FI5201 Multi-Cultural Conflicts and Ethics

Canadian Governments Relation to the Kettle and Stony Point Indigenous Peoples: Ipperwash

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Table of Contents

Sec.1	Introduction	Pg.2
Sec.2	Ipperwash	Pg.4
Sec.3	Benign Neglect	Pg.6
Sec.3.1	Characteristics and Arguments for the policy of Benign Neglect	Pg.7
Sec.3.2	Arguments against the policy of Benign Neglect	Pg.10
Sec.3.3	The policy of Benign Neglect and the Ipperwash Case	Pg.12
Sec.4	Group-Differentiated Rights	Pg.14
Sec.4.1	Characteristics of the policy of Group-Differentiated Rights	Pg.14
Sec.4.2	Arguments for the policy of Group-Differentiated Rights	Pg.17
Sec.4.3	Arguments against the policy of Group-Differentiated Rights	Pg.18
Sec.4.4	The policy of Group-Differentiated Rights and the Ipperwash Case	Pg.20
Sec.5	Going Forward from Ipperwash	Pg.22
Sec.6	Conclusion	Pg.24
Sec.7	Bibliography	Pg.26

1. Introduction

In the short history of Canada the plight of the indigenous population is perhaps one of the most tragic stories while at the same time one of the least popularized. It is no wonder that we might want to keep this blemish on the fruit of our history hidden from popular view. What might that say about ourselves? Indeed, there is nothing laudable about our colonization of a once culturally rich nation built upon various indigenous tribes spread across the great land of Canada. Today indigenous people across Canada suffer from poverty, soaring high school drop out rates, high suicide rates, and unresolved land claims.[1] There are many instances that can illustrate the erroneous nature of the relationship the Government has in the past held with respect to the indigenous population. Ipperwash is one such instance. In 1942 land was seized by the Government of Canada from the Kettle and Stony Point Band's under the War Measures Act. Furthermore, land sold to the Government of Canada earlier and which contained a sacred burial ground which was under the agreement to be fenced off, was not. Tension over these two issues increased over many years and finally in 1995 an indigenous man by the name of Dudley George was shot and killed during a legal protest over a land claims dispute involving the earlier deals. Several years after the shooting, the Government of Canada resolved the land claims dispute and issued a full apology for the events that lead up to and including the death of Dudley George.

The main focal point of this essay will be the presentation and critical analysis of two competing policies. Both of these policies may be seen as an answer to my central questions. The first called *the policy of benign neglect* as understood to be mainly a passive policy primarily consisting of 1. minimal state interference into civil society, 2. equality before the law, 3. equal constitutional political, civil and welfare rights, and 4. judicial enforcement of constitutional rights. The second policy termed *the policy of*

[1] "CBC News Aboriginal," n.d., <http://www.cbc.ca/news/background/aboriginals/index.html> (17 October 2007)

group-differentiated rights is one which involves a more active policy and consists primarily of 1. substantial state intervention, 2. equality before the law, 3. equal constitutional political, civil, and welfare rights, 4. judicial enforcement of constitutional rights, 5. group-differentiated rights e.g. self-governance. I have in mind Will Kymlicka's group-differentiated rights, more specifically when they are used in dealings with national minorities such as that of indigenous populations.

My central question is thus, how may have the situation at Ipperwash been different if the policy of benign neglect or the policy of group-differentiated rights been used, and which of these two policies should be used by the Government of Canada moving forward from Ipperwash? Questions which will arise in addressing this central question are the following. Should we use a policy of benign neglect in our relation to indigenous peoples? Does the Canadian Charter of Rights and Freedoms afford enough rights and protections for indigenous people? Should special group rights be attributed to the indigenous communities seen in the case example?

For the purpose of this essay I take the now infamous Ipperwash scandal to shed light on two possible policy solutions towards the indigenous populations. In addition, it is my intention to speculate how such policies if used, would have altered the outcome of the Ipperwash scandal, and which policy should be used now as a policy towards indigenous populations, specifically the Kettle and Stony Point Band's.

I begin with a brief overview of the Ipperwash case (Section 2). As the incident involving the death of Dudley George over a land claims dispute is important to understand it is necessary to provide the context through which the incident took place. Because of this, I begin the summary in 1937 and go right up until the publication of the public inquiry into the death released in 2007. I then examine the first policy that maybe used in dealing with indigenous populations, the policy of benign neglect (Section 3). I bring to the discussion arguments for and against such a policy, how through use of the policy of benign neglect the Ipperwash case may have been different, and discuss its viability as a policy moving forward from the Ipperwash case. After this, the second policy, the policy of group-

differentiated rights (Section 4) is brought into the discussion with both arguments for and against such a policy. I shall speculate how the Ipperwash case may have been different had such rights been provided and then postulate the need for such rights in any policy moving forward from Ipperwash towards the indigenous people. There is then a section commenting on how we should move forward from Ipperwash (Section 5). Finally, I conclude which of these two policies is best equipped as a policy with respect to the proper relation of the Government of Canada to the Kettle and Stony Point Band's moving forward from Ipperwash (Section 6).

2. Ipperwash

The Ipperwash scandal although being a tragic event that highlights the inadequacies of the Canadian Governments relation to indigenous peoples resulting in the death of Dudley George, an indigenous man, it serves nonetheless as a useful example. As just fore mentioned, it highlights a defective system of relations towards the indigenous people of Canada through which analysis of the incident may shed light on what a proper relation to indigenous populations might look like. The controversy that is Ipperwash, although peaked at the shooting of Dudley George, needs to be looked at and examined from some time prior to the shooting to get a full picture of the event and thus placing it into proper context.

In 1928 all of Stony Point waterfront was sold by the Kettle and Stony Point Band's to the Government of Canada but amidst disagreement. A former Chief wrote to the Department of National Defence seeking help protecting the band's treaty rights. The letter however fell on deaf ears.

At Stony Point, the Ontario Government decided to buy a portion of the land in order to create Ipperwash Provincial Park. The park however was located around a sacred burial ground and in 1937 the Kettle and Stony Band asked the government to fence off the

burial ground. Although agreeing with the two bands, the government did not follow through and the burial ground remained open and accessible.[2]

By 1942 land was needed for a new training ground for the army and it was decided that the best spot for the training grounds was Stony Point. Undervaluing the land but forcing a sale through citing the War Measures Act the Government appropriated the land.

The sixteen Stony Point families were relocated to Kettle Point with the promise that the land would be returned to them after it was no longer needed. After WWII however, the government decided to keep that land rather than return it.[3] With still no fence around the sacred burial ground it was unearthed in 1950 by Ipperwash Provincial Park workers who, showing no respect, claimed some of the remains as souvenirs.

The tension at Ipperwash boiled over in 1995. The descendents who had moved onto Camp Ipperwash wanted Ipperwash Provincial Park where the sacred burial ground was located. On Sept. 4th a massive police build up began as the gates to Ipperwash Provincial Park were forced open and protestors took possession of the land. About 30 protestors in all then began to build barricades to underline their land claim and to protest the destruction of the burial ground.[4] At 11pm the police riot squad moved in. One man approached the police to mediate but was quickly beaten to the ground and then taken into custody. Two teenagers hoping to rescue the man jumped into a bus and drove at the police, forcing them to jump out of the way. The police opened fire on the vehicle and the teenagers turned back towards the park. Amidst the gun fire, Sgt. Ken Deane fired several rounds hitting Dudley George, one of the protest leaders, in the chest killing him. Shortly after the incident Dudley George was buried and the demand for a public inquiry was launched. Initially the PC government resisted, insisting they had nothing to do with the

[2] "The Ipperwash Report," n.d., <http://www.theglobeandmail.com/v5/content/features/ipperwash/> (17 October 2007)
[3] Ibid
[4] "CBC News The Ipperwash inquiry," n.d., <http://www.cbc.ca/news/background/ipperwash/> (17 October 2007)

police actions that day.[5] On Sept.13 the Federal Government revealed that the protest was legal as the park does indeed house a sacred burial site.

The original land claim, the reason why the protestors occupied the park, was settled in 1998 under a 26 million dollar agreement. The land was to be cleaned up and returned to the Kettle and Stony Point First Nation. In addition, every member was to receive between 150,000 and 400,000 dollars.[6]

When the Liberals won the elections in 2003 they announced on Nov.12th, eight full years after the death of Dudley George, there would be a public inquiry.[7] On May 31st 2007 the inquiries findings were released. Judge Sidney Linden ruled that the OPP, Mike Harris, and the Federal Government were all responsible.[8] The Federal Government gave back camp Ipperwash with a full apology and compensation. The Provincial Government issued an apology for the events that lead to Dudley Georges death and made a pledge to honour his memory by trying to use the Ipperwash report to "bring all peoples together to move forward."[9]

3. Benign Neglect

The first policy I wish to discuss in light of Ipperwash and the Government of Canada's relation thereby to the indigenous people is the policy of benign neglect. The term is most widely used today as I understand it, when it is considered that a hands-off approach to regulation will improve the interests of the 'neglected' group. There are four key characteristics of the policy of benign neglect. 1. minimal state interference into civil society, 2. equality before the law, 3. equal constitutional political, civil and welfare rights, and 4. judicial enforcement of constitutional rights.

[5] "CBC News The Ipperwash inquiry,"
[6] Ibid
[7] Ibid
[8] Ibid
[9] "The Ipperwash Report,"

3.1 Characteristics and Arguments for the policy of Benign Neglect

There are those who promote a separation of state and culture. They believe that cultures do not need assistance from the state to survive, or more accurately, they hold that giving political recognition to particular cultural practices is unfair and unnecessary.[10] They argue that the state should not interfere with the "cultural-market place".[11] A culture is then seen as one which is either worthy or unworthy of existence and the state should have no part in helping one culture or inhibiting another.[12] "Rather, it should respond with 'benign neglect' to ethnic and national differences."[13] Proponents of this view have in a sense drawn a line distinguishing between what ought to be open to state intervention and what should not. They hold that the state should play only a minimal role in the private sphere. The private sphere is the sphere which includes primarily our concept of what the good life entails. Our goals, ambitions, etc. are things which the state should have little to no say over which are acceptable and which are not. Of primary importance, the private sphere includes our culture and contains within it our right to freedom of assembly.[14] Benign neglect thus rests nicely with those who would promote a separation of the state and of culture, so far as benign neglect is seen a policy of minimal state intervention.

Chandran Kukathas presents in "Liberalism and Multiculturalism: The Politics of Indifference" an argument for state neutrality when it comes to matters of culture that offers support for those who wish to see a separation of state and culture. Demands for recognition, similar to the demands of the Kettle and Stony Point Band's, are to be dealt with through neutrality. Kukathas makes the claim that cultural survival cannot be guaranteed and should not be considered a right.[15] He goes on to say that, "…the state

[10] Kymlicka (1995) pg.107
[11] Ibid pg.108
[12] Ibid
[13] Ibid
[14] Proponents of the separation of state and culture do leave open the possibility of state intervention when it comes to matters such as the raising of children in profoundly unethical ways. Since the childrearing practices of indigenous populations does not fall into this category and I am only concerned with indigenous populations, the allowance of state intervention in extreme cases shall not be explored any further than as just briefly mentioned.
[15] Kukathas (1998) pg.694

should not be in the business of trying to determine which cultures will prevail, which will die, and which will be transformed."[16] This further underscores the argument for maintaining minimal state interference into cultures.

A policy of benign neglect, as with any policy between two groups in Canada, would by legal necessity have to adhere to Sec.15 of the Canadian Charter of Rights and Freedoms. Thus a policy of benign neglect in addition to having the characteristic of a hands-off approach to ones cultural beliefs would also afford each member of a group with equality under the law.

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[17]

Support for using a policy such as benign neglect may thus in light of being assured equality under the law come from another source and not necessarily from only those who would like to see a separation of state and culture. That is to say that the indigenous population of Canada may want a type of liberal benign neglect. A lack of regulation would fulfill, what Chandran Kukathas states as, complying with their request of "leave us alone to live according to our ways of life."[18] Under benign neglect the indigenous population wishing to be left alone could be and would still maintain all of the rights and freedoms given to them by the Canadian Charter of Rights and Freedoms. It is under

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[16] Kukathas (1998) pg.694

[17] Department of Justice Canada, "Canadian Charter of Rights and Freedoms," n.d., <http://laws.justice.gc.ca/en/charter/> (17 October 2007)

[18] Kukathas (1992) pg.116 In using this quote I do not mean to give the impression that I agree with or defend an unrestricted freedom of association. I believe that there are certain situations when it is necessary for state intervention but most cases that would fall into this category are not found within the culture of indigenous populations and thus not discussed in this essay.

Sec.2 that we see that indigenous populations have the right to associate with and live as they so choose.

> **2.**Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion;
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c) freedom of peaceful assembly; and
> d) freedom of association.[19]

As is clear from Sec.2 every citizen of Canada is afforded a great deal of freedom to live as one so chooses within the community of their choosing. Thus a policy of benign neglect towards an indigenous community would have the effect of underscoring that they were to be left alone, and in adhering to their wishes a positive outcome would be reached.

A further characteristic of a policy of benign neglect is the enforcement of constitutional rights. Any policy which is to be implemented in Canada cannot supersede the Canadian Charter of Rights and Freedoms which includes a section on enforcement of rights, Sec.24 is clear and explicit on the issue.

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[20]

What makes this policy of benign neglect appealing is threefold. Firstly, the policy when used insures only a minimal use of state intervention. This allows for the state to remain

[19] "Canadian Charter of Rights and Freedoms,"
[20] Ibid

separate and neutral when it comes to questions of culture. The state neither promotes nor impedes upon the free expression of ones culture. Secondly, everyone is treated with equality under the law. This allows for the freedom of individuals to express their constitutional rights with equal footing as any other would be allowed to and with equal validity in their claims to such rights. Thirdly, the enforcement of these rights aforementioned is upheld to the greatest degree possible.

3.2 Arguments against the use of the policy of Benign Neglect

Now there are several objections that can be raised against the line of thought that we should use the policy of benign neglect as a policy towards indigenous people. The first being that as hopeful as some might be that the Government will not in anyway interfere or promote a culture, this is not what actually is the case in practice. And if it is the case that one culture is promoted above others there must be some type of compensation for those who it does not benefit intrinsically. I call this the objection of realism. The second objection is one of equality. It is argued that equality under the law may not in real terms be equality of outcomes. In other words the policy of benign neglect does not account for or attempt to ameliorate disadvantages suffered by minority cultures. I call this the objection of equality.

The objection of realism runs as follows. The situation that may develop from a policy of the Government to exhibit non-interference towards a culture may arguably be a good one but thinking that the Government does not, in actuality, exert influence on a culture or play "favourites" is wishful thinking. The state does do these things. "The state unavoidably promotes certain cultural identities, and thereby disadvantages others."[21]

> Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups.[22]

[21] Kymlicka (1995) pg.108
[22] Ibid

There are groups that are disadvantaged unfairly in the "cultural market-place" and only through Government recognition and support can this be rectified.[23] One way to rectify the situation, Will Kymlicka suggests, is to provide group-differentiated rights. By handing out rights such as territorial autonomy, land claims, and language rights this can help alleviate the disadvantage by providing external protections that ensure the minority cultures have the same opportunity to live and work in their own culture.[24]

The objection of equality is simply that disadvantages suffered by minority cultures are in no way addressed by the policy of benign neglect. This second objection is relatively weak for the following reason. Although the policy of benign neglect does not address or attempt to ameliorate disadvantages suffered by minority cultures, in the "cultural market-place", it does not contradict and in fact accommodates other policies or programs which would. Rather than attributing rights to a specific group treating all members as being in a similar situation, benign neglect allows for additional policies and programs which aim at eradicating disadvantages but base their attention towards the disadvantages themselves. Thus, in dealing with soaring high school drop out rates, benign neglect allows for programs which aim at solving this problem across cultures and do not specifically target specific cultures such as the indigenous populations as a whole.[25] This allowance of further programs and policies is made clear if we look again at Sec.15 (2) in the Canadian Charter of Rights and Freedoms "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups…"[26]

[23] Kymlicka (1995) pg.109
[24] Ibid
[25] For further information on attributing rights to individuals instead of groups and arguments for and against such application Brain Barry (2001) is useful pg.112-115. He notes that disadvantages suffered by minority cultures can be solved by looking and dealing with the disadvantages themselves.(pg.114) Furthermore, he notes problems with over-inclusive homogeneous approaches that deal with group members as a whole instead of on individual terms.(pg.115)
[26] "Canadian Charter of Rights and Freedoms,"

3.3 The policy of Benign Neglect and the Ipperwash Case

There are several examples I would like to present in the case of Ipperwash that were points of conflict which I will determine if had the policy of benign neglect been used, would things have turned out differently. The first example and perhaps the most important one occurred in 1937 when the Kettle and Stony Band's asked the Government to fence off the burial ground located in the newly created Ipperwash Provincial Park. Although the Government agreed, they did not follow through and the burial ground remained open. This was perhaps the worst part of the incident because it was this that advanced and gave strength to the protest over the land surrounding the burial ground. It was during this protest that, after boiling over, caused the death of Dudley George. The burial ground was never fenced off as the Government said it would be, and in 1950 parts of it were in fact dug up. The second example is regarding the land claims dispute that started the protest. For many years beginning at the start of WWII the Government said they would return the land containing Camp Ipperwash when it was no longer needed. The requests to hand back the land earlier continued to fall on deaf ears and it was not until 1998, over fifty years since the seizure, did the Government of Canada return the land to them. The final example was with the demand for a public inquiry. This delicate situation which the PC Government did not want to face up to was rejected and it was not until a Liberal Government came into power and eight full years had passed that the beginning of a public inquiry into the matter was launched. Had the policy of benign neglect been used I would like to say that each of these events would have been either avoided completely or dealt with in a timely fashion but that is not the case. It is not so clear how the events may have been altered had the policy of benign neglect been used. The indigenous population of the Kettle and Stony Point Band's, under the policy of benign neglect, would have been treated as equal to other non-indigenous under the law and as such they would have been entitled to apply to a court to obtain a resolution. It is my understanding that with regard to all three examples the Kettle and Stony Point Band's did in fact seek a court to resolve the disputes or uphold promises. There is only data regarding the seizure of land just before WWII where the Kettle and Stony Point

Band's actually applied formally to a court after the end of WWII.[27] This however was not resolved until 1981, nearly forty years after originally appealing to the court. It could be argued that land claims are a delicate issue and involve a lot of work to resolve. Thus, the problem of the court taking nearly forty years to find a solution to the problem may by some, not myself, be excused. With regard to the first and third examples however there is no excuse. It does not take eight years to start a public enquiry when people are demanding it right away. Furthermore, and more importantly perhaps, it does not take over half a century to fence off a sacred burial ground. I would argue that they were treated unfairly, unequally, because of their ethnicity. Had a policeman shot a white man, or had a western style grave yard been discovered, both a public inquiry and a fence would have been completed promptly. What theorizing about the use of the policy of benign neglect on the Ipperwash case shows quite clearly is that although the indigenous people can appeal to a court when they feel their rights have been violated, the courts as they are set up may treat like cases differently, whether consciously or not, and in so doing display a faulty legal system and furthermore, true inequality under the law.

Moving forward from the Ipperwash case we now need to take a look at the viability of the policy of benign neglects use on the Kettle and Stony Point Band's. Having rectified the land claims disputes and in addition issuing a full apology for the events that lead up to and including the death of Dudley George our relation to the Kettle and Stony Point Band's can be seen as one with a fresh start. We must ask ourselves how much influence should the state have in the affairs of the two band's? My understanding of the case and of the situations both prior and post the death leads me to think, at this point, that we should aim at minimal state intervention in allowing the Kettle and Stony Point populations to now live as they so choose, a choice provided to them through the policy of benign neglect. In doing so we will appease those who wish to see the state remain neutral when it comes to matters of culture and in addition, and more importantly, we will appease the Kettle and Stony Point Band's with their desire to live according to their own customs and yet be treated as equals under the law. They will be allowed to express

[27] Indian and Northern Affairs Canada, "Fact Sheet – Camp Ipperwash Negotiations," n.d., <http://www.ainc-inac.gc.ca/pr/info/cin_e.html> (17 October 2007)

their rights in accordance with their native customs. Furthermore, if the policy of benign neglect is used it would mean that other programs and policies could be used in correlation to it that would address some of the disadvantages that have been incurred. Although the main policy that would be used would not address these problems, the policy of benign neglect does allow and accommodates other approaches in alleviating these issues. It is important to note that these additional policies and programs would not address the problems as a fundamentally indigenous problem but would rather be more specific, addressing the problems head on, soaring high school drop out rates for instance. The policy of benign neglect is a valid and appealing policy for use on the Kettle and Stony Point Band's, and one which should be considered in determining which policy would be best both in light of Ipperwash and moving forward from it.

4. Group-Differentiated Rights

In the following section I shall introduce the policy of group-differentiated rights as the second and competing possible policy approach to the indigenous populations of the Kettle and Stony Point Band's. The second policy consists of group-differentiated rights as originally posited by Will Kymlicka in "Multicultural Citizenship: A Liberal Theory of Minority Rights". Beginning with the characteristic of the policy I then move onto the arguments for such an approach and then the objections to it. Following this I speculate as to how such a policy if it had been adopted would have altered the outcome of the Ipperwash scandal. Finally I examine its validity as a policy for future relations between the Government of Canada and the Kettle and Stony Point Band's.

4.1 Characteristics of the policy of Group-Differentiated Rights

This policy is composed of the following characteristics. 1. substantial state intervention, 2. equality before the law, 3. equal constitutional political, civil, and welfare rights, 4. judicial enforcement of constitutional rights, 5. group-differentiated rights e.g. self-governance. Since there are similarities between the characteristics of the policy of benign neglect and the policy of group-differentiated rights, characteristics 2, 3, and 4, I

shall not repeat what has already been mentioned regarding those characteristics in section 3 of this essay.

Under the policy of group-differentiated rights the state has influence in both public and private spheres in part because of how Kymlicka defines the type of culture which he examines. Kymlicka focuses on a sort of culture which he calls a societal culture. This type of culture provides members with "meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.[28] He argues that liberals should recognize how important a person's membership in their societal culture is through enabling meaningful individual choice which supports self-identity.[29] Because societal culture encompasses both the private and public spheres the government, so far as it has domain over the public sphere, also has partial domain over ones culture. Due to this characteristic, the policy of group-differentiated rights can be seen as a hands-on approach with the Government exerting itself into the realm of cultures. What is meant by a hands-on approach is that unlike the policy of benign neglect which involves only a minimal amount of state intervention, the policy of group-differentiated rights involves a more extensive role for the state to play in maintaining and promoting a variety of cultures.

External protections are given to minority groups to alleviate the vulnerability they have from economic and political pressures imposed by the larger society. External protections, however, are legitimate only when they promote equality between groups. Promotion of equality is done through rectifying the suffering by particular groups caused by their vulnerability and disadvantages.[30]

External protections for Kymlicka are group-differentiated rights. Rights which are attributed to national minorities and ethnic groups and that make up for the disadvantages they suffer from. Kymlicka writes:

[28] Kymlicka (1995) pg.76
[29] Kymlicka (1995) pg.105
[30] Ibid pg.152

> "Group-differentiated rights – such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights – can help rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions. These external protections ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority."[31]

Thus, a policy of group-differentiated rights would imply state intervention to alleviate the disadvantages minority cultures are exposed to on the basis of majority decisions. Kymlicka argues that liberals should accept a wide range of group-differentiated rights and can do so without sacrificing their commitments to social equality and individual freedom.[32]

Group-differentiated rights come in the form of three mechanisms that are used in dealing with cultural differences and attempt to ameliorate disadvantages that may be suffered by a national minority. As mentioned, there are three mechanisms which are used to accommodate cultural differences, two of which I shall go into greater depth, those being the first and last mentioned. The three mechanisms are self-government rights, polyethnic rights, and special representation rights.[33] The first mechanism of self-government rights is in response to the demands of national minorities for political autonomy and/or territorial jurisdiction and allows national minorities assurance of the "full and free development of their cultures and the best interests of their people."[34] The national minority is given with regards to crucial issues involving the survival of their culture, extensive authority.[35]

The third mechanism, the second I will discuss, is special representation rights. This mechanism in large part deals with proper representation within the government. It is

[31] Kymlicka (1995) pg.109
[32] Ibid pg.126
[33] As polyethnic rights primarily are attributed to immigrant minorities and thus do not encompass the indigenous populations of Canada I shall not go further in explaining their function as a mechanism to accommodate cultural differences.
[34] Kymlicka (1995) pg.27
[35] Ibid pg.28

increasingly argued that the political process is unrepresentative in that it does not reflect the diversity of the population because the process is being dominated by primarily middle-class, able-bodied, white men.[36] Special representation rights in the form of group representation rights are temporary rights in that they are used to make it possible for disadvantaged groups to have their views and interests effectively represented while the problem of needing these rights is address and hopefully eliminated.[37]

4.2 Arguments for the policy of Group-Differentiated Rights

In this section I shall look at arguments for the policy of group-differentiated rights. There are two main arguments as I see them to be, for group-differentiated rights. The first is tied into notions of individual choice and the importance of meaningful options. The second is an argument for true equality which states for there to be true equality we need to allow for group-differentiated rights to be distributed.

Kymlicka argues that where the survival of a culture is not guaranteed we must act to protect it because cultures are valuable in so far as it is only through having access to a societal culture that people also have access to meaningful options.[38] We must therefore use group-differentiated rights as a tool to protect cultures whose survival is threatened. Group-differentiated rights allow access to societal cultures which then foster the conditions necessary for meaningful individual choice.[39] Kymlicka states:

> This argument about the connection between individual choice and culture provides the first step towards a distinctively liberal defence of certain group-differentiated rights. For meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and freedom of expression and association. They also need access to a societal culture. Group-differentiated measures that secure and promote this access may therefore, have a legitimate role to play in a liberal theory of justice.[40]

[36] Kymlicka (1995) pg.32
[37] Ibid
[38] Ibid pg.83
[39] Ibid pg.83-84
[40] Ibid

What Kymlicka shows in support for the idea of group-differentiated rights is that cultures are important because it enables people to make meaningful individual choices amongst a range of options and thus we should take active measures to protect them.[41]

The argument for true equality runs as follows. The state unavoidable tends to favour the culture of the majority and in so doing disadvantages the ability for minority cultures to survive in the same manner as that of the majorities. Minority cultures are placed at a systematic disadvantage in the "cultural market-place" through no fault of the members of that minority, and are done so regardless of their personal choices in life.[42] Although rights are indeed given unequally amongst all cultures it is only through doing this that a state of true equality under the law can be reached. Kymlicka puts it best when he writes:

> While these group-differentiated rights for national minorities may seem discriminatory at first glance, since they allocate individual rights and political powers differently on the basis of group membership, they are in fact consistent with liberal principles of equality. They are indeed required by the view, defended by Rawls and Dworkin, that justice requires removing or compensating for undeserved or 'morally arbitrary' disadvantages, particularly if these are 'profound and pervasive and present from birth'(Rawls 1971: 96)[43]

Proponents of group-differentiated rights insists that for all citizens to be treated with genuine equality there needs to be such rights for ethnic and national minorities.[44] Without such rights, "…the members of many minority cultures face a loss of their culture, a loss which we cannot reasonably ask people to accept."[45]

4.3 Arguments against the policy of Group-Differentiated Rights

The strongest objection to a policy of distributing group-differentiated rights goes after the claim of the value of belonging to a specific societal culture and thus because cultures

[41] Kymlicka (1995) pg.105
[42] Ibid pg.13
[43] Ibid pg.126
[44] Ibid pg.108
[45] Ibid pg.109

are not worth as much and do not play as important a role in our lives, the state should have no part in maintaining their survival.

A good analogy that can illustrate the first part of the objection to a policy of group-differentiated rights is provided by Kymlicka.

> We do not feel obliged to keep uncompetitive industries afloat in perpetuity, so long as we help employees to find employment elsewhere, so why feel obliged to protect minority cultures, so long as we help their members to find another culture?[46]

This implies that so long as people have access to a culture things will be fine and it does not necessarily have to be their culture specifically. Waldron notes that many people move from one culture to the next quite frequently in large cosmopolitan areas without seemingly suffering from such a move.[47] To this Kymlicka responds that Waldron overestimates just how much people do in fact move between cultures. Rather someone in a cosmopolitan setting should be viewed instead of moving between cultures as simply "enjoying the opportunities provided…"[48] Secondly when someone does in fact move from one culture to another they are moving away from something that they are entitled to, that being living within ones own societal culture. It is a kin to choosing to forgo non-subsistence resources, something which a person is entitled to.[49]

There is a strong line of thought that suggest that the state and ethnicity should be separate much like the state and religion should be separate. It is argued that when public benefits are distributed to make it easier for a specific group to preserve its culture, this violates the ideal of ethnicity and state separation which some liberals would object to.[50]

The response to this has actually been mentioned previously in this essay but needs to be emphasized. When the state decides on things such as official language, and political

[46] Kymlicka (1995) pg.84
[47] Ibid pg.85
[48] Ibid
[49] Ibid pg.86
[50] Ibid pg.112

boundaries, there is "no way to avoid supporting this or that societal culture."[51] In favouring a societal culture over others, there are some minorities which are placed at an unfair disadvantage in the "cultural market-place" through no fault of their own. Group-differentiated rights are unequal only so far as they treat different groups differently in attempts to make things equal. Thus, one of its premises is that things as they stand for various societal cultures are unequal and group-differential rights are only used to make things equal. Since the state is not separate from ethnicity it should seek change in bringing about equality.

4.4 The policy of Group-Differentiated Rights and the Ipperwash Case

In speculating how the Ipperwash case may have been different had the policy of group-differentiated rights been used towards the Kettle and Stony Point Band's we find that there would have been three large changes that could arguably have resolved the situation before it started and thus the protest where Dudley George was shot would have never happened.

Starting in 1928 when an elder Chief wrote to the Government of Canada in attempts to uphold their treaty rights but found that the letter fell on deaf ears, things should have been different. Instead of allowing the sale of land, under the policy of group-differentiated rights the indigenous band's would have been given territorial jurisdiction through self-governance rights and thus the authority to disallow such a sale would have been placed in their hands. Thus the land would not have changed hands in the first place and the Stony Point waterfront would not have been sold off.

Again, at the beginning of WWII when all of the Stony Point families had to be relocated for the development of an army training base the policy of group-differentiated rights would have lead to a drastically different outcome. Because group-differentiated rights includes rights to self-governance it would have been possible for the indigenous band's to exert their political autonomy and their territorial jurisdiction. With rights in place to

[51] Kymlicka (1995) pg.113

protect their culture they would not have been moved because of the ties native cultures have with the land. Moving to a different land, even if it is the same amount of land, is a loss to an indigenous culture. With the policy of group-differentiated rights the indigenous culture would have been given pre-eminence over the location of the army base.

In all cultures one of the most integrated aspects in ones culture is the method used to bury the dead. Burials often have a deeply cultural expression to them which are inherently tied to a specific religion or culture. The indigenous populations of Canada are such cultures. The fact that the sacred burial ground found in Ipperwash Provincial Park was not sectioned off with a fence as was promised, is perhaps the most devastating injustice the Kettle and Stony Point Band's endured and showed a lack of proper representation within the government. The fact that there was no fence partitioning off the sacred land allowed for a more unsettling action to take place, that being the unearthing of the burial ground and the collection of indigenous remains to be kept as souvenirs. Had a policy been in place that gave the Kettle and Stony Point Band's culture prominence, which the policy of group-differentiated rights would have done, such a travesty as the unearthing of a sacred burial ground would not have taken place. Any form of proper representation within the government on behalf of the indigenous band's would have seen the injustice occurring and swiftly moved for action in building a fence. The fact that this was not the case shows that there was no proper representation within the government, something which would have been altered had the policy of group-differentiated rights been used.

If the policy of group-differentiated rights as outlined in this essay been the one used in relation to the Kettle and Stony Point Band's there would have been no protest, and thus Dudley George would not have been killed. With the land claims intact and the burial ground surrounded by a fence a major blemish on Government and indigenous cultural relations would not exist.

Moving forward from the Ipperwash scandal one should ask whether or not the policy of group-differentiated rights should prevail. Although had such a policy been in place the events surrounding Ipperwash would not have unfolded in such a tragic manner, we cannot simply conclude that the same policy is the right one for dealing with the Kettle and Stony Point Band's today. The issue of land claims is no longer viable since the Government has rectified the situation and furthermore the harms caused by the unearthing of the sacred burial ground can do no further damage as a fence has been placed around it and the Government has issued a full apology for the events that lead up to, and including the death of Dudley George. Furthermore, the Kettle and Stony Point Band's culture is not threatened in any way. Although it is true that the majority culture is unavoidably helped by the state, the culture of the Kettle and Stony Point Band's has also been helped, albeit only after a tragic loss. To this end the Governments response to this tragedy was an attempt to place them on equal footing with the majority culture in resolving land claims and all other injustices suffered. The question then is would the rights given to the Kettle and Stony Point Band's under the continued policy of group-differentiated rights be an unfair advantage attributed by the state to a culture? This is hard to answer. I tend to think that it is not unfair. Although many of the disadvantages suffered by the two band's have been rectified, we still need to give these band's political autonomy and territorial jurisdiction so that they may ensure the full and free development of their cultures with the best interest of their community in mind. In addition, the problem with proper representation within the government is an on going issue that has not yet been resolved. Indigenous people are still under represented which means that their interests and views are not afforded the proper weight as they should be given.[52]

5. Going Forward from Ipperwash

Going forward from Ipperwash, to propose that we adopt a policy of benign neglect rather than one of group-differentiated rights is flawed. This claim for the policy of benign neglect really rests on the assumption that any state intervention is unnecessary in

[52] Kymlicka (1995) pg.32

maintaining the Kettle and Stony Point Band's culture. Kymlicka notes that we can imagine a point where the amount of land claims attributed to an indigenous people would not provide reasonable external protections but would rather provide an unequal opportunity for them.[53] In addition he recognizes that once a societal culture is protected the 'cultural market-place' does have an important role to play in determining the character of the culture.[54]

> Decisions about which particular aspects of one's culture are worth maintaining and developing should be left to the choices of individual members. For the state to intervene at this point to support particular options or customs within the culture, while penalizing or discouraging others, would run the risk of unfairly subsidizing some people's choices.[55]

Thus, any further support from the Government towards the Kettle and Stony Point Band's would unfairly subsidize their culture. As Kymlicka points out. "If the measures to protect a minority culture are either unnecessary or too costly, then a policy of 'benign neglect' may be justified in certain circumstances.[56]

The Kettle and Stony Point Band's do however need the continuous policy of group-differentiated rights. This will ensure them with rights to political autonomy and territorial jurisdiction. Furthermore, since there is still to this day inadequate political representation on the part of indigenous people, a policy such as the policy of group-differentiated rights is needed to push us towards adequate representation. This does not unfairly subsidize their culture nor does the policy of group-differentiated rights come at too high a cost or is unnecessary. Rather the policy of group-differentiated rights is necessary and makes them a good standard to which we should aspire to in our dealings with all national minorities.

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[53] Kymlicka (1995) pg.110
[54] Ibid pg.113
[55] Ibid pg.113
[56] Ibid pg.106. In citing Kymlicka here I do not intend to maintain the position that he would endorse the policy of benign neglect over that of the policy of group-differentiated rights. Rather, I am merely pointing out that he recognizes instances which may call for such a policy as that of benign neglect, instances which I have after citing him attempted to show we do not find in our dealings with the Kettle and Stony Point Band's.

We can further see some of the flaws with the policy of benign neglect if we go back and see how things might have been different had that policy been used during the Ipperwash scandal. Things would not have been different. Instead of showing how the outcome would have been different under the policy of benign neglect, it could only shed light on a faulty legal system and did not bolster the policy itself. This contrasts strikingly with the policy of group-differentiated rights which, had it been used, would have lead to a different outcome.

Since the policy of group-differentiated rights contains many of the same characteristics of the policy of benign neglect but also acknowledges disadvantages and correctly makes attempts to alleiviate these disadvantages though substantial state intervention I believe it is the better of the two policies. Minimal state interference although initially seems appealing, simply does not do justice to recognizing persistent disadvantages minority cultures such as that of the Kettle and Stony Point Band's suffer from.

6. Conclusion

It has been the purpose of this paper to propose two possible policy solutions to dealing with the indigenous band's of the Kettle and Stony Point populations. Through careful examination of the characteristics, arguments for and against each policy, and how they would have altered the events throughout the Ipperwash scandal in addition to what implications they have as a policy moving forward from Ipperwash, I have tried to present the two policies as competing polices. It is my conclusion that the best policy towards the Kettle and Stony Point Band's today is the policy of group-differentiated rights. This rests on the fact that there still is a need for extensive state intervention in order to maintain their culture by providing them with rights to self-governance, political autonomy, and territorial jurisdiction. The policy of benign neglect simply does not afford these cultures with these necessary rights and is in this sense then to be seen as the lesser of these two policies. Furthermore, the outcome under the policy of benign neglect would have been very similar to the one that actually transpired whereas under the policy

of group-differentiated rights we saw a stark change in what would have occurred had such a policy been used.

Sec.7 Bibliography

Department of Justice Canada, "Canadian Charter of Rights and Freedoms," n.d., <http://laws.justice.gc.ca/en/charter/> (17 October 2007)

"CBC News Aboriginal," n.d., <http://www.cbc.ca/news/background/aboriginals/index.html> (17 October 2007)

"CBC News The Ipperwash inquiry," n.d., <http://www.cbc.ca/news/background/ipperwash/> (17 October 2007)

"The Ipperwash Report," n.d., <http://www.theglobeandmail.com/v5/content/features/ipperwash/> (17 October 2007)

Indian and Northern Affairs Canada, "Fact Sheet – Camp Ipperwash Negotiations," n.d., <http://www.ainc-inac.gc.ca/pr/info/cin_e.html> (17 October 2007)

Kukathas, Chandran (1992), *Are There Any Cultural Rights?*, Political Theory, Vol. 20 No.1, pg.105-139

Kukathas, Chandran (1998), *Liberalism and Multiculturalism: The Politics of Indifference*, Political Theory, Vol.26 No.5, pg.686-699

Kymlicka, Will (1995), *Multicultural Citizenship*, Oxford: Clarendon Press