 *Canadian Native Law Reporter* 139, 162), his reasons do not contain an analysis of the nature of Thomas' membership(s) in aboriginal or other Canadian communities.

inescapably choices for both minority *and* majority cultures. Non-intervention is an incomplete answer to the problem of conflicting rights.

Perhaps more fundamentally, Kymlicka's neat resolution of the conflicts under consideration will not be persuasive to those who remain unconvinced by his attempt to identify an individualisable or divisible good of cultural membership which is capable of equitable distribution.¹²⁰ In general terms, Kymlicka's failure to adequately confront the issue of conflicting individual and collective rights can be seen as a consequence of his failure to recognise the collective nature of the interests which are involved in the cultural goods which his theory protects. Indeed, as Réaume has argued, Kymlicka's focus on the link between individual autonomy and culture results in the value of culture being abstracted from the concrete practices of *particular* cultural communities.¹²¹ This leaves him unable to adequately explain why individual interests in those particular cultures can ground minority rights because the individual interest in autonomy can, in at least some circumstances, be satisfied by other autonomy-supporting cultural contexts. This suggests that a focus on individual interests in autonomy is the wrong place to start in a justification of rights protecting particular cultures.

'[A] better strategy,' writes Réaume, 'would be to provide an account of the interest that a group as a whole has in the secure enjoyment of its culture.'¹²² Her argument is that only a *collective* interest is capable of grounding rights for particular cultural groups. Where, however, it is a collective interest which grounds a minority right, there will be a point where the integrity of that interest may well limit the scope for individuals to reject actual practices and beliefs which the group collectively develops. (So here the internal relation is moving in the opposite direction to Kymlicka's theory.)

An approach which accepts the distinctively collective nature of the interests justifying minority rights exposes the issue of conflict more directly and usefully than does Kymlicka's, as the interests which justify them are distinct from those which ground individual rights. As such, there is no reason to think an internal relation will *in all cases* lead to the complete vindication of individual rights where conflicts with particular collective minority rights arise. Like Kymlicka, Réaume recognises that it may not be legitimate for outsiders to enforce the protection of individual rights within cultural minorities.¹²³ Unlike Kymlicka, however, she emphasises that the possibility of cultural emigration — to be respected, one presumes, by the minority and majority cultures — must not be foreclosed, and that this provides a 'partial vindication of the rights of individuals against groups'.¹²⁴ The exact nature of this qualified defence of individual rights is, however, left obscure. In particular, we are given no indication as to what the right to exit would entail in practical terms or the role of external cultures in ensuring that the possibility of cultural emigration is kept open. However, if, as I

¹²⁰ See generally McDonald, above n 14.

¹²¹ Réaume, 'Justice between Cultures', above n 84, 126–30.

¹²² *Ibid* 130.

¹²³ *Ibid* 140.

¹²⁴ *Ibid* 139–40.

argue below, no formulaic response or abstract theory is capable of resolving these questions, then Réaume's reluctance on this score is not only understandable, but appropriate.

What does seem clear is that any attentiveness to exit rights must focus on 'the real prospects of exit', as a mere theoretical possibility is unlikely to convince individuals (or internal minorities) that exiting the group is a good enough substitute for their rights.¹²⁵ And, once we have reached the point of ensuring the exit door remains ajar (though not so far open as to expose the minority to being swamped by, or assimilated into, the wider society), it becomes apparent that to do so may not always be consistent with respecting the interests of cultural minorities which ground collective rights. The demands of cultural autonomy and the protection of those individual rights which are necessary to make the costs of exit tolerable for individuals faced with that choice, may simply pull in opposite directions.¹²⁶ Thus, although focusing on internal relations between conflicting collective and individual rights will in some cases be helpful, it cannot be expected to deal with all conflicts which may arise.

Here, however, we should remember that the internal relation methodology will not serve to resolve all moral conflicts which arise in the case of conflicting individual rights either. In multicultural societies it is routine for the justification of even well-established rights to be contentious. Where this is so, the resolution of rights conflicts cannot be achieved through their internal relations and there is no alternative to undertaking a contextual approach to actual instances of rights conflicts, sensitive to the nature of the interests grounding each right and the weight they deserve in particular circumstances.

V CONFLICTS IN CONTEXT

This article has sought to establish two general conclusions: (i) that gross generalisations about the irreconcilability of collective and individual rights cannot be maintained; and (ii) that, where these sets of rights do conflict, there is no reason to think that strategies available to deal with other conflicts of rights (such as the internal relation methodology) will not also be available to cope with them. An analysis of all the permutations and combinations of conflicts between various collective and individual rights has not been attempted, as there is not, at least on the interest theory of rights, a great deal to be said in the abstract about how such conflicts might be resolved. Indeed, a search for anything like a general theory of conflicts between rights is likely to be futile.¹²⁷ Given the multiplicity and complexity of the interests underpinning claims of rights, how could these interests be valued or ranked in the absence of knowing how they play out in the circumstances of a particular case?

The lack of a general theory of conflicts and the recommendation of a contextual approach will disappoint those who look to rights discourse for easy solu-

¹²⁵ Green, 'Internal Minorities', above n 33, 265.

¹²⁶ See, eg, *Wisconsin v Yoder*, 406 US 205 (1972).

¹²⁷ Green, 'Internal Minorities', above n 33, 269.

tions to the moral conflicts we face. But to recommend a contextual approach is not to accept that reasoned arguments are not available. Rather, by refusing to grasp at simple answers to difficult problems, it offers the possibility that rights discourse may assist us in thinking about the issues raised with more sophistication and sensitivity than any formulaic response is likely to provide. To illustrate this claim, I want to conclude with two points (of a general sort) which indicate how the approach taken to rights and collective rights in this article can be of assistance in constructively approaching conflicting collective and individual rights contextually, in a way which cannot be (fairly) described as 'rudimentary' or 'political haggling'.

First, a focus on the nature of the interests which ground rights enables some of the excesses of 'rights-talk' or 'the rhetoric of rights' to be left behind.¹²⁸ Conflicts in cases such as *Ford* and *Thomas* need not be construed as requiring us to establish, once and for all, the priority of one species of right over another. Rather, by focusing more precisely on the interests and values which ground particular rights, it is possible to see which right is more important in given factual circumstances.

Consider another Canadian example. In *R v Sparrow*¹²⁹ the Supreme Court of Canada accepted evidence establishing that 'for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture'.¹³⁰ In relation to the conflicting individual interests of sporting and commercial fishers, the significance of this *shared* interest in a cultural practice central to the Band's identity appears more weighty in the circumstances of the case. In such circumstances 'the sacrifice required of non-members by the existence of these rights is far less than the sacrifice members would face in the absence of such rights'.¹³¹ Not only are non-members able to exercise the full panoply of their individual rights in the vast majority of a multination state, but the consequence of allowing their rights absolute priority may undermine the existence of a minority culture itself. The interest approach to rights and collective rights, by demanding a precise examination of the interests justifying the claimed rights, thus perspicuously raises the issues which must be considered.

Similarly, Avigail Eisenberg has suggested that the result in *Thomas* can be understood as involving a finding that, on the evidence presented, *involuntary* involvement in the Spirit Dance 'was not a central feature of the Salish way of life'.¹³² Viewed against this, *Thomas*' individual interest in personal security — which in the circumstances was under significant threat — took on considerable importance. Regardless of whether Hood J's reasons fully square with Eisenberg's interpretation, the case usefully illustrates how it is only once the interests

¹²⁸ See Avigail Eisenberg, 'The Politics of Individual and Group Difference in Canadian Jurisprudence' (1994) 27 *Canadian Journal of Political Science* 3, 9.

¹²⁹ [1990] 1 SCR 1075; 70 DLR (4th) 385.

¹³⁰ *Ibid* 1099; 402.

¹³¹ Kymlicka, *Multicultural Citizenship*, above n 5, 109 (discussing generally the effect of many minority rights on members of the larger society).

¹³² Eisenberg, above n 128, 18. There may, of course, be problems concerning how evidence relating to minority cultures is received by the courts of majority cultures.

underpinning conflicting collective and individual rights are identified, and their importance in the circumstances is evaluated, that we can even begin to adequately respond to the underlying moral conflicts. The point is not that identifying the nature of interests grounding individual and collective rights will mean that the resolution of conflicts will become straightforward — difficult judgments as to the importance of these interests in the circumstances remain to be made. Rather, it is that until the interests on each side of the equation are examined, the real question for consideration will not be correctly or fully posed. Abstract statements about how collective and individual rights interact are of little assistance.

This contextual approach, which begins by identifying the interest involved in any possible conflict between rights, mirrors the methodology recommended by the High Court in *Wik* to deal with conflicting native title rights and the rights of pastoralists.¹³³ The Court accepted that to answer this question it would be necessary to analyse the legal interests which ground native title alongside those underpinning the pastoralists' rights in each particular factual and legal matrix. Only after the nature of the interests on both sides of the equation were considered could the question of inconsistency be determined.

This leads into my second general comment on how genuine cases of conflicting collective and individual rights should be approached. To focus on the actual interests which ground rights and their relative importance in a particular factual context is in an important sense to accept, as the High Court did in *Wik*, the *assumption of coexistence*. In legal terms this assumption was achieved in *Wik* by emphasising that 'clear and unambiguous' legislative language be required to extinguish native title.¹³⁴ This is one way of accepting that neither set of rights pre-emptively trumps the other.¹³⁵ Significantly, accepting the assumption of coexistence, rather than asserting pervasive irreconcilability, may lead to a transformation of our starting question so we ask not whether coexistence is possible, but a more interesting and urgent question for multicultural societies: How can coexistence be achieved? If the arguments in this article are accepted,

¹³³ In *Wik* itself, the Court was not required to engage in the exercise of determining whether an inconsistency between the two sets of rights existed. The Wik Peoples and the Thayorre People were given special leave to appeal to the Full Federal Court from various determinations on preliminary questions of law which had been made by Drummond J in the Federal Court. These appeals were removed from the Federal Court and heard by the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth). It was thought that the determination of these preliminary legal issues might resolve the substantive native title claim at common law and under the *Native Title Act 1993* (Cth).

¹³⁴ (1996) 187 CLR 1, 155 (Gaudron J). As Deane and Gaudron JJ emphasised in *Mabo* (1992) 175 CLR 1, 111, this interpretive rule is a manifestation of the more general principle of statutory construction that 'clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation'.

¹³⁵ On one possible interpretation, the essential difference between the majority and the dissenting judges in *Wik* was the stage at which they were willing to apply the assumption of coexistence to the dispute before them. Whereas the majority was willing to assume coexistence in the characterisation of the potentially conflicting statutory rights, the minority applied the assumption only after the pastoralists' rights had been construed in a way in which, regardless of the content of native title rights, they were exclusive and thus could not be consistent with an acknowledgment of any other use interests over the land in issue.

then claims that collective and individual rights are fundamentally irreconcilable should delay us no further in responding to that question.