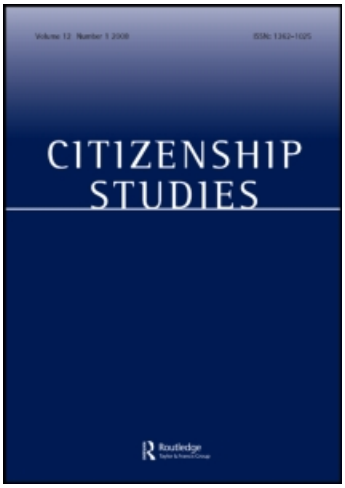

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Sui Generis and Treaty Citizenship[1]

JAMES (SÁKÉJ) YOUNGBLOOD HENDERSON

This article, written from an Aboriginal perspective, explores the problematic invitation to federal citizenship in Canada for Aboriginal peoples. Its focus is on the deficits of such an offering for the constitutional rights of Aboriginal peoples, which is characterized by sui generis *and treaty citizenship. Informed by Aboriginal and intercultural perspectives, the article argues that the offerings of statutory citizenship for Aboriginal peoples inverts rather than respects the constitutional relationship. It looks at how the Supreme Court of Canada has located and structured* sui generis *Aboriginal orders, the concepts of* sui generis *citizenship, treaty federalism, and constitutional supremacy as compared with the idea of federal citizenship, concluding that such 'invitations' to Canadian citizenship are inconsistent with and infringe upon the constitutional rights of Aboriginal peoples. By understanding the prismatic nature of Canadian federalism in a postcolonial context, this article aims at reconceptualizing Canadian citizenship in terms of ecological belonging, fundamental rights, and respect for human diversity and creativity.*

> [W]hat s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; … (Per Lamer C.J.C.).[2]

In its path from colony to nation building, Canada in 1947 and 1976, by federal statutes created Canadian citizenship.[3] Prior to these acts, Canada was in the remarkable position of being a federation without citizens. From 1947, Canada's citizenship policy was to encourage and enhance the meaning of citizenship as a unifying bond. Consistent with this policy, Queen Elizabeth II in *Symbols of Nationhood* characterizes Canadian citizenship as 'a gentle invitation':

> Canada asks no citizens to deny their forebears or forsake their heritage—only that each should accept and value the cultural freedom of others as he enjoys his own. It is a gentle invitation

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> this call to citizenship and I urge those who have accepted the invitation to participate fully in the building of the Canadian society and to demonstrate the real meaning of the brotherhood of man (Canada, 1991).

Since a Canadian citizen can have dual citizenship under federal law, Canadian citizenship is supplemental citizenship that does not erase the immigrants' or Aboriginal peoples' heritage. Federal law preserves citizenship in the Commonwealth and British subjectship,[4] thus generating asymmetrical citizenship. After 1977, anyone born in Canada is presumed to hold Canadian citizenship.[5]

The Queen's 'gentle invitation' to Aboriginal peoples of Canada is unnecessary, ambiguous and problematic. It is inconsistent with both the imperial constitutional relationship and the existing constitutional framework of rights. From my treaty perspective, the offer of citizenship to Aboriginal peoples is another attempt to resolve the intractable *Canadianité* colonial consciousness and its 'icy white nationalism' (Mackey, 1999, pp. 30–1; Howard-Hassman, 1999) or 'nordicity' (Saul, 1997, p. 69)[6] rather than to implement the new constitutional rights of Aboriginal peoples or to implement international human rights. The call of federal citizenship to Aboriginal peoples transforms the sacred homeland of Aboriginal nations (with their *sui generis* Aboriginal orders and their treaty confederation with the British sovereign) into another version of Euro-Canadian self-congratulation and individualism. In favouring colonial over constitutional models, the invitation asks Aboriginal peoples to comply with colonial narratives posing as modernity, instead of asking Canadians and their institutions to comply with constitutional supremacy and shared sovereignties of treaties.

This essay will examine my understanding of the gentle invitation of federal citizenship in relation to the interconnected Aboriginal orders, treaty federalism, and Canadian federalism that generate a new constitutional vision for Canada. It addresses the offer of Canadian citizenship to Aboriginal peoples as a colonial remedy built on false assumptions and pretensions, as documented by the *Final Report of the Royal Commission on Aboriginal Peoples* (Canada, 1996).[7] In ways similar to the failed enfranchisement and assimilation policies of the past,[8] the offered Canadian citizenship subverts the constitutional rights of Aboriginal peoples for the interests of the dominant immigrant groups. It is a belated, flawed, and inverted invitation. It is premised on a desire for creative dominance and federal sameness rather than on respect for constitutional differences and reconciliation. Its purpose (deliberate or inadvertent) is to restrict the constitutional rights of Aboriginal peoples of Canada and make them formally equal to other Canadian citizens, who exist as entities of federal statutes.

The call to citizenship ignores the Aboriginal heritage and its substantial involvement in building the Canadian federation. It is more an invitation to compliance with colonialism and domination than a nation building exercise. It ignores the systemic constitutional principle of Canada's birth and the contemporary constitutional right of Aboriginal peoples to sustain their society distinct from diasporic aliens and immigrants (Macklem, 2001; Mercredi and Turpel, 1994). Indeed, both the Aboriginal and treaty rights in the imperial constitutional

order affirm the right of Aboriginal peoples to live in a territory where governments and peoples respect our diverse heritage and differences. These constitutional rights are inherent rights, they are not delegated rights from the British sovereign. Instead, they are rights acknowledged by the British sovereign. These enabling *sui generis* rights are the basis of convergence of a postcolonial and intercultural Canada. They affirm the right to *sui generis* orders and kinship bonds, treaty federalism and its shared subjecthood, and the ability of these rights and powers to converge with older colonial powers in dynamic modern reconciliations to create a postcolonial society.

While the inconsistencies and incoherences of colonial consciousness frame the call to federal citizenship, Aboriginal parents, children, and grandchildren have the constitutional right not to respond. They have to make choices and accommodations that do not force them to feel or actually to be disconnected from their heritage or difference. Aboriginal peoples do not have to accommodate to fictions or narratives of the immigrants or respond to the call to Canadian citizenship. My choice is to remain an Aboriginal person with Aboriginal and treaty rights rather than become an artificial person created by federal statutes living a prismatic existence.

The Gentle Invitation

The gentle invitation of Canadian citizenship extended by the federal *Citizenship Act* to Aboriginal peoples is ambiguous and dated. The asymmetrical dual citizenship is a federally constructed narrative that imagines, provides, and defines a new identity. It is asserted to serve the important political, emotional and motivational purposes of fostering a sense of unity, shared civic purpose, and basic sense of identity and belonging among a diverse population. It masks the oppressive legacies of colonialism and racism.

Neither the statute nor the invitation is designed carefully enough to achieve these objectives without damage to the constitutional rights of Aboriginal peoples. As applied to Aboriginal peoples, they seem to be more efforts to legitimize the colonial construct of citizenship than acknowledge or comply with the existing *sui generis* constitutional right of most Aboriginal nations to their own laws and customs.

Canadian citizenship, then, is a narrative confidently plotted from the colonial 'insiders' perspective of the British and French inhabitants by virtue of birth or alienage.[9] It generates and is engendered by the Gzowskian[10] narrative of romantic self-representation as a 'nation of immigrants' from a diversity of nations and backgrounds, and enriched by a multitude of experiences, seeking to build a tolerant multicultural nation. Within this romantic narrative, the diversity and richness of each ethnic group is a constitutional value to be protected, preserved, and enhanced.[11] Nevertheless, this model avoids and effectively denies the *sui generis* and treaty relationship of Aboriginal peoples with the British sovereign.

This narrative confuses citizenship as a right to political or civil membership with citizenship as a right to presence in the territory. Most Canadians simply assume that citizenship gives an independent right to presence. Part of this

narrative's appeal is to provide an alternative justification for settlement and to ignore the treaty right to be present in Canada. The right to membership replaces the Aboriginal–sovereign compact. Although it does not have to be the case, the invitation of citizenship becomes an ideological rival to our existing *sui generis* and treaty citizenship. In this way, federal citizenship, supposedly a tool of equality for immigrants based on tolerance and respect for all individuals, acts to exclude Aboriginal peoples.

Federal citizenship regenerates the special constitutional paradox of Aboriginal peoples' relationship with the Queen. In 1973 Queen Elizabeth II affirmed ecological and heritage rights of treaty Indians, as well as their right to determine freely their political status and pursue their economic, social, and cultural development with Canadians:

> You may be assured that my government recognizes the importance of full compliance with the spirit and terms of your treaties. I am deeply impressed by the pride of heritage which has sustained you through so many dramatic changes and difficulties. I hope this very sense of identity will help you find your own true Indian place in the modern world. You have said that you are proud to be both Indians and Canadians. I am sure that your fellow Canadians are learning to appreciate and to respect the very special qualities and culture of the Indian peoples and their deep feeling for the natural environment of the homeland. … Let us look to the future. The Indian people of Canada are entering a new phase in their relationship with other Canadians. It is my hope that in the coming years you will together find a means to combine a way of life, which suits your culture, and social aspirations, with full participation in the creation and enjoyment of the growing material wealth of Canada today (quoted by Prince, 1991, p. 85).[12]

Similarly, the Supreme Court of Canada has affirmed:

> [T]he Aboriginals' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the Aboriginal perspective, any federal–provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign–Aboriginal relations.[13]

The Court has also stated that outside the affairs of life governed by treaties, Indians are subject to all the responsibilities of other Canadian citizens.[14] However, Aboriginal thought and law embodied in the treaties affirm and protect a comprehensive way of life for treaty Indians that should be fully enjoyed as the treaties guide us into the future with human dignity. This constitutional recognition affirms Aboriginal choices, not to be confined by or to British concepts of subjecthood or Canadian concepts of citizenship.

The gentle invitation to a fuzzy federal citizenship may be as well intended as the earlier offering of Christianity, civilization, and assimilation—the devas-

tating consequences of which are only now being unravelled by Aboriginal peoples, governments, and judiciary. The invitation relies on the false assumption that there is a separate Canadian society to receive Aboriginal peoples. Such beliefs are often expressed bureaucratically as whether Aboriginal peoples are 'in Canada' or 'of Canada'. In 1998, Canada's statement of reconciliation with Aboriginal peoples acknowledged:

> Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the *Indian Act*. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.
>
> In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner that preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future.[15]

Aboriginal nations have always been central to Canada and Canadian sovereignty. From my point of view, denial of this reality manufactured the legal and political acrobatics in the colonial mind to deny sovereignty of the nations and full compliance with their treaties. It generated the endless creative struggle of the colonialists to account for and deal with destruction of Aboriginal nations and the taking of indigenous wealth while denying its reality by partial and exclusionary scholarship, law, and policy. Facing up to the colonial past and taking responsibility for the entire history requires understanding that Canada is based on the foundation of shared sovereign by represented in Eurocentric thought by the concepts of Aboriginal sovereignty and the treaties.

The vague offer of citizenship ignores the fact that the rights of aliens to Canadian citizenship are derived mostly from the Aboriginal sovereign's conditional permission to the British sovereign to provide for settlements, rather than as is frequently argued, from British sovereignty alone and delegated legislative authority. Aboriginal peoples do not have to join Canada and become citizens; Canada and its citizens have to acknowledge their Aboriginal foundation.

The dark shadow over the colonial legislatures' treatment of Aboriginal peoples has been the failure of the rule of law and majority rule to respect and implement these constitutionally recognized rights. The pattern of neglect looms over Canadian history, citizenship, and life in a way that produces Aboriginal distrust and ambivalence toward the offer of citizenship. From 1876 to 1951, for instance, federal law denied that Indians were 'persons'.[16] After the creation of the Federal Citizenship Act, from 1950 to 1965, the Indian Affair Branch was placed under the Department of Citizenship and Immigration to encourage Indians to accept citizenship.[17] Only recently has Canada tentatively accepted that Indians were 'peoples' under the Human Rights Covenants. That this dark past, based on a belief in European superiority, has not been remedied prevents me (and many like me) from embracing the invitation to citizenship.

Federal citizenship is often imagined as the companion of democracy; however, exclusive democracies were created before citizenship was conceptualized. In 1960, when the federal government extended voting rights to Indians, their treaty rights were specially protected (Henderson, 1994, pp. 320–22; Canada, 1996, Vol. 1, pp. 299–200).[18] Treaty Indians have sceptically called this right 'the ten-second relationship'. The right to participate on the basis of one person with one vote in the required elections of a temporary despotic government of a political party that acts for the distant and impotent sovereign has not been helpful in sustaining or clarifying Aboriginal and treaty rights, reforming the colonial pathologies in the *Indian Act*,[19] eliminating racial discrimination, or affirming Aboriginal nationality.

Further, the belated invitation fails to identify the responsibilities, rights, or meanings that attach to the status of citizenship. I fail to see how the value of Canadian citizenship can in any way enhance the constitutional rights of Aboriginal peoples. Indeed, Aboriginal peoples have a constitutional heritage that must be reconciled and reconceptualized before any invitation to federal citizenship can be contemplated. The troubled history of our inherent rights in the rule of law is all too evident in the inability of Canadian governments and society to sustain treaty obligations and commitments, both to Aboriginal peoples and others.[20] And Canada's failure to implement treaty rights or human rights makes new relationships very difficult. Remedying the situation will involve institutional change as much as changes in attitude and perspective.

The invitation of federal citizenship appears to offer Aboriginal peoples the right to an alternative identity with a national passport, an identity shared with abstract strangers, and respected by abstract others that police the borders. This offer is no remedy for the past violation of Aboriginal or treaty rights. Under the circumstances, it is difficult for me to consider accepting less than my ancestors negotiated and the sovereign promised in the treaties. While the Aboriginal signatories shared with the unknown guest who was supposed to be regulated by the sovereign under the spirit and terms of the treaties, the colonialists turned their backs on the treaties and became oppressors under their delegated powers of self-rule. Self-rule was transformed into the colonization of the Aboriginal other.

For most Aboriginal peoples of Canada, the ideal of Canadian citizenship represents a McLuhanistic backward perspective toward imaginary borderlines

created by imperial and federal acts during colonization rather than a vision of an improved future, fulfilling life, or enhancement of human potential. It seems incompatible with or antithetical to a view of Canadian citizenship defined by 'tolerance', 'a belief in equality' and 'respect for all individuals'. It darkly suggests that a federal government elected by citizens can discriminate against the constitutional rights of the Aboriginal people of Canada so that they will value citizenship and be motivated to become citizens. It offers little in the way of democratic participation or answers to the troubling question of belonging. It reminds one of the disposable legacy of Canadian idealism: the make-it-up-as-you-go theory of colonialism; its tradition of elegant words transforming into bad faith compliance; and the widening gap between its contrived image and its abeyances. Canada's historic and present inability to protect the constitutional rights of Aboriginal peoples against majority votes undermines the idealism of citizenship. Canada's colonial pathologies limit its idealism: its reliance on the exploitation of Aboriginal natural resources rather than on fostering human creativity and innovation; its allegiance to the dollar and economy rather than to its intercultural youth; its tolerance for poverty and powerlessness among Aboriginal people; and its resistance to Aboriginal control of Canadian affairs.

In interpreting the contemporary constitutional order of Canada affirmed by the judiciary's respectful attentiveness to constitutional reform, the *Final Report* of the Royal Commission acknowledges that each Aboriginal nation has the right to determine who belongs to the nation (Canada, 1996, Recommendations 2.3.8–11). It recommends that Canada recognize Aboriginal peoples as enjoying self-determination under the Human Rights Covenants and a unique form of dual citizenship, as citizens of an Aboriginal nation and citizens of Canada (Recommendations 2.3.8). It also recommends that Canada take steps to ensure that the Canadian passports of Aboriginal citizens explicitly recognize this dual citizenship and identify the Aboriginal nationality of individual Aboriginal persons (Recommendations 2.3.9).

The acceptance of federal citizenship is really a personal choice, as well as a generational issue, for each Aboriginal family or person (Monture-Angus, 1999, 2001; Battiste and Semaganis, 2002; Borrows, 2000, 2001; Chartrand, 2001; Porter, 1999; Alfred, 1999; Turner, 1998; Johnston, 1993).[21] It does not have to be a choice between fidelity to Aboriginal and treaty rights or to the artificial Canadian nation, though it is often conceived within this dialectic. The controlling questions are: will the holding of Canadian citizenship give anything more to *sui generis* or treaty rights? Will it empower our future generations of Aboriginal peoples or become an infringement on our existing constitutional rights?

Since no-one can speak for the vast diversity of Aboriginal peoples or treaty beneficiaries or future generations, I will only speak for myself. My choice is not to accept the engaging federal invitation. In choosing a way of life promised in the treaties, I prefer to belong to a specific ecology, interrelated Aboriginal heritages, with a caring and sharing of values and identity within an extended family, and in a multicultural society. Remembering that I will be known forever by the tracks I leave and choices I make, I prefer to rely tenaciously on treaty

federalism and treaty citizenship in forging and clarifying good relations with the rest of Canada and the peoples of the planet. Treaty citizenship preserves and enhances Aboriginal heritage while providing for authentic options and life choices. It provides humanity and meaning to my family and relatives. As Elder Danny Musqua of the Keeseekoose First Nation often teaches: to be faithful to who you are is to be faithful to your Nation (Cardinal and Hildebrandt, 2000, p. 28).

My response arises from my belief in the implicit principles and legacy of treaties in creating a global order based on consent and respect. Treaty citizenship may seem an illusion to many Canadians, but it is not. Treaty citizenship is a good and decent vision and an integral part of the Canadian order. I am opposed to any non-consensual imposition of citizenship on any people. Federal citizenship cannot be a take it or leave it proposition of power politics, as that is inconsistent with and infringes my constitutional treaty rights, Aboriginal language rights, heritage, healing processes, and identity.

The Aboriginal treaty relationship with the British sovereign stands for a distinctive cluster of beliefs and attitudes about consensual relationships between nations. It generates an operative compact and framework about constitutional association and the possibilities of mediating difference to create unity. It represents a belief in autonomous zones of power, freedom, and liberties in consensual and dynamic order, rather than the unexamined essence of divine sovereignty and its imposed hierarchies or parliamentary sovereignty.

Aboriginal thought and treaty citizenship allow my constitutional voice to be heard as part of the Aboriginal peoples of Canada to advocate for ecological-based belonging, a new transnational and intercultural concept of postcolonial Canada, and global peoplehood with others founded on respect, dialogue, and co-operation.

In contrast to statutory dual citizenship, citizenship is beginning to exist in the Canadian mind as a singular category. Greater numbers of Canadian scholars are beginning to think of citizenship as a singular category. But asymmetrical dual citizenship should not be confused with the concept of equal citizenship. Politicians and academics have attempted and are attempting to transform dual citizenship into a rhetorical ideology of equal citizenship.[22] Equal citizenship conceals various legacies and wrongs within itself, each inextricably intertwined.[23] It doesn't have to be an assimilation model, however, as most Canadians have already rejected 'going native' for a Eurocentric model of civilization. Canadians have oppressed the half-blood or Métis who created an intercultural society (Canada, 1996, Vol. 4, pp. 199–386). Also, most Indians and Inuit reject the idea of going Eurocentric (*Ibid.*, Vol. 1, pp. 263–81, 286–8).

In the ideology of equal citizenship the assimilation principle seems to require the subordination of treaties, constitutional difference, and an ancient sense of belonging to a place and people. It represents the forgetting, denying, or trivializing of the treaty compact in exchange for life as a racial or ethnic minority, which has not been an effective instrument for protecting vital constitutional, cultural, or personal interests of Aboriginal peoples. Equal citizenship wrongly implies that sameness or equality is a constitutional requirement for national solidarity or cohesion.

Constitutional respect for the relations between the Aboriginal peoples and the British sovereign offers a more compelling model than either the federal model of dual citizenship or the rhetoric of equal citizenship. Equal citizenship is not the transcultural and intercultural model I desire for my family and my grandchildren. As a people with a constitutional right to a *sui generis* and treaty citizenship, Aboriginal peoples should have a major role in constructing these models. Citizenship doesn't have to be based on ideological equality; it can respect *sui generis* and treaty citizenship as well as a statutory citizenship.

Aboriginal heritages and teachings protected in the constitution of Canada will take my family and children forward with human dignity into an uncertain future. The ones who matter most, my children, who have been lent to me by the Creator, will be intercultural people. They will have to live with a contested, intertwining identity firmly grounded in their ancestors' teachings and legacies with postcolonial belonging (in Cree *miskâsowin*, finding one's sense of origin, centre, and belonging) in a globalized Canadian society. They will have many belongings and homes from which to generate an improved Canadian society revealing Canada as an innovative transnational and intercultural model for the unfolding global order.

Sui Generis Aboriginal Orders

Within its interpretation of s. 35(1) of the *Constitution Act, 1982* the Supreme Court of Canada has affirmed that constitutional orders of Aboriginal peoples pre-existed imperial power, treaties and the subsequent sovereign delegation of political power to the 'fit' immigrants. The judicial understanding of Aboriginal and treaty rights in the constitution of Canada unravels the assimilationist and colonial biases that are camouflaged by the invitation of federal citizenship. The doctrine of Aboriginal rights protecting the inherent orders was part of a body of fundamental constitutional law and presumptive legal structure that was logically prior to the introduction of English common law. This doctrine respecting Aboriginal law and customs is affirmed by the British sovereign in the *Coronation Oath Act*,[24] which outlines the essential constitutional duties of the Sovereign in governing the diverse peoples in the foreign dominions (*Halsbury's Laws of England*, 1991). It constitutionally governed the reception and application of British law in the foreign jurisdiction and colony.[25]

The Court has affirmed that when the British sovereign asserted any jurisdiction over Aboriginal territory, the assertion protected and vested the pre-existing Aboriginal order in British imperial constitutional law.[26] The protection afforded *sui generis* Aboriginal orders by both British imperial constitutional law and British common law prohibited intrusions by the British parliament, colonial governments, the common law courts, or the colonialists. These protections were transferred to Canadian constitutional law by virtue of s. 35(1).[27]

In *Van der Peet*, Justice McLachlin argued that the 'golden thread' of British legal history was 'the recognition by the common law of the ancestral laws and customs of Aboriginal peoples who occupied the land prior to European settlement'.[28] The Court further held that if Aboriginal peoples were 'present in some form' on the land when the Crown asserted sovereignty, their pre-existing

right to the land in Aboriginal law 'crystallized' in British law as a *sui generis* Aboriginal title to the land itself.[29]

These *sui generis* Aboriginal orders are the ancient law of the land, and they are embedded in Aboriginal heritages, languages, and laws (Canada, 1996, Vol. 4, p. 454).[30] S*ui generis* orders of Aboriginal nations exist in the same way as Eurocentric legal tradition. As law professor Robert Cover stated:

> A legal tradition [...] includes not only a *corpus juris*, but also a language and a mythos—narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from meaningful patterns of the past (Cover, 1983; Kronman, 1990).[31]

Sui generis Aboriginal orders reveal legal traditions based on shared kinship and ecological integrity. They demonstrate how Aboriginal peoples deliberately and communally resolved recurring problems (see the elegant works of Borrows, 1994, 1996, 1997). Aboriginal law, both implicit and explicit, reflects a vision of how to live well with the land and with other peoples.[32] It reveals who Aboriginal peoples are, what they believe, what their experiences have been, and how they act. In short, it reveals Aboriginal humanity's belief in freedom and order.

Aboriginal orders operate by their own force; they are not delegated orders derived from the British or French sovereign. The Supreme Court has held that *sui generis* Aboriginal orders exist independently of British constitutional law, proclamation, or sovereign recognition, and independently of British common law.[33] That is, they do not depend for their existence on consistency with British law. Indeed, the Court has declared that neither the British nor the French legal tradition can adequately describe or operate *sui generis* Aboriginal orders.[34] The Court has emphasized that s*ui generis* Aboriginal orders are distinct from the liberal principles and abstract rights used in *Charter* interpretations of personal rights.[35] Thus, even if the various manifestations of inherent rights have never been positively affirmed by British or Canadian legislation, they are constitutionally valid.[36]

The Supreme Court has affirmed Aboriginal nationhood.[37] Justice L'Heureux-Dubé, in *Van der Peet*, said directly: '[I]t is fair to say that prior to the first contact with the Europeans, the Native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs'.[38] Contrary to popular misconceptions, Aboriginal nationhood is defined by Aboriginal law and customs, rather than by any European concept of nationhood. Far from being dependent on European concepts, this *sui generis* Aboriginal nationhood is itself the source of the sovereign's jurisdiction over all activities in Aboriginal territories and over all systems of law that regulated these activities.[39]

As the Court has acknowledged, these *sui generis* Aboriginal orders must be understood and interpreted as distinctive and integral to Aboriginal law and societies, rather than as part of European law and societies.[40] Such s*ui generis* Aboriginal nationhood or inherent sovereignty exists as comprehensive orders with deeply interrelated responsibilities, rights, and obligations that are specific and precise. They are consensual, interactive, dynamic, and cumulative.

Sui Generis Citizenship

The constitutionally protected Aboriginal orders preserve *sui generis* citizenship based on kinship (see Battiste and Semaganis, 2002; Littlebear, 1993). Like Aboriginal sovereignty, the kinship structures create a *sui generis* citizenship that is distinct from a European or Canadian concept of citizenship. This vision of belonging to the land, a people, and a family unfolds an alternative vision of society and citizenship. It accentuates relationships—in particular, the responsibilities among families, clans, communities, and nations to a particular ecology. Aboriginal teachings focus on unity: everyone and everything is part of a whole, in which they are interdependent. Aboriginal thought values the ecological order over social order, relationships over individual identity, the extended family over the immediate or biological family. With all things and in all things, Aboriginal peoples are relatives. Each person has a right to a personal identity as a member of a community, but also has responsibilities to other life forms and to the ecology of the whole. Such kinship was a necessary foundation of Aboriginal sovereignty and order.

Instead of promoting abstract rights, the Aboriginal order of kinship implies a distinct form of responsibilities. Everyone has the responsibility to give and receive according to his or her choices and gifts. Those who give the most freely and generously enjoy the strongest claims to sharing—claims directed to their relations. Instead of defining a nationality separate from relatives, Aboriginal teachings recognize a web of reciprocal relationships among individuals. Leaders do not shed their kinship responsibilities but remain tied to their clans. Such thinking renders the rights of citizens against the nation as meaningless, because there is no artificial entity to argue against, only family, clans, and relatives.

Aboriginal thought knew no concept of strangers or others; everyone was a guest. Within the vast fabric of families, clans, and confederacies, every person stands in a specific, personal relationship. All children of the Earth were welcome at our council fires. ‘Guests’ within their territory were typically assigned to a local family or clan for education and responsibilities.

In the Aboriginal order, responsibilities are the freedom to be what people are created to be. Because no person knows what path is for another, each person has the independence and security to discover that path without interference. From infancy, children are born into a family, surrounded by relatives and friends who are considered ‘uncles’ and ‘aunts’. The actual blood kinship may be worked out in time, but everyone appears related, thus kin. At the same time, they are left free to discover their gifts and talents and choose their unique course of action. This kind of subjectivity is the product of an order that strives for consensus but tolerates a great deal of diversity and non-conformity.

Treaty Federalism

The *sui generis* Aboriginal orders created treaties with the British sovereign that generated consensual reconciliations, delegations, obligations, and rights among the treaty parties (Henderson, 1994). Within Aboriginal diplomacy and treaties, kinship models meant adopting the foreign sovereign through the metaphors of a father, mother, uncle or auntie, brother, or sister.

Where treaty negotiations were successful, inherent rights crystallized as vested or reserved treaty rights in both legal systems, with their scope delineated by the wording of the negotiation and the treaty.[41] Where no accommodation was reached in a negotiation, those Aboriginal orders and rights continued; they were not extinguished.[42] In the context of a treaty negotiation and agreements between independent legal regimes, implied or constructive interpretation is invalid. Aboriginal rights to the land continue to exist apart from the treaty in Aboriginal law.[43] Inherent rights not specifically delegated to the sovereign or placed under its administrative jurisdiction are reserved to the Aboriginal orders.[44]

The treaties, as written documents, recorded an agreement that had already been reached orally. Because of misunderstanding, treachery, and deception, the treaty commission did not always record the full extent of the oral agreement.[45] The Aboriginal perspective on the oral and written agreement and the honour of the Crown are remedial parts of treaty interpretative principles. The consensual treaties replaced parts of the general protective jurisdiction generated over Aboriginal orders by the assertion of sovereignty over Aboriginal territory.[46] These treaties are distinct, *sui generis* sources of imperial constitutional law in Great Britain and later the United Kingdom.[47] These treaties created a free association with the sovereign. Since they legitimize the British presence in the Aboriginal territories, they were and remain the original constitution of Canada. Treaty federalism is the foundation of provincial and federal authority in North America under subsequent imperial acts.

The treaty order was built upon the shared principle of *pacta sunt servanda* in the European law of nations and Aboriginal law, which creates mutual trust as a powerful tool for working out independent wills. The autonomy of the Aboriginal nations is the constitutional force behind treaty obligations. Respect for the autonomy of each treaty party acknowledged the inherent Aboriginal orders, their system of law and rights, and their way of life as well as their ability to create treaty rights, obligations, and promises.[48]

The parties to a treaty created and sustained commitments to agree upon a transnational structure and its shared meanings. Generating the spirit and purpose of the treaty, these commitments created a constitutional structure based on the principle that co-operation is preferable to reliance on military might or war. These commitments create new legal meaning or jurisgenesis between the nations. The enormousness of these commitments in the law of each treaty party creates the solemnity and sacredness of the agreements. Each treaty party is bound by law to keep its promises because each has intentionally invoked the convention of treaty. Thus, each nation's constitutional law and the intent of the treaty parties control the interpretation of *sui generis* treaties,[49] not the principles of public international law.[50]

All through the treaty negotiations, Aboriginal peoples invited the agents of the British sovereign to make known the 'good thoughts' of peace, to clear the path between each other, to bury the hatchet of war, to link arms together, and to remove the clouds that bind the Sun which shines peace on all peoples of the world (Williams, 1996). They agreed to live like brothers with the British sovereign and to keep the promises and relationship 'as long as the sun shines and the water flows' (Stanley, 1961; Morris, 1880; Mair, 1908). The British sovereign, in turn, promised noninterference with Aboriginal order and lifestyles and an enriched livelihood (Morris, 1880, pp. 28, 92–3, 96, 184–5, 211).

These treaty promises are expressions of autonomous wills exercising their liberty by binding themselves into the future. Where no obligation existed before a treaty promise, the mutual agreements imposed new binding obligations on each nation. Treaty promises created greater or lesser autonomy in some areas, and made obligatory a course of conduct that but for the treaty would otherwise be optional or discretionary. These restrictions on future conduct are restrictions mutually undertaken in order to strengthen a long-term relationship; they limit the future for present purposes.

The promises and obligations of the treaties are the source of specific jurisdiction of the British sovereign and subjects in North America. In effect, these treaties formally extended to the immigrants the guest status of the Aboriginal order. These 'inviolable' compacts are exchanges of solemn promises,[51] protected initially by imperial constitutional law[52] and now by the constitutional law of Canada.[53] Emphasizing the importance of the promises, the Court has held that the nature of these promises is sacred.[54]

The sovereign's honour requires the courts always to assume that the sovereign intended to fulfil its promises to Aboriginal peoples.[55] Canadian governments and courts are also required to distinguish treaty rights from delegated legislative rights. Treaty rights are based on inherent rights of Aboriginal law and custom, distinct from parliamentary powers. All agencies of Canadian governments are required to scrutinize and control the extent of legislative or regulatory impact on constitutional rights to ensure recognition and affirmation.[56]

The oral promises and terms of the treaties establish the framework of the imperial sovereign's authority and obligations. Treaty delegations from the Aboriginal nations to the British sovereign are conditional transfers of Aboriginal authority to the British sovereign. These specific delegations create the delegated jurisdictions of representative or responsible Canadian governments.[57] They create most of the rights or privileges of the colonialist-immigrants in British North America. Often in these treaty delegations, the Aboriginal nations permitted the sovereign to establish trading settlements or villages on the coastlands and allowed the sovereign to control these venues. It was in these venues that the Canadian narrative emerged and developed subjectship and citizenship. The terms of the treaties are the indigenous principle of constitutional legitimation that has haunted Canadian federalism, nationalism, and citizenship. They are as significant to constitutional legitimation in the constructed Canadian colony and nation as Canadian governments and citizens' relentless attempts to ignore such legitimization.

The treaties affirm the existing *sui generis* Aboriginal nationality and they extend the protection of being Her Majesty's treaty subjects to them. They create shared, consensual alliances or 'subjecthood' distinct from the relationship to Her Majesty's other subjects. This subjecthood is not a feudal relationship manifested legally by statutory allegiance, treason, and treasonable offences wherever the natural-born subject resides, but autonomous relations defined by the treaties. As such, it is the voluntary foundation of treaty citizenship, British subjectship, and Commonwealth citizenship.

Treaty rights, like Aboriginal rights, must not then be interpreted as if they were common law rights or ordinary statutory rights.[58] They are independent of British legal concepts or positive legislation, but vested in the constitution of Canada.[59] Aboriginal and treaty rights are contextually characterized by Aboriginal thought, heritage, and traditions.[60]

The *Final Report* of the Royal Commission conceptualizes the treaties as constitutional instruments that create and regulate the relationship with Canadian governments. The existing imperial treaties create a 'social compact' [Canada, Vol. 2(1), p. 20 (*Ibid.*) and sacred compact (p. 52)], and the correct constitutional understanding of the treaties is the 'bedrock' of Canadian law (*Ibid.*, p. 35).[61] They are the 'bearers of ancient and enduring powers' (*Ibid.*, 1993, p. 36) that created 'treaty federalism' in Canada [*Ibid.*, p. 194], itself 'an integral part of the Canadian constitution' (*Ibid.*, pp. 20–1, 194). These existing treaties are comparable to the 'terms of union where former British colonies entered Confederation as provinces' (*Ibid.*, pp. 21, 22, 994–5).

The *Report*'s constitutional vision of returning to principles of the treaties establishes a new social compact in Canada. This new social compact is central to the commission's vision of a multinational Canadian federation that respects cultural diversity (*Ibid.*, pp. 10, 15, 17–21, 74, 83, 167, 307; Vol. 5, pp. 149, 158). In *People to People, Nation to Nation,* a volume of highlights from the *Report,* the commission stated 'an agreed treaty process can be the mechanism for implementing virtually all the recommendations in our report—indeed, it may be the only legitimate way to do so' (Canada, p. 51).

The *Report* concludes that new treaties are required with Aboriginal peoples such as Indians in British Columbia and the Métis. In respect of longer-term treaty implementation and the renewal processes of existing treaties, the *Report* recommends change in political institutions. The commission's findings characterize the dishonoured treaties by the colonial governments as part of the negative 'ghosts' of Canadian history (*Ibid.*, pp. 4–5).

Constitutional Supremacy

The Supreme Court has affirmed the interrelatedness of parts of the *sui generis* Aboriginal orders and treaty federalism with other constitutional powers and principles (*Ibid.*, para. 148). It states that each element of the Canadian constitution is linked to all other elements and must be interpreted by reference to its underlying structure or its principles as a whole.[62] While Aboriginal orders and treaty federalism cannot be defined in isolation from the other sections that make up the framework of the constitution, these constitutional rights cannot be

trumped or excluded by the operation of any of these other powers or principles.[63] In reviewing past imperial acts, the Court has held that only plain, clear, and positive imperial law can limit Aboriginal law or rights.[64] The Court argues that these constitutional convergences breathe life into the Constitution of Canada and generate a theory of constitutional supremacy.[65] Constitutional supremacy replaced the judicial doctrine of exhaustiveness of delegated powers of imperial acts, a doctrine developed in the context of federal–provincial jurisdictional disputes in which Aboriginal peoples or their constitutional rights under s. 35(1) played no role.[66] It affirms the Aboriginal principle of constitutional legitimation, and rejects the colonial past (Henderson *et al.*, 2000).

Under the theory of constitutional supremacy, s*ui generis* Aboriginal orders and treaty federalism do not have to surrender their unique visions to either the common or civil law regimes or the immigrant theory of majority rule. They do not have to surrender to federal citizenship. Canada's constitution protects the *sui generis* orders in their own right from governmental powers as well as from democratic processes by the underlying constitutional principles of the protection of minorities (*Ibid.*, para 80). They are an integral part of the living law of Canada and they cannot be categorized or ignored by governments or the courts.[67]

In order for convergence to take place between the constitutional powers and the constitutional rights of Aboriginal peoples, the Supreme Court has asserted governmental actions must be consistent with Aboriginal and treaty rights.[68] The Government of Canada cannot arbitrarily ignore the constitutional rights of Aboriginal peoples of Canada.[69] If government action is constitutionally consistent and still infringes upon Aboriginal or treaty rights, the Supreme Court has developed a rigorous justified infringement test to limit federal and provincial actions.[70] This test applies to the requirements of federal citizenship.

Pursuant to constitutional supremacy, sections 35(1) and 52(1) of the Canadian Constitution, the legal traditions of *sui generis* Aboriginal orders and treaty federalism have full constitutional force.[71] Canadian governments, bureaucrats, politicians, courts, and citizens have a duty to extend constitutional equality before and under the law to these *sui generis* Aboriginal orders and treaty federalism. These orders and rights modify existing legislation, regulations and rules.[72]

Under constitutional supremacy, all parts of Canada have a duty to recognize and affirm *sui generis* Aboriginal constitutional rights; they cannot pretend Aboriginal society had no law or primitive law.[73] The Supreme Court has acknowledged the constitutional necessity of constructing a fair, respectful, and impartial analysis of the constitutional rights of Aboriginal peoples that affirms their human dignity. As guarantors of the constitutional order,[74] the courts have a duty to protect the constitutional and *Charter* rights of Aboriginal peoples from infringement, to prevent the abrogation of or derogation from these rights,[75] to interpret these rights in a manner consistent with the preservation and enhancement of Aboriginal heritage,[76] and to give Aboriginal peoples appropriate and just remedies if their rights are violated.[77]

The Supreme Court has explicitly emphasized the necessity for a fair and just

constitutional reconciliation between the *sui generis* Aboriginal orders or treaty federalism and the governmental powers. Such reconciliations must build on the potential of consensual agreements and autonomy.

To propel the reconciliation processes and accomplish convergence, the Court established new analytical techniques and judicial methods, which it calls *sui generis* interpretation (see Borrows and Rotman, 1997; Henderson, 1997). When determining Aboriginal law and treaty rights, a comparative, intercultural, legal analysis is appropriate since 'one culture cannot be judged by the norms of another and each must be seen in its own terms'.[78] The Dickson Court stated when analyzing inherent rights under s. 35(1), '[I]t is [...] crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake'.[79] Governments and social science researchers should adopt similar analytical methods in their approach to Aboriginal or treaty topics.[80]

To analyze *sui generis* Aboriginal orders and treaty federalism within the Canadian constitutional framework, government officials and reviewing courts must step outside British legal traditions and academic disciplines to create *sui generis* analyses. In conducting these analyses, they have a duty to criticize the old colonial order with its legacy of racial discrimination. They must create an innovative and just language to develop methods of constitutional convergence and interpretation. Specifically, they have a duty to reconcile the *sui generis* analysis of the rights of Aboriginal peoples with existing adjudicative theory, especially legal positivism (for an excellent synthesis see Macklem, 2001, pp. 16–23).

To protect *sui generis* Aboriginal orders and treaty federalism, the Supreme Court has affirmed many constitutional limitations on the powers of the federal and provincial governments. Central to policing the boundaries are the constitutionally binding fiduciary obligations on the governments to Aboriginal peoples.[81] These obligations regulate and supervise the actions of Canadian governments and subjects toward *sui generis* Aboriginal orders and treaty federalism. These duties ensure the integrity and honour of the Crown[82] and are consistent with the 'sacred' nature of Aboriginal and treaty rights.[83] These protective obligations are always involved when governments or their administrations take any action that affects Aboriginal and treaty rights. The Court has required the various manifestations of the Crown to act in a trust-like and non-adversarial manner to fulfil its fiduciary obligations toward Aboriginal peoples.[84] This obligation includes good faith consultation with constitutional rights holders and may require their consent or agreement to implement legislation, regulation, or policy.[85] In addition, governments and courts have a duty to reconcile the specific British or French constructs of sovereignty, government, law, and culture with specific Aboriginal knowledge, languages, heritages, and laws.

This duty also applies to federal citizenship. In constitutional supremacy, constitutional rights trump federal statutes; thus the citizenship offer is not a rival for *sui generis* and treaty citizenship of Aboriginal peoples. The democratically elected framers of the *Constitution Act, 1982* established this broad constitutional principle. The Court has rejected the proposition that Aboriginal or treaty rights disruptive to Canada should be denied or declared inoperative.[86] In

other words, *sui generis* and treaty citizenship is a constitutional right and relationship; federal citizenship must be consistent with it. Analytical integrity and constitutional fidelity requires that *sui generis* and treaty citizenship be affirmed and recognized as the essential dignity of Aboriginal peoples; where these rights end those of federal citizenship begin.[87]

Conclusion

Like the sound of the ringing church bells of the Christian regime and the lonely whistle of trans-Canadian trains, the animating voice of the Hobbesian artificial Man State—the call of citizenship—is declining. These sounds remain, but their meanings are the withering ideas of the Eurocentric past imposing singularity in its political order. This conceptual order that once defined the parameters of the possible is fading before the unfolding ecological sustainability of biological diversity, peoplehood and human rights, and the global dynamics of freedom and trade that seek to articulate respect for difference and diversity in a renewed promise of abundance or at least searching for post-scarcity. These standards are replacing the conditions of citizenship and government.

The constitutional law of Canada affirms the triangularity of modern power among federal, provincial, and Aboriginal and treaty rights. It prevents simple closure to the prismatic concepts of citizenship, federalism, and sovereignty (Riggs, 1964).[88] These concepts are interconnected parts of shared, delegated treaty relations between Aboriginal orders and the British sovereign. The treaties created the framework of the constitutional order and the non-Aboriginal concept of 'citizenship'. In the colonization era, these concepts frequently were individualized and inverted into the argument and invitation of citizenship.[89] The inverted argument ignores the reliance of the British sovereign on Aboriginal sovereignty, treaties, and the affirmation of *sui generis* orders. The peoples of Canada, courts, and governments need to learn the art of thinking to create constitutional convergences and symbiosis on these issues as well as to adopt a form of terrestrial consciousness.

The *sui generis* order and treaty order present exceptional choices to Aboriginal peoples, both personally and collectively, to grasp and articulate their perspective on the transcultural transformation. *Sui generis* and treaty citizenship gives the Aboriginal peoples of Canada the ability to envision and advocate relentlessly for alternative relationships and destinies within and without Canada. Assimilation is not a precondition for either unity or belonging; indeed, it is a deep and irreversible impoverishment. These destinies are built on Aboriginal heritage and law, revealing their rootedness in the ecology in their deepest beliefs, passions, and their oral traditions. Unfolding these destinies will inform the vision of a postcolonial *kanata* and a reconception of belonging. Aboriginal peoples must not be afraid of envisioning a seemingly impossible reform and destiny, especially if we want our destiny to become a reality. As many Elders have said: A human being who has a vision is not able to use the power of it until after they have done this vision on earth for people to see.[90]

The best solutions to *sui generis* and treaty citizenship should be founded on the inescapable pluralism and diversities of existing polities as the guiding

normative principles of belonging and citizenship. Often calls for solidarity and cohesion appear to be narcissistic or self-pitying, concerned with the loss of a colonial model of society rather than a contribution to strategic self-assessment and institutional reform (Findlay, 2000a,b; Green, 1995). Among male scholars, it has raised the desperate search and perilous longing for control of the human spirit in the guise of social cohesion.[91]

The first step in generating a comprehensive Canadian sense of belonging must be found in learning and protecting its diverse ecology rather than in narrowly conceived political or cultural thought (Borrows, 2000; Battiste and Henderson, 2000). Almost all empires or nations founded on artificial political ideologies have collapsed (O'Sullivan, 1994). When they have collapsed, the various people have reorganized them into historic relationship with the natural ecology and shared heritage (*Ibid.*; also for Paz's suggestion see Paz, 1979).

Since no perfect or pure cultural realm has every existed, the preferred terrestrial consciousness of Aboriginal peoples needs to be intercultural or transcultural. Interculturalism is founded on the idea of the freedom to choose and consent to alliance that respects parallelism, diversity, creativity, and shared power. Recent books illustrate this challenge. In particular, the profound works of: Mi'kmaw educator, Marie Battiste (2000; Battiste and Henderson, 2000); Maori educator, Linda *Tuhiwai* Smith (1999); Mohawk writers Patricia Monture (1999) and Taiaiake Alfred (1999). These works structure the postcolonial Indigenous 'resonance' (or renaissance) in the same way as the works of Chinua Achebe, Edward Said, Gayatri Chakravorty Spivak, and Roberto Mangabeira Unger create and inform Third World postcolonial thought. In addition, these works are supported by James Tully's insights on interculturalism (1995); Monique Deveaux's analysis of cultural pluralism (2000); and the exceptional constitutional analysis of Patrick Macklem (2001).

Together these books show how modern political theory fails either to address or to respond adequately to crucial issues raised by Aboriginal difference or cultural diversity. These works challenge contemporary thinking and categories of the Eurocentric past. These 'frozen' categories may be incompatible with the spirit and intent of postcolonial belonging and its terrestrial consciousness. In the global transformation and Indigenous resonance, the frozen ideas of the nation and citizenship appear disconnected and empty. The Indigenous resonance needs to promote prismatic thought to generate a just and sustainable future to replace the neo-colonial version of the European enlightenment and its universality.

Indigenous consciousness and environmentalism move toward the ideas of a planetary order, ecological belonging, human rights and peoplehood.[92] In the unfolding transformation, Indigenous peoples may need to combine imagination with memory, rather than conform to Eurocentric concepts such as sovereignty or citizenship. In the past, political imagination has usually been a national imagination; today it is a planetary imagination. Rather than relying on governments and political parties and their fossilized ideas of the inherited normative vocabulary and language games of Eurocentric thought, previously colonized peoples around the planet are displacing the Eurocentric categories with a terrestrial consciousness.

This terrestrial consciousness is at the core of the postcolonial belonging that de-emphasizes citizenship for ecological belonging and responsibilities. Indigenous peoples who were colonized are discovering that belonging to an ecology is our shared purpose, bond, and unity. Postcolonial belonging has generated the Indigenous 'resonance' in public and private international law, as well as in Canadian law and civil society movements.

The postcolonial belonging to a territory or ecology relies on the belief in the capacity of peoples to regenerate the world and the necessity for them to do so in order to fulfil an ultimate destiny. These beliefs provide a basis both for a conscious attack upon the existing order and for the conscious establishment of a new global order. The context for transforming the pre-existing legal order is justified as the re-establishment of a more fundamental law as justice or freedom. Without such beliefs the great legal revolutions of Eurocentric history could not have occurred (Berman, 1983). Each of the great legal transformations of the Western legal tradition made a sharp division between the law before it, what came with it, and what became the law after the transformation. Each of them also placed the historical old and new within a framework of an original creation and, at the end, an ultimate victory. The 1982 constitutional reaffirmation of Aboriginal and treaty rights follows this tradition in remaking Canada.

In the unfolding multi-faceted national and global transformation, Aboriginal peoples must confront the regeneration of the planet and intercultural peoplehood. Indigenous peoples are imagining and constructing an alternative pluralism from their traditions and teachings. They are criticizing, displacing, and redefining Eurocentric rights, discourses, interests, and ideas based on their pain, experiences, and visions. They are sustained by a shared belief in finding an in-built legal, economic, and institutional context of a free and nourishing terrestrial society. In the process they are mapping new institutional and cognitive changes.

In learning to belong to an ecology or a heritage, the first step is to accept it for what it is and what it might become. In Canada, such a project is unfolding guided by Aboriginal sensitivity to protecting and nourishing the land and its resources. It is striving toward an ecological society that African-American poet Langston Hughes suggests 'never has been yet, and yet must be' (Smith, 1997).

The second step is accepting human diversity, imagination, creativity, and innovation. The human spirit has always overrun imposed, artificial limits created by governments throughout history. The political encounter of a diverse multicultural society is the current transformation of the human spirit. It is the challenge of a resilient encounter of commitments, an encounter with the vectors of each particularity and angularity as it transforms into intercultural belonging and terrestrial consciousness.

The spirit and responsibilities of the framework of *sui generis* and treaty citizenship establish a constitutional space for both of these steps to enter the public discourse. It will allow a responsible future for our intercultural youth and a sustainable environment. The offer of federal citizenship does not offer the same space; it offers only the silence and anguish of minority interest group status.

Notes

1. Guidance was provided by *ababinilli*, *máheóo*, and *niskam*, although I assume full responsibility for interpretation. Many thanks to Professors L.M. Findlay, Marie Battiste, and Isobel Findlay of the University of Saskatchewan for their discussions and thoughts.
2. *R.* v. *Van der Peet,* [1996] 2 S.C.R. 507 at para. 31 [hereinafter *Van der Peet*] commenting on s. 35(1) of *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (UK), 1982, c. 11.
3. *Canadian Citizenship Act*, S.C. 1947 C-15; R.S.C. 1970 c. C-19; *Citizenship Act*, R.S.C. 1985, c. C-29. Also see *Immigration Act*, 1910 (UK), 9 and 10 Edw. c. 27 ss. 2 and 3 (legalized the status of the Canadian citizen for immigration purposes); *Canadian National Act*, 1921 (UK) 11 and 12 Geo. 5, c.-4 (created the status of the Canadian national for the purposes of nominating nationals for membership of the International Court of Justice).
4. *Citizenship Act*, 1985 at s. 32. See Jones (1956, p. 87), who states that before the *Statute of Westminster* in 1931, the federal parliament did not have the constitutional jurisdiction to amend the law of nationality that accorded the status of British subject to those born within the United Kingdom.
5. *Citizenship Act*, 1985 at s. 3(1)(a). Section 3(1)(d) confirms the natural-born citizenship rights of a person born after the 31st day of December 1946. Section 4 provides that only persons who were not 'aliens' on 1 January 1947 can claim citizenship through birth in Canada. 'Alien' was negatively defined in s. 2 of the 1947 Act as a person who was not a Canadian citizen, Commonwealth Citizen, British subject or citizen of the Republic of Ireland. Persons born in Canada who were 'aliens' could not claim Canadian citizenship through birth in Canada; they could become Canadian citizens under either the Canadian parentage rules or by naturalization. Indians were not considered persons in Canada in 1947, see below in note 16.
6. This concept does not seem to include the Nordic consciousness of the Sami people.
7. Established in August 1991 by Parliament, the Royal Commission on Aboriginal Peoples was mandated to study a broad range of issues, many of which are complex and deal with long-standing matters in the relationship between Aboriginal and non-Aboriginal peoples in Canada. The Commission directed our consultations to one over-riding question: what are the foundations of a fair and honourable relationship between the Aboriginal and non-Aboriginal people of Canada? Its five-volume final report represents extensive consultations with Canadian scholars and Aboriginal peoples on various subjects and contains 440 recommendations. It held 178 days of public hearings, visited 96 communities, consulted dozens of experts, commissioned scores of research studies, and reviewed numerous past inquiries and reports. Its central conclusion can be summarized simply: the main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong. It stated that assimilation policies have done great damage, leaving a legacy of brokenness affecting Aboriginal individuals, families and communities. The damage has been equally serious to the spirit of Canada—the spirit of generosity and mutual accommodation in which Canadians take pride.
8. The *Indian Act*, S.C. 1876, c-18, legislated a process of enfranchisement whereby Indians could acquire full British subject status by relinquishing their ties to Aboriginal culture, traditions, any Aboriginal or treaty rights, and ties to their community. The costs of ending Aboriginal personhood surpassed the cost for an immigrant from another country. Assimilation through enfranchisement clearly failed in Canada, as the rate of enfranchisement was extremely low. When only one Indian voluntarily enfranchised, the *Indian Act* made it compulsory. See Canada (1996, Vol. 1, pp. 255–332).
9. *Citizenship Act*, 1985 at s. 3.
10. The late Peter Gzowski's journalistic narrative of the best of Canada as elaborated in radio interviews and dialogues with Canadians every morning on CBC Radio throughout much of the 1980s and 1990s.
11. *Canadian Charter of Rights and Freedoms* [hereinafter *Charter*], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11 at s. 27; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 757.
12. The royal statement affirms Aboriginal self-determination; see below in note 92.
13. *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 109.
14. *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 at 36. Similar to treaties, the Supreme Court has stated that in citizenship the correlatives of allegiance, protection, rights, and duty arise, *Winner* v. *S.M.T. (Eastern) Ltd*, [1951] S.C.R. 887 at 902.
15. Notes for an address by the Honourable Jane Stewart, Minister of Indian Affairs and Northern Development on the occasion of the unveiling of Gathering Strength—Canada's Aboriginal Action Plan, Ottawa, Ontario, 7 January 1998 (http://www.ainc-inac.gc.ca/nr/spch/1998/98j7_e.html).

16. *Indian Act*, s. 12: 'The term "person" means an individual other than an Indian, unless the context clearly requires another construction'. In the *Indian Act*, R.S.C. 1886 revised the clause and placed it in interpretation section 2(c); R.S.C. 1927, c. 98, s. 2(i). 'The expression "person" means any individual other than an Indian.' In 1951 this provision was silently omitted from the interpretation sections.
17. 13 Geo. VI Chap. 16. In 1965, the Indian Affair Branch was transfer to the Department of Northern Affairs and National Resources (P.C. 19652285).
18. This was the first time that the federal government acknowledged voting rights for treaty Indians without the condition of assimilation into Canadian society and rejection of their imperial constitutional rights.
19. *Indian Act*. See also Mercredi and Turpel (1994, pp. 80–95).
20. *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at para. 50 [para. number from online: QL(SCJ)]. Canada is a party to over 30 international human rights instruments as multilateral treaties that have not been implemented: see Canada (2001). This report urged that Canada 'actually live by these multilateral treaties and implement them'.
21. *Lovelace v. Canada*, U.N. Doc. CCRP/C/DR/[XII]/R6/24 (31 July 1983).
22. For questions of dual citizenship and undivided loyalty toward Canada, see the Minutes of Proceeding and Evidence of the Parliamentary Standing Committee on Citizenship and Immigration (1994).
23. Section 15(1) of the *Charter*, provides for the equality of every individual before and under the law without discrimination as to national or ethnic origin. This section guarantees that every individual within Canada must be treated with equal concern and respect based on the theory of inherent dignity. This constitutional guarantee to every individual may create a conflict with federal citizenship rights and responsibilities to some as a suspect ground for positive discrimination toward an alien individual by imposing unequal burdens, see *Andrews* v. *Law Society of B.C*., [1989] S.C.R. 143 (invalidating Canadian citizenship as a prerequisite to admission to the legal profession within the province as *prima facie* constitutionally suspect). But see *Lavoie* v. *Canada* [2002] S.C.C. 23 (Canadian citizens receiving preferential treatment in federal Public Service employment over permanent residents is a justified violation of equality rights under s. 1 of the *Charter*). Other provisions recognized in the *Charter* for citizens are: the right to vote and to be qualified for membership in legislative bodies (s. 3); the right to enter, remain in, and leave Canada [s. 6(1)]; and the qualified right to have children educated in one of the two official languages [s. 23(1)].
24. *Coronation Oath Act*, (1688) I Will & Mar. c. 6 (see Blackstone, 1979). In the common law, the protection of Aboriginal laws and custom is called the law of continuity; see Walters (1999).
25. *R.* v. *Côté*, [1996] 3 S.C.R. 136 at para. 49. Also, the Supreme Court has held that the law of Aboriginal title represents a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province, *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 340. As to the reception of law and its complications, see McHugh (1998).
26. For the development of and a description of imperial constitutional law, see Walters (1992, 1995). For the imperial constitutional law protecting the *sui generis* treaties with Aboriginal nations, see Dupuis and McNeil (1995). *R.* v. *Sundown*, [1999] 1 S.C.R. 393 at paras 24, 46; *R.* v. *Badger*, [1996] 1 S.C.R. 771 at paras 41, 47.
27. *R.* v. *Secretary of State*, [1981] 4 C.N.L.R. 86 at 99 (Eng. C.A.) per Lord Denning M.R.; *R.* v. *Sparrow*, at para. 23.
28. *Van der Peet*, at para. 263.
29. *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 101 at para. 145. Also see *Delgamuukw* v. *British Columbia,* [1993] 5 C.N.L.R. 1 (B.C.C.A.) at para. 46, citing Brennon J., *Mabo* v. *Queensland,* [1992] 5 C.N.L.R. 1 (H. C. Aus.) at 51; *Côté*, at para. 49.
30. See the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, United Nations Economic and Social Council, *Preliminary Report of the Special Rapporteur, Protection of the Heritage of Indigenous Peoples*, UN ESC, UN Doc. E/CN.4/Sub.2/1994/31 (1994) at para. 8. For a more comprehensive analysis, see Battiste and Henderson (2000).
31. '[W]e must respect the past because the world of culture that we inherit from it makes use of who we are. The past is not something that we, as already constituted human beings, choose for one reason or another to respect, it is such respect that establishes our humanity in the first place' (Kronman, 1990, p. 1066).
32. The interpretative framework of the courts is different in construction, but similar in legal operation to the 'images' that W.E. Conklin describes in *Images of a Constitution* (1989). McLachlin J., as she was then, in dissent in *Van der Peet* describes the majority constitutional framework as 'reasoning from first

principles' or systematic reasoning rather than following imperial British common law and its historical and judicial methodology to the *sui generis* orders (*Van der Peet* at para. 262).

33. *Côté*, at paras. 49, 52; *Van der Peet*, at para. 247 per McLachlin J. dissent.
34. *Delgamuukw*, at paras. 130, 189; *St. Mary's Indian Band* v. *Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 14; *Mitchell* v. *Peguis Indian Band*, at para. 34 per Dickson C.J.; *Canadian Pacific Ltd* v. *Paul*, [1988] 2 S.C.R. 654 at 678; *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 382.
35. *Ibid.* at para. 19 (Aboriginal rights cannot be defined on the basis of the philosophical precepts of the liberal enlightenment).
36. *Côté*, at paras. 49 and 52 per Lamer C.J.C.; *Van der Peet*, at para. 247 per McLachlin J. dissent.
37. *Côté*, at para. 48 per Lamer C.J.; *Van der Peet*, at para. 37 relying on *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) Marshall C.J.; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at para. 69, Lamer J. as he then was. Aboriginal nationality should not be confused with the federally created Indian Bands, which are entities of federal law, or the Liberal party 'inherent self-government' policies for these bands. See *R.* v. *Pamajewaon*, [1996] 2 S.C.R. 821.
38. *Van der Peet*, at para. 106; *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313 [hereinafter *Calder*] at 328, per Hall J.
39. *Delgamuukw*, at 176.
40. *Van der Peet*, at paras. 17, 20, 42.
41. *Van der Peet*, at para. 313 per McLachlin, J.
42. *Sparrow*, at para. 37; *Delgamuukw,* at para. 180.
43. *Van der Peet*, at 120 *per* L'Heureux-Dubé J. (dissenting on other grounds).
44. *R.* v. *Marshall*, [1999] 3 S.C.R. 456 at para. 48; *Sioui*, at paras. 58, 87, 100, 120.
45. *Badger*, at para, 52.
46. *Delgamuukw*, at paras. 145, 166–9, 174, 176, 178.
47. *Badger*, at paras. 76–9; see generally, in the context of treaties in federal law and the nature of treaties, *Sioui*, at paras. 69–74.
48. *Sundown*, at paras. 6, 11, 25, 33, 35–6; *Badger*, at paras. 76, 82; *Van der Peet*, at para. 31.
49. *Badger*, at paras. 41, 52–4, 78; *Marshall*, at paras. 7, 14, 40, 43–4, 48, 64, *Côté*, at para. 49. See also Henderson (1997).
50. *Sioui*, at paras. 26, 42, 76; *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at para. 33. These principles may be helpful and persuasive sources of interpretation of context or content of rights if they are relevant. See *Baker*. v. *Canada*, [1999] 2 S.C.R. 817 at para. 70; *Reference Re Public Service Employees Act (Alta.)*, [1987] 1 S.C.R. 313 at 348.
51. *Sundown*, at paras. 24, 46; *Badger*, at paras. 41, 47.
52. *Royal Instruction, 1761*, UK Public Record Office, Colonial Office 217/8 at 27–8; the *Royal Proclamation, 1763*, Privy Council Register, Geo. III, Vol. 3 at 102; UK Public Records Office, c. 6613683; R.S.C. 1970, app. I at 123–9. Rights confirmed by the proclamation are reaffirmed in s. 25 of the *Charter,* preserving their original authority as royal prerogative grants in imperial constitutional law. Prerogative treaties and acts are protected under *An Act to Remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within Diverse Countries and Places out of Her Majesty's Dominions, and Render the Same More Effectual*, 1843 (U.K.), 6 & 7 Vict., c. 94 and *An Act to Remove Doubts as to the Validity of Colonials Laws*, 1863 (U.K.), 28 & 29 Vict., c. 63, which are acts of parliament of the United Kingdom.
53. Prerogative treaties and rights are protected by imperial law from delegated legislative or executive powers to Canada and the provinces. See ss. 9, 12 and 129 of *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), R.S.C. 1985, App. 1, No. 5, and s. 35(1) and 52(1) of *Constitution Act, 1982*.
54. *Badger*, at paras. 41 and 47, *Sioui*, at para. 96; *Simon*, at para. 51; *Campbell* v. *Hall*, (1774) 1 Cowp. 204 [aff'd in *Secretary of State*, at 127 (Eng. C.A.)]. By comparison, in British common law the most sacred principles appear to be the sovereignty of the King or Queen and the rule of law, while the sacred principles of British positive law was based on parliamentary supremacy. In the Canadian constitutional order, the most sacred principles are federalism, democracy, constitutional supremacy and the rule of law, and the protection of minorities, see *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*] at paras. 32, 49–82.
55. *Sundown*, at 46; *Marshall*, at para. 49; *Badger*, at para. 47.
56. *Badger*, at paras. 78–80; *Sparrow*, at paras. 63–5.
57. *Sparrow*, at para. 37; *Sundown*, at paras. 25, 42.

58. *Sundown*, at para. 35.
59. *Badger*, at para. 79.
60. *Sundown*, at para. 35.
61. This is comparable to A.V. Dicey's assertion in the *Introduction to the Study of the Law of the Constitution* (1939) that the doctrine of parliamentary sovereignty is 'the very keystone of the law of the [United Kingdom] constitution' (pp. 39, 70).
62. *Quebec Secession Reference*, at para. 50.
63. *Delgamuukw,* at paras. 49–50.
64. *Sparrow,* at para. 37; *Delgamuukw,* at para. 180.
65. *Sparrow*, at paras. 49–54.
66. *A.G. Ont.* v. *A.G. Can (Reference Appeal)*, [1912] A.C. 571 at 583.
67. *Van der Peet*, at 559 and *Delgamuukw*, at paras. 97–8.
68. *Marshall*, at para. 67.
69. *Ibid.* at para. 64. Section 52(1) of *Constitution Act, 1982.*
70. *Sparrow*, at paras. 68–71, 75, 82; commented on in *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 and *Delgamuukw*, at paras. 161, 162–5.
71. *Quebec Secession Reference,* at para. 54.
72. *Van der Peet*. *Sui generis* rights demand a unique approach that accords due weight to the perspective of Aboriginal peoples; however, that accommodation must be made in a manner that does not 'strain' the Canadian legal and constitutional structure (at para. 49).
73. In the colonial era, courts routinely stated that Aboriginal peoples were 'barbarous', 'savage', or 'uncivilized' and incapable of recognition at common law, and they had no law. This view was rejected by the Supreme Court per Hall J. in *Calder*, at 346–7 and Dickson, J. in *Simon*, at para. 399. In defiance of the classical common law in British legal history, British legal positivist debated about where customs qualify as law, since they restricted the concept of law to positive law or a command theory: see Austin (1869) and Hart (1961). Compare to Professor Joseph Raz (1977) in whose view the rule of law 'bears no relationship to the moral worthiness of the substantive content of its laws, whether primitive or evil, the courts are required to observe the legislation even if the substantive content is morally repugnant', and to development of unwritten principles in the Canadian Constitution, see *Quebec Secession Reference.*
74. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at paras. 47–52.
75. *Charter,* at ss. 25, 26.
76. *Ibid.,* s. 27.
77. *Ibid*., s. 24(1).
78. Chief Judge E.T. Durie of the Maori Land Court of New Zealand and Chairman of the Waitangi Tribunal, 'Biculturalism and the Politics of Law', address to University of Waikato, 2 April 1993, quoted by Judge A.G. McHugh in 'The New Zealand Experience in Determination of Native or Customary Title: Effect of Title Grants and Need for a New Title System' (address to Supreme Court and Federal Court judges of Australia at the 1995 conference in Adelaide).
79. *Sparrow,* at para. 69.
80. For an example, see the holistic interrelated methodology of the Royal Commission in Canada (1996, Vol. 5, Appendix C, 'How We Fulfilled Our Mandate' at p. 296).
81. *Ibid* at para. 59.
82. *Ibid.* at paras 58, 65; *Badger*, at para. 78; *Sundown*, at para. 24; *Marshall*, at paras. 49–52.
83. *Badger*, at para. 41. Also see, *Campbell* v. *Hall*.
84. *Sparrow*, at 59.
85. *Delgamuukw*; Lawrence and Macklem, 2000.
86. R. v. *Marshall*, [1999] 3 S.C.R. 533 at para. 45. (Marshall II).
87. *Ibid*.
88. In addition to the Aboriginal and treaty sovereigns, there are 14 sovereign legislative bodies in Canada: the Parliament of Canada, and the legislatures of 10 provinces and three territories. For the constitutional theory of shared sovereignty, see Macklem (2001, pp. 107–31).
89. For a modern example, see Bill C-63 in 1999 and Bill C-16 in 2000, which sought to strengthen the value of Canadian citizenship by better defining what it means to be Canadian. They died on the Order Table. Clause 2(2)(b) of Bill C-16 deals with Indians who are registered under the *Indian Act* but who are not citizens. It proposes that such individuals who choose to become citizens would on registration be deemed to be permanent residents, thereby allowing them to begin the naturalization process. This clause continues

the colonial false assumptions of federal citizenship. It ignores Aboriginal and treaty rights of these peoples.

90. This is an ancient Aboriginal teaching among many Aboriginal nations. Often the teaching is attributed to Nicholas Black Elk, a Lakota *wicasa wakan* and Catholic catechist.
91. In Canada see Kymlicka and Norman (2000), Cairns (2000), Flanagan (2000) and Ignatieff (1994). The spirit of this search for social cohesion is analogous to that of the Anglo-Saxon elite in Canada's eugenic movement, especially its program against 'unfit' immigration, as discussed in McLaren (1990). The topic and the academic discipline have changed or been disguised, however, the purpose or spirit of the elite academic project is similar: scientific racial betterment is now discussed as social cohesion. Compare these works to that of Green (2001).
92. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Art. 1, para. 2. *International Covenant on Civil and Political Rights*, Art. 1, para. 3, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, Art. 1, para. 3 993 U.N.T.S. 3; Canada, 1996, Vol. 2 at 163–84; Anaya, 1996; Lâm, 2000, especially R. Falk's forward at p. xiii; *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, U.N.G.A. Res. 54/174, A/RES/54/174, 15 February 2000, para. 10.

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