THE RIGHTS OF MINORITY CULTURES. Edited by Will Kymlicka. Toronto: Oxford University Press, 1995. Pp. 387 ($75.50).

For the reader whose political theoretical interest has been engaged by Canada's continuing debate about the rights/claims of First Nations Peoples and Francophone Quebeckers to self-determination, this anthology has much to offer. With the notable and regrettable exception of a single essay (developing Will Kymlicka's own original argument that the rights of minority cultures deserve to be recognized within a liberal democratic state),[1] the 17 pieces republished in this volume canvas fully the current spectrum of controversy in this pressing field of scholarly discourse.[2]

In particular, for those interested not just in what the judiciary are doing in grappling with these hard questions – but in why, beneath the text of their judgments, they might be doing it and whether they are getting it right – *The Rights of Minority Cultures* is a rich resource. Consider the *Corbiere*[3] case, first argued a couple of years ago and now under appeal. The plaintiffs at trial were members of the Batchewana Band who did not reside on reserve lands. Their court challenge addressed their being denied a vote in Band affairs. The historical reasons for their residential and electoral situation began in 1859 when all of the Band's reserve lands were surrendered except for Whitefish Island, a small island in St. Mary's River, which drains into the eastern end of Lake Superior. For a century, due to the tiny size of this reserve, the majority of the Batchewana Band lived by necessity away from Whitefish Island. Their place of residence did not affect their right to vote until 1951 when the *Indian Act* was amended to require that band members be ordinarily resident on the reserve in order to vote in band elections.[4] By 1962, owing to the creation of additional substantial reserves, the majority of the members of the Batchewana Band came to live on reserve land. However, a consequence of the enactment of Bill C-31[5] was that, by 1991, 68 per cent of Band members did not reside on the reserve. As Strayer J. put it, it was "no coincidence" that Bill C-31 came into force on the very day that s. 15 of the *Charter*[6] took effect, as the main beneficiaries of Bill C-31 were the women and their children who had lost their status as *Indian Act* Indians because they had married non-status persons.[7]

Strayer J. found that the challenged section of the *Indian Act* which denied status to the plaintiff band members as 'electors' had the effect of shutting them out of any decision to surrender reserve lands, despite provisions of the *Indian Act* which say that

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[1] Kymlicka's two books on this subject surely place him, by any standard, second to no one. See *Liberalism, Community and Culture* (New York: Oxford University Press, 1989) and *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Toronto: Clarendon Press, 1995).

[2] The book concludes with a comprehensive eight page guide to further reading.

[3] *Corbiere* v. *The Queen* (1994), 107 D.L.R. (4th) 582, 67 F.T.R. 81, [1994] 1 C.N.L.R. 71, 18 C.R.R. (2d) 354 (F.C.T.D.), Strayer J. [hereinafter *Corbiere* cited to D.L.R.].

[4] *Indian Act*, S.C. 1950-51, c. 29, s. 76.

[5] *Indian Act*, S.C. 1985, c. 27. Bill C-31, *An Act to Amend the Indian Act*, 1st Sess., 33rd Parl., 1985.

[6] *Canadian Charter of Rights and Freedoms*, s. 33, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[7] *Supra* note 3 at 597. What led up to this synchronized event was the decision of the United Nations Human Rights Commission that the former s. 12(1)(b) of the *Indian Act* discriminated against women, contrary to the provisions of the International Covenant on Civil and Political Rights. See *Lovelace* v. *Canada* (1981), [1983] Can. Hum. Rts. Y.B. 305 (UN Human Rights Committee).

reserve lands are set aside for the use and benefit of all band members. It operated in a similar fashion with regard to moneys held by the Crown for the use and benefit of all band members. As such, it offended s. 15 and was not saved by s. 1 of the *Charter*. However, as to all other matters involving the day-to-day governance of the Band, Strayer J. found that the residency requirement was not discriminatory. He reasoned that as it is the residents on reserve lands who must bear the consequences of these governmental decisions, they and they alone should be the ones to elect the band council.

Appeals and cross-appeals were promptly filed in the aftermath of this judgment. Both the Congress of Aboriginal Peoples (CAP)[8] and the Native Womens' Association have filed applications to intervene in support of the plaintiffs/respondents.[9] CAP argues that:

> As well as violating the Charter-protected equality rights and quite possibly the federal government's fiduciary obligation to all Aboriginal peoples (not just those residing on reserve), the existing system appears to violate the fundamental democratic right to have a say in situations where one's **rights and obligations** and those **of one's community** are at stake.[10] [Emphasis added]

This begs the crucial question whether a community can properly be said to be a rights/obligations-bearing entity. It is for a discussion of this issue that one might well turn to *The Rights of Minority Cultures.*

In terms of 'rights talk', is a minority culture greater than the sum of its parts? Nathan Glazer and Darlene Johnston argue for an affirmative answer to this question. Glazer qualifies his argument as applying only in countries, such as Canada, which have come to accept the idea that two or more 'national' cultures can exist within a single state. This is to be contrasted with the United States which, for Glazer, has firmly adopted a unitary conception of a common national culture. Johnston argues for a group right to self-preservation recognizing that prescriptions for minority cultural survival will have to be group-specific.[11] She then applies this point in advancing an argument that, for native peoples, their identities, their culture and the land are indissolubly linked. This means that their right of self-preservation must involve an adequate land base.

Michael Hartney argues that the use of the terminology of communal, collective or group rights leads to confusion[12] and to moral mistakes. A collective cannot be said to have rights of its own unless one can show that it has interests which are distinct from those of its members. Hartney denies that there are any such interests. He illustrates this by referring to the following argument advanced by counsel for Quebec, at trial, in the

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8 Notice of Motion of July 24, 1995, File A-578-93.

9 Notice of Motion of August 10, 1995, File T-3038-90.

10 *Supra* note 7.

11 W. Kymlicka, ed., *The Rights of Minority Cultures* (Toronto: Oxford University Press, 1995) at 189.

12 *Ibid.* at 221. Hartney takes no issue with the notion of a right reserved to members of a group. This usage of "group rights" was coined by the late Walter Tarnopolsky in "The Equality Rights (Ss. 15, 27 and 28)" in W.S. Tarnopolsky & G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 437-39. It was taken up by Wilson J. in *R.* v. *Edwards Books & Art Ltd.* [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1. This is quite a different way of talking about group rights than treating a collective itself as a rights bearing entity. Unhappily, this vital distinction is lost on most users. Hartney notes that the French edition of Tarnopolsky's argument speaks of a 'droit collectif'.

Bill 101[13] case: Section 23 of the *Charter*, the guarantee of the right to education in a minority language, is about ensuring the survival of the minority group. So long as Quebec provides sufficient English language schooling to meet this objective, discrete groups of Anglophone Quebeckers, such as those who were educated in English elsewhere in Canada, have no *Charter* grounds to challenge Bill 101's bar to their childrens' claim to receive schooling in English. For Hartney, the moral mistake is manifest.

> That is like arguing that there is some value in having clean air over and above the fact that human beings need clean air, and that this value is being preserved as long as there is some corner of the globe where clean air still exists, even if people are dying everywhere else from a lack of it.[14]

If one finds this convincing, but remains resistant to signing up for membership in the Reform Party, one must look elsewhere for theoretical ground on which to stand in speaking up for cultural minorities. Leslie Green accepts Will Kymlicka's liberal account which begins with each person's need for the capacity to frame, pursue, and revise his or her conceptions of the good life. As we know from his previous work, for Kymlicka culture counts as a primary good in this liberal project:

> Liberals should be concerned with the fate of cultural structures, not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value. Without such a cultural structure, children and adolescents lack adequate role-models, which leads to despondency and escapism, a condition poignantly described by Seltzer in a recent article on the adolescents in Inuit communities....The cultural structure they need and value is being undermined, and the Inuit have been unable to protect it.[15]

Green takes Kymlicka's concern for individual rights within minority cultures a step further, though he chooses to address this issue as one of the rights of 'internal cultures'. He recalls Kymlicka's analysis of the problem posed by the religious dissenter on an American Indian reservation which is a theocracy.[16] But, Green notes that Kymlicka's conclusion that no sound theory of minority cultural rights could justify oppressing the dissenter has, in the case of the Pueblo, the happy result that "[perhaps] the Pueblo could remain Pueblo even with a Protestant minority".[17] Green argues that there will not always be such a way both to preserve the minority culture, albeit with some marginal modifications, and to respect the rights of the internal minority. Tragic choices may come to be faced. For some minority cultures, respect for the internal minority may well be destructive.

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[13] *Quebec Association of Protestant School Boards* v. *Quebec (A.G.) (No. 2)* (1982), 140 D.L.R. (3d) 33, 3 C.R.R. 144 (Que. Sup. Ct.).

[14] *Supra* note 11 at 222-23.

[15] *Supra* note 1, *Liberalism, Community and Culture* at 165-66.

[16] *Ibid.* at 195ff. See also *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), where the United States Supreme Court avoided the issue by ruling that the dissenter has access only to the forum of the tribal court to advance the arguments from discrimination under the *Indian Civil Rights Act*, 25 U.S.C.S.

[17] *Supra* note 11 at 270.

> Yet without respect for internal minorities, a liberal society risks becoming a mosaic of tyrannies; colourful, perhaps, but hardly free. The task of making respect for minority rights real is thus one that falls not just to the majority but also to the minority groups themselves.[18]

Chandran Kukathas rejects the idea of internal minorities or of any sort of dissenting rights within a minority culture. For unless the minority culture is itself a liberal one, Kymlicka's and Green's analysis of minority cultural rights can lead only in the direction of interference and intolerance, on the part of the dominant culture. Kukathas advances an objective theory which does not focus at all on a minority culture's right to survive, but has the effect of keeping the dominant culture from interfering with minority cultures, even those which are theocracies or which oppress women.

Such an outcome is achieved by taking freedom of association seriously. This means that people must have the right to live together in association, even if that means adopting counter-cultural values. The first corollary of the fundamental freedom of private action is that no group has an entitlement to governmental support, even to enable it to survive. The second corollary is that any given person who wishes to opt out of such an association has the right of exit. The solution to the Pueblo conflict then consists of granting the right of the Protestant dissenters to leave the Pueblo and take up lives in the wider liberal political culture.[19]

Does it follow from this approach that, in *Corbiere,* Strayer J. ought not to have 'interfered' with the reserve residency requirement for the franchise in the name of *Charter* equality values on behalf of the women and children who acquired status and membership under Bill C-31? The women and their children never chose the exit option. They were disenfranchised by the operation of law. Their plea is that their membership rights be taken seriously by the Batchewana Band. But the Band argues, it is worried about the further erosion of its already all too scarce resources which would result from giving in to the demands. Restricting one's analysis to 'freedom of association' does not seem to help much in resolving this problem. The Batchewana Band apparently do not wish to associate with the Bill C-31 women and children by treating them as full members of the community. On the premise of the liberal idea of freedom of association, without their consent, the *status quo* will remain. Bill C-31 people will continue to be excluded though they have had no choice in the matter. They clearly do not want to pursue their lives within the wider society. They want recognition in reality, not just on paper, of their cultural membership in the Band.

For readers interested in the question of the nature of cultural groups, Avishai Margalit and Joseph Raz advance arguments that explain and justify why Bill C-31 people see cultural membership to be crucial to their well-being. Margalit and Raz speak in terms of 'encompassing groups' whose culture is so pervasive as to form a significant part of their members' sense of identity. Membership is not a matter of choice or a hallmark of achievement. Rather, "[o]ne belongs because of who one is".[20] This conception is a world away from Kukathas' freedom of association. But, the liberal values of individual dignity and self-respect are not neglected. Because membership in the cultural minority contributes to a person's sense of identity, it follows that the

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18 *Ibid.*

19 *Ibid. at* 248.

20 *Ibid. at* 84.

minority culture itself be respected by the dominant culture.

Iris Marion Young argues that feminist analysis has much to offer if one is interested in taking up this imperative. She urges that group difference as 'otherness', especially in the dichotomies between a dominant and a subordinate culture is rather like the story of patriarchy.[21] What is needed, then, is a relational conception of difference, a vision of 'togetherness in difference'. This parallel between the language of 'group difference' and 'gender difference' has the added virtue of avoiding a tired dichotomous canard. Much has been written on this way of framing the issue by positing a hard choice between 'assimilation', the direction so many thinkers have persuaded themselves must be taken, and 'separation', where hatred of the other drives people to secession at best and 'ethnic cleansing' at worst.

The Rights of Minority Cultures does not neglect this debate. The first section of this anthology contains pieces by Vernon Van Dyke and Ephraim Nimni which posit that, historically, both liberal individualism and Marxism were assimilationist. Michael Walzer and Nathan Glazer discuss many of the problems of pluralism for either a communitarian or a liberal theory of the state. Jeremy Waldron goes further with a thesis about respecting minority cultures which is roughly that 'the road to Hell is paved with good intentions'. Waldron takes the 'fatwa' still hanging over Salman Rushdie's head as proof enough of the perils attached to 'identity politics'. With respect to the *Corbiere* litigation which I have referred to in this review, it is notable that Waldron cites the *Mississippi Band of Choctaw Indians v. Holyfield*,[22] a case in point. There, the United States Supreme Court rejected the wishes of a Choctaw mother who had given birth off her reservation in order to put her child up for adoption in the wider society, in favour of the argument of the tribe that it needed the child for its long-term cultural survival. This is really the reverse of *Corbiere*. Waldron finds it at best 'unpalatable'.[23]

Yet Waldron's prescription is not one of assimilation. It is a plea for cosmopolitanism, a plea for a post-modern conception of the self drawing its definitions from a variety of sources. As Rushdie himself has put it:

> *The Satanic Verses* celebrates hybridity, impurity, intermingling, the transformation that comes of new and unexpected combinations of human beings, cultures, ideas, politics, movies, songs. It rejoices in mongrelization and fears the absolutism of the Pure.[24]

The fifth section of *The Rights of Minority Cultures* contains two essays which address the challenge of including minority cultures in the dominant society's structures of governance. Arend Lijphart lays out the case for a form of 'consociationalism' which provides for a Cabinet position, a form of proportional representation in Parliament, and a veto for minority cultures when their vital interests are in jeopardy. Anne Phillips writes from a feminist perspective about the problems of domination, the 'freezing' of group identities, identity politics and accountability. The last issue is the most crucial. It is all very well to want to create structure for representation of minority cultures, but it is quite another thing to ensure that the representatives selected are accountable to the groups they serve and represent. On balance, Phillips concludes that, by extending feminist arguments into the exercise of institutionalizing minority group representation,

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[21] *Ibid.* at 158. For Young, "gender is a paradigm of this presumption that difference is otherness." (*Ibid.*)

[22] 490 U.S. 30 (1989).

[23] *Supra* note 11 at 97. No doubt, Kukathas would disagree.

[24] *Ibid.* at 93.

"the potential risks outweigh the gains".[25]

The final discursive section of *The Rights of Minority Cultures* is entitled "Controversies". It contains four essays which present a range of issues and approaches. Joseph H. Carens argues that taking the liberal principles of equality and freedom seriously would require the removal of all barriers to immigration save for those which might be justified on the basis of the need to maintain public order. No other moral course is available to the conscientious liberal thinking government. Allen Buchanan contends that cultural survival might occasionally justify secession. However, this would only be a very last resort in the face of an assimilationist agenda on the part of the state. James Anaya canvasses the history of minority rights under the League of Nations and its subsequent absence from much of the story of the United Nations, until recently, due to the abuses of the Third Reich. Despite the activity in various United Nations fora of the last seven years or so on the subject of minority rights in general and indigenous rights in particular, Anaya concluded that this momentum will not likely lead to much as it poses too great a threat to the *status quo* of 'state sovereignty'. Lastly, Bhiku Parekh addresses the Salman Rushdie affair from the perspective of Muslim groups in Britain. Given that they were offended by *The Satanic Verses,* quite apart from whether they shrunk back in horror from the 'fatwa', as most did, their indignation needs to be dealt with. This leads Parekh to call for a rethinking of traditional liberal legal doctrines with a view to accommodating the values of Muslim groups.

Kymlicka concludes his introduction to this anthology with this comment:

> We have no choice but to learn to live with cultural pluralism, and to devise strategies for coexistence that are consistent with principles of freedom, justice, and democracy.[26]

Those who agree will be helped in thinking through the hard questions which await them by reading *The Rights of Minority Cultures.*

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25 *Ibid* at 298.

26 *Ibid.* at 21.

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