THE APPLICATION OF THE CONCEPT OF 'CITIZENS PLUS' TO STATUS INDIANS IN CANADA

A Thesis Submitted to the College of

Graduate Studies and Research

in Partial Fulfilment of the Requirements

for the Degree of Master of Arts

in the Department of Political Studies

University of Saskatchewan

Saskatoon

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Abstract

This thesis considers the application of a differentiated citizenship to status Indians in Canada. The topic is studied both normatively and empirically. The thesis reviews how the concept of citizenship has evolved through the thought of modern liberal theorists, such as T.H. Marshall, Will Kymlicka and Charles Taylor. Some recent work concerning citizenship in Canada recommends that the state ought to extend differentiated citizenship rights to certain groups, such as status Indians in Canada. This thesis argues that the Canadian state is already extending differentiated citizenship rights to status Indians. It examines some of the components of this differentiated citizenship regime, such as Aboriginal and Treaty rights.

Acknowledgements

I am indebted to a number of persons without whose encouragement and constructive criticism I could not have completed this thesis. I would like to thank Professor Duff Spafford whose pages of comments, suggestions of readings, and hours of discussion have guided me throughout the preparation of this thesis. Also, I want to thank Professor David Smith and Professor Karman Kawchuk for numerous suggestions and help throughout the various stages of the thesis preparation. And finally, I would like to thank the Department of Political Studies and the La Ronge First Nation for the financial assistance that accounted for most of the moneys required for the completion of this thesis.

A.R.M.

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CHAPTER ONE

INTRODUCTION

This thesis considers the application of a differentiated citizenship known as "citizens plus" to status Indians in Canada. The concept of "citizens plus" was introduced into Canadian political debate, and applied to status Indians, in 1966-67, in a report popularly known as the Hawthorn Report.[1] Put simply, "citizens plus" embodied the idea that status Indians in Canada would possess all of the rights attaching to citizenship which fell to Canadian citizens in general, plus rights which recognized the special position -- legal, constitutional, perhaps even social -- which was occupied by status Indians. The concept had to make its way against competing concepts of citizenship with potential application to status Indians. Prominent among the competing concepts was

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[1] H.B. Hawthorn, ed., A Survey of the Contemporary Indians of Canada, 2 vols. (Ottawa: Queen's Printer, 1966 and 1967).

that embodied in the White Paper of 1969,[2] which was hostile toward special rights for status Indians. The position was firmly taken in the White Paper of 1969 that the interests of Canada and of status Indians alike would be served best in the long run by constitutional, legal and social arrangements which treated all Canadians alike and made ordinary Canadian citizens of status Indians.

The contest between these two concepts, one envisaging a differentiated citizenship, the other a universal, undifferentiated citizenship, suggests the two questions to which this thesis is addressed. The first is this question: Should there be special rights, bringing with them a special form of citizenship, which, in justice, should belong to status Indians in Canada? This first question is explicitly normative, and is considered in chapter two of the thesis. The second question is this one: Are there, in fact, special rights which belong to status Indians in Canada? To answer this second question requires an empirical investigation of the rights of status Indians to discover how, if at all, they differ from the rights held by other citizens of Canada. Such an investigation is carried out in chapter three of the

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[2] Canada, Statement of the Government of Canada on Indian Policy 1969, (Ottawa: Department of Indian Affairs and Northern Development, 1969).

thesis.

The Hawthorn Report's concept of "citizens plus" was in some ways a precursor to the strand of contemporary political philosophy that concerns itself with differentiated citizenship. The Report itself is explicit that forced assimilation is not to be considered a proper goal of the Canadian state.[3] The Report was commissioned by the Department of Citizenship and Immigration, not the Department of Indian Affairs and Northern Development (DIAND) and this may partially explain an approach which emphasizes citizenship. As a concept, "citizens plus," unlike assimilation and nationalism, lacked a historical tradition and a philosophical background. "Citizens plus" may have been a concept that appeared before its time.

The concept of "citizens plus" would allow status Indians to possess the same citizenship rights as other Canadian citizens, while at the same time possessing distinct or special rights that are based upon treaties, legislation, and other agreements. The Report suggested that "citizens plus" would allow status Indians to "live in equality and in dignity with the greater Canadian society."[4] It argued that equality could be aspired to

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[3] Hawthorn 13.

[4] Hawthorn 5.

without assimilating status Indians; this is consistent with the Canadian state's current approach to equality. The principles that underlie the Hawthorn Report were impeccably liberal. For instance, the Report advocated giving status Indians a choice over the degree of their involvement in the Canadian polity. Some might choose to vote in Canadian elections, while others did not. Those who wanted to integrate into the majority society would not be prevented from doing so.

The Hawthorn Report states that status Indians possess a "right" to be "citizens plus,"[5] anticipating the rights-based discussion of the position of status Indians which was to follow. Although "citizens plus" never evolved beyond the conceptual stage, Cairns states that "citizens plus" could be used as the basis of a theory. Indeed, such a theory might well take the form of Kymlicka's theory of minority rights, to be studied in chapter two.

The Hawthorn Report stated that it is important that the cultural autonomy of status Indians should not be diminished by the policy changes of the Canadian state.[6] Status Indians ought to be free to choose whether or not retain their distinct identities. Indeed, the Hawthorn

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[5] Hawthorn 6. Emphasis added.

[6] Hawthorn 10.

Report anticipated the activity of pressure groups based on this distinct identity that is evident in contemporary Canadian politics.[7] Unlike the 1969 White Paper, which argued for the abolition of DIAND, the Hawthorn Report expected DIAND to exist well into the future.

The Hawthorn Report developed the concept of "citizens plus" with the urban migration of status Indians partially in mind.[8] Contemporary political theory has had difficulty dealing with the urban population of status Indians. Cairns argues that the Royal Commission on Aboriginal Peoples (RCAP) had just such a difficulty. Presently, DIAND has little involvement with urban status Indians. The Hawthorn Report recommended that DIAND be responsible for the "plus" aspect of "citizens plus." For urban Indians, the "plus" aspect may be different than that for on-reserve status Indians, but DIAND would be involved with both sets of status Indians.

For much of Canadian history, the dominant approach of the Canadian state towards status Indians has been to assimilate them into the larger political community. The Gradual Civilization Act was enacted in 1857 by the

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[7] Hawthorn 12.

[8] Hawthorn 12.

legislature of the United Canadas.[9] The purpose of this act was to remove the legal distinctions between status Indians and Her Majesty's other Canadian subjects.

The concept of assimilation possesses its own philosophical history that includes proponents such as Immanuel Kant. The word race entered Germany from France in the late 1700s and was used to denote kind or lineage.[10] Kant reasoned that if distinct races existed, then a stem genus must have existed and he believed that this stem genus was composed of "white brunettes" who lived between the 31st and 52nd parallels of Europe. Americans (Aboriginal peoples) are considered inferior by Kant for various reasons, one being that all other races were capable of cultivation, while Americans were not. Kant recommends that all races be assimilated into the white race.[11] From Kant to the 1969 White Paper, assimilation was understood by many, liberals included, to be a progressive approach to difference.

While the Hawthorn Report argued for a differentiated

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[9] Alan Cairns, Citizens Plus: Aboriginal Peoples and the Canadian State, (Vancouver: UBC Press, 2000) 49.

[10] Mark Larrimore, "Sublime Waste: Kant on the Destiny of the 'Races'." Catherine Wilson ed., Civilization and Oppression, (Calgary: University of Calgary Press, 1999) 101.

[11] Larrimore 114.

citizenship regime, the 1969 White Paper aspired to a common citizenship regime. The 1969 White Paper proposes to eliminate the differentiated treatment of status Indians. The White Paper argues that the inequalities between status Indians and other Canadian citizens is caused by the "separate treatment" of status Indians.[12] The White Paper understood that the history of the relationship of status Indians to the Canadian state was one of separate or different treatment. Equality would be obtained by removing the special status of Indians. To this end, the White Paper recommended eliminating DIAND. Furthermore, it was argued that distinct treatment "provides fertile ground for social and cultural discrimination."[13] The White Paper made no distinction between on- and off-reserve status Indians. The idea of equality embedded in the concept of "citizens plus" is similar to that of the Supreme Court of Canada, which comprehends affirmative action, while the idea of equality embedded in the White Paper is that associated with universal human rights.

Some contemporary political theorists, such as Will Kymlicka and Charles Taylor, argue that the Canadian state

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[12] Canada, Statement of Canada on Indian Policy 1969, 3.

[13] Canada, Statement of Canada on Indian Policy 1969, 5.

ought to create a differentiated citizenship regime that would include status Indians. Taylor points out that there are few models for Canada to follow.[14] He gives two possible examples in Belgium and Switzerland, but notes that Belgium is rife with internal conflict between language groups that is worse than Canada's. He writes that Switzerland "seems to achieve harmony by the device of mutual ignorance in watertight cantons."[15] Taylor concludes by expressing doubt that answers to Canada's citizenship difficulties will be found outside its borders. It is likely that the Canadian state will have to locate solutions within Canada.

Alan Cairns argues that, since the late 1970s, a consensus has been developing in support of the nation-to-nation approach to Aboriginal-Canadian relations in Canada. Evidence of this approach is to be found in such diverse locations as the Charlottetown Accord, RCAP, and the two-row wampum.[16] It is endorsed by the federal government, the Assembly of First Nations (AFN) and many academics. It

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[14] Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism, (Montreal and Kingston: McGill-Queen's Press, 1994) 25.

[15] Taylor, Reconciling the Solitudes 25.

[16] On two-row wampum, see Ovide Mercredi and Mary Ellen Turpel, In The Rapids: Navigating the Future of First Nations, (Toronto: Penguin Books, 1993) 35.

is often argued that treaties ought to be the preferred instrument to regulate the relations between status Indians and the Canadian state. The AFN has argued that the Charter of Rights and Freedoms ought not apply to self-governing First Nations. The concept of Canadian citizenship which is contemplated for status Indians by Aboriginal nationalism can be very limited.

Chapter two of this thesis will review contemporary political theory as it pertains to the extension of citizenship rights. As has been noted, there are liberal theorists, such as Kymlicka and Taylor, who argue that some form of differentiated citizenship <u>ought</u> to be adopted by Canada. Their writings represent the philosophical groundwork that "citizens plus" lacked when it was introduced in the 1960s.

Chapter three takes stock of how status Indians are <u>already</u> treated differently by the Canadian state. Recognition of the special position of status Indians -- a position often shared with other Aboriginal peoples -- is to be found in a variety of documents: the Canadian Constitution, court judgments, treaties, legislation and the Criminal Code.

Chapter four concludes that the Canadian state is in the process of extending differentiated citizenship rights

to status Indians. Furthermore, the Canadian state has participated in the creation of special rights for status Indians since Confederation when the federal government accepted the responsibility of legislating for "Indians, and Lands reserved for Indians."[17]

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[17] *Constitution Act, 1867*, s. 91(24).

CHAPTER TWO

A NORMATIVE APPROACH TO STATUS INDIAN DIFFERENCE

I

This chapter begins by considering the meaning of citizenship in the context of Canadian constitutional documents. Citizenship is then examined in a wider context, with emphasis on the work of certain liberal political thinkers who have made contributions to the idea of a differentiated citizenship consistent with the concept of "citizens plus" discussed in chapter one.

II

Alan Cairns states that the enhancement of Canadian citizenship is one of the most important constitutional consequences of the Canadian Charter of Rights and Freedoms.[18] The text of the Charter rarely refers to the concept of citizenship; however, the Charter recognizes

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[18] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [enacted by the *Canada Act 1982* (U.K.), 1982, c.11, s. 25, Schedule B].

"Everyone," "Any person," "Anyone," "Every individual," and "Any member of the public." These references to individuals, rather than citizens, seem to diminish the value of citizenship. On the other hand, voting rights, mobility rights, and minority educational rights are ascribed to citizens.

Section 7 of the Charter states: "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 7 has been interpreted to include "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law."[19] Persons who have entered Canada illegally are ascribed rights. Indeed, most Charter rights are ascribed to non-citizens in virtue of their mere presense in Canada.[20]

The concept of "citizenship" is still evolving. Canadian citizenship was established for the first time by federal statute in 1947.[21] Prior to 1947, Canadian citizens were known as British subjects. Parliament established a

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[19] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 202.

[20] Peter W. Hogg, Constitutional Law of Canada, 3rd ed. (Scarborough: Thomson Canada Ltd., 1992) 835.

[21] Citizenship Act, R.S.C. 1985, c. C-29.

new Citizenship Act, which came into force on February 15, 1977. A new Citizenship of Canada Act will attempt to strengthen Canadian citizenship through the modernization of the Act.[22]

In 1994, the Legislative Review Advisory Group recommended that the Citizenship Act be combined with the Immigration Act. The Department of Citizenship and Immigration argued that the concept of citizenship was sufficiently valuable so as to merit its own Act. The Canadian state intended to strengthen the value of Canadian citizenship by ensuring that only those who have a genuine attachment to Canada have a claim to it. Currently, all children born in Canada acquire citizenship automatically, except for the children of foreign diplomats. Children of Canadian parents who are born outside of Canada automatically acquire Canadian citizenship at birth, and do not not have to meet the residency requirement. The second generation of Canadians born outside of Canada will also automatically acquire Canadian citizenship at birth, but will need to apply to retain citizenship and to meet the residency requirement before age 28. The third generation of Canadians born outside of Canada will no longer have a

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[22] Canada, Citizenship and Immigration Canada, Citizenship of Canada Act, (Ottawa: Minister of Public Works and Government Services Canada, 1998) 1.

claim to Canadian citizenship, unless this provision were to render the individual stateless.[23]

Residing in Canada is an important condition of Canadian citizenship. It demonstrates an attachment to Canada and it provides an opportunity for the applicant to become familiar with Canada. The residency requirement allows the individual to experience Canada's values, languages, cultures and physical environment. An applicant is expected to reside at least three years in Canada. The proposed Act planned to extend the time period in which the applicant had to accumulate three years of physical presence in Canada.[24] The present Citizenship Act requires three years of physical presence out of a four year period in Canada, whereas the proposed Act would extend this to three years of physical presence out of a five year period. Bill C-63 has since been amended to allow for three years of physical presence out of a six year period.[25]

Applicants for Canadian citizenship will no longer be required to demonstrate knowledge of either one of the

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[23] Canada, Citizenship and Immigration Canada, Citizenship of Canada Act 3.

[24] Canada, Citizenship and Immigration Canada, Citizenship of Canada Act 5.

[25] "Citizenship Act proposals loosened," The National Post, 17 May 1999.

official languages of Canada. The original Citizenship Act required an adequate knowledge of either French or English, and the proposed Act required immigrants to have basic skills in either French or English.[26] However, the minister of Citizenship and Immigration Canada agreed to amend Bill C-63, so that knowledge of French or English will be no longer required.[27]

Canadian citizens celebrate the value of citizenship on Canada Day. This aspect of citizenship is symbolic and it contributes to the stability of the Canadian state. These symbols of cohesiveness mediate against those forces that would pull the state apart, such as some forms of nationalism.

The Citizenship of Canada Act proposes a new oath of citizenship:

> From this day forward, I pledge my loyalty and allegiance to Canada and Her Majesty Elizabeth the Second, Queen of Canada. I promise to respect our country's rights and freedoms, to defend our democratic values, to faithfully observe our laws and fulfil my duties and obligations as a Canadian citizen.

The proposed version differs from the old version in that the reference to the Crown's successors has been removed

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[26] Citizenship Act, 23-24-25 Elizabeth II, Chapter 108, s. 5(1)(c).

[27] "Citizenship Act proposals loosened," The National Post, 17 May 1999.

and the references to Canada's rights and freedoms, and democratic values has been added.

The present Citizenship Act, the Charter of Rights and Freedoms, and the proposed Citizenship of Canada Act have numerous references to the rights of citizens. The formal concept of citizenship has few references to duties of the citizen and states little about the content of those duties. It is only the normative discussion of citizenship that makes any attempts to outline duties of Canadian citizens and their content.

III

The usual understanding in Canada of citizenship as a concept is liberal and individualistic. This understanding can be observed explicitly in the Statement of the Government of Canada on Indian Policy, 1969, more commonly known as the 1969 White Paper. The White Paper argued that the difficulties of status Indians were due to their special status. The White Paper recommended the repeal of the Indian Act, the dismantling of Indian and Northern Affairs Canada, and the transfer of responsibility of status Indians to the provinces. In terms of citizenship, status Indians would be assigned equal status with other Canadian citizens. The idea was that all citizens of

Canada ought to belong to Canada in the same way. The White Paper was consistent with Trudeau's understanding of the proper relationship between Canada and Quebec.

The notion of equality which underwrote this understanding of citizenship was derived from the idea of "colour-blind laws" that radiated out of the United States after the Brown v. Board of Education decision of the United States Supreme Court.[28] In Brown v. Board of Education, the Supreme Court struck down the system of segregated schools for black and white children in the southern United States. This decision has had a profound influence on how North America has understood racial equality. Justice was understood to be "colour-blind laws," opposed to "separate but equal treatment."

This understanding of justice and equality was endorsed in John Rawls's A Theory of Justice. The individualism that is embedded within Rawls's theory can be viewed in his first principle of justice: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar liberty

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[28] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, (Oxford: Clarendon Press, 1995) 58-59.

for all."[29] This quotation reveals that each individual, for Rawls, is fundamentally similar to the next individual. This could be taken as being counter-intuitive in that, arguably, what is most interesting about citizens are their differences, not what makes them similar. Indeed, most individuals are physiologically quite similar, but individuals are also sociologically different. Furthermore, individuals do not get the opportunity to choose these contingencies of life. A status Indian is born into a gender, a nation, a tribe, and a legal status. Individuals may attempt to transcend these differences, but some degree of their prior attachment will remain with them.

The 1969 White Paper uses just such a conception of justice and equality. The Trudeau government believed that this "colour-blind" conception of justice would lead to the full participation of status Indians in Canadian society. The White Paper stated that this would require a "break from the past."[30] Rawls's theory took a non-historical approach and so does the 1969 White Paper. Unfortunately, for better or worse, the Canadian government is constrained

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[29] John Rawls, A Theory of Justice, (Cambridge: The Belknap Press of Harvard University Press, 1971) 302-03.

[30] Canada, Statement of the Government of Canada on Indian Policy 5.

by treaties and legal decisions that are very much a part of Canada's history. The idea of treaty-making and the common law rely heavily upon history, yet the Trudeau government believed that we, as in Canada, could "abstract" ourselves out of history.

The White Paper stated that, in 1969, it was "the right time to change long-standing policies."[31] However, the history of status Indian-Canadian state relations is paradoxical in nature. The Canadian state's explicit intent was to assimilate status Indians, but the Canadian state created legal distinctions between status Indians and other Canadian citizens and this has fostered status Indian identity. The White Paper stated:

> The Government could press on with the policy of fostering further education; could go ahead with physical improvement programs now operating in reserve communities; could press forward in the directions of recent years, and eventually many of the problems would be solved. But progress would be too slow. The change in Canadian society in recent years has been too great and continues too rapidly for this to be the answer. Something more is needed. We can no longer perpetuate the separation of Canadians. Now is the time for change.[32]

The influence of these ideas that were fostered by Brown v. Board of Education can be seen in the statement: "We can no

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[31] Canada, Statement of the Government of Canada on Indian Policy 6.

[32] Canada, Statement of the Government of Canada on Indian Policy 6.

longer perpetuate the separation of Canadians." Furthermore, how would it be possible to rectify the immense inequalities between status Indians and the majority of Canadians quickly? The 1969 White Paper was offering formal equality, not substantive equality. If the White Paper had been transformed into policy, it is doubtful that it could have delivered on its promises. For instance, non-status Indians, who possess the same rights as other Canadian citizens, have not obtained equal economic or social status with other Canadian citizens.

It is of interest that Harold Cardinal and the Alberta chiefs responded in terms of citizenship. Indeed, status Indians desired equality, but status Indians wanted to retain their treatment as a group. Status Indians understood their belonging to Canada as being mediated through their group. In recent times, status Indians have phrased their dissent through the concept of nation, but this was not the case in the early 1970s. It was very much a debate using the concept of citizenship. The White Paper advocated that citizens ought to belong to the Canadian state in the same way, while "citizens plus" recommended a differentiated citizenship. It was Harry Hawthorn's concept of "citizens plus" that helped undermine the 1969 White Paper.

IV

In 1950, T.H. Marshall's Citizenship and Social Class was published. The political context of Marshall's work was the post-World War II era when the British Labour Party and its social democratic program of a welfare state and universal provision of welfare services predominated. Marshall believed that the "common culture" was being denied to the working classes and that they ought to have access to a "common civilization" which should be understood as "a common possession and heritage."[33] Indeed, liberalism's assumptions about the relationship between citizenship and integration have largely been shaped by the experience of the working class, particularly in the British context.

Marshall studied the progressive inclusion of the citizen in Great Britain.[34] Marshall claimed that the early civil, political, and social dimensions of citizenship, which "were wound into a single thread," separated with the evolution of distinctive institutions.[35] Marshall separates citizenship rights into three categories and applies these

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[33] T.H. Marshall, "Citizenship and Social Class." Citizenship and Social Class and Other Essays, (Cambridge: Cambridge University Press, 1950) 101-02.

[34] Marshall 101-02.

[35] Marshall 11-12.

categories to the historical development of rights and duties in Great Britain since the eighteenth century. The 1700s brought civil citizenship.[36] The civil element includes the rights necessary for individual freedom: equality before the law, liberty of the person, freedom of speech, thought, and faith, the right to own property, and conclude contracts. The 1800s witnessed the development of political citizenship.[37] These political rights include the right to take part in elections, the right to serve in bodies invested with political authority, whether legislatures or cabinets. Marshall states that, "no sane and law-abiding citizen was debarred by personal status from acquiring and recording a vote.[38] The franchise was established by the exercise of civil rights to property ownership and freedom of association.

Marshall also claimed that most adult males were deprived of political and civil rights, since they lacked the economic means by which they could exercise these rights. Marshall's solution was that the state should add social citizenship rights: "the whole range from the right to share to the full in the social heritage and to live the

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[36] Marshall 10-11.

[37] Marshall 11.

[38] Marshall 20.

life of a civilized being according to the standards prevailing in society."[39] Social citizenship would undergird formal legal rights with entitlements to social and economic security so that citizenship could become a real as opposed to a purely formal experience. Given the tendency of market pressures to generate unequal outcomes, the state is called upon by its own citizens to expand entitlements to keep the gulf between real inequality and formal equality from growing too large.

Each time citizenship is expanded, it becomes stronger and richer. For Marshall, if the promise of universal political and civil freedom were to be fulfilled, then social rights were essential. The three categories of rights would enable the citizen to protect him or herself from the force and violence of other citizens, the state, and an economic elite that was empowered by an inequitable market system. In the transition from subject to citizen, the individual acquires the capabilities to prevent his or her powerlessness at the hands of other citizens. These three categories of rights correspond with four sets of institutions. The three categories of rights are distinct, since they have different organizational bases. The legal system is the main institutional focus of the

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[39] Marshall 11.

administration of civil rights. Parliament and local government are the focus of political citizenship. The primary institution for the delivery of social citizenship rights has been social services and schools.

The political system benefits from social citizenship in four ways.[40] First, social citizenship creates the economic conditions necessary for citizens to pursue their life choices and thereby become autonomous. Second, society becomes more egalitarian, which helps lessen class tensions. Third, this lessening of class tensions consequently leads to increased political stability. Last, social citizenship ensures the perpetuity of a community in which all citizens can become full members. These benefits of social citizenship further reinforce the transformation from subject to citizen.

Citizenship rights have decreased the inequalities of the class system by providing socioeconomic benefits to the disadvantaged. Michael Ignatieff states: "Given the inertial tendency of markets to generate inequality, the state is called upon, by its own citizens, to redress the balance with entitlements designed to keep the contradiction between real inequality and formal equality

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[40] Eric Gorham, "Social Citizenship and Its Fetters," Polity 28 (Fall 1995) 26.

from becoming intolerable."[41] Social rights provide entitlements that raise the standards of living for the lowest classes. This, in turn, mitigates class distinctions exacerbated by the market.

Social citizenship rights are intended to accord common status to all individuals, signifying that they are "equal with respect to rights and duties with which status is endowed."[42] This status is required for a society, understood as a contract, which is characterized by inequalities of property, family and class, in order to equalize individuals within a population "which is now treated for that purpose as though it were one class."[43]

One purpose of social citizenship is to create social stability.[44] Market inequality causes groups of citizens to compete for the existing distribution of property.[45] Social citizenship rights are intended to lessen the inequalities that lead to political instability. Desmond S. King and

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[41] Michael Ignatieff, "Citizenship and Moral Narcissism," The Political Quarterly 60 (January 1989) 65.

[42] Marshall 28-29.

[43] Marshall 34, 56.

[44] Gorham 36.

[45] Desmond S. King and Jeremy Waldron, "Citizenship, Social Citizenship and the Defence of Welfare Provision," British Journal of Political Science 18 (October 1988) 426-27.

Jeremy Waldron state:

> A more sensible and liberal solution is to say that the removal of need from society is one of the great and urgent issues of civic life, for as long as it remains, whether the poor are admitted to citizenship or not, there is always the danger that - directly or relayed through compassion - the clamour for bread now will subvert the processes of political debate.[46]

Stability is also required for the mobilization of consent to social and political arrangements. Citizenship defines political and social membership and this stabilizes the relationship between citizens within a complex of institutions. This membership provides protection and security for property from violence both outside and inside the state. Social citizenship guarantees all citizens those entitlements that are required for the exercise of their liberty.[47] Marshall believes that social citizenship rights and duties allow modern civilizations to flourish:

> The claim of all to enjoy the conditions of citizenship is a claim to be admitted to a share in the social heritage, which in turn means a claim to be accepted as full members of society, that is, as citizens...The duty to improve and civilize oneself is therefore a social duty, and not merely a personal one, because the social health of a society depends upon the civilization of its members. And a community that enforces this duty has begun to realize that its culture is an organic unity and its civilization a national heritage.[48]

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[46] King and Waldron 429.

[47] "Citizenship and Moral Narcissism" 72.

[48] Marshall 8, 26.

The practice of citizenship reflects and strengthens understandings of community, belonging, and membership.

The logic of social citizenship is inclusive, although Marshall does recognize the existence of socioeconomic groups. Social welfare policy ought to be used to break down barriers, to bring more people into the community, to give more people a share in the social heritage. Social citizenship policies turn legal members of a state into effective citizens.

The strength of Marshall's approach is that it goes beyond the conventional idea that membership in a state is predominantly a legal, political, or formal matter. Marshall's approach is legal, political, and socioeconomic. It is also historical and this introduces into the study of citizenship the element of social change that was lacking from the more legal approaches to citizenship. The expansion of the rights of citizens results in the incorporation of new groups into the state. The new rights make the possession and wielding of previous rights more effective. These rights remove barriers that separate groups from the citizens of the state. These barriers have been legal and customary.

T.H. Marshall's notion of social citizenship is a precursor to group-differentiated rights. However,

Marshall's primary intent was to enhance the citizenship status of the working class in Great Britain. It may be said that Marshall's analysis fails to recognize the effects of social movements on the extension of rights. Factors such as social movements and immigration have extended citizenship in various dimensions. Jurgen Habermas states that "the classification of rights has come to include not only cultural rights but also new kinds of civil rights for which feminist and ecological movements today struggle in particular."[49]

V

In the multicultural West, we live in societies in which certain individuals have not been treated with equal dignity because they were, for example, women, homosexuals, blacks, Catholics, or Aboriginal. There is widespread agreement that the insults to their dignity and the limitations of their autonomy imposed in the name of these collective identities are seriously wrong. One form of healing the self is to recognize citizens as who and what they are and that their identity is valuable for them and the polity to which they belong. If one must be an

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[49] Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, William Rehg, trans. (Cambridge: The MIT Press, 1998) 77.

Aboriginal person in a society that is not decent, then one has to deal constantly with assaults on their dignity. Thus, Aboriginal people ask to be respected as Aboriginal persons.

Will Kymlicka's work on minority rights promises to provide a foundation for group rights within liberalism. For Kymlicka, group-differentiated rights are only acceptable if they can be reconciled with respect for the autonomy of individuals. In Multicultural Citizenship, he develops and refines some of the arguments originally presented in Liberalism, Community, and Culture in the light of criticisms Kymlicka's arguments have encountered, and supplements these arguments with some new ones, focusing more broadly on the resources within liberalism to justify a range of group-differentiated rights for minorities. Kymlicka's theory focuses upon the relationship between individual liberty and "societal cultures." "Societal cultures" are composed of "practices and institutions" that are territorially and linguistically concentrated and that provide individuals 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."[50] Kymlicka's "societal cultures" are basically commensurate with the concept of "nation" and they provide a cultural backdrop for individual choices. It is assumed that individuals are capable of stepping back and "assess[ing] moral values and traditional ways of life."[51]

Group-differentiated rights are intended to protect cultures, but individuals maintain the ability to opt out of cultural communities. In liberal democracies, the dominant culture is capable of defending its interests and values, but minority cultures are often unable to do likewise, and therefore face morally arbitrary inequalities.[52] This situation can be rectified through differentiated citizenship. This includes territorial autonomy, language rights, special veto powers, and guaranteed representation.

Liberal political theory accepts the idea of restricting citizenship to persons who meet certain qualifications within the nation-state. The most plausible reason for this is also a reason for allowing group-differentiated citizenship within the nation-state, that is, to recognize and protect membership in distinct

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[50] Kymlicka, Multicultural Citizenship 76.

[51] Kymlicka, Multicultural Citizenship 92.

[52] Kymlicka, Multicultural Citizenship 126.

cultures.[53] In the international context, Canada attempts to maintain its distinctness through institutions, such as the Canadian Radio and Television Commission. Kymlicka begins by suggesting that many discussions of multiculturalism are flawed because they have failed to distinguish between a nation and an ethnic group. He defines a nation as "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture."[54] Ethnic groups, in contrast, are formed by immigrants who, although they may share a distinct language and culture, do not constitute a historical community. A state may be culturally diverse, either because it contains a number of different nations, or because it contains a number of ethnic groups.

In Kymlicka's view, the distinction between national minorities and ethnic groups is of crucial moral and political importance because in general ethnic groups left their homeland freely to seek a new life abroad, whereas national minorities did not. For that reason, many of the disadvantages suffered by members of ethnic groups as a result of living in a state where they do not constitute a

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[53] Kymlicka, Multicultural Citizenship 125.

[54] Kymlicka, Multicultural Citizenship 11.

majority are not unfair, since they result from their voluntary choices, in contrast to the same sort of disadvantages when experienced by members of national minorities. Since the disadvantages suffered by national minorities are not a result of their own free choice, group-differentiated rights can be legitimate and sometimes morally required means of redressing them. Kymlicka does, however, endorse some rights for ethnic groups on the grounds of equality. Kymlicka calls these "polyethnic rights." An example is given, in that Sikhs have been ascribed the right to wear a turban in the military and in the police.[55] Kymlicka also recognizes that there are exceptions to his rough generalizations about nations and ethnic groups. For example, some immigrant groups, such as black citizens in the United States were forced to leave their homelands.

Kymlicka distinguishes between internal restrictions and external protections. An example of an internal restriction could be the use of the blood quantum membership rules that have been adopted by some First Nations. Kymlicka does note that many status Indians understand the blood quantum as a violation of their own

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[55] Kymlicka, Multicultural Citizenship 114-15.

traditional practices.[56] The Royal Commission on Aboriginal Peoples argues that the blood quantum diminishes the chances of cultural survival.[57]

Kymlicka argues that the reason why many liberals have been hostile to group rights is that they understand them as asserting the moral primacy of the group against the individual, and as tools to restrict the freedom of individual members. To value autonomy is to respect the conceptions of others, to weigh their plans for themselves very heavily in deciding what is good for them. But Kymlicka argues that group-differentiated rights can in various ways provide members of a group with a means of protection against threats posed by the economic and political power of the wider society. Land rights, language rights, and representation rights, for example, can all serve as external protections in particular circumstances. When they play this role, they are commensurable with respect for individual rights.

In the two central chapters of the book, Kymlicka

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[56] Will Kymlicka, Finding Our Way: Rethinking Ethnocultural Relations in Canada, (Toronto: Oxford University Press, 1998). 131.

[57] Canada, Report of the Royal Commission on Aboriginal Peoples, vol. 2, Restructuring the Relationship, (Ottawa: Canada Communication Group Publishing, 1996) 239.

argues that some group-differentiated rights are not merely compatible with individual rights, but are required by the very same principles of freedom and equality as justify the latter. He restates, and defends against criticism, the argument originally developed in Liberalism, Community, and Culture, which maintains that the fundamental interest individuals have in leading a good life requires the freedom to live in accordance with their own beliefs about what gives value to life, and to be able to question and revise those beliefs. This is tied to the idea that people ought to be acknowledged publicly as what they really are. Freedom of this sort "involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us."[58] When individuals are deprived of their cultures, constituted by shared language, values, institutions and practices, not only does their autonomy suffer, but they are also subject to a morally arbitrary disadvantage compared to those who can live and work in their own language and culture.[59] Thus, liberal principles of freedom and equality require, in some circumstances, group-differentiated rights to protect individuals against the

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[58] Kymlicka, Multicultural Citizenship 83.

[59] Kymlicka, Multicultural Citizenship 126.

potential loss of their cultures.

Kymlicka states "that people vote as members of communities of interest, and wish to be represented on this basis."[60] Here Kymlicka is asserting an empirical proposition. He is saying that citizens do in fact vote in this manner. Kymlicka understates the complexity of citizens' commitments or allegiances. The reasons why a particular citizen votes in a certain way are myriad. There is little doubt that communities of interest are important to the experience of the citizen, but that citizen may possess commitments to more than one community of interest, and they may possess commitments that are individual in spirit.

Since Kymlicka's argument is founded upon the importance of personal autonomy it has attracted the criticism that it provides protection for liberal communities, communities founded upon respect for personal autonomy and individual rights, but not for illiberal communities. Kymlicka partly accepts this point - liberal theory cannot justify protecting communities that violate the rights of their members - but argues that liberals are not committed to imposing liberal principles on non-liberal communities. Indeed, he maintains that in many cases much

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[60] Kymlicka, Multicultural Citizenship 136.

of the same reasons which justify one state not imposing liberal principles on another also justify a state not imposing those principles on national minorities within it.

Kymlicka responds to the charge that group-differentiated rights undermine social unity. He points out, however, that denying self-government rights is in many cases likely to be just as destabilizing as granting them would be, given the resentment it may well create. Shared values are not sufficient for social unity. A shared identity is also required and there may be simply no way in practice of fostering it.

Kymlicka extends his general theory to the Canadian state in a recent volume.[61] Kymlicka argues that self-government rights would extend to status Indians, since they comprise distinct "nations" or "peoples," and they occupied North America prior to the creation of the Canadian state.[62] Self-government would constrain the authority of the federal government over First Nations. Status Indians are asking for more than a devolution of authority; they are asking for recognition as a distinct people and as a founding partner of the Canadian state who possess a right to self-government. It should be noted

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[61] Kymlicka, Finding Our Way.

[62] Kymlicka, Finding Our Way 6.

that Kymlicka states that self-government would require reduced influence, at least in some instances, at the federal level for the self-governing First Nation.

Kymlicka's theory of minority rights goes some way in extending Marshall's theory and it offers a definition of nation and it is this definition of nation that distinguishes between nation, polyethnic groups, and those groups who qualify for special representation rights. He makes use of the concept of choice to make this distinction. Nations are accorded self-government rights, since they did not choose their situation. Polyethnic groups are ascribed different rights on the grounds that they chose to emigrate at some point in time. However, it is only those immigrants who actually emigrated that chose Canada, or some such liberal democracy. The second generation of immigrants did not choose any more than the Aboriginal peoples, who are ascribed different rights. It seems as if Kymlicka's distinction between these two categories is more obscure than at first glance. If choice is the critical determinant, it is unclear why groups that chose to emigrate should be accorded special rights on that basis, since they chose to disadvantage themselves. This is distinct from according special rights on the basis that they will foster political community or to preserve

cultural diversity. This is not to say that special rights should not be ascribed to polyethnic groups, but that the concept of choice must be manipulated in special ways in order to justify special rights. Kymlicka is correct in that there is a moral distinction between nations and ethnic groups.[63] Some kinds of group-differentiated rights such as self-government rights may be meaningful and appropriately ascribed to nations, whose members are geographically concentrated, which could not be meaningful or appropriately granted to ethnic groups, whose members are, in general, geographically dispersed - but this has nothing to do with the non-voluntariness or otherwise of the disadvantages they face.

VI

The problem of identity is raised whenever an individual, or group, compares itself with others. Charles Taylor argues that the concept of citizenship ought to be sufficiently flexible so as to allow particular groups to belong to Canada in different ways. Taylor's argument is a response to Rawls's A Theory of Justice. John Rawls has argued that equal recognition is about the equal dignity of all citizens. Here, equal recognition means the

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[63] Kymlicka, Finding Our Way 97.

equalization of rights and entitlements. The idea of equal citizenship has come to be accepted by many citizens and by the strain of liberal thought which champions universal rights.

The politics of difference offers a second understanding of equal recognition that has resulted in the politics of difference.[64] Here, it is thought that all persons and the collectivities to which they belong ought to be recognized for their distinct identities. In this case, identical rights and entitlements do not foster equality. Indeed, these identical rights and entitlements may well result in the assimilation of distinct identities. It is now important to understand how persons differ from one another. Policy should be designed with these differences kept in mind. A distinct identity is one of the normative justifications for the different treatment of status Indians.

Taylor states that the conflict between these two understandings of equal recognition came into conflict with the adoption of the Charter of Rights and Freedoms in 1982.[65] Various groups, such as the Québécois and the

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[64] Taylor, Multiculturalism and the "Politics of Recognition" 38.

[65] Taylor, Multiculturalism and "The Politics of Recognition" 52.

Aboriginal peoples, lobbied to have their difference accounted for within the Charter.[66] This was important for both of these groups, since both argue for some form of self-government and certain forms of legislation that will allow for the survival of their distinct cultures.

The Assembly of First Nations did not want the Charter to apply to self-governing Aboriginal jurisdictions.[67] The Native Women's Association of Canada argued that the Charter ought to apply to Aboriginal self-government. Lawyer Theresa Nahanee argued that the collective right to self-determination is premised on the individual right to self-determination.[68]

This conflict demonstrates profound philosophical assumptions that ground each party's understanding of autonomy. The Assembly of First Nations' understanding of

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[66] It is perhaps interesting that prior to the Charlottetown Accord the Native Women's Association of Canada insisted that they ought to have a seat in the constitutional discussions, since the Assembly of First Nations did not represent their interests as Aboriginal women. Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? 2nd ed. (Toronto: University of Toronto Press, 1993) 194-95.

[67] Menno Boldt, Surviving as Indians: The Challenge of Self-Government, (Toronto: University of Toronto Press) 319.

[68] Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government." Constitutional Forum, (1993) 114.

autonomy is very much like the political thought of the Counter-Enlightenment. Freedom can only be exercised by an individual as a member of a collectivity. Dignity is derived from this sort of autonomy. The Native Women's Association of Canada's understanding of autonomy is similar to that of Immanuel Kant's. Here, dignity is not associated with any particular form of the good life. Nahanee's statement is similar to views espoused by liberals, such as Rawls and Dworkin, and some brands of feminism. The individual comes prior to the community.

Taylor notes that liberalism cannot reconcile all cultures, but that it can account for the political expression for a particular range of cultures.[69] For some, such as the Muslim people, liberalism is more of an organic outgrowth of Christianity. The idea of separating the church from the state is derived from Christian civilization. Indeed, Larry Siedentop has argued that the term, "secular", was initially a Christian concept.[70]

Taylor recognizes that a "first-level" acceptance of

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[69] Taylor, Multiculturalism and "The Politics of Difference" 62.

[70] Larry Siedentop, "Liberalism: The Christian Connection." Times Literary Supplement, (24-30 March 1989) 308.

diversity already exists within Canada.[71] Many Canadian citizens possess an allegiance to the Charter and multiculturalism. These citizens understand themselves to accept the idea of diversity and they are correct to do so. Indeed, without this level of understanding diversity, Canada's constitutional difficulties could possibly be insurmountable.

However, Taylor notes that this level of acceptance is insufficient to account for the various nations that exist within Canada.[72] First-level acceptance of diversity cannot include la nation québécois or the Aboriginal peoples. The Aboriginal peoples may be more problematic here than la nation québécois. For example, the recent signing of the Nisgaa Treaty in British Columbia can be understood as a desire to remain within the Canadian system of governance, while at the same time, the Mohawk Nation has little desire to remain within the Canadian federation.

Taylor posits a second-level or "deep" diversity as a way to include all citizens within the federation.[73] There

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[71] Charles Taylor, "Shared and Divergent Values." Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism, Guy Laforest, ed. (Montreal and Kingston: McGill-Queen's University Press, 1994) 182.

[72] Taylor, Reconciling the Solitudes 182.

[73] Taylor, Reconciling the Solitudes 183.

ought to be a plurality of ways of belonging to the Canadian state. These ways of belonging would be acknowledged and accepted by other Canadian citizens. Persons, such as Cree citizens, would belong to Canada through their nation. Conversely, the Cree citizens would acknowledge the propriety of the Canadian "mosaic."

For those who dissent from this solution, Taylor gives three reasons for approaching Canada in this way.[74] First, Taylor argues that this is the only way in which to rebuild a united Canadian federation. Second, the true nature of polities is more like Canada, not the United States. Finally, for those citizens who desire a uniform citizenship regime, this is an empirical impossibility. Even if Canada was to separate into smaller political communities, the problem of diversity would remain.

Will Kymlicka agrees with Taylor's approach to diversity.[75] However, a commitment to "deep" diversity is insufficient by itself. Indeed, a love for diversity itself will not necessarily lead to a love of a particular cultural group, such as the Cree people. Kymlicka notes that this level of allegiance is the result of mutual solidarity, not the groundwork for it.

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[74] Taylor, Reconciling the Solitudes 183-84.

[75] Kymlicka, Multicultural Citizenship 191.

In conclusion, Taylor's approach is an extension of T.H. Marshall's extension of rights and entitlements on a socio-economic basis. If we are to consider socio-economic rights, culture, and nation, we should not give priority to any one of these groups. It is important to recognize that these groups are composed of others who may also possess allegiances that equal or come prior to an allegiance to a nation or culture. Some members of the Native Women's Association of Canada possess an allegiance to their gender that may equal or surpass their allegiance to their nation.

VII

This chapter offers a framework for understanding Canada. Often, it is considered that a lack of will is the only thing that precludes the reconciliation of the various interests and groups in Canada. T.H. Marshall believed that the extension of social citizenship would be able to create a more inclusive polity. The extension of social citizenship did address the difficulty of social class, but social classes are not the only groups that exist within polities. Will Kymlicka posited the notion of socio-cultural rights. Although Kymlicka's theory is significant, it is problematic, since it grants moral primacy to one community of interest. There is little

doubt that one's nationality is an important element of life, but allegiances and commitments often extend beyond the concept of nation. Charles Taylor argues that "deep" diversity can enable a state to reconcile differences within it. Taylor's argument too is problematic, in that the state must be composed of citizens who already possess sentiments and toleration for one another in order to develop "deep" diversity.

The proper relationship between status Indians and the Canadian state is political. Status Indians are more than members of a community of interest. They often belong to many communities of interest. Status Indians may be women, handicapped, or have commitments to political parties. Likewise, Canadian citizens may have plural allegiances. Political negotiation allows for the discussion of the myriad factors that come into play in the world of experience. Treaties need to be discussed by First Nations, individual members of First Nations, federal, provincial, and municipal governments, and individual Canadian citizens. In 1763, it may have been possible for a formal Indian-Canadian state relationship, but this is no longer plausible.

The federal government, the Canadian courts, and the Royal Commission acknowledge that legal remedies are not

the only way in which to have Aboriginal and treaty rights recognized and affirmed.[76] Indeed, the Supreme Court of Canada has noted that judicial determination may not be the preferred manner of establishing Aboriginal and treaty rights.[77] Political negotiations, in good faith, ought to be the preferred method of establishing Aboriginal and treaty rights. Furthermore, rights that are established through political negotiation should be understood as such. Aboriginal and treaty rights should be understood as negotiated rights, not as abstract or absolute rights.

Political negotiation would enable parties to discuss each other's real needs as they exist within a state with finite resources. Complex and mutually agreed upon trade-offs could be made, and legal remedies could be used for positions that proved intransigent. Political negotiation would allow for participation of parties, such as farmers or municipalities, that have interests in lands that are being claimed by First Nations. This process would also reflect the nation-to-nation relationship recommended by the Royal Commission on Aboriginal People, while at the same time recognizing the complexity of political

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[76] *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1997] 3 S.C.R. 1010.

[77] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186.

negotiation. Chief Edward John stated at the Royal Commission hearings:

> It has never been the role of the Courts to define the detailed terms of the accommodation between the Crown and the First Nations. We have gone to the Courts in our own defence. We view them as a source of guidance for government, as to the rights of Aboriginal peoples and the resulting duties of government.[78]

In conclusion, status Indian citizenship in Canada is best approached in piece-meal fashion. This is consistent with how liberal democracies have generally approached politics. There are no grand theories to guide the way. Indeed there may be no one solution. There may be argumentation and minor conflict. The goal should be to reach agreements that may have to be renegotiated over time, but that allows status Indian and Canadian citizens to live together in a somewhat peaceful manner.

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[78] Canada, Royal Commission on Aboriginal Peoples, Restructuring the Relationship, vol. 2, (Ottawa: Minister of Supply and Services Canada, 1996) 566.

CHAPTER THREE

THE EXISTING SPECIAL STATUS OF REGISTERED INDIANS

I

Chapter two considered the proposition that status Indians ought to be ascribed different rights and obligations than other Canadian citizens. Some liberal theorists, such as Will Kymlicka and Charles Taylor, have supported this proposition. For instance, Kymlicka, as we have seen, proposes that status Indians be granted self-government rights. Kymlicka's general position is thoroughly consistent with Harry Hawthorn's concept of "citizens plus." This concept would allow for civic allegiance to the Canadian state and a national allegiance to the status Indian's nation.

It will be argued in this chapter that status Indians already possess different rights and duties than other Canadian citizens, and that "citizens plus" is a concept

which finds support in Canadian law and experience.[79] The chapter documents how status Indians are ascribed different rights and duties in Canadian law through the Canadian Constitution, Aboriginal rights, treaty rights, the Indian Act, taxation, criminal law, and Aboriginal justice.

II

The Canadian Constitution ascribes distinct rights and duties to status Indians. This section discusses the Royal Proclamation of 1763, the Constitution Act, 1867, the Constitution Act, 1982 (including the Charter of Rights and Freedoms), Aboriginal self-government, and the Crown fiduciary responsibility. One section of the Royal Proclamation of 1763 concerns Indians and provides a basis for the distinct rights and duties possessed by status Indians.

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[79] I confine attention in this thesis to differential treatment of status Indians which could be construed as being to their advantage. Differential treatment to the disadvantage of status Indians has been important historically; the denial of the rights to vote until 1960 is an example. Richard Bartlett has stated that status Indians had been "legislated into a state of tutelage and dependence in which the Federal government abandoned them." Bartlett describes status Indians in this condition as "citizens minus." See Richard H. Bartlett, "Citizens Minus: Indians and the Right to Vote." 44 Saskatchewan Law Review (1979/80) 163.

The Royal Proclamation of 1763[80] was the result of the British conquest of New France and served to consolidate Great Britain's dominion over North America. The structure of the Royal Proclamation itself reflects how the relationship between the Crown and First Nations differs from the relationship between the Crown and its settler colonies: one section of the Royal Proclamation deals with the constitutional arrangements in Quebec and three other new colonies; another concerns status Indians and provides a basis for the distinct rights and duties possessed by status Indians.

The Royal Proclamation of 1763 protects First Nations' interests against incursions by settlers and governments. The Royal Proclamation states that "great Frauds and Abuses have been committed in purchasing Land of the Indians."[81] The Crown possesses the exclusive right to acquire lands from First Nations. The Royal Proclamation lays down the procedure governing the voluntary cession of First Nations' lands to the Crown:

> if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for

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[80] *Royal Proclamation of 1763*, R.S.C. 1985, Appendix II, Number 1.

[81] *Royal Proclamation of 1763*.

> that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie...[82]

The Royal Proclamation reserved lands for First Nations "as their hunting grounds."[83] The cession provision provides for the basis of treaty-making between the Crown and First Nations. This provision recognizes First Nations' right to unceded lands and forms the basis for Aboriginal and treaty rights acknowledged in section 35 of the Constitution Act, 1982. The Royal Proclamation has the force of law and is cited in section 25 of the Canadian Charter of Rights and Freedoms. In Calder v. Attorney-General of British Columbia, the Supreme Court of Canada ruled that the Royal Proclamation of 1763 is "an Executive Order having the force and effect of an Act of Parliament."[84] Section 25 of the Charter states that,

> The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from an aboriginal, treaty or other rights or freedoms...including...any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.[85]

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[82] *Royal Proclamation of 1763.*

[83] *Royal Proclamation of 1763.*

[84] *Calder v. Attorney-General of British Columbia,* [1973] 7 C.N.L.C. 91 at 150.

[85] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* [enacted by the *Canada Act 1982* (U.K.), 1982, c.11, s. 25, Schedule B].

Section 91(24) of the Constitution Act, 1867 gives the federal government exclusive authority to legislate for "Indians, and Lands reserved for the Indians."[86] It was by the authority conferred by this section of the Constitution Act, 1867 that the federal government enacted the Indian Act[87] which applies primarily to status Indians who live on reserves. Furthermore, this section is the source of the exclusive right of the federal government to extinguish Aboriginal rights and title.

Nevertheless, the Constitution Act, 1867 did not end First Nations' political systems. The first Dominion statute enacted after Confederation was the Indian Lands Act of 1868. Section 8 of this statute states that no surrender of lands reserved for the use of any tribe, band or body of Indians is valid unless assented to by the Chief or Chiefs of the group assembled "at a meeting or council of the tribe, band or body summoned for that purpose according to their rules..."[88] Similar wording has been

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[86] *Constitution Act, 1867*, 30 and 31 Vict. c.3, (U.K.) R.S.C. 1985, Appendix II, No. 5.

[87] *Indian Act*, R.S.C. 1985, c. I-5.

[88] *An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*, Statutes of Canada 1868, 31 Victoria, chap. 42. Emphasis added.

retained in legislation concerning status Indians until the present time. The Indian Act of 1951 allows for bands with councils chosen "according to the custom of the band."[89] A similar provision appears in the current Indian Act.[90] Provisions such as these indicate that the internal constitutions of First Nations remained after the passage of the Constitution Act, 1867.

The Constitution Act, 1982 entrenched a range of distinct rights for status Indians. These distinct rights were the result of political pressure by Aboriginal peoples and the Canadian public. Section 35(1) of the Constitution Act, 1982 states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[91]

In section 35(2), the Constitution Act, 1982 describes Aboriginal peoples as "Indians, Inuit and Metis." Section 35(3) states that modern-day land claims agreements are covered by the term "treaty rights." The Supreme Court of Canada has ruled that "existing" Aboriginal rights are those rights that existed on April 17, 1982 when the

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[89] *Indian Act*, R.S.C. 1952, chapter 149, section 2(1)(a)(ii).

[90] *Indian Act*, R.S.C. 1985, chapter I-5.

[91] Section 35 of the *Constitution Act, 1982* [enacted by the *Canada Act 1982* (U.K.), chapter 11, section 1].

Constitution Act, 1982 was proclaimed into force. Aboriginal rights that had been extinguished prior to 1982 are not recognized.[92] For the most part, the rights that are contained in section 35 are collective rights. Section 35 serves to protect the distinct rights of status Indians and to guarantee their distinct status as constitutional entities.

The Constitution Act, 1982 includes a Canadian Charter of Rights and Freedoms. Section 25 of the Constitution Act, 1982 is designed to balance the collective rights of status Indians with the individual rights of the Charter. Section 25 states that:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[93]

Bruce Wildsmith states that the purpose and effect of section 25 is to maintain the distinct status of Indians.[94]

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[92] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[93] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [enacted by the *Canada Act 1982* (U.K.), 1982, c.11, Schedule B].

[94] Bruce Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms, (Saskatoon: University of Saskatchewan Native Law Centre, 1988) 2.

Peter Hogg describes section 25 as a "saving provision."[95] Section 25 is to provide exemptions, such as hunting rights, to status Indians from Charter rights, such as equality rights.

Status Indians have a fiduciary relationship with the federal government that is different from the relationships between the federal government and other Canadian citizens, and is similar to a trust relationship. No legal category existed that described the relationship between status Indians and the Crown. The Supreme Court of Canada has described this unique relationship in two significant cases. In Guerin v. R., the Supreme Court found that the historical occupation of the land by status Indians and the fact that the Crown has assumed that the land is only alienable to the Crown created a fiduciary relationship between the Crown and status Indians.[96] In R. v. Sparrow, the Supreme Court examined whether Parliament possessed the ability to regulate fishing that is now limited by section 35(1) of the Constitution Act, 1982. The Supreme Court ruled that the Crown had a duty to legislate in a manner so as to avoid infringing on Aboriginal and treaty rights

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[95] Peter Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992) 694.

[96] *Guerin v. R.*,[1984] 2 S.C.R. 335.

unless there were "compelling and substantial" reasons to do so.[97] The fiduciary responsibility of the federal government towards status Indians concerns fair negotiation with status Indians who possess distinct rights. Alan Pratt states that fiduciary law is the method in which the legal aspects of the unique relationship between the Crown and status Indians has been given expression and self-government is the political aspect of this relationship.[98]

The concept of Aboriginal self-government expresses the desire of status Indians, understood as a group, to govern themselves and to be accountable to their own people. The Supreme Court has endorsed the idea that Indians were self-governing groups. In R. v. Sioui, Justice Lamer cited the following passage with approval:

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged. [Emphasis added by Justice Lamer][99]

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[97] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[98] Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle," 2 National Journal of Constitutional Law (1992) 166.

[99] Cited in *R.v. Sioui*,[1990] 1 S.C.R. 1025.

However, in Mitchell v. Peguis Indian Band, Justice La Forest of the Supreme Court of Canada stated that status Indians have acknowledged the ultimate sovereignty of the Crown. They have ceded their lands for the protection of the Crown in the possession and use of reserved lands.[100] Aboriginal self-government within the Canadian Constitution means something other than the sovereignty exercised by the federal and provincial governments. This is not to say that Aboriginal self-government does not exist or that Aboriginal self-government is not being aspired to.

In 1997, the Minister of Indian Affairs and Northern Development introduced Gathering Strength: Canada's Aboriginal Action Plan. This publication was the result of the report of the Royal Commission on Aboriginal Peoples. One of the objectives of the plan is to strengthen Aboriginal governance. The Plan states that "a vision of the future should build on recognition of the rights of Aboriginal People and on the treaty relationship."[101] The Plan notes how the treaty relationship imposes duties upon both status Indians and the federal government. The Plan states that the federal government has recognized the

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[100] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

[101] Canada, Department of Indian Affairs and Northern Development, Gathering Strength: Canada's Aboriginal Action Plan, (Ottawa: Minister of Supply and Services, 1997) 10.

inherent right of self-government for Aboriginal people as an existing Aboriginal right within section 35 of the Constitution Act, 1982.

Canada's Constitution, common-law record, and status Indians provide support for Aboriginal powers of self-government. The recent debate over the accountability of First Nations' governments implies that First Nations possess a fair degree of self-governance. The mere existence of an organization such as the First Nation Accountability Coalition of Manitoba implies that First Nations possess a degree of freedom that allows for mismanagement of funds.

III

Though the rights to which the concept refers are ancient the concept of Aboriginal rights has developed in contemporary times. The 1969 White Paper is evidence that the Trudeau government ascribed negligible consequence to the concept of Aboriginal rights. In 1972, the federal Progressive Conservative party endorsed the concept of Aboriginal title, but Trudeau doubted the validity of the concept.[102] Thomas Flanagan argues that the publication of Native Rights in Canada in 1972 represents the collective

[102] Cairns, Citizens Plus 169.

adoption by the legal profession of the concept of Aboriginal rights. Flanagan described this volume as the "indispensable textbook of native law."[103]

In 1982, the concept of Aboriginal rights was constitutionalized and protected. Aboriginal rights are the rights of status Indians, as collectivities, to engage in specific traditional practices in specific territories. The Constitution Act, 1982 recognized and affirmed existing Aboriginal and treaty rights.[104] One significant purpose of section 35 of the Constitution Act, 1982 is to reconcile Aboriginal rights with Crown sovereignty. Aboriginal rights are possessed in virtue of the prior autonomy possessed by status Indians who possessed most of the lands that are now Canada.

A member of the Musqueam First Nation, Ronald Sparrow, had been fishing in waters that had been traditionally used by his First Nation. Sparrow was charged with using a drift net that violated section 61(1)of the federal Fisheries Act.[105] The Crown argued that the Musqueam First Nation's right to fish had been

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[103] Cited in Cairns, Citizens Plus 169.

[104] Section 35(1) of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

[105] *Fisheries Act*, R.S.C. 1970, c. F-14.

extinguished by the Fisheries Act. Sparrow argued that he possessed an existing Aboriginal right to fish and that the provision concerning the length of the net infringed this existing Aboriginal right. In R. v. Sparrow, the Supreme Court of Canada ruled that section 35 of the Constitution Act, 1982 brought Aboriginal rights into the Canadian Constitution and that "existing Aboriginal rights" are those rights that existed when the Constitution Act, 1982 came into effect.[106] The Court held that the concept of "existing Aboriginal rights" is to be interpreted in such as way as to allow for the evolution of Aboriginal rights over time.[107]

In R. v. Van der Peet, Chief Justice Lamer noted that Aboriginal rights are just as important as the other rights that are in the Canadian Charter of Rights and Freedoms. They should be understood differently than these other rights, since they are held by the Aboriginal peoples, who are also members of Canadian society. Furthermore, Aboriginal rights are sui generis in nature. They are possessed by particular First Nations, thus, they may differ from First Nation to First Nation. The prior occupation of North America is the crucial distinction

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[106] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[107] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

between First Nations and other minority groups, according to Chief Justice Lamer. It is this basis that gives status Indians their special legal and constitutional status.

In R. v. Van der Peet, the Supreme Court of Canada ruled that Aboriginal title is a sub-category of the broader category of Aboriginal rights.[108] Furthermore, the Court held that Aboriginal rights exist due to the fact that status Indians existed in Canada prior to the arrival of the European peoples. The Court also found that an Aboriginal right may exist independent of a particular piece of territory. The focus of Aboriginal rights is on what status Indians have done in the past, not whether or not the Aboriginal right is tied to a particular piece of territory. Aboriginal rights are derived from the practices, customs, and traditions that are integral to the distinctive cultures of Aboriginal peoples.

There is often disagreement over the precise nature of an Aboriginal right. This is due to conflict between the written text of treaties and the oral traditions of First Nations. Canadian courts have stated that the onus lies with First Nations to demonstrate they possessed an Aboriginal right. For example, Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern

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[108] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

Development), posited a four point test.[109] First, the First Nation must demonstrate that it existed as an organized society. Second, the First Nation occupied a specific territory over which the First Nation asserted title. Third, the First Nation's occupation excluded other organized societies. Fourth, the First Nation's occupation was an established fact at the time sovereignty over the land was asserted by England. However, the Supreme Court, in Delgamuukw v. British Columbia, has made the demonstration of an Aboriginal right easier for First Nations. The Chief Justice stated:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[110]

There are three ways in which Aboriginal rights may have been extinguished prior to 1982. First, Aboriginal rights may be extinguished through the act of treaty-making. In Ontario (Attorney General) v. Bear Island Foundation, the court ruled treaties could extinguish

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[109] *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development*, [1979] 3 C.N.L.R. 17 (Fed. T.D.).

[110] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 87.

Aboriginal title to land.[111] In R. v. Howard, the court found that treaties could extinguish an Aboriginal right to hunt and fish.[112] Second, an Aboriginal right may be extinguished through Crown activity which is inconsistent with the exercise of the Aboriginal right in question. For example, if the Crown passed a statute concerning land use over territory which was the traditional hunting grounds of a First Nation, the Aboriginal right to hunt could be extinguished. Third, the Crown may extinguish an Aboriginal right by some action which demonstrates a "clear intention" to extinguish specific Aboriginal rights.[113] It appears that this method of extinguishing Aboriginal rights has the strongest support in law. However, it is unclear what constitutes a "clear intention."

Since 1982, it is now impossible to extinguish an existing Aboriginal right without the consent of the First Nation. However, in certain circumstances, the Crown may regulate an Aboriginal right without the First Nation's consent. In R. v. Sparrow, the Supreme Court considered

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[111] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

[112] *R. v. Howard*, [1994] 2 S.C.R. 299.

[113] John J. Borrows and Leonard I. Rotman, Aboriginal Legal Issues: Cases, Materials and Commentary, (Toronto and Vancouver: Butterworths Canada Ltd., 1998) 339.

the circumstances in which a federal law could limit the right to fish. A federal law would need a very good reason to interfere with an Aboriginal right and the law could only interfere in the least intrusive way possible. If these conditions were not met, the law would violate section 35 of the Constitution Act, 1982, and would be declared unconstitutional.[114]

IV

The treaties that have been signed between the Crown and First Nations are a good example of how status Indians have been treated differently than other Canadian citizens. Treaties, also known as land claims agreements, are still being signed between First Nations and the Crown. For the most part, the Canadian state deals with citizens as individuals, but the Canadian state deals with status Indians as members of a collective, as well as dealing with status Indians as individuals.

The first treaties signed between First Nations and the Crown were the peace and friendship treaties that were signed in the seventeenth and eighteenth centuries. The Crown was primarily concerned with ensuring peaceful relationships in return for guaranteeing certain hunting

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[114] *R. v. Sparrow*, [1990] 3 C.N.L.R. 160.

and fishing rights. These treaties did not require First Nations to cede land to the Crown. The Supreme Court of Canada has held that peace and friendship treaties are treaties, even though no land was ceded.[115]

The treaties that are made between the Crown and status Indians are sui generis, that is, they are unique.[116] The treaties do not fit existing legal categories, such as contracts and international treaties, thus they are sui generis. Peter Hogg has provided a roster of the characteristics that are indicative of a valid treaty:

> 1. Parties: The parties to the treaty must be the Crown, on the one side, and an aboriginal nation, on the other side.
> 2. Agency: The signatories to the treaty must have the authority to bind their principals, namely, the Crown and the aboriginal nation.
> 3. Intention to create legal relations: The parties must intend to create legally binding obligations.
> 4. Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.
> 5. Formality: there must be "a certain measure of solemnity."[117]

A treaty is made between the Crown and a particular First Nation. The Crown represents "other" Canadian citizens and an Aboriginal nation is composed of status Indians who act

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[115] *R.v. Simon*, [1986] 1 C.N.L.R. 153.

[116] *R. v. Sioui*, [1990] 1 S.C.R. 1025.

[117] Peter Hogg, Constitutional Law of Canada, 4th ed. (Toronto, Carswell, 1997) 691.

as a collective entity. A treaty creates duties, and these duties have rights that correspond to particular duties. The Crown and the First Nation are ascribed with rights and both assume particular duties. The rights and duties that are ascribed and assumed are negotiated rights and duties, unlike Aboriginal rights that are posited prior to the arrival of the European nations.

The Supreme Court of Canada has ruled that treaties that are agreed to between the Crown and First Nations are not international treaties.[118] The term "treaty" in section 88 of the Indian Act[119] refers only to treaties made with status Indians.

The treaties made between the Crown and First Nations are to be interpreted in a broad and liberal manner.[120] Furthermore, treaties ought be understood in a way that upholds the honour of the Crown and treaties should be interpreted in a manner that avoids the appearance of "sharp dealings." Ambiguities are to be resolved in favor of First Nations. Treaties are to be understood in a way that considers how the Crown and First Nations understood

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[118] *R. v. Francis*, 5 C.N.L.C. 170 (S.C.C.).

[119] *Indian Act*, R.S.C. 1985, c. I-5.

[120] *R. v. Taylor and Williams*, [1981] 3 C.N.L.R. 114 (Ont. C.A.).

the treaty when it was signed.

Treaty rights are not absolute. Treaty rights are subject to reasonable regulation and statutory limitations. For example, in R. v. Horseman, the Supreme Court of Canada ruled that Treaty No. 8 hunting rights were subject to valid conservation laws.[121]

In R. v. Sundown, the Supreme Court of Canada upheld the right of a Cree man to build a cabin in a north Saskatchewan provincial park.[122] The decision confirms the treaty right of status Indians to carry out a "traditional" hunt that includes the right to build a shelter. Jeff Rath, a Calgary lawyer, argues that as a result of this decision, provinces may have to consult status Indians who are signatories to a treaty about the uses of Crown lands.[123] A spokesman for the Saskatchewan Department of Environment and Resource Management stated that the Government of Saskatchewan will begin to consult with status Indians who have signed treaties about the construction of cabins.

In R. v. Marshall, the Supreme Court of Canada ruled

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[121] *R. v. Horseman*, [1990] 3 C.N.L.R. 95 (S.C.C.).

[122] *R. v. Sundown*, [1999] 1 S.C.R. 393.

[123] "Cree man can build cabin in provincial park: court," National Post, 26 March 1999.

that a treaty signed by the Mi'kmaq in 1760 contained a right to catch and sell eels for commercial purposes.[124] The treaty did not specifically provide for such a right. The guideline to be followed is that the Mi'kmaq possess the right to catch and sell fish for a "moderate livelihood." A moderate livelihood addresses daily needs, such as food, clothing, and shelter, but not the accumulation of wealth.

V

The Indian Act is a controversial and paradoxical act of government. It is both endorsed and abjured by status Indians. This thesis has no interest in ascertaining the value of this act. It will be sufficient to determine whether or not the Indian Act has treated status Indians differently from other Canadian citizens. Prior to the amendments to the Constitution Act in 1982, the Indian Act was the most prominent symbol of the special status of Indian peoples. When the Trudeau government proposed to abolish the Indian Act in 1969, the ensuing dissent by status Indians served as a watershed event in the mobilizing of status Indians as an organized interest. Harold Cardinal aptly sums up the ambiguous status of the

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[124] *R. v. Marshall*, [1999] 231 N.R. 325.

Indian Act in the lives of status Indians:

> We do not want the Indian Act retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to help devise new Indian legislation.[125]

The Indian Act was enacted in 1876 under the federal government's jurisdiction over "Indians, and Lands reserved for the Indians."[126] The Canadian state generally relates to its citizens as individuals. However, status Indians are also addressed by the Canadian state as a collective. The Indian Act is a powerful symbol of the special relationship between the Canadian state and status Indians, independent of the content of the act. The name of the act is of great significance, in that only status Indians possess the rights that the act ascribes.

The Indian Act is a piece of legislation that affects the lives of status Indians from birth until death. The Act defines who are to be legally understood to be Indians.

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[125] Harold Cardinal, The Unjust Society, The Tragedy of Canada's Indians, (Edmonton: M.G. Hurtig Ltd., 1969) 140.

[126] Section 91(24) of the *British North America Act, 1867*, Statutes of the United Kingdom, 30-31 Victoria, Chap. 3.

An Indian is a person who is either registered as an Indian or a person who is entitled to be so registered.[127] Status Indians are issued certificates of Indian status. These cards are referred to by status Indians as "status cards" or "treaty cards." The certificate states "This is to certify that (name of status Indian and registry number) is an Indian within the meaning of the Indian Act, chapter 27, Statutes of Canada (1985)." The status card is not the only piece of identification that status Indians possess that is bound to the Indian Act. The health card of a status Indian has an "R" as a "family/beneficiary number" that indicates that the individual is a registered Indian. Thus, status Indians usually have on their persons a part of the Indian Act on a daily basis. Sections 48 to 50 of the Indian Act concern how an Indian's estate is to be distributed. This affects the lives of status Indians from birth until death.

The Indian Act empowers the band council to exercise municipal government authority. Sections 81 to 86 describe the powers of the band council. Sections 74 to 80 describe how the band council is to be elected. As far as differentiated citizenship is concerned, the actual powers of the council and how the council is elected are

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[127] *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1).

insignificant. What is significant is that one culture, or nation, chooses its government and only members of that culture, or nation, will govern on its behalf. No other culture, or nation, in Canada can make such a claim.

The band council possesses the authority to make by-laws providing they do not conflict with the *Indian Act,* regulations made by the Governor in Council, or the Minister of Indian Affairs and Northern Development.[128] A band council by-law is a statutory instrument and has the force of law.[129] Band council by-laws are effective within the boundaries of the reserve. Some of the areas in which band councils can make by-laws are the provision of health care, the control of public games, the control of alcohol, and the management of game on the reserve. The band council could use these powers to create by-laws that endorse, or condone, certain values concerning, for example, gambling or the use of alcohol on the reserve.

The Indian Act authorizes First Nations to assume control over the membership rules of their community if they so choose.[130] No other community in Canada has federal

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[128] *Indian Act*, R.S.C. 1985, c. I-5, s. 81(1).

[129] *R. v. Baker Lake*, [1983] 4 C.N.L.R. 73 (B.C. Co. Ct.).

[130] *Indian Act*, R.S.C. 1985, c. I-5, s. 10(6).

legislation that empowers one community to choose who will be a member of the band. This section of the Indian Act can be invoked to ensure that First Nations members are a majority on reserves.

The Indian Act protects reserve lands from seizure under the legal process.[131] Indian lands are held by the Crown for the use and benefit of the band. The use and benefit of the band is a collective right. Other groups in Canada do not possess this right. Individuals are capable of owning land collectively, but this land would not be held and protected by the Crown.

The Indian Act is administered by the Department of Indian Affairs and Northern Development. The department is responsible for the fulfilment of the duties that arise from the treaties, the Indian Act, and other legislation. The significance of this department in relation to this thesis lies in its title. No other ethnic category has its own federal department. Sally Weaver posits the role of the department in relation to status Indians:

> ...in contrast to the historic role of DIAND as custodial administrator, new paradigm thinking proposes a smaller, more responsive and more development-oriented administrative role. Its job is to constructively support and advance First Nations political autonomy, and to service the negotiated

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[131] *Indian Act*, R.S.C. 1985, c. I-5, s. 29.

agreements...[132]

The Indian Act has had a profound influence on Aboriginal nationalism. Most Indian Act bands now refer to themselves as First Nations. The Federation of Saskatchewan Indian Nations and the Assembly of First Nations are both composed of particular First Nations, all of whom were once known as Indian Act bands, and still are legally considered Indian Act bands.

The Royal Commission on Aboriginal Peoples states that an underlying purpose of the Indian Act was, and possibly still is, the assimilation of status Indians.[133] This thesis is not concerned whether assimilation was, or is, the purpose of the Indian Act. However, it should be noted that institutions can maintain and produce difference. The Canadian state produced an Act that is something of a complete institution, in that it affects the status Indian from birth until death. Even if the Canadian state's purpose remains the assimilation of status Indians, the existence of institutions such as the Indian Act would have the effect of maintaining difference.

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[132] Cited in James S. Frideres, Aboriginal Peoples in Canada: Contemporary Conflicts, 5th ed. (Scarborough: Prentice-Hall Canada Ltd., 1998) 197.

[133] Canada, Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1996) 314-16.

VI

The Indian Act grants tax exemptions to status Indians that other Canadian citizens do not possess. The tax exemption for status Indians originates with An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury.[134] According to Imai, the "historic status of the First Nations as independent, self-governing communities is the most likely rationale for the exemption."[135] The Crown negotiated treaties with the Indians for their lands in return for goods and services. The tax exemptions are to protect the ability of status Indians to benefit from these goods and services.[136] Justice LaForest stated tax exemptions guard against governments eroding the benefits given by the federal government through the imposition of taxes. This section will provide a sample of the ways that status Indians can benefit from tax exemptions that only they possess.

Status Indians do not pay income tax while they work on reserve land. Status Indians working off-reserve may be

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[134] S.C. 1850, c. 74.

[135] Shin Imai, Aboriginal Law Handbook, 2nd ed. (Scarborough: Carswell, 1999) 281.

[136] Richard H. Bartlett, Indians and Taxation in Canada, 3rd ed. (Saskatoon: Native Law Centre, 1992) 1.

exempt. Whether status Indians pay income tax is contingent upon whether or not the income can be considered as "the personal property of an Indian...on a reserve."[137] Status Indians who live on the reserve do not pay income tax on scholarships to attend an off-reserve university.[138] Also, as long as the income can be connected to the reserve, employment insurance benefits and Canada Pension Plan payments cannot be taxed.[139] The same holds true for income from investments. An example may be when a status Indian earns income from money in a bank account located on a reserve.

Usually, status Indians who live off-reserve do not possess any tax exemptions. However, the proliferation of enterprises on urban reserves has meant that more status Indians living off-reserve have access to tax exemptions. For example, the Saskatchewan Indian Federated College in Regina is situated on reserve land, and therefore status Indians who are employed there qualify for the tax exemption concerning income tax.

First Nations possess the ability, through the Indian

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[137] *Indian Act*, s. 87.

[138] *Greyeyes v. R.*,[1978] 2 F.C. 385 (Fed. T.D.).

[139] KPMG, First Nations and Canadian Taxation, 2nd ed. (Prince George: KPMG, 1997) 84.

Act, to tax individuals and businesses on the reserve.[140] First Nations may enact by-laws that address taxation. The Minister of Indian Affairs and Northern Development must approve before the by-law is effective. An Indian Tax Advisory Board advises the Minister on these by-laws. Their advice is needed before a taxation scheme can be approved by the Minister. The Board ensures that the taxation scheme is fair, and is harmonized with the taxation schemes in the surrounding area. Model by-laws and a taxation scheme are available. The Supreme Court of Canada has endorsed the general approach of these model by-laws and taxation scheme.[141]

The Supreme Court of Canada found that the promotion of Aboriginal self-government is a policy objective that can be considered in the evaluation of taxation regimes. Some bands tax their members for gasoline and tobacco. Three First Nations in British Columbia have been granted taxing powers.[142] The Kamloops First Nation taxes its members on alcohol, tobacco, and fuel; the Westbank First

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[140] *Indian Act*, s. 83.

[141] *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

[142] *Budget Implementation Act*, 1997 (S.C. 1997, c. 26, ss. 36, 44, 52) and *Budget Implementation Act*, 1998 (S.C. 1998, c. 21, ss. 59, 70).

nation taxes its members on tobacco and alcohol; and the Cowichan Tribes tax their members on tobacco. Legislation provides that the tax exemption under section 87 of the Indian Act[143] does not apply to the members of these First Nations when they are being taxed for these items. The British Columbia Supreme Court upheld the Cowichan Tribes' taxing power.[144]

Status Indians do not pay provincial sales tax when purchasing goods on a reserve.[145] Justice McLachlin argues that this creates two advantages for First Nations. First, it will give a competitive advantage to on-reserve businesses and encourage on-reserve economies. Second, and deriving from the first, this will provide a source of revenue for First Nations' taxation. Furthermore, status Indians do not pay the Goods and Services Tax for purchasing goods on reserve land and do not pay taxes on services when the benefit is to be realized primarily on-reserve.

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[143] Section 87 states that the "personal property of an Indian situated on a reserve" is exempt from tax.

[144] *Large (c.o.b. Cowichan Native Tobacco Co.) v. Canada (Minister of Justice)*,[1998] 3 C.N.L.R. 109 (B.C. S.C.).

[145] *Union of New Brunswick Indians v. New Brunwick (Minister of Finance)*,[1998] 1 S.C.R. 1161.

VII

The Criminal Code[146] sets out the acts that are considered crimes in Canada. Federal and provincial legislation create additional offences. However, the application of these laws is limited by Aboriginal and treaty rights that are recognized by the Constitution. The Indian Act restricts the application of provincial laws; for example, by-laws passed by an Indian Act band council may take precedence over provincial laws that concern the same subject matter.

There are court decisions and Criminal Code provisions that allow or even require judges to take account of the special circumstances of Aboriginal offenders when sentencing them. In R. v. Chief, the court ruled that the need for an Aboriginal person to possess a gun to hunt had to be taken into account on a weapons charge.[147] In Hill v. Canada, the court quashed the warrants of arrest for an Aboriginal person who was unable to pay standard fines.[148]

In December, 1998, a jury in British Columbia found a Métis woman guilty of manslaughter in the death of her

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[146] *Criminal Code*, R.S.C. 1985, c. C-46.

[147] *R. v. Chief*, [1990] 1 C.N.L.R. 92 (Y.T. C.A.).

[148] *Hill v. Canada*, [1991] 2 C.N.L.R. 58 (Ont. Gen. Div.).

common-law husband.[149] The court was asked to consider section 718.2(e), a new section of the Criminal Code that was enacted in 1996, when passing sentence. Section 718 of the Criminal Code addresses the purpose and principles of sentencing. The fundamental principle that animates this section is that "a sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender." The Criminal Code gives six objectives of sentencing. Two of these objectives are "to assist in rehabilitating offenders" and "to provide reparations for harm done to victims or to the community." In R. v. M., the court considered these two objectives and stated:

> It is unrealistic to believe that persons coming from extremely disadvantaged backgrounds can be rehabilitated, once the cycle of crime starts, by successive and increased periods of imprisonment, especially when, upon release, they are returned to the same environment and lifestyle which contributed to their misfortune in the first place. What is required, in such a case, is intensive guidance, encouragement, training and supervision while on probation, preferably on a daily basis by a person in whom the accused has confidence. In the case of a native Canadian, it may be essential that any program include support of his indigenous community.[150]

Section 718.2(e) directs a sentencing judge to consider

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[149] "Woman killed husband, must serve community: Aboriginal background cited in leniency." The Globe and Mail 20 January 1999.

[150] *R. v. M. (R.B.)*,[1990] 54 C.C.C. (3d) 132 (B.C.C.A.).

"all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." Section 718.2(e) suggests that considerations other than incarceration may meet the needs of the community and the offender better than incarcerating them.

Enforcement of law is provided by the Royal Canadian Mounted Police, provincial police, municipal police, and First Nations Constables. Also, Band Constables may enforce Indian Act by-laws. In Ontario, Indian Act by-laws can be enforced by the Ontario Provincial Police, First Nations constables, or persons appointed by the First Nation Council for the explicit purpose of by-law enforcement. Approximately one-half of Ontario reserves are policed by First Nations constables.[151] They work and live on these reserves. The Ontario Provincial Police appoint these constables, but they must be approved by the First Nation council or the reserve's governing police authority. These individuals who are appointed by a First Nation council to enforce by-laws are called "band constables." They are different from First Nations

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[151] Imai, Logan, and Stein, Aboriginal Law Handbook 268.

constables in that First Nations constables are appointed in accordance with the Ontario Police Services Act.[152] In R. v. Hatchard, the court ruled that the powers band constables are somewhere between a citizen and a peace officer.[153] Violations of Indian Act by-laws are tried by Provincial Division judges or justices of the peace. Justices of the peace are appointed under the Indian Act in the case of Akwesasne.

In Ontario, a Native Justice of the Peace Program trains Aboriginal persons to become justices of the peace. Aboriginal justices of the peace handle provincial and Indian Act offences on some reserves. These appointments are made under the authority of the Indian Act and are able to handle by-law offenses and some minor Criminal Code offenses.[154] In Ontario, Akwesasne is the only reserve to have such a justice of the peace and the federal government does not appoint justices of the peace under the Indian Act any longer.

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[152] *Ontario Police Services Act*, R.S.O. 1990, c. P.15.

[153] *R. v. Hatchard*, [1993] 1 C.N.L.R. 96 (Ont. Gen. Div.).

[154] *Indian Act*, R.S.C. 1985, c. I-5, s. 107.

VIII

Efforts have been made to make the existing justice system more responsive to the needs of Aboriginal people and to allow for more Aboriginal participation within the justice system. This section concentrates upon disputes that occur at the level of the community. Often, internal community disputes are best mediated through community-administered justice. This section concentrates upon how the justice system is currently being reformed.

There are projects that are intended to improve services within the existing justice system. Friendship Centres, or occasionally independent agencies, operate Native court worker programs in most provinces.[155] Native court workers are available to Aboriginal defendants for help and support. They ensure that Aboriginal defendants have legal counsel, and if they do not, then Native court workers may attempt to have the case postponed until legal counsel can be obtained.

A number of Aboriginal community legal clinics exist in Ontario.[156] Legal advice and representation are provided

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[155] Canada, Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada, (Ottawa: Minister of Supply and Services, 1996) 96.

[156] Imai, Logan, and Stein, Aboriginal Law Handbook 282.

at no cost to those Aboriginal people who cannot afford a lawyer. The Aboriginal Legal Services clinic in Toronto specializes in providing services to Toronto's status and non-status Indian population. There are numerous clinics across northern Ontario that possess considerable expertise in the law concerning Aboriginal people.

In Ontario, many reserves possess community sentencing panels.[157] Judges preside over this process, but the community chooses a panel of Elders who submit recommendations to the judge, if the member is found guilty. In R. v. Webb and R. v. Moses, the judge invited family members and social workers to participate in a sentencing circle.[158]

There are other community justice projects that involve diverting certain cases from the usual process to a panel of Elders or community members.[159] The Crown will discuss possible cases with a First Nation coordinator to ascertain whether a case is appropriate for an Elders or community panel. Should a case be diverted, the criminal

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[157] Imai, Logan, and Stein, Aboriginal Law Handbook 283.

[158] *R. v. Webb*, [1993] 1 C.N.L.R. 148 (Y.T. Terr. Ct.) and *R. v. Moses*, [1992] 3 C.N.L.R. 116 (Y.T. Terr. Ct.).

[159] Imai, Logan, and Stein, Aboriginal Law Handbook 283.

charges are stayed.

In northern Ontario, there are some reserves that have no judges, prosecutors, or defence counsel.[160] Proceedings are carried out in the First Nation language and First Nations constables deliver the facts of the case to the court. The panel deliberates upon the sentence and it is disposed of, whether it be a fine, a period of community service, or even chopping wood for an Elder. If the individual complies with the panel's recommendations, then the Crown will withdraw the charges in the provincial court. If the individual does not comply with the Elder's panel, then the provincial process will be resumed.

Another type of Aboriginal justice initiative is the Indian Claims Commission and the British Columbia Treaty Commission.[161] The Indian Claims Commission is administered by Canada and the Assembly of First Nations. The purpose of the Commission is to examine and report on disputes between the Government of Canada and First Nations concerning specific claims. The British Columbia Claims Commission is administered by British Columbia, Canada, and the British Columbia First Nations' Summit. The purpose of

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[160] Imai, Logan, and Stein, Aboriginal Law Handbook 283.

[161] Imai, Aboriginal Law Handbook 373.

the Treaty Commission is to aid the parties in negotiating treaties.

IX

This chapter has addressed the Canadian Constitution, Aboriginal rights, treaty rights, the Indian Act, taxation, criminal law, and Aboriginal justice. In all these instances, status Indians are treated differently than other Canadian citizens. There is a path dependent nature to difference, in that once difference becomes recognized in law, there is a tendency for difference to be recognized more generally in society. To some extent, it is now implausible to consider anything but a differentiated citizenship regime.

This chapter made no attempt to justify how or why the Canadian Constitution and Canadian law have endorsed the differential treatment of Canadian citizens and status Indians. The purpose of this chapter was to demonstrate that status Indians are different from other Canadian citizens, and this difference is endorsed by law. An endorsement by the law and the Canadian Constitution may be understood as legitimating this difference.

Chapter Four

Conclusion

The main conclusion of this thesis is that status Indians have been ascribed special rights that are consistent with differentiated citizenship regimes of the kind posited by contemporary liberal thinkers such as Will Kymlicka and Charles Taylor. Harry Hawthorn's concept "citizens plus" was posited by the Hawthorn Report in the late 1960s and is as salient as any of the recent theories. "Citizens plus" was the concept that was used by status Indians to defeat the 1969 White Paper and was the primary concept describing the status Indian-Canadian state relationship until the late 1970s when it was replaced by the nation-to-nation Aboriginal nationalism.

Insofar as status Indians are concerned, the Canadian state has already adopted a differentiated citizenship regime. It can be dated at the latest to the enactment of the first Indian Act in 1876. It is important that Canada move beyond discussion of its adopting a differentiated

citizenship regime in the future and begin to recognize that it has taken this approach for some time.

Once the fact of a differentiated citizenship regime has been accepted, the discussion over Canadian citizenship can focus on how differentiated citizenship can be realized. For instance, the concept of "citizens plus" is capable of capturing all the instances of special rights described in chapter three, such as Aboriginal rights. It is capable of underwriting a civic or "thin" nationalism. Most First Nations in Canada endorse a civic nationalism. The Mohawk Nation is an aberration in that it endorses an ethnic nationalism; ethnic nationalism was a factor in the creation of the Royal Commission on Aboriginal Peoples which endorsed the nation-to-nation approach.

Furthermore, the "citizens plus" concept is capable of being extended outside of the status Indian-Canadian state policy sphere. This thesis focuses on status Indians in Canada, but "citizens plus" could be extended to include other constituencies in Canada that are lobbying for some type of differentiated recognition.

The Supreme Court of Canada and the Royal Commission on Aboriginal Peoples recommends a political relationship between status Indians and the Canadian state. The "citizens plus" concept can play a part in reconciling the

complexity of political relations concerning status Indians in Canada. Status Indians are more than members of nations. Issues such as gender tend to be diminished or silenced by the concept of nation. "Citizens plus" would be able to better describe and protect a status Indian who happened to be a woman and a union member.

"Citizens plus" was replaced by Aboriginal nationalism in the late 1970s. It was the dominant concept for less than ten years. Both the Canadian state and status Indians began using the concept of nation, rather than that of citizenship. Alan Cairns argues that there is an emerging consensus concerning the nation-to-nation relationship between status Indians and the Canadian state. However, it is far from certain whether the concept of nation is an accurate concept to describe status Indians. The Royal Proclamation of 1763 describes Aboriginal people as tribes or nations. It seems that it has always been a problem how Aboriginal peoples are to be described politically.

The concept of "citizens plus" seems more capable of capturing this ambiguous situation. Aboriginal rights have been defined as being unique to particular First Nations. Such particular rights are better bundled together, rather than being considered a category by themselves. The "plus" aspect of "citizens plus" could contain many and diverse

aspects of differentiated belonging. If we accepted that Canada is already extending a differentiated citizenship regime, and in particular "citizens plus," then we could begin to articulate the "plus" aspect of citizenship in Canada.

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