UNCERTAIN CITIZENS: ABORIGINAL PEOPLES AND THE SUPREME COURT

John Borrows*
Toronto

Citizenship is a multifaceted concept, attentive to issues of rights, participation, identity and social cohesion. It is only in the past few years that Canada's institutions have started to consider these issues in relation to Aboriginal peoples. In particular, the Supreme Court of Canada has been called upon to take a more active role in defining the contours of Aboriginal citizenship. In this respect they have developed doctrines to define Aboriginal rights, permit Aboriginal organizations, recognize the importance of Aboriginal identity, and facilitate social cohesion. While the Court's efforts in these areas are encouraging, it is clear that its work is far from finished. This paper will examine the Supreme Court's treatment of Aboriginal peoples in the area of social cohesion, and evaluate the remaining uncertainty that surrounds the concept of Aboriginal citizenship in Canada.

La citoyenneté est un concept aux multiples facettes, sensible aux questions des droits, à la participation, à l'identité et à la cohésion sociale. Ce n'est que depuis quelques années que les institutions canadiennes ont commencé à considérer ces questions en rapport avec la citoyenneté des peuples autochtones. En particulier, la Cour suprême du Canada a été appelée à jouer un rôle plus actif dans la définition des contours de la citoyenneté autochtone. À cet égard, elle a développé des doctrines qui définissent les droits des Autochtones, permettent les organismes autochtones, reconnaissent l'importance de l'identité autochtone, et facilitent la cohésion sociale. Bien que les efforts de la Cour dans ces domaines soient encourageants, il est clair que son travail est loin d'être terminé. Cet article examine le traitement des peuples autochtones par la Cour suprême dans le domaine de la cohésion sociale, et il évalue l'incertitude qui entoure encore le concept de citoyenneté des Autochtones au Canada.

* John Borrows, of the Faculty of Law, University of Toronto, Toronto, Ontario and of the Chippewa of the Nawash First Nation.

I. *Uncertain Citizens: Aboriginal Peoples and The Supreme Court*

Aboriginal peoples have had a troubled relationship with Canada. For most of the country's history there has been very little recognition or protection of their fundamental human rights and personal freedoms.[1] This has resulted in their individual and collective lives being unduly "susceptible to government interference".[2] Governmental interference is evidenced through the suppression of Aboriginal institutions of government,[3] the denial of land,[4] the forced taking of children,[5] the criminalization of economic pursuits,[6] and the negation of the rights of religious freedom,[7] association,[8] due process[9] and equality.[10] The people who created this country and those who subsequently presided over its growth did not ensure that, as a vulnerable group, Aboriginal peoples were "endowed with institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority".[11] This deficiency led to further vulnerability and increased governmental intervention as Aboriginal peoples were not extended the institutional means to resist the violation of their

---

[1] See *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103: For many years the rights of Indians to their aboriginal lands were virtually ignored.

[2] *Reference Re Québec Secession*, [1998] 2 S.C.R. 217 at para. 74.

[3] *Logan* v. *Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (upholding foreseeable eviction of traditional Haudenosaunee government).

[4] For example, Joseph Trutch, in denying Aboriginal title in B.C. observed:

The title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied.

British Columbia, Papers Connected with the Indian Land Question, 1850-1875 (Victoria: Government Printer, 1875) at p. 11.

[5] J.S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Winnipeg: University of Manitoba Press, 1999).

[6] Aboriginal people are constantly charged with criminal offences for hunting and fishing in traditional economic pursuits. Some high profile cases are *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.); *Simon* v. *The Queen*, (1985) 24 D.L.R. (4th) 390 (S.C.C.); *R.* v. *Horseman*, [1990] 1 S.C.R. 901; *R.* v. *Cote*, (1996) 138 D.L.R. (4th) 185 (S.C.C.); *R.* v. *Badger*, (1996) 133 D.L.R. (4th) 324 (S.C.C.); *R.* v. *Marshall*, [1999] 3 S.C.R. 456.

[7] *Thomas* v. *Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.) (Aboriginal spirit dancing not protected by Charter); *Jack and Charlie* v. *The Queen* (1985), 21 D.L.R. (4th) 641 (S.C.C.) (taking fresh deer meat for Aboriginal death ceremony not protected).

[8] Many bands were kept apart or relocated to prevent their association because of a government fear they would organize to resist impingements of their rights.

[9] A Crown fiduciary duty has recently been articulated in an attempt to cure violations of Aboriginal rights stemming from differences in the way Aboriginal people hold and access their rights. Significant cases in this regard are *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.); *Kruger* v. *The Queen*, (1985) 17 D.L.R. (4th) 591 (F.C.A.); *Blueberry River Indian Band* v. *Canada*, (1995) 130 D.L.R. (4th) 193 (S.C.C.). For a fuller discussion see L. Rotman, *Parallel Paths* (Toronto: University of Toronto Press, 1996).

[10] *Canada (A.G.)* v. *Lavell*, [1974] S.C.R. 1349 (invidious distinctions in *Indian Act* on basis of sex upheld).

[11] *Québec Secession*, *supra* note 2.

rights.[12] The absence of political and legal remedies to contest the injustices they faced has contributed to their unacceptable socio-economic status within a generally prosperous society.[13] As a result of this treatment, Aboriginal peoples became "uncertain citizens". They were loosely associated with the Canadian political community but denied the institutions, rights and/or resources necessary to meaningfully participate in the life of the country, either collectively or as individuals. As a result, Aboriginal peoples have not enjoyed social cohesion, political stability and civic peace in their relationships with other Canadian citizens.

After close to one hundred years of near silence on the issue of Aboriginal peoples' place in society, the Supreme Court of Canada entered the arena through the case of *Calder* v. *A-G (B.C.)* and forever changed the framework of Aboriginal citizenship in the country.[14] The Court's momentus recognition that Aboriginal title was a justiciable right, and not solely a moral or political concern, placed the relationship of Aboriginal peoples to the rest of society squarely in the public eye.[15] It raised the possibility that Aboriginal peoples had unextinguished legal interests that protected them against the types of abuses they had been subjected to during the first one hundred years of Confederation.

---

[12] Indians could not vote for the first seventy five years of confederation, see for example British Columbia *Qualification and Registration of Voters Amendment Act*, S.B.C. 1872 c. 37, s. 13. Indians did not generally enjoy federal voting rights until 1960 when the federal franchise was finally extended to them without qualification. The provinces extended the franchise to Indians at different dates: British Columbia 1949, Manitoba 1952, Ontario 1954, Saskatchewan 1960, Prince Edward Island and New Brunswick 1963, Alberta 1965, Québec 1969. The Inuit were excluded from the federal franchise in 1934 but had the vote restored to them in 1950. Metis were always considered citizens able to vote in federal and provincial elections. Indians also had restricted access to legal remedies. For example, see Section 141 of the *Indian Act*, R.S.C. 1927, c. 98, which read:

> Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty...

For commentary, see Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 59.

[13] See Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strenght,* vol. 3 (Ottawa: Supply and Services Canada, 1996).

[14] *Calder* v. *The Attorney General of British Columbia* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313 [hereinafter *Calder* cited to D.L.R.].

[15] See *R.* v. *Sparrow, supra*, note 1 at 1104:

> It took a number of judicial decisions and notably the *Calder* case...to prompt a reassessment of the position....

Furthermore, the *Calder* case also suggested that Aboriginal rights had as their source an authority that originally lay outside of the common law and constitutional legal structures. This unique source was "the fact...that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries".[16] As such, the Court proffered the notion that Aboriginal rights did "not depend on treaty, executive order or legislative enactment", as most freedoms did, but were "pre-existing rights", that had their own logic "indigenous to their culture [though] capable of articulation under the common law".[17] The effect of the *Calder* decision on Aboriginal citizenship was enormous. For the first time in the country's history Canadians at many levels began to seriously contemplate the possibility that Aboriginal peoples would be a permanent part of the political and legal landscape.[18] Aboriginal peoples also seized on the implications of this decision and began to press more strenuously for a broader recognition of their rights throughout society.

Not quite ten years later these forces coalesced,[19] and Aboriginal rights gained a fixed place in Canada's legal structure when they were recognized and affirmed in section 35(1) of the *Constitution Act 1982*.[20] The rivetting of these provisions within Canada's legal framework meant that the Court would one day again be called upon to give them meaning. After a failure of governments to identify or define Aboriginal rights in a constitutionally mandated series of First Ministers conferences,[21] the Supreme Court would not have to wait long before it was asked to perform this task. Beginning with the watershed decision of *R.* v. *Sparrow*[22] in 1990, the Supreme Court rendered no less than 25 decisions in a ten-year period dealing with the rights of Aboriginal peoples in

---

[16] *Calder*, *supra* note 14 at 156.

[17] *Ibid.* at 200.

[18] The fact that an Aboriginal presence might be a permanent feature of Canadian society is contrasted with the Court's adoption of the Royal Commission's statement (*Canada, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol. 1* at 137-91) (Ottawa: Supply and Services Canada, 1990) that "describes the relationship between the federal government and Aboriginal peoples during the period from the early 1800's to 1969 as one of "displacement and assimilation".

[19] The Supreme Court itself identified this process and wrote, in *R.* v. *Sparrow, supra* note 1 at 1105:

It is clear, then, that s. 35(1) of the *Constitution Act, 1982* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible...

For a discussion on the rise of Aboriginal advocacy since the early 1970's, see M. Asch, *Our Home and Native Land* (Toronto: University of Toronto Press, 1984).

[20] The text of section 35(1) reads:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[21] Section 37 of the *Constitution Act, 1982* mandated these conferences, and four were held between 1983 and 1987.

[22] *R.* v. *Sparrow, supra* note 1.

Canadian society.[23] While not all of these cases focussed on section 35, this substantial volume of material has had far reaching implications for Aboriginal peoples' citizenship status. Aboriginal peoples are revitalizing, creating and accessing rights necessary to meaningfully participate in the life of the country, both collectively and as individuals.

A) *Three Theories of Citizenship: Rights, Participation and Identity*

Citizenship requires more than the existence of rights, though this is obviously an important element. Following the insight of philosophers Will Kymlicka and Wayne Norman,[24] I have argued elsewhere that Aboriginal citizenship should embody at least three distinct types of relationships.[25] For people to be fully considered citizens they should enjoy some formal status in relationship to others in the state, [26] be free to act with others in any variety of

---

[23] *Oregon Jack Creek Indian Band* v. *Canadian National Railway*, [1990] 1 S.C.R. 117; *R.* v. *Horseman*, [1990] 1 S.C.R. 901; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; *R.* v. *Sparrow*, *supra* note 1; *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85; *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 2 S.C.R. 570; *Williams* v. *Canada*, [1992] 1 S.C.R. 877; *Québec (A.G.)* v. *Canada (N.E.B.)*, [1994] 1 S.C.R. 159; *R.* v. *Howard*, [1994] 2 S.C.R. 299; *Native Women's Association* v. *Canada*, [1994] 3 S.C.R. 627; *C.P.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Blueberry River Indian Band* v. *Canada*, [1995] 4 S.C.R. 344; *R.* v. *Badger*, [1996] 1 S.C.R. 771; *R.* v. *Lewis*, [1996] 1 S.C.R. 921; *R.* v. *Nikal*, [1996] 1 S.C.R. 1013; *R.* v. *Vanderpeet*, [1996] 2 S.C.R. 507; *R.* v. *N.T.C. Smokehouse*, [1996] 2 S.C.R. 672; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723; *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821; *R.* v. *Adams*, [1996] 3 S.C.R. 101; *R.* v. *Cote*, [1996] 3 S.C.R. 139; *Opetchesaht* v. *Canada*, [1997] 2 S.C.R. 119; *St. Marys* v. *Cranbook*, [1997] 2 S.C.R. 657; *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; *R.* v. *Williams*, [1998] 1 S.C.R. 1128; *Union of New Brunswick Indians* v. *New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161; *R.* v. *Sundown*, [1999] 1 S.C.R. 393; *R.* v. *Gladue*, [1999] 1 S.C.R. 688; *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203; *Westbank First Nation* v. *British Columbia Hydro*, [1999] 3 S.C.R. 134; *R.* v. *Marshall (I)*, [1999] 3 S.C.R. 456; *R.* v. *Marshall (II)*, [1999] 3 S.C.R. 533; *R.* v. *Wells*, [2000] 1 S.C.R. 207; *Lovelace* v. *Ontario*, (2000) 255 N.R. 1 (S.C.C.).

[24] W. Kymlicka & W. Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104 *Ethics* 352.

[25] "The Supreme Court, Citizenship and the Canadian Community: Judgments of Justice G.V. La Forest", W. McClaughlin, ed., *The Honourable Mr. Justice G.V. La Forest* (Ottawa: Supreme Court of Canada Historical Society, 2000). I have also written about citizenship in "Landed Citizenship" in W. Kymlicka & W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) at 326.

[26] T.H. Marshall, *Class, Citizenship and Social Development* (Chicago: University of Chicago Press, 1964). T.H. Marshall was influential in outlining this view of citizenship in the 1940's in his attempt to catalogue the benefits which flowed from the democratic developments in the 18th, 19th and 20th centuries. He stated that civil rights developed late in the 18th century with the rise of the centralized nation state and included entitlements to things like "life, liberty and the pursuit of happiness. He wrote that political rights developed in the 19th century and granted status to people to participate in the nation state through the franchise, freedom of speech, association and the press, and the right to run for political office. Finally he observed that social rights were a product of the late 19th and early 20th centuries and include rights to public education, health care, unemployment insurance, old age pensions, and the like.

groups not created by the state,[27] and find respectful acknowledgement of their self-identity, even if the state does not embrace or espouse this identity.[28] Though there is room for improvement, the Supreme Court has recently begun the process of charting these three facets of Aboriginal citizenship.

First, the Supreme Court has confirmed that Aboriginal peoples possess individual civil, political and social rights, along with all other Canadians, that are essential for the functioning of society. This is a significant recognition as this was not always the case in the legislation and jurisprudence relating to Aboriginal peoples.[29] As a result, Aboriginal peoples can often rely on these rights through formal legal rules and procedures to protect them from the harmful actions of others. They possess legal agency and capacity to participate in litigation, and are no longer simply regarded as wards of the federal government, subject to the rules and oversight of a distant power. In the early 1980's the Court wrote in this regard, "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities...of other Canadian citizens".[30] Furthermore, the Supreme Court has expressed respect for the autonomy of certain aspects of their collective actions,[31] though the larger issue of their collective right to self-government is still awaiting more expansive comment in this regard.[32]

---

[27] A. De Toqueville, *Democracy in America*, vol. 2 (New York: Arlington House, 1840) is a major work celebrating this conception; for a contemporary sythesis of citizenship theory in this tradition see T. Janoski, *Citizenship and Civil Society: A Framework of Rights and Obligations in Liberal, Traditional and Social Democratic Regimes* (Cambridge: Cambridge University Press, 1998).

[28] J. Tully, *Strange Multiplicity: Constutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); C. Taylor, "The Politics of Recognition" in A. Gutman, ed., *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992) 25-73; I.M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" in R. Beiner, ed., *Theorizing Citizenship* (Albany: State University of New York Press, 1995) 175-207.

[29] See *A.G. Canada* v. *A.G. Ontario; A.G. Québec* v. *A.G. Ontario*, [1897] A.C. 199 at 213; *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct); *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150, aff'd. [1964] S.C.R. 642 (treaty rights not justiciable); *Canada (Attorney General)* v. *Lavell*, [1974] S.C.R. 1349 (substantive equality rights do not extend to sexual discrimination against Indian women). For a more detailed description of the cases and legal history cataloguing the denial of Indian peoples rights, see generally, S. Harring, *Whites Man's Jurisprudence* (Toronto: Osgoode Legal History Society, 1999).

[30] See *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 at 36. For a view that questions the value of Canadian citizenship see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999).

[31] See *Blueberry River Indian Band* v. *Canada*, *supra* note 23 at 358:

> ...the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.

[32] See the Court's nascent discussion of Aboriginal self-government in *Canadian Pacific* v. *Matsqui Indian Band*, *supra* note 23 at para. 74; *R.* v. *Pamajewon*, *supra* note 23; and *R.* v. *Delgamuukw*, *supra* note 23 at paras. 170-71; *Lovelace* v. *Ontario*, *supra* note 23 at paras. 75, 79, 87.

Secondly, the Supreme Court has not interfered with the variety of Aboriginal associations that exist across the country, as had occurred in the legislative enactments of an earlier era.[33] Recent freedom in this regard has allowed Aboriginal peoples to actively participate in the civic life of the country through groups that exist outside of official state structures. This activity is important because healthy citizenship involves more than just a passive entitlement to certain rights; it requires the positive acceptance of responsibility for the health and well being of the community.[34] The spontaneous formation of Aboriginal groups and organizations and the service they render to others in this country has served Canada in important ways. For example, Aboriginal peoples have worked for the preservation of the environment, provided community and social services through the establishment of friendship centres, sports leagues and cultural survival camps, organized pow-wows and other cultural celebrations for themselves and their neighbours, worshipped through sun-dances, sweat-lodges and churches, served on their school boards, chambers of commerce, and arts councils, and have generally been willing to demonstrate self-restraint and exhibit public spirited-ness in cooperation with others. As have most Canadians, Aboriginal peoples have been often willing to freely engage or to defer their own self-interest for the good of others without being formally compelled to do so, and this has strengthened the bonds of citizenship within the country.[35] The Supreme Court does not seem inclined to restrict the relationships Aboriginal peoples enjoy among themselves and with others that do not rely on explicit state approval, especially in light of their expressed approval of the importance of respecting private activity.[36]

---

[33] From 1876 to 1951 Aboriginal peoples had many restrictions placed on their association through provisions of the *Indian Act* that prevented their meeting to the purposes of pursuing land claims, criminalized their participation in cultural events (such as sun dances, potlatches, give-away dances and pow-wows), and strictly controlled their gathering for purposes that were not favoured by the Indian department of local Indian agents. For an overview see J.R. Miller, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 1989).

[34] For an excellent discussion of the need to actively tolerate autonomous associations in democracy see M. Walzer, *On Toleration* (New Haven: Yale University Press, 1997).

[35] For a description of this value see C. Taylor, "Cross-Purposes: The Liberal-Communitarian Debate" in *Philosophical Arguments* (Cambridge, Mass: Harvard University Press, 1995) at 187. The tip of the iceburg in Aboriginal community involvement is represented by the recipients of the National Aboriginal Achievement awards, which can be viewed online: <http://www.naaf.ca/rec2000.html>.

[36] In *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, (1991) 76 D.L.R. (4th) 545, Mr. Justice La Forest wrote at page 633:

> This Court has repeatedly drawn attention to the fact that the Charter is essentially an instrument for checking the powers of government over the individual... The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected... To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act".

Thirdly, the majority of the Supreme Court has become increasingly attentive to issues of Aboriginal identity in the cases it has been called upon to decide. This is significant because it allows Aboriginal peoples to strengthen their relationship with others in Canada when there is a greater respect for the different identities they hold of themselves within the community - though this has only taken root in the last thirty years and still enjoys weak support.[37] For example, in *Corbiere* v. *Canada* the Supreme Court gave sensitive treatment to Aboriginal identity when considering whether it was discriminatory for the *Indian Act* to disenfranchise off-reserve band members from band elections. In recognizing the importance of identity to off-reserve Indians, and finding that the disenfranchisement was discriminatory, the Court approvingly followed this statement from the Royal Commission on Aboriginal Peoples:

> Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal peoples in cities....
>
> Cultural identity... is also tied to a land base or ancestral territory. For many, the two concepts are inseparable... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.[38]

The Court's affirmation of Aboriginal identity illustrates the point that Aboriginal citizenship has expanded its parameters beyond status and participation, and has begun to address in greater detail the more subjective elements of who Aboriginal peoples "feel they are" in relationship to others in society.[39] Respect for identity as a third aspect of citizenship is important because many Aboriginal peoples have felt excluded from citizenship, despite possessing common rights and sharing reciprocal obligations with other members of the community.

The Supreme Court's approach to Aboriginal issues has therefore been broadly consistent with Kymlicka and Norman's three-fold taxonomy of citizenship. It has recognized and affirmed some of the important status-based entitlements Aboriginal peoples possess in Canadian society, has allowed for the association and participation of Aboriginal peoples in groups not formally created by the state, and has addressed the perspective and identities of Aboriginal peoples in their relationship with others in this country. While the work in these three areas is incomplete, and many struggles lie ahead in respecting the dignity of Aboriginal peoples as individuals and nations, the Court has built a promising framework for resolving the uncertainty that has plagued Aboriginal peoples' citizenship status in Canada.

---

[37] "The Supreme Court, Citizenship and the Canadian Community", *supra* note 25.

[38] Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services, 1996) at 521 & 525, in *Corbiere* v. *Canada*, *supra* note 23 at para. 17.

[39] *R.* v. *Sparrow*, *supra* note 1 at 1112, states that it is "crucial to be sensitive to the Aboriginal perspective itself of the meaning of the rights at stake".

B) *A Fourth Consideration: Citizenship and Social Cohesion*

Recently, however, Professors Kymlicka and Norman have suggested another category of citizenship that should be in the catalogue of ideas constituent of this concept. In *Citizenship in Diverse Societies* they argue that citizenship must also concern itself with social cohesion, which includes concerns about social stability, political unity and civil peace.[40] They consider the issue of social cohesion relevant because many are worried that the proliferation of rights, the multiplication of community allegiances, and the strengthening of people's diverse identities are destructive of citizenship as a whole. It is said that societal unity is important to citizenship because it allows people to build societies that are greater than the sum of their individual rights, associations and identities. It facilitates empathy, common concern and compassion that are essential to the functioning of any civil society. It encourages the removal of barriers that restrict sharing and exchange, and thereby assists in the free flow of goods, services, affluence and assistance. These considerations suggest that social cohesion should be added to the list of aspirations people hold for this concept because it addresses an ideal of citizenship that applies "not [just] at the individual level, but at the level of the political community as a whole".[41]

In the context of Aboriginal citizenship, Professors Kymlicka and Norman's addition is appropriate. Many people express concern that social cohesion in Canada is threatened by the recognition of Aboriginal rights, the flourishing of Native organizations, and the strengthening of Aboriginal identities.[42] Blockades, burning docks, insolvent churches and sporadic confrontations are often blamed on the Court's recognition of Aboriginal rights.[43] While others may argue that these conflicts stem from the historic non-recognition of Aboriginal rights, the point made by those worried about differentiated Aboriginal citizenship is that the affirmation of "special rights" unnecessarily fans the embers of social strife. Whatever one's position on the causes of Aboriginal/non-Aboriginal discord, it is both distressing and disheartening to witness the continued conflict that exists in some places between the parties. The distrust, suspicion, animosity and hostility that erupt between the groups cannot be good for any group of people over the long term. Surely, any relevant conception of citizenship must address the issues of cohesion, unity and peace that exist at the bottom of these challenges.

---

[40] W. Kymlicka & W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 1.

[41] *Ibid.* at 31. This notion has also become a theme in some of Michael Ignatieff's recent writings, see M. Ignatieff, *Blood and Belonging: Journeys Into the New Nationalism* (New York: Farrar, Straus & Giroux, 1994); M. Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (London: Chatto & Windus, 1998).

[42] For a general comment in this regard see M. Smith, *Our Home or Native Land?* (Victoria: Melvin H. Smith, 1995).

[43] See D. Frum, "The Dissolution of Canadian Churches", *National Post* (19 August, 2000).

This same concern about Aboriginal rights and differentiated citizenship also finds expression in the academic literature. For example, two books recently published by high-profile Canadian political scientists demonstrate this apprehensiveness about Aboriginal citizenship, though they both take a different approach. In a book entitled *First Nations? Second Thoughts*, University of Calgary Professor Tom Flanagan writes in a manner that is largely un-supportive of the separate treatment of Aboriginal peoples in matters of land and governance because of their potential threat to individual choice, representative government, a free market economy, and progress in human affairs.[44] His thesis seems to be that the bonds of unity in Canada will be eroded if, as a country, Canada follows what he terms the "aboriginal orthodoxy" (which stresses Aboriginal rights, treaties, economies, identity, sovereignty, nationality and governance). For Professor Flanagan, the pursuit of these aspects of Aboriginal citizenship is problematic because it would "redefine Canada as an association of racial communities rather than a polity whose members are individual human beings", "encourage Aboriginal peoples to see others...as having caused their misfortune", and "encourage Aboriginal people to withdraw into themselves".[45] Clearly, Professor Flanagan sees problems with concepts of Aboriginal citizenship that accentuate group rights, reinforce Aboriginal organizations, and emphasize Aboriginal identity. While some may find that certain elements of his argument overstep the mark if one is concerned about fostering civic peace,[46] his underlying motivation to call attention to concerns of stability and peace deserves attention.

Alternatively, Professor Alan Cairns sees problems with elements of a differentiated Aboriginal citizenship on other grounds. In his book, *Citizens Plus: Aboriginal Peoples and the Canadian State*, Professor Cairns wonders "what will hold us together?" if aspects of Aboriginal citizenship are stressed to the exclusion of their relationships with other Canadians.[47] His book is not as concerned as Professor Flanagan's with the fact that Aboriginal peoples stress group rights, develop diverse organizations and nurture strong identities; rather his worry is that these elements of citizenship could overwhelm a shared sense of "interdependence" within Canada if we do not simultaneously pay attention to social cohesion when we foster different aspects of Aboriginal citizenship. In such observations Professor Cairns is supportive of Adeno Addis who observed that "the task of political and legal theory in the late twentieth century must be one of imagining institutions and vocabularies that will affirm multiplicity while cultivating solidarity".[48] Thus, it

---

[44] T. Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000) at 8-9.

[45] *Ibid.* at 194-95.

[46] See a short review by T. Alfred, *Windspeaker*, (May, 2000).

[47] A. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: U.B.C. Press, 2000) at 200.

[48] *Ibid.* at 212, quoting A. Addis, "On Human Diversity and the Limits of Toleration" in I. Shapiro & W. Kymlicka, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) at 126. For a similar thesis see J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

is pertinent to consider social cohesion as an element of citizenship when we catalogue Canada's relationship with Aboriginal peoples. Our common welfare seems to depend on our interest in one another, and thus requires that we move beyond status, association and identity in defining its contours. In this regard, Professor Cairn's observation at the end of his book is insightful, that "the members of Aboriginal nations will continue to have rights and duties vis-à-vis federal and provincial governments, the obvious vehicle which is citizenship. Further, a common citizenship will facilitate the coming and going of Aboriginal individuals and families across self-government nations. Our practical task...is to enhance the compatibility between Aboriginal nationhood and Canadian citizenship".[49]

As has been the case with Professors Kymlicka, Norman, Flanagan, Cairns, and numerous other Canadians, the Supreme Court of Canada has struggled with the same issues of social cohesion, political unity and civil peace in its decisions dealing with Aboriginal peoples. To attempt to solve the dilemma of recognizing a differentiated citizenship, while still being alert to the challenges of social and political cohesion, the Court has developed three major concepts that address this concern. These theories of civic peace can be classified as 1) the justification for infringement approach to Aboriginal rights, 2) the purposive reconciliation construction of Aboriginal rights, and 3) the encouragement of negotiation for the resolution of Aboriginal rights approach. Each of these conceptions of Aboriginal citizenship will be examined to illustrate how the Supreme Court has treated the dilemma of social cohesion in a regime that recognizes partially differentiated citizenship claims.

C) *The Supreme Court's Approaches to Citizenship as Social Cohesion*

i) *Justification for the Infringement Approach*

In *R.* v. *Sparrow*, the Supreme Court of Canada for the first time faced the question of how Aboriginal rights outlined in section 35(1) in Part II of the *Constitution Act* related to the *Charter of Rights and Freedoms* in Part I of that Act, and how Aboriginal rights generally interacted with the legislative powers of the federal government.[50] The Court encountered this issue because the lawyers for the Musqueam Indian Band and the intervenor Assembly of First Nations argued that section 35(1) rights were more securely protected than rights guaranteed in the *Charter*, and that section 52 of the *Constitution Act* therefore automatically made any law or regulation affecting Aboriginal rights of no force or affect. This argument was founded on a textual analysis of the Constitution that placed section 35(1) outside of the reach of section 1 (judicial review of government interference with protected rights) and section 33 (legislative override of judicial decisions) of the *Charter*. The argument also

[49] Cairns, *supra* note 47 at 213.

[50] *Sparrow*, *supra* note 1 at 1083.

took some strength from the suggestion that section 35(1) itself embodied an Aboriginal "right to regulate" which created a sphere of authority within Canada's federal structure that shielded Aboriginal peoples from the operation of certain Dominion laws. In effect, it could be said that Aboriginal peoples were claiming that social cohesion and civil peace under section 35(1) would best be served through a recognition of their ability to exercise regulatory authority in Canada in a manner similar, though with obvious differences, to that shared by the Dominion and provincial governments.[51] Many Aboriginal peoples feel that peace with Canada will be realized when the rule of law facilitates "normative order" in their communities by recognizing Indigenous laws, values and legal perspectives as the basis for their relationships with others.[52]

The Court however sidestepped the argument that Aboriginal peoples have a protected sphere of jurisdiction within Canadian federalism with the phrase "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown".[53] However, even if from the outset of this country sovereignty and legislative

---

[51] For the judicial creation of wide ranging provincial powers in Canada's federal structure, despite a textual structure that might suggest otherwise, see *Citizens Insurance Company* v. *Parsons* (1881), 7 A.C. 96 (P.C.); *Hodge* v. *The Queen* (1883), 9 A.C. 117 (P.C.); *AG Ontario* v. *AG Canada (The Local Prohibition Reference)*, [1896] AC 348 (P.C.); *Montreal* v. *Montreal Street Railway*,[1912] A.C. 333 (PC); *AG Canada* v. *AG Alberta* (The Insurance Reference), [1916] 1 A.C. 598 (P.C.); *Reference Re the Board of Commerce Act 1919 and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 (P.C.); *King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434 (S.C.C.); *AG Canada* v. *AG Ontario* (*Labour Conventions*), [1937] A.C. 326 (P.C.); *AG Canada* v. *AG Ontario* (*The Employment and Social Insurance Act*), [1937] A.C. 355 (P.C.); *AG British Columbia* v. *AG Canada* (*The Natural Products Marketing Act*), [1937] A.C. 377 (P.C.). For further discussion of the strengthening of provincial powers under the Constitution through judicial interpretation see G.P. Browne, *The Judicial Committee and the British North American Act* (Toronto: University of Toronto Press, 1967).

[52] For further development of this point see J. Borrows, Sovereignty's Alchemy: An Analysis of *Delgamuukw* v. *The Queen* (1999) 37 Osg. Hall L.J. 537. This article suggests that the Court should strengthen culturally appropriate normative order in Aboriginal communities by facilitating Aboriginal rule of law. In the *Reference Re Language Rights Under the Manitoba Act, 1870* [hereinafter Manitoba Language Reference] (1985), 19 D.L.R. (4th) 1 at 22-22 the Supreme Court noted that the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. ...As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *Carl Zeiss-Stiftung* v. *Rayner & Keeler Ltd.*, [1966] 2 All E.R. 536 (H.L.) at 577. According to Wade and Philips, *Constitutional Administrative Law*, 9th ed. (1977), at 89:

> ...the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions.

[53] *Sparrow*, *supra* note 1 at 1103. For comments concerning this finding see J. Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L.R. 1.

power over Indians vested in the Crown, which some have questioned,[54] this statement does not respond to the point that Aboriginal peoples may nevertheless *still* have some jurisdictional powers despite the Crown's assertion.[55] It is possible to recognize multiple sites of jurisdictional authority within a country without undermining the existence of that state as a viable political entity.[56] In fact, this is the predominant theory of federalism that exists within Canada today, as the federal and provincial governments each possess spheres of authority that are limited by the other yet still manage to exist in balance with one another.[57] The Court's response to the Musqueam's argument concerning their own regulatory jurisdiction thus did not receive a full answer, as it chose to focus on those instances which would require Dominion legislative infringement of Aboriginal rights, instead of exploring the scope of any regulatory power Aboriginal peoples may possess. Thus, the former question concerning Aboriginal jurisdiction still remains, and its place in Canada as a principle that promotes social cohesion and peace is currently unsettled.

Why did the Court fail to tackle the question of an Aboriginal regulatory framework in its first case dealing with Aboriginal rights? It may be that it took this approach because it first wanted to emphasize another principle thought conducive to political unity in rendering its decision - the boundaries of Aboriginal power. Concerns that unregulated Aboriginal rights could open a pandora's box of social unrest probably overshadowed concerns that failures to give a healthy scope to these rights would erode social cohesion.[58] Thus, instead of immediately deciding Musqueam's jurisdictional point, the Court answered the question before them by creating federal limits beyond which Aboriginal rights could not extend. The Court devised these limits by holding

---

[54] M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta L.Rev. 498.

[55] Indeed, this is the dominant theory for an Aboriginal regulatory authority in the United States: See two leading works on this subject, F. Cohen, *Handbook of Federal Indian Law* (Washington: U.S. Government Print Office, 1942); C. Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987).

[56] The recognition of Indigenous sovereignty on this continent has been affirmed, even in the face of British (and later American) assertions of sovereignty; for a foundational statement in this regard see *Worcester* v. *Georgia* (1832) 31 U.S. (6 Pet.) 515; 8 L.Ed. 483:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, with the single exception of that imposed by an irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.

[57] *Friends of the Oldman River Society* v. *Canada (Minister of Transportation)*, [1992] 1 S.C.R. 3.

[58] If it was the situation that concerns for social cohesion came down more heavily on the side of limits to Aboriginal rights, rather than for their broader scope, this would be revealing of the ultimate perspectives that guided the decision in this case. People on another side might argue that social cohesion in Canada is exceedingly tenuous as long as one group has to struggle to justify the ultimate legitimacy of its authority. The uncertainty this engenders could encourage undue or extreme actions to secure recognition, which would further diminish civil peace.

that Aboriginal rights could be constrained by federal legislative objectives that allowed the government to justify the infringement of Aboriginal rights in certain circumstances. It held that although "it is true that section 35(1) is not subject to section 1 of the *Charter*, ...this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of section 52 of the *Constitution Act*, 1982".[59] In some ways this was a safer road for the Court to take if it was concerned with social peace. Placing limits on Aboriginal rights presumably diminishes fears that some people may have had that Aboriginal rights could strain and potentially rip the fabric of federalism that had been operative up to that point.

Therefore, one can speculate that the Court held that Dominion laws could infringe Aboriginal rights because of its concern for social cohesion.[60] How else does one explain the reading in of limitations to those rights, when this was not required by the text of section 35(1)? This question is particularly potent when one recognizes that the Court's implied intent to address the textual, rather than the Musqueam's jurisdictional point, did not have strong textual support. In particular, the placement of Aboriginal rights in Part II of the Constitution, which is not textually subject to the section 1 limitation found in Part I of that document, did not deter the Court from importing such limitations despite this distinction. In particular, the Court found limitations on Aboriginal rights by importing the categories of fiduciary law into the meaning of this section, even though these doctrines had no explicit footing in the wording of the provisions. It did this by implying that the words "recognition and affirmation" in section 35(1) incorporated a fiduciary relationship with Aboriginal peoples, which included a federal right to legislate with respect to them under section 91(24) of the *Constitution Act, 1867*. It may be said that the Court's use of fiduciary law was prompted by an attentiveness to civic cohesion, because this doctrine is traditionally concerned with the regulation and monitoring of parties' conduct in certain relationships. Nevertheless, it is somewhat ironic that a doctrine which has been used to protect Aboriginal peoples from the arbitrary power of government (the fiduciary obligation) was turned on its head and used as a justification for infringing constitutionally protected Aboriginal rights.

Despite questions that continue to plague the Court's test in *Sparrow* related to the infringement of Aboriginal rights, it is nevertheless fairly clear that the Court took the approach it did out of a desire to facilitate social cohesion in the country. First of all, the Court viewed its position as steering a middle course between "two extreme positions", one of which "would guarantee Aboriginal rights in their original form unrestricted by subsequent regulation" and the other that would find most of those rights extinguished.[61] Such a view of Aboriginal rights likely speaks to the Court's efforts to create a mediated social peace

[59] *Sparrow*, *supra* note 1 at 1108-09.

[60] One might observe that the Court was concerned that a recognition of Aboriginal jurisdiction might prompt "conflict" and "tensions" with other users of the resource at issue. *Sparrow*, *supra* note 1 at 1101, talking about commercial fishers.

[61] *Sparrow*, *supra* note 1 at 1109-10.

through its test. Secondly, the very terms of the *Sparrow* test itself are an attempt to recognize differentiated citizenship rights by providing Aboriginal peoples with a check against Dominion legislative power, while respecting the "increasingly more complex, interdependent and sophisticated" nature of Canadian society where exhaustible resources need protection and management.[62] The fact that the Court is explicit about the concerns of non-Aboriginal peoples in its development of Aboriginal rights jurisprudence intimates societal stability as a motivating factor in the creation of their test. The very contours of the test therefore illustrate sensitivity to the interests of both Aboriginal and non-Aboriginal peoples. The Court finds that in order to justify an infringement of Aboriginal rights, the government must have a valid legislative objective and uphold the honour of the Crown in the implementation of that objective. The balancing that such an approach requires is strong evidence of the Court's concern for social cohesion in the development of its justification for infringement test.

The Court's interest in cohesion, stability and peace is also apparent in subsequent cases. In the 1999 *Marshall* decision the Supreme Court of Canada again had the opportunity to revisit the Aboriginal regulatory issue that had confronted them nine years earlier in *Sparrow,* though this time in the context of treaty rights. Once again however, the Court largely sidestepped the issue of Aboriginal regulatory jurisdiction under treaty rights and again focussed on the Crown's right to regulate the resource. The reason why the Court's decision did not address this point, as before, seems to be driven by the Crown's concern for political stability. It responded to the Crown's concern that Mi'kmaq trading rights "would open the floodgates to uncontrollable and excessive exploitation of the natural resources" by observing that "catch limits can be established and enforced without violating the treaty right".[63] In finding such limits, there was no discussion of the legal limits imposed on Aboriginal fishers' right to trade by Mi'kmaq law and custom.[64] Furthermore, the Court did not acknowledge the fact of the Crown's own culpability in facilitating an uncontrollable use and excessive exploitation of the resource in question over the past one hundred years.[65] Despite the Crown's mismanagement of the resource and the continuing existence of Mi'kmaq law, the Court nevertheless chose to recognize the right to regulate the fishery as residing in the federal government. It did not explore the possibilities for enforceable Mi'kmaq management or co-management regimes that solely or equally called upon Mi'kmaq law-making authority in the regulation of the resource.[66]

---

[62] *Ibid.*

[63] *Marshall I, supra* note 23 at paras. 57, 61.

[64] For the importance of Aboriginal law and custom in Aboriginal rights' litigation see J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629.

[65] D.R. Matthews, "Constructing' Fisheries Management: A Values Perspective" (1995)18 Dalhousie L.J. 44.

[66] C. Notkzke, "A New Perspective in Aboriginal Natural Resource Management: Co-management" (1995) 26 Geoforum 187. Co-management is discussed in the *Royal Commission's Report*, vol. 2, *supra* note 12 at 665-79.

The findings of federal regulatory power in the *Marshall* case were strongly confirmed a few weeks later in a judgement known as *Marshall II*. In this decision the Court was asked to rehear the first decision (*Marshall I*) by the West Nova Fisherman's Coalition, who were concerned about the potential lack of non-Mi'kmaq regulatory authority over the east-coast fishery. In the aftermath of violent clashes and vociferous public criticism arising from the first decision, the Supreme Court of Canada took this opportunity to clarify its earlier opinion while simultaneously dismissing the application to rehear the case.[67] In doing so the Court re-framed the context of the original decision and placed the treaty's regulatory powers in very plain terms. For example, it observed that the treaty did not support a general right to take resources throughout the province.[68] It emphasized that *Marshall I* could not be extended to support a right to take resources other than eels.[69] It reiterated that both the provincial and federal governments had to regulate the rights guaranteed within the treaty.[70] It highlighted that the government could regulate the right to fish for "necessaries" to "produce a moderate livelihood" and not be found to be infringing the treaty right.[71] Finally, the Court accentuated the notion that the government could regulate the treaty right in such a manner as to give priority to non-Aboriginal interests in situations where "regional/community dependencies" may warrant.[72]

The Court's findings in *Marshall II*, as in *Sparrow*, clearly imply a concern with social cohesion, as they place the regulation of the resource in one party's hands. It seems that the Court may think such a result is required by implications in the text of section 35(1), and best mediates between the parties in the case of

---

[67] *R.* v. *Marshall II*, *supra* note 23. The West Coast Fisherman's Coalition sought a rehearing of the Marshall case, and a further trial on the issue of justification for the infringement of treaty rights. They were concerned about the potential application of the judgement to lobster fishing. The Court denied the rehearing saying the issue of justification was not raised in argument dealt with in the courts below. Furthermore, the Court said the Coalition's application was based on a misconception of the scope of the former Marshall opinion. The earlier decision concerned eels fishing under a particular treaty, not a general right to take resources throughout the province.

[68] The Court wrote that the "treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the separate but similar treaty was made." *Ibid.* at para. 17.

[69] The Court wrote:

The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower.

Ibid. at para. 20

[70] On the government's power to regulate treaty rights see paras. 24-28. The Court held that: the "government's power to regulate the treaty right is repeatedly affirmed"; "the government's general regulatory power is clearly affirmed". It also observed that treaty rights were "limited by the rights of others", and therefore "the government must ultimately be able to determine and direct the way in which rights interact".

[71] *Ibid.* at para. 36.

[72] *Ibid.* at para. 41.

potential conflict. Nevertheless, despite not having addressed any aspect of Aboriginal regulatory authority in *Sparrow* or *Marshall II*, the Court in *Marshall II* does leave some hint that one day it may find a coordinate federalism between the parties by expressing the view that "treaty rights... are exercised by authority of the local community".[73] This is a hopeful sign - perhaps one day the recognition of a complimentary Aboriginal jurisdiction in regulatory matters over which they have rights might provide a better path to peace in disputes involving the allocation of resources between the parties. The recognition of Aboriginal law as a vehicle to foster stability and normative order within and between Aboriginal communities and others could be of great benefit to Canada's social structure. It could enable Aboriginal peoples to become a stronger force in the promotion of certainty and stability throughout the country as they exercise greater responsibility in resolving disputes that lie in their midst.

The strengthening of Aboriginal jurisdiction is consistent with the theory of law that already sustains a measure of peace and balance between the Dominion and provincial governments in Canada. Federalism already exists in Canada as a "political mechanism by which diversity could be reconciled with unity",[74] and therefore could accommodate Aboriginal regulatory power without threatening its underlying structure. As a result, the country's federal structures could be interpreted to facilitate "democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to that diversity".[75] In these circumstances, the recognition of Aboriginal jurisdiction in section 35(1) of the Constitution would complete the federal system in Canada, which is only partial according to the precise terms of the *Constitution Act, 1867*.[76] Such a result would also be consistent with the nature of peace and friendship treaties themselves. When these agreements were signed, despite the words the parties sometimes used, it is exceedingly clear through observing their pattern of repeated conduct that disputes about treaties' meanings were usually resolved through further treaty councils.[77] In fact, an appreciation of these agreements in their widest historical sweep reveals that the parties' preferred course of dealing favoured the resolution of disputes through re-negotiation and renewal. The Courts' reasons

---

[73] *Ibid.* at para. 17.

[74] *Québec Secession Reference*, *supra* note 2 at para. 43.

[75] *Ibid.* at para. 58.

[76] *Ibid.* at para. 55.

[77] For descriptions of Mi'kmaq/Crown relations in this period, and the renewal aspect of peace and friendship treaties, see W. Wicken, "Re-examining Mi'kmaq-Acadian Relations 1635-1755" in S. Depatie et. al., eds., *Habitants et marchands, vingt ans après : Lectures de l'histoire des XVII^e et XVIII^e siècles canadians* (Montréal: McGill-Queen's Press, 1998); W. Wicken, "Heard it From our Grandfathers: Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928" (1995) 44 UNB L.J. 145; W. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties" (1994) 43 UNB L.J. 43; J. [sákéj] Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L.Rev. 241; J. [sákéj] Henderson, "Constitutional Powers and Treaty Rights" (2000) 63 Sask. L.Rev. 719.

in *Marshall* are consistent with this approach. They wrote that "the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation".[78] Perhaps the parties will eventually take guidance from this perspective when faced with disputes over the meaning of these treaties and reconvene peace and friendship councils to resolve their differences through negotiation and agreement. This result would be consistent with the Court's encouragement of the negotiation approach outlined below and, despite the further challenges that would be encountered there, might be our best hope of making peace permanent, and friendship firm.

ii) *The Purposive Reconciliation Construction of Aboriginal Rights*

The Supreme Court's concern for a conception of citizenship that incorporates political stability and civic peace is also apparent in the way it approaches the underlying purpose of section 35(1)'s inclusion in the Constitution. In *R.* v. *Vanderpeet*, the Court struggled with the fact that the Constitution granted special protection to only one part of Canadian society when it affirmed Aboriginal rights.[79] They noted that such a result seemed inconsistent with the principles of the liberal enlightenment that recognized "general and universal" rights by all people in society regardless of their collective status. The Court thus had to offer an explanation as to how special rights could co-exist with universal rights in Canadian society. The course it took in providing this explanation was to hold that Aboriginal rights had to be given a purposive, large and liberal construction consistent with their favoured constitutional status. When the Court applied this approach, and articulated a rationale for the existence of special rights, it held that the reason Aboriginal peoples had special rights was that when Europeans arrived in North American they were "...already here, living in communities on the land, and participating in the distinctive cultures, as they had done for centuries".[80] The fact of a prior Aboriginal presence therefore became one half of the purpose justifying the special grant of rights in the Constitution. The other half of the purpose underlying the special regime of Aboriginal rights, which once again reveals the Court's concern for social cohesion, was that these pre-existing rights "must be directed towards reconciliation... with the sovereignty of the Crown".[81] The Court's formulation of the purpose of section 35(1) in this manner makes reconciliation the centre-piece of its jurisprudence dealing with Aboriginal rights.

The concept of reconciliation is very definitely a concept concerned with social cohesion, political stability and civic peace. It implies a search for a middle ground, between conflicting positions. The language of reconciliation

---

[78] *Marshall II*, *supra* note 23 at para. 22.

[79] *Vanderpeet*, *supra* note 23 at paras. 18-19.

[80] *Ibid.* at para. 30.

[81] *Ibid.* at para. 3.

has been particularly prominent in South Africa where that country's political rejuvenation is heavily dependent on "Truth and Reconciliation" to bring social and political unity to a deeply divided citizenship.[82] This language is gaining strength in Canada because of the Court's reliance on this concept in its recent jurisprudence. Reconciliation conveys the idea that there is a rift between peoples that needs to be bridged. In fact, the Court employs the metaphor of a bridge in discussing reconciliation when it notes that the essence of Aboriginal rights is their bridging of aboriginal and non-aboriginal legal cultures.[83] Interestingly, the bridge that Aboriginal rights jurisprudence tries to join together, in reconciling pre-existing Aboriginal rights with assertion of the sovereignty of the Crown, is the "form of intersocietal law that evolved from long-standing practices linking the various communities". The Court gave content to reconciliation by drawing from Professor Walters' writings, where he wrote that "the challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly different legal cultures".[84] The Court followed Professor Walters' conclusion concerning the process of achieving reconciliation between two legal cultures when they adopted his observation that "consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined...a morally and politically defensible conception of rights will incorporate both legal perspectives".[85]

Thus, reconciliation of Aboriginal and Canadian legal cultures exists as a *sui generis* conception to respect and incorporate the presence in Canada of two vastly different legal cultures.[86] The fact that this reconciliation is *sui generis*, means that the situation with Aboriginal peoples is constitutionally unique, and could not be used by other groups in Canada to claim special rights. Limiting of the number of claimants to differential treatment also speaks to the Court's concern with social cohesion. It conveys the idea that the recognition of unique

---

[82] See D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law and Jurisprudence in the Perspective of Legal Philosophy* (Toronto: University of Toronto Press, 1991); D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

[83] *Vanderpeet*, *supra* note 23 at para. 42.

[84] *Ibid.* at para 42. This same point was also recognized in *R.* v. *Delgamuukw*, *supra* note 23 at para. 114, where the court wrote, "what makes aboriginal title sui generis is that it arises before the assertion of sovereignty". Chief Justice Lamer furthered this point by writing that Aboriginal title "is also sui generis in the sense that its characteristics cannot be completely explained by reference to either the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other Aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives."

[85] *Ibid.* citing M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*" (1992) 17 Queen's L.J. 350 at 412-13.

[86] For a discussion of the *sui generis* nature of Aboriginal rights see J. Borrows & L. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36 Alta L.Rev. 9.

Aboriginal rights will not open a "floodgate" of claims from various other peoples for special constitutional status. One can appreciate why the Court would take this approach. The distinguishing of Aboriginal rights from other rights in this way is important for political stability because it sends the message that such treatment is not universally available to others in Canada. The Court's statement that Aboriginal rights are not the norm, but are *sui generis,* is therefore crucial for those who worry that Canada would otherwise disintegrate if every group were able to claim a differentiated constitutional citizenship. And to reiterate, this categorization is also crucial because it conveys the point that reconciliation can take place on a plane that respects and incorporates the presence of Canada's vastly different legal cultures. As the Court noted, a *sui generis* approach will place "equal weight" on each perspective and thus achieve a "true reconciliation between the cultures".

In *R.* v. *Gladstone*, the Supreme Court attempted to build on this position and extend its search for social cohesion when it wound together the *sui generis* nature of Aboriginal rights with a concern for their justifiable infringement under the notion of reconciliation. Unfortunately, the Court's efforts in this regard had the effect of inappropriately telescoping the two concepts into a single legal test, when this had not been the case previously. Under the Court's reformulation, reconciliation was merged with so called valid government objectives to potentially undermine Aboriginal rights that conflict with broader non-Aboriginal interests. In *Gladstone* the Court reworked the *Sparrow* test in the following way. It said:

> [b]ecause...distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[87]

The Court in *Gladstone* misapplied *Sparrow* when it held that the placement of limits on Aboriginal rights were a necessary part of their reconciliation with the Crown. Reconciliation should be the bridge that holds Aboriginal rights firmly apart from broader non-Aboriginal objectives that may not themselves be the subject of constitutional protection. On this bridge the parties can then meet in mutual respect and recognition to negotiate the resolution of their differences, while taking comfort that their rights will not be overridden without their consent. Reconciliation should not become a gangplank that forces Aboriginal peoples to step off into the deep waters of colonial objectives, and thus abandon their rights whenever that may be considered necessary to fulfill objectives that are of "sufficient importance" to the non-Aboriginal community. The way that

[87] *R.* v. *Gladstone*, *supra* note 23 at para. 73.

the Court employed the concept of reconciliation in *Gladstone* thus potentially fuses the conciliatory purpose of the justificatory test with the means by which reconciliation would be fulfilled. Yet *Sparrow* seemed to hold reconciliation somewhat apart from justification when it held that "federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights".[88] Reconciliation in *Sparrow* was thus directed at demanding and holding government to a higher standard in dealing with Aboriginal rights; reconciliation *was NOT*, in itself, a license to provide the government with particularized legislative reasons that justify legislative infringements. Reconciliation should be the process that holds back the federal government's ability to infringe Aboriginal rights for unconstitutional objectives; it should not be the case that reconciliation is employed as an objective that permits the infringement of Aboriginal rights. If it were, legislatures could cloak virtually any action that restricts Aboriginal rights with constitutional legitimacy as long as they characterized their actions as fitting under this umbrella. Such a result ignores the Court's own counsel in *Sparrow*: "[w]e find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights".[89]

The Court's use of reconciliation as a basis to justify the infringement of Aboriginal rights is also inappropriate because it virtually undermines the justification test of Aboriginal rights as an approach that could facilitate social cohesion. The broad use of reconciliation as a specific reason to limit rights recreates the problem the Court tried to solve in the first place when it developed the justification test in *Sparrow*. It must be remembered that the *Sparrow* Court articulated the justifiable infringement test to reinforce the idea that "[t]he relationship between the Government and aboriginals is trust- like, rather than adversarial".[90] In fact, the very existence of the Court's finding of an infringement test in *Sparrow* is completely dependent on the notion that the "recognition and affirmation [of Aboriginal rights] incorporate the fiduciary relationship and so import some restraint on the exercise of sovereign power".[91] However, when *Gladstone* employs reconciliation as a reason for infringement, it necessarily recreates an adversarial, rather than a trust-like, relationship between the parties. Antagonism is the likely result of such a broad use of the concept because it reduces the restraint on sovereign power and permits it to be overthrown for non-constitutionally protected reasons: "objectives of sufficient importance to the broader community". This approach potentially strips Aboriginal peoples of their constitutional protection in the toughest cases, when the majority's interests are arrayed against them, at the very time they might require the greatest protection. This approach thus does not provide a blueprint

[88] *Sparrow*, *supra* note 1 at 1109.
[89] *Ibid.* at 1113.
[90] *Ibid.* at 1108.
[91] *Ibid.* at 1109.

for reconciliation, in fact, it risks completely alienating the parties when the stakes are highest - when there is a conflict between the constitutionally protected rights of Aboriginal peoples and the non-constitutionally protected goals of non-Aboriginal peoples. Justifying the infringement of Aboriginal rights in the name of reconciliation could therefore further fuel adversarial relationships between Aboriginal peoples and their neighbours, and end any trust-like affiliation that may exist between the parties.

Civic peace is thus threatened when one part of the community can take away rights from another part of the community, and then justify this action for the reason that it is "important" to those who are taking away the rights. This result potentially sanctions many of the injustices associated with colonization and directs Aboriginal peoples to reconcile their perspectives with the diminishment of their rights. It endorses the infringement of Aboriginal rights in furtherance of legislative objectives which are "compelling and substantial",[92] to one party to the dispute.[93] This point is made clear in *R.* v. *Delgamuukw*, where the strained application of *Sparrow*'s notion of reconciliation articulated in *Gladstone* is stretched even further. The Court writes:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community"... In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.[94]

The Court's approach is therefore problematic for cohesion amongst the citizens of Canada because it comes down so heavily in favour of the very acts of government that Aboriginal peoples will be disputing in the Courts. While this may be viewed by some in a positive light, because of benefits the test confirms for rest of Canada, it is bound to provoke negative reactions for those who see great injustice in the taking of lands, governance and culture from those who were in rightful possession. The unilateral exercise of power over the long term, without persuasion, participation, co-operation, and mutual respect, is a path that diminishes social cohesion and peace between people. The outstanding

---

[92] *Delgamuukw*, *supra* note 23 at para. 161, per Lamer J.

[93] *Ibid.* at para. 153.

[94] *Ibid.* at para. 165 [emphasis in the original]. In commenting on this paragraph Cathy Bell has observed that the "fact that many of these objectives fall within provincial jurisdiction suggests that "how" not "whether" rights have been infringed, is the proper focus of future discussions between the parties": "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 62. For a critique of the infringement of constitutional aboriginal rights see K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified" (1997) 8 Constitutional Forum 33.

issues still present in the Court's analysis of reconciliation indicate that a deeper examination of this concept needs to take place before it can fulfill its role as a concept that builds social cohesion.

iii) *Encouragement of the Negotiation Approach*

The third approach that demonstrates the Supreme Court's concern for civic peace in dealing with Aboriginal rights is its encouragement to the parties to resolve their outstanding issues through the political process. This approach is complementary to the search for justification for the infringement of rights and the direction towards reconciliation. The most visible example of the encouragement of the negotiation approach comes from the concluding remarks of the *R.* v. *Delgamuukw* case where Chief Justice Lamer observed that litigation concerning Aboriginal rights is expensive in both economic and human terms. This reflection led him to the conclusion that he would "not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts".[95] The Chief Justice's statement is significant because it identified the Court's disquiet with having to resolve complex legal issues when the parties have done so little to provide concrete and specific statutory or contractual terms for the Court to interpret. It is plain that the Court would prefer not to deal with these issues as the first line of authority on Aboriginal rights. The Court would rather perform a subsidiary role in reinforcing the independent political actions of the parties. In fact, Chief Justice Lamer makes this explicit when he writes "[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve...the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".[96] He gave impetus to the encouragement for negotiation by saying "[l]et us face it, we are all here to stay".[97]

The Court's encouragement of negotiation and political solutions for the resolution of Aboriginal rights is not unique to *Delgamuukw* however. In fact, *R.* v. *Sparrow*, the Court's first case under section 35(1) makes the same point. There, Chief Justice Dickson and Justice La Forest wrote that "[s]ection 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place".[98] This conclusion is supportive of the gist of the decisions in *R.* v. *Sioui*[99] and *R.* v. *Horseman,*[100] handed down in the same time period as *R.* v. *Sparrow*. For example, in *R.* v. *Sioui* the Court was comfortable in giving effect to a negotiated solution between the Huron and the British, even

[95] *R.* v. *Delgamuukw*, *supra* note 23 at para. 186.
[96] *Ibid.*
[97] *Ibid.*
[98] *Sparrow*, *supra* note 1 at 1105.
[99] *Sioui, supra* note 23.
[100] *Horseman, supra* note 23.

though the negotiations took place over two hundred years ago. Foreshadowing later discussion of reconciliation, Justice Lamer (as he then was) wrote that the treaty of 1760 "intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand".[101] In *Horseman*, Justice Cory was equally at ease in reinforcing political solutions to Aboriginal issues, instead of having to resolve them in the first instance, even if the political resolution arrived at in an earlier era "might well be politically and morally unacceptable in today's climate".[102]

Given the Court's preference for reinforcing non-litigated solutions between the parties it should come as no surprise that the broad sweep of the Court's jurisprudence has been quite supportive of attempts to resolve issues implicating Aboriginal citizenship through negotiation and political action. In *Canadian Pacific* v. *Matsqui Indian Band*[103] the Court was willing to reinforce federal and Aboriginal policy for the development of self-government by agreeing that this policy could at least inform some elements of the scheme at issue. It did not object to the notion that the raising of revenue by bands for local purposes was a legitimate purpose "to promote the interests of Aboriginal peoples and to further the aims of self-government".[104] Similarly, in *Lovelace* v. *Ontario*,[105] the Court was quite willing to perform a supplementary role to the political process by upholding policy that was designed "to further develop a partnership or a "government-to-government" relationship" between Ontario's First Nations and the province of Ontario. The Court wrote with approval that the project under consideration was appropriate in its aim "at supporting the journey of these aboriginal groups towards empowerment, dignity, and self-reliance". Therefore, while the disputed policy did not...meet similar needs in [non-federally recognized band] communities, its failure to do so did not "amount to discrimination under section 15" of the *Charter*.[106] All these cases indicate that Aboriginal self-government is an objective the Court is willing to uphold, particularly when it is developed through a process of negotiation and consent.

The Court seems to find nothing constitutionally offensive in the initiatives that have so far been taken to foster Aboriginal choice and accountability in Canada. While there will no doubt be cases that test the flexibility and boundaries of Canada's federal system relating to Aboriginal peoples, so far the Court has not found reason to limit the experiments that are being taken. To provide one last example, in *R.* v. *Gladue*,[107] the Court did not balk at giving effect to Parliament's objective of reforming the *Criminal Code* to take account

---

[101] *Sioui*, *supra* note 23 at 1071.

[102] *Horseman*, *supra* note 23 at 934.

[103] *Matsqui Indian Band*, *supra* note 23.

[104] *Ibid.* at para. 43. This purpose (self-government) was cited with approval in *Westbank First Nation*, *supra* note 23 at para. 37.

[105] *Lovelace*, *supra* note 23 at para. 7.

[106] *Ibid.* The holding in *Lovelace* is significant because it paves the wave for holding that policies encouraging the development of self-government are not prima facie contrary to equality rights under s. 15.

of "the particular circumstances of aboriginal offenders" in sentencing. This result was upheld because of the Court's recognition that Parliament was in the best position to direct a re-balancing of Aboriginal over-incarceration. This was the consequence even though it is challenging for the courts to recognize that Aboriginal people might require particular consideration in any decision, because such a result seems to cut against the grain of universalized citizenship rights. The Court's willingness to agree with legislators that there was "crisis in the Canadian criminal justice system" that "reveals a sad and depressing social problem" shows their support for political action in the resolution of questions concerning Aboriginal citizenship. The *Gladue* case, together with the twenty-five written since 1990, reveal a similar support and encouragement for negotiation and political action in resolving the place of Aboriginal citizens in Canadian society. It is time those in the political arena heed this message, and bring greater peace and stability to Canada by negotiating for the resolution of those issues that tear at our common humanity. While there have been some efforts and success in this regard, the unconscionably slow pace at which this is occurring illustrates that there needs to be a broader based concern with concepts of citizenship attentive to our long term interdependencies.[108]

Conclusion

Canada is somewhat unique among western nations in constitutionally embracing a theory of differentiated citizenship in relation to some of its members. This does however present concerns regarding social cohesion, political stability and civic peace that require justification in the legislatures and highest courts of the land. The question this paper has addressed is whether it is possible for the courts to be attentive to this aspect of citizenship when their usual engagement with this subject involves rights, association and (lately) identity. From the Supreme Court's treatment of Aboriginal rights we have seen that it is indeed possible to find that the courts have a legitimate concern with general social cohesion in their role as guardians of the rule of law. In fact, upholding social stability and civic order is at the heart of their duty. The Court has stated that their administration of the rule of law must always be attentive to any potential for "chaos and anarchy" that may result from their decisions.[109] They have said that the law would not tolerate a legal vacuum,[110] nor would it tolerate any part of Canada being without a valid and effectual legal system.[111] The Court's regard

---

[107] *Gladue*, *supra* note 23. The specific section of the *Criminal Code* at issue was s. 718.2(e), R.S.C., c. C-46, Part XXIII [repl. 1995, c. 22, s. 6], ss. 718(2) [am. 1997, c. 23, s. 17].

[108] For my other thoughts in this regard see J. Borrows, "Domesticating Doctrines: Aboriginal Peoples and the Royal Commission" (2000) McGill L.J. [forthcoming]; Landed Citizenship: Narratives of Aboriginal Political Participation in W. Kymlicka & W. Norman, eds., *Citizenship in Diverse Societies*, *supra* note 40.

[109] *Manitoba Language Reference*, [1985] 1 S.C.R. 721.

[110] *Ibid.* at 753.

[111] *Ibid.* at 758.

for cohesion is thus an appropriate focus of their attention. They must ensure that the country does not find itself in a situation where there is an irreversible threat to the validity, force and effect of rights, obligations, and respect for the identity and dignity of others.[112]

However, the Court's ability to untangle threats to the country's political stability and civic peace is tempered by their recognition that they are not the best party to ultimately work out the details of the necessary arrangements. Thus, they have approached the issue of social cohesion in questions of Aboriginal citizenship by devising procedures and broad principles to direct the parties in better performing their duties in this regard. The Court's test for the infringement of Aboriginal rights, their purposive interpretation of the Constitution aimed at reconciliation, and their encouragement to negotiation and political action all are designed to serve this purpose, even if there are elements of these doctrines that require further examination and development.

Ultimately, it may be instructive to return to the insights of Kymlicka and Norman in their discussion of social cohesion as a citizenship issue. They observe "that it is clearly unhelpful to talk as if there is a zero-sum relationship between minority rights and citizenship; as if every gain in the direction of accommodating diversity comes at the expense of promoting citizenship".[113] This insight is certainly applicable to Aboriginal peoples in the Canadian context. The accommodation of Aboriginal rights does not come at the expense of promoting citizenship. It is true that there are unique concerns involved when a country recognizes Indigenous rights and departs from more universalized and common protections for citizenship based on rights, participation and identity. However, with reasoned exchange and shared experiences, fears regarding the accommodation of difference can be overcome in such a way that promotes, rather than sacrifices, citizenship. In fact, as Kymlicka and Norman remind us, "refusal to grant recognition and autonomy to such groups [like aboriginal peoples] is often likely to provoke even more resentment and hostility from members of national minorities, alienating them further from their identity as citizens of the larger state".[114]

---

[112] *Ibid.* at 768. In the *Manitoba Language Reference* this rule was applied as follows:

All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are *not* saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws. At the termination of the minimum period these rights, obligations and other effects will cease to have force and effect unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. ... [emphasis in original].

[113] Kymlicka & Norman, *Diverse Societies*, *supra* note 40 at 39.

[114] *Ibid.* at 40.

Therefore, it should be recognized that the Court's affirmation of differential rights for Aboriginal peoples could actually enhance citizenship. In fact, the Court's fair and just definition of the contours of section 35(1), including the collective right to self-governance, can go some distance toward securely guaranteeing Aboriginal and Canadian rights, responsibilities and identities. When Aboriginal peoples no longer feel threatened in the survival of the languages, cultures, and distinctive practices, this may be the time when they feel an even greater willingness to embrace their relationships with others in this country. Similarly, when other Canadians no longer worry that their resources, rights and livelihoods will be taken from them by recognizing a differentiated Aboriginal citizenship, then we may find ourselves in a situation where the rights secured through such recognition may encourage their mutual reinforcement. Of course, there is no guarantee that feelings of interdependence will flourish under such protection. Nevertheless, the stronger rooting of all people's rights, associations and identities within the soil of the Canadian political economy certainly is a necessary, even if it is not a sufficient, condition for the enjoyment stronger bonds of national unity in this land.