

THE RULE OF LAW AND ABORIGINAL RIGHTS: THE CASE OF THE CHIPPEWAS OF NAWASH¹

Bruce Morito

Philosophy, Centre for Global and Social Analysis
Athabasca University
Athabasca, Alberta
Canada, T9S 2A3

Abstract / Résumé

A moral analysis of the historical changes in the legal relationship between the British/ Canadian Crown and the Chippewas of Nawash discloses an intimate connection between the fiduciary and legal failures of the Crown and its disrespect for the rule of law. Deterioration of the relationship, through failure to recognize the Covenant Chain wampum, the Royal Proclamation of 1763, the pre-confederation treaties and even an Imperial Proclamation of 1847 (signed by Queen Victoria), illustrates how the Crown has been prepared to undermine its own moral foundations of law in order to deal with the "Indian problem." Such analysis, I argue, is critical for establishing the context for the determination of Aboriginal rights.

Une analyse morale des changements historiques dans les relations juridiques entre la Couronne britannico-canadienne et les Chippewas de Nawash révèle un lien intime entre les défaillances fiduciaires et juridiques de la Couronne et son manque de respect envers le principe de légalité. La détérioration des relations, due au défaut de reconnaître le wampum du Covenant Chain, la Proclamation royale de 1763, les traités antérieurs à la Confédération et même une Proclamation impériale de 1847 (signée par la reine Victoria), illustre comment la Couronne a sapé ses propres principes moraux rattachés à la loi afin de traiter le "problème indien." Je soutiens qu'une telle analyse se montre cruciale à l'établissement du contexte entourant la détermination des droits des Autochtones.

The Chippewas of Nawash's story, in broad relief, is not unusual in Indian country. The Nawash, like all First Nations, have found themselves the recipients of injustices systemically entrenched in government policy and modes of decision-making. Adequate understanding of the depth and meaning of injustice toward Aboriginal peoples, then, cannot be attained apart from first penetrating to these levels. The approaches to policy and decision-making adopted by Canadian governments and supported by industry as well as the majority of Canadians can and usually do further exacerbate historical injustices by promoting under-analysis, if not mis-analysis, of this systemic injustice. In more detailed relief, the Nawash situation is different from most First Nation situations, insofar as it represents an extreme in the extent to which the Crown has violated its own legal and moral obligations. Much can be learned from the Nawash case, consequently, that might be less clearly evident in other cases.

This paper is an examination of the weave of moral and legal elements of injustice systemically entrenched in natural resource policy, as it affects the Chippewas of Nawash. Tracing the history of the Chippewa-Crown² relationship to the present regulatory scheme governing the Lake Huron fisheries, where the Chippewas claim jurisdictional rights over the fisheries, demonstrates just how an injustice has come to be masked and absorbed into policy and management schemes. The Ontario Ministry of Natural Resources sees the issue over the fisheries as one of determining a fair share of the fish resource in the Lake Huron region around the Bruce Peninsula (Southern Ontario). But by tracing the history of the Crown's honouring of treaties in the breach, it becomes clear that the "fairness" with which the Ministry is prepared to treat the Nawash, in the final analysis, further victimizes them. Indeed, as I will argue, the fairness approach extends a line of undermining the rule of law, a line traceable to 1763. This line has been one of using the legal institution to foster colonization, encroachment into treaty territories and justification of treaty violations. Each of these uses, it will be argued, undermines the rule of law through an abrogation of responsibilities and duties to protect treaty signatories from arbitrary and capricious use of the law to gain or justify dominance of one party over the other. The present regulatory scheme is just one manifestation of this misuse of the legal system.

Such misuses will be connected to the moral vacuum in which the Nawash situation has developed. By connecting this moral vacuum to the Crown's violation of the treaties, it can be argued that the very rule of law was and continues to be threatened in the Crown's dealings with the Nawash. This essay will focus on values vitally connected to the rule of law: freedom, autonomy, honour and dignity. Since these values are cross-cul-

turally identifiable, both Aboriginal communities and non-Aboriginal communities can be expected to identify their importance and binding nature, such that both can recognize and acknowledge these values as foundations for the rule of law. Any abrogation of treaty responsibilities, therefore, can and must be evaluated against the backdrop of these values.

History

The Proclamation of 1763 by King George III (*The Royal Proclamation*, 1970) applied to the Chippewas of the Great Lakes among other tribes of the Western Confederacy (so called by Sir William Johnson) (Sullivan, 1921) and to the Six Nations Confederacy (Williams, 1982). It was a proclamation by the British Crown ensuring the protection of Aboriginal lands west of the Appalachian mountains and was affirmed at the 1764 Treaty of Niagara by both confederacies (*Ibid.*). It is important to note here just what the 1764 agreement meant both to the Chippewas and to the British Crown. The Great Covenant Chain was the Western Confederacy's interpretation of the 1763-1764 agreement and was represented in the form of a wampum (a belt embroidered with symbols of the agreement and utilized by both confederacies). It was witnessed by over two thousand Confederacy warriors and the British representative, Sir William Johnson, Superintendent General of North American Indians.³ The wampum stated that Indians lived in solidarity with the British and were sovereign within their territories. The territory of the two confederacies extended from the west through to present day Quebec. British settlers were to be restricted to the east coast up to the Appalachian Mountains. Military alliances, especially against the Americans, were to be retained in solidarity with the British (Williams, 1982).

In fact, the Crown, through William Johnson, utilized the wampum to solidify alliances with the Chippewas, noting that the relationship had effectively evolved from one bound by a rope, through one bound by an iron chain, to the one bound by the silver Covenant Chain (*Ibid.*:51-52).

You know that we became as one body, one blood & one people. The same King our common Father that your enemies were ours that whom you took into your alliance & allowed to put their hands into this Covenant Chain as Brethren, we have always considered and treated as such (Public Archives of Canada, 1822).

The Wampum, at this point, then, was the foundation for an equal relationship between the Crown and the Western Confederacy. It was a chain of love and friendship.

Later in 1768, owing to British concerns over the restrictions on settlement detailed in the Royal Proclamation of 1763, Johnson brokered a new treaty with the Mohawk (of the Six Nation Confederacy), known as the Fort Stanwix Treaty. The new treaty reduced the territory of the Mohawk, much to the dread of their Delaware cousins (Williams, 1982). This new agreement with the Mohawk was also an obvious threat to the Western Confederacy, yet it continued to support the British in the War of 1812. It was, indeed, seen that the wampum of 1764 bound the Western Confederacy by honour to continue in support of the British. Later, in 1836, Sir Francis Bond Head, Lieutenant Governor of Upper Canada expressed his understanding of the wampum and what it meant to the members of the Western Confederacy:

An Indian's word, when it is formally pledged, is one of the strongest moral securities on earth; like the Rainbow, it beams unbroken when all beneath is threatened with annihilation. The most solemn form in which an Indian pledges his word is by the Delivery of a Wampum belt of shells; and when the purport of this symbol is once declared, it is remembered and handed down from father to son with an Accuracy and Retention of Meaning which is quite extraordinary (Canada, 1837).

Here, demonstration of the continuity in the Crown's understanding of the meaning that the wampum had for the Aboriginal partners is clear. In the same correspondence, Bond Head also addressed the fact that the Crown had gradually defaulted on its promises. In response to this abrogation he said:

However, the regular Delivery of the Presents proves and corroborates the Testimony of the Wampums; and by whatever Sophistry we might deceive ourselves, we could never succeed in explaining to the Indians of the United States that their Great Father was justified in deserting them (Williams, 1982; Canada, 1837).

Bond Head recognized the disparity between the integrity of the Crown and its Aboriginal partners; he understood that the Crown was abandoning its agreement, and that the process was transparent to the Chippewas. The results of such processes are duly noted by the Supreme Court of Canada. "We cannot recount with much pride the treatment accorded to native people of this country." "And there can be no doubt that over the years the rights of Indians have been honoured in the breach."⁴

In 1836, Bond Head addressed the Chippewas and Ottawas on the shores of Manitoulin Island concerning the Niagara Treaty. Since White encroachment was inevitable, as cultivation of the land was expanding

rapidly, the "natural" impoverishment of Indian hunting grounds made it necessary to change the agreement.⁵ Now, the Crown, in the Bond Head Treaty, acknowledged that, were the Chippewas to become farmers and till the land (use it), they could possess it.⁶ However, this Lockeian condition of title or ownership (Western European attitude toward the land as a commodity), was, in effect, a device designed to change the terms of reference of the original agreement. It was a device explicitly designed to "civilize" the Aboriginal, a programme to be more brutally carried out later in the guise of assimilation (cultural genocide) programmes. At the same time, this new agreement undermined the foundation of respect, as recorded in the wampum, since it changed the terms of reference for the relationship between Chippewa and Crown. The imposition of these new terms of reference, in effect, was an attempt to force the Chippewas to use foreign concepts such as "ownership" and "property" in order to be recognized as having any right to autonomy and respect at all.

What allowed the Crown to force these terms of reference onto the relationship was the duress of the Chippewas. Under threat of full-scale abandonment, and rejecting the Crown's proviso, the Chiefs of the Saugeen Chippewa were forced to agree to the demands of the Crown. Chief Metigwob's⁷ perception of Bond Head's message, as cited at the St. Clair River, September 15, 1836, was that it was pointless to resist the encroachment in light of the veiled threat that the Crown would cast the Chippewas off, as settlement continued to advance; the Chiefs were "over persuaded" to sign the surrender known as "Surrender 45." Thus, even in the early stages of the surrender process, during which all of the land south of the neck of the Bruce Peninsula (located in Southern Ontario) was occupied through encroachment, compliance was garnered by exploiting the people's duress.⁸

Two forms of abandonment were performed in 1836: 1) abandonment of legal commitments;⁹ 2) abandonment of the underlying moral commitments to respect the conditions necessary for maintaining the autonomy of the Aboriginal nation. In effect, nothing in the substance or the spirit of the original proclamation, or the wampum, was honoured in this new deal. From this point on, the wampum became irrelevant to the British.

The process, from 1768 on, illustrates how the Crown failed to fulfil its fiduciary responsibilities, and the analysis of this failure helps to characterize what these responsibilities were (and continue to be). The fiduciary relationship between Crown and Aboriginal peoples is one based on honour and trust (as expressed in the wampum and as recognized by the Crown representative). This basis has been re-affirmed and described by the Supreme Court today.¹⁰ Honour-driven, unlike contract-driven relation-

ships, depend critically on trust, rather than suspicion, "sharp-dealing," or fear of enforcement. This description can serve to set minimal conditions for a trust relationship, which depend critically on moral values such as honour, generosity in understanding and upholding the dignity of partners. So, the history of the Crown-Chippewa treaty relationship can, in part, be described as a history of the Crown's abrogation of its moral responsibility to uphold its commitment to protect the fiduciary relationship necessary for protecting the freedom and autonomy of Aboriginal society. By failing to protect against encroachment and by changing the terms of reference, the Crown both undermined the political freedom (autonomy as a sovereign nation) and the conditions of personal/community freedom (protection of honour, dignity and integrity) of the Chippewas. The latter, the core of this paper, will be explained in subsequent sections, but an initial point of clarification may be helpful here.

The connection between these moral values and freedom is this: these values, among others, are the primary objects we strive to protect when we fight for freedom. Fighting against oppression is motivated by the need to protect not only life, but to protect those values that make life meaningful and worthwhile. In fact, it is difficult to imagine the human fight for freedom apart from the need to live an honourable and dignified life. Satisfaction with dishonour and indignity, would yield acceptance of slavery and de-humanizing subservience to dictators.

Returning to the legal story, we can see that the Royal Proclamation and the Niagara Treaty were indeed legal documents, but they also defined the fiduciary or moral obligations; legal and moral obligations were one at this point. Carrying these obligations implies that the honour and integrity of either party would be sacrificed were they to fail to protect the freedom and autonomy of the other community. The Chippewas and Ottawas, as noted by Bond Head, never failed to live up to their fiduciary responsibility to the Crown in these early times. The honour of the Western Confederacy had not been abrogated by a fiduciary failure.

The fiduciary responsibility of the Crown, in contrast, was not only compromised, it was distorted and manipulated. In 1836, the fiduciary obligations were separated from law, it appears, by design. Francis Bond Head's reasoning to justify re-writing the treaty was based on the assertion that the encroachment of White settlers in treaty territory was inevitable, because the desire of White settlers for farm land was beyond the control of the government. Under a re-formulated concept of the fiduciary obligation, the pretense of paternalism and the interest in "civilizing" the Native,¹¹ Bond Head reasoned that it was his "obligation" to the Chippewas to set aside a tract of land (the Bruce Peninsula) from which all White settlers

would be extricated, in return for surrendering 1.5 million acres of what is known as the Saugeen watershed. Not much later (1854), the Crown returned to re-establish boundaries, in Surrender 72, reducing the Reserve from the entirety of the Bruce Peninsula to five small and fragmented Reserves. Finally, through 1855-7, 16,000 more acres were surrendered, leaving the Chippewas with two small Reserves and a small (3,800 acre) hunting ground. These legal aspects of the process have been described and acknowledged in an Ontario Provincial Court decision, *R. v. Jones*.¹²

On the matter of law, the most poignant thing to note is that the Treaty of 1836 involved a deed of title and Queen Victoria as signatory. As encroachment continued, the Chippewas sent a delegation to Toronto in 1839 to obtain a deed of title to show encroaching settlers that the Chippewas had ownership of the areas to which both parties agreed in 1836.¹³ The result was "The Imperial Proclamation," a "written paper" stating,

...it is Our Royal Will and pleasure that the said Ojibway Indians and their Posterity for ever shall possess and enjoy and at all times hereafter continue to possess and Enjoy the said above described Tract of Land or the proceeds of the sale thereof... without any hindrance whatever on our part or on the part of Our Heirs and Successors or of Our or their servants or officers.¹⁴

The proclamation is also recognized today by the provincial court¹⁵ as a clear expression "to protect the Indian's traditional fishing grounds." It is incredible that, in light of such an unambiguous declaration only a few years later, the British Crown would be instrumental in the further drastic reduction of Ojibway lands.

Clearly, the Crown distorted the meaning of its fiduciary obligations in order to serve the interests of its own subjects over and against its commitments to Aboriginal nations. Whereas in the original relationship, the fiduciary obligation was mutual and based on a trust to recognize Aboriginal autonomy, to respect terms of reference and to protect against encroachment, the eventual meaning of the fiduciary obligation was perversely reformulated as a paternalistic obligation. This obligation was further perverted to advance encroachment and domination by the settler community.

While the pattern of encroachment and appropriation usually took the form of encroachment followed by alteration of the terms of treaties, sometimes, the pattern was reversed, and treaties were used to advance settlement. A particularly telling instruction to the Lieutenant-governor of Northwest Territories after the cession of Rupert's land is noteworthy.

Turn attention promptly toward North and West assuring Indians of your desire to establish friendly relations with them, you

will ascertain and report to His Excellency the course you may think most advisable to pursue, whether by treaty or otherwise, for the removal of any obstructions that might be presented to the flow of population into the fertile lands that lie between Manitoba and the Rocky Mountains (Canada, 1871).

In general, this use of the treaty making process manifests how the Crown manipulated the fiduciary relationship to effect compliance in Aboriginal communities, once it was sufficiently powerful to do so. The pattern is systemic, in the sense that it has become the implicit norm for dealing with re-location of Aboriginal peoples and "re-negotiation" of treaties. The same pattern is presently being repeated in Voisey's Bay, Labrador, as mining companies encroach on Innu and Inuit lands in the interest of exploiting rich mineral deposits. *De facto* settlement and natural resource exploitation was and continues to be part of a system for leveraging compliance of Aboriginal peoples to abandon their rights.¹⁶

The Nawash Fisheries

In the Imperial Proclamation of 1847, a seven mile boundary around the peninsula was included in the Chippewa Reserve, and was designated an Aboriginal fishery, in the same agreement that would have encroaching non-Natives removed in return for the surrender of 1.5 million acres. The present Ontario government (The Crown in Right of Ontario), assuming Crown ownership, has claimed that it has authority in the area to monitor and manage in accordance with conservation principles and a multi-stakeholder "fair-allotment" agenda. Licensing of Aboriginal fishers, assigning total allowable catches, and cooperating with the Ontario Federation of Anglers and Hunters (OFAH) to stock exotic species, such as salmon for recreational purposes, are examples of how parameters for negotiating with Aboriginal fishers have been set.

The Ontario Ministry of Natural Resources (OMNR) has chosen to interpret Aboriginal rights narrowly, restricting the meaning to a right to negotiate fish quotas, but not so as to allow for debate over jurisdictional issues or treaty issues. The OMNR's terms of reference allow for access to the fishery by Nawash, by virtue of having a rightful quota, but not title to or control over the fishery.¹⁷ The OMNR has insisted on regulating Aboriginal fishers through licensing, charging Aboriginal fishers with violations of regulations, and refusing to allow the Chippewas to manage their own resource, except perhaps in the immediate vicinity of the Reserve.

The ministry's policy, however, even runs contrary to Supreme and provincial court rulings. Both courts reject the claim that Aboriginal rights are to be interpreted according to how they had come to be exercised in

the regulatory context.¹⁸ These rights are not to be interpreted in light of the *de facto* regulatory scheme. Moreover, the provincial court finds fault with the Crown in Right of Ontario for abrogating its responsibility to protect the Native fisheries against dominant outside interests. The dominance of non-Native fishing interests is expressed in the planting of exotic species (the recreational salmon fishery), which the Ministry has in fact aided and encouraged to the extent that the salmon fishery has become an assumed element of the regulatory scheme. But at a deeper level, failure to protect against dominant outside interests reflects the same type of fiduciary failure of the government during the period of the surrenders. In fact, it goes further by insisting on a fair share allotment approach to negotiations in the face of the Supreme Court's determination of the right to an Aboriginal priority in the fisheries.¹⁹ The Ministry has offered, as of April 1997,²⁰ to increase the Nawash share from approximately 1.2% of the total allowable catch (TAC) to 50% of the TAC. On the surface, this may seem generous, but in light of the rights of the Chippewas to the seven mile boundary around the peninsula, the offer retrenches the assumption that Aboriginal rights are to be interpreted in light of the existing regulatory authority and terms of reference, completely ignoring the fiduciary obligation to recognize and respect the Chippewa community's terms of reference and conditions of freedom.

In the event that the Provincial Crown should wish to dissociate itself from the federal and pre-Confederation British Crown fiduciary obligation and the obligation to uphold the honour of that title, it should be recognized that the identification and legitimacy of the provincial Crown's authority, be it as it may, rests on its continuity with the pre-Confederation British Crown, as much as does the federal Crown's identity as an authority. Where there is transference of Crown authority, in whatever body it may lie, then, there is also transference of Crown obligation, including the obligation to uphold the honour of the Crown.

By managing the Lake Huron fisheries, to a large extent, for salmon through extensive stocking programs, the OMNR is imposing a value structure onto the Lake Huron fisheries which services recreational fisheries over and above Aboriginal and commercial fisheries. This is not only in violation of Supreme Court rulings that state that resource priorities should first meet the needs of conservation, then satisfy Aboriginal rights to fish for food (which includes a right to a commercial fishery, under *R. v. Jones*), third, meet the needs of non-Native commercial fisheries, and last accommodate recreational fisheries,²¹ it is a blatant affront to Aboriginal perspective that emphasizes a commitment to Indigenous species (on moral and spiritual grounds). The instruction to be sensitive to Aboriginal perspective

(both culturally and historically) is also given explicitly by the Court.²² Doing so is inextricably linked to respecting the autonomy of a peoples and to satisfying the demands of a fiduciary relationship. By allowing the sports fishery to dominate the OMNRs fisheries management activities and policies, the government has continued to abandon its fiduciary responsibility through the promotion of encroachment of exotics and colonization of the Chippewa territories. Today, encroachment is effected through assumed jurisdictional and management privilege, and colonization through the imposition of a value scheme for managing the fishery resource in Chippewa territory. Judge Fairgrieve partially corroborates this analysis, as noted in his 1993 decision that the conservation plan of the OMNR indeed favoured the recreational fisheries and failed to recognize the constitutional priority of the Nawash.²³

Furthermore, the "fair share" and the accompanying "good for all" approach can and is used to undermine the priority status of the Nawash. The concept of fairness is being used as a principle of distribution of benefits on the assumption of shared values. But in this context, the values are not shared, since Nawash is struggling to gain respect for treaty rights, for a re-establishing of cultural and community integrity/stability, whereas the non-Native fishers are fighting for recreational values, while the business community is fighting for economic prosperity, evaluated in terms of monetary flows. Moreover, the Nawash don't want a share of the salmon; they want them removed. Recreation is not a fundamental value and legally cannot take priority over fundamental values of community stability, self-esteem, and autonomy. Once again, therefore, a concept central to justice, namely "fairness," is distorted to leverage compliance, and public support.

The Crown does not hold a fiduciary responsibility toward the recreational or non-Native commercial fisheries, since the regulatory scheme is not grounded on the rule of law or the honour of the Crown. The radically different Crown-Chippewa relationship is a unique or *sui generis* relationship according to which the government is under obligation to determine a frame of reference that would protect Aboriginal perspective and values, over and against *de facto* regulatory and management schemes. It is to do so through respect, understanding and consultation. Legally, such respect not only ought to result in recognizing the priority of Aboriginal fisheries, after the concerns of conservation are met,²⁴ it ought also to involve determinations of management schemes which would prioritize protection of Indigenous (lake trout and whitefish), as opposed to exotic or planted species. The stocking of exotic salmon represents the colonial attitude that Aboriginal peoples can be forced to fall into line with dominant interests and, in the process, abandon their values. The practice also runs contrary to

recent developments in natural resource management under an ecological approach to conservation ethics. This approach focuses on indigenous species and elimination of exotic species (Olver, Shuter and Minns, 1995). Resistance to the moral and now scientific case against the exotics further underlines just how far proponents of dominant interests will marginalize and mis-analyze rights, moral obligations and cultural/community values in order to advance their agenda.

The dispute over quotas is minimally important, when evaluated against the more fundamental injustices being perpetrated on the Nawash. Another way to view the issue is as follows: The Ministry is in effect re-casting rights issues as negotiation issues, in which the Nawash are considered one among many stakeholders.²⁵ The government has implicitly claimed that the treaties and the history of injustice perpetrated on the community are irrelevant. None of the terms of reference that the Ministry is insisting on fit within the expectations of the court, let alone within moral expectations of trust and honourable dealings. The re-casting, then, effectively forces a distortion or mis-representation of Aboriginal rights, where these rights are defined as including a recognition and respect for the perspective and values of Aboriginal communities.

The Ministry's approach runs contrary to the spirit of the Sparrow decision in which the Supreme Court mandated that governments interpret Aboriginal rights in a generous and liberal manner, in light of the mistrust that Aboriginal people rightfully had toward the Crown.²⁶ Interpreting "generous" or "liberal" in terms of "fair share allotment (50%)" as the extent of the Aboriginal right in the seven mile boundary might possibly have been less liberal and generous (after all the previous allotment had been 1.2%), but not by much. In light of what is rightfully owing the Nawash, the fair share approach is tantamount to offering minimal monetary compensation to a rape victim, while allowing the perpetrator complete immunity from prosecution. Since the violations described here are of the order of breaking fundamental trust relations that are built on honour, respect for the conditions of autonomy and self-esteem, they are of a fundamental moral and legal order; hence, the parallel to rape. The Crown's approach utterly fails to recognize the appropriate terms of reference that are necessary for righting the wrongs that have been and continue to be perpetrated on Nawash.

Connecting to The Rule of Law

I have attempted to describe the pattern of injustices done to the Chippewas of Nawash to illustrate the systemic nature of the fiduciary and legal failure on the part of the Crown. This approach is meant principally to

draw attention to the deeper consequences of tolerating the misappropriation of the law by dominant interests. It seems entirely fitting, then, to connect this misuse of the law to a disrespect for the rule of law. Arguably, the relationship between Chippewa and the Crown, since 1763 illustrates both a history of violation of law and, more fundamentally, of the rule of law. Before proceeding to defend this proposition, possible defences²⁷ that the Crown could make to pre-empt such a discussion will be examined.

The Crown might argue that the surrender of 1836 is the starting point for legal relations between itself and the Western Confederacy on the grounds that the Royal Proclamation and the 1764 Treaty of Niagara were based on vague cross-cultural terms of agreement, vague at least within the British tradition. Earlier indications of the British intent to "civilize" the Native might be cited as evidence that the original terms of agreement were not satisfactory to British legal tradition. Even though the Crown was quite clear about what the treaty meant and clear geographical boundaries had been set, the multifaceted (cultural, moral and legal) interface between British and Aboriginal traditions might support the claim that vagueness in the original agreement required re-negotiating terms of reference. In 1836 and 47, however, no such vagueness was present, since the moral and cultural elements had been eradicated from the legal relationship.

If, for the moment, we accept 1836 as a reference point, it could be argued that acceptable legal relationships and legal violations could only have been possible from 1836 onward. Consequently, the Crown could admit that laws were broken, as settlers encroached on Chippewa land, but that there was no threat to the rule of law, since the hands of the government were tied, so to speak, by the inevitable and irreversible encroachment. So, re-negotiating the treaties was the best the Crown could do.

Long before this date, however, Johnson and Bond Head clearly understood what the wampum meant, and that the treaties were legal documents. In light of this fact, the provincial court's (*R. v. Jones*) citing of the 1836 "Bond Head" treaty as a recognition of Aboriginal title (ownership) to the Bruce Peninsula region (as seen from the Aboriginal people's point of view) suggests that there was no intolerable vagueness in the early agreements. Further, since the 1836 treaty and the Imperial Proclamation of 1847 are parts of a continuous line of negotiations, complaints and disputes, they were, in fact, no more than particular moments in the Crown-Chippewa legal relationship that formally began in 1763, if not well before this date. If the cultural and moral elements came to be vague through the course of the relationship—and this is a generous interpretation—it can only be because of a denial by the Crown to uphold its fiduciary obligations of respect and understanding. The 1836-1847 date, then, might

be considered the point of over-determination of the legal relation and of Aboriginal title. By "over-determination" I mean that the legal relationship was justified on more grounds than were necessary. Queen Victoria's proclamation was a punctuated response to the Crown's legal failure to prevent encroachment into treaty areas, which had already been guaranteed in the Bond Head treaty.

Moreover, British abrogation of formal legal and fiduciary obligations was transparent to the Chippewas throughout the historical relationship long before 1836; and the representatives of the Crown knew it was transparent. Not only was there no vagueness in the legal relationship before 1836, that relationship had been more clearly formulated in the wampum agreements than in the later more legally restrictive agreements. It was more clearly formulated in the sense that it more accurately articulated the conditions necessary for satisfying a fiduciary relationship, whereas the later legalistic relationship failed utterly as such.

What did become clear in 1836 was that a *de facto* dominance had developed, and that the dominant society was simply unwilling to live up to its legal and fiduciary obligations. Herein lie the roots of abandoning the rule of law. Working backwards from the post-1847 surrender process is illustrative.

Violating the Rule of Law

The surrender pattern, from 1847 on, was clearly deliberate and in violation of the terms of agreement as set out in the Bond Head Treaty and in the Proclamation by Queen Victoria. This pattern straightforwardly violates treaty law. At the same time, it reflects a contempt for the law. The Crown used the institution and process of law as a tool of exploitation, under the guise of paternalism; since the exploitation was effected through the abandonment of both intent and letter of the law, the Crown abandoned its commitment to the rule of law by using the legal system to institute laws that undermined the treaties and the autonomy of the Nawash. This use of the law is typical of tyrannical regimes. It is a manipulation of the law to advantage a dominant and oppressive group.

Prior to 1836-1847, the interface between the Crown and the Western Confederacy can be interpreted as a relationship governed by the rule of law and the honour sustaining it. At this point, the rule of law was far more central to the stability of the relationship, since there was no dominant enforcement agency or single body of law to sustain the agreements. Respect for law, along with the fear of the consequence of war, sustained the wampum/proclamation agreements. In this manner, the notion of the rule of law is predominantly a moral notion, the respect for which depends

critically on the honour of the agreeing parties. The respect for the rule of law at this point was engendered through the ability of both parties to understand one another sufficiently to respect the conditions of autonomy of both nations. The two-row wampum of the Iroquois signifying the agreement with the British explicitly indicates that the canoe of the Iroquois and the ship of the British, although traveling in tandem, were nevertheless separate and independent. The Royal Proclamation of 1763 expresses nothing less.

One could conclude that the rule of law was to be found in its purest form at this point in the relationship. Its significance would be as clear at this point as it would be during the initial phases of the separation between church and state. If we consider the rule of law as an expression of the revolt against capricious monarchical, oligarchic and majoritarian rule, we understand that its intent is "...to put a fence around the innocent citizen so that she may feel secure in these and other activities." In light of the many difficulties faced by the legal system as law becomes more determined by economic imperative than by principle, Judith Shklar finds a last place of relevance for the idea of the rule of law. "If one then begins with the fear of violence, the insecurity of arbitrary government and the discriminations of injustice one may work one's way up to finding a significant place for the rule of law..." (Shklar, 1987). This place would be the same place that the founders of democracy established even before the Proclamation of 1763. It should be mentioned that the later John Stuart Mill saw the entire course of the development of democratic rule as the march away from capricious and majoritarian tyrannies in the hope of achieving liberty for all (Mill, 1947).

At the risk of legal naivety, I assume that the rule of law is indeed grounded on sound and longstanding liberal values that are traceable at least back to the origins of parliamentary democracy and the development of the Principle of Consent (Gould and Truitt, 1973) in the "Agreement of the People" and retrenched in Mill's *On Liberty*. The avoidance of tyranny and arbitrary rule was foundational for the new democracy, and nothing in this regard has changed as the foundation for the rule of law. This foundation in agreement and mutual understanding was precisely the foundation of the Chippewa-Crown relationship. My point here is not to assume that the wampum are legitimated by their conformity to the rule of law, but that Ojibway tradition and agreements were founded on the same grounding values and principles as was/is British law, and as are present in Canadian and American traditions. The rule of law is designed to guarantee respect for the freedom, autonomy and dignity of people. It is to recognize that imposing arbitrarily determined laws and terms of reference onto a non-dominant sector is illegitimate and to be resisted with vigour.

Granted, Theodore Lowi (1987) has shown that governments are no longer particularly driven by the rule of law and cannot afford to be cognizant of the ever declining integrity of law, since administrative exigencies and economic demands militate in just the opposite direction. If it is the case that governments dare not advance the interest of legal and political integrity, because of economic pressures, then citizens of democratic nations are ineluctably on the road toward serfdom (*Ibid.*:58). I agree with this conclusion in light of the fact that economic and administrative exigencies tend to rule all government agendas, such that all perspectives and concerns are forced ultimately to be articulated in terms that comply with economic and administrative demands. If we cannot in fact appeal to the rule of law, however, we abandon any hope of principled confrontation with a legal and political system gone awry; we resign ourselves to falling victim to fatalistic anti-democratic forms of imposition and oppression, the same pathetic resignation as demonstrated by Bond Head in his attitude toward settler encroachment. I take it that as citizens of a democracy, we cannot tolerate such resignation. In Canada, moreover, we are constitutionally bound by the rule of law.²⁸ So, despite the skepticism leveled at it, we are bound to the rule of law by our commitments as free citizens, as moral communities and as a constitutionally bound democracy.

The rule of law is born in the passion for freedom and the demand to respect the conditions of freedom. The rule of law, in its moral dimensions, is, in effect, our only recourse for maintaining some semblance of just rule by law. Moreover, it now seems the best if not the only instrument for the Crown to maintain a democratic and honourable relationship with First Nations. While particular laws enacted by the Canadian and American governments may have had little or no legitimacy within the First Nation communities, historically, the rule of law has, because of the legitimacy of the wampum and treaties. The fact that a wampum-based treaty was adhered to by the Western Confederacy demonstrates that the initial agreement was made possible by mutual recognition of formal commitments to binding principles of law. As Paul Williams notes (1982), Thomas G. Anderson, Superintendent of the Indian Department at Manitoulin Island in 1845, recognized that the wampum indicated specific terms of agreement, including borders, the delivery of presents and perpetual friendship with the British. These belts stayed together and traveled together as an indication of commitment to the rule of the agreement. The Royal Proclamation of 1763, to the Ojibway, was simply the British equivalent of the wampum. This Great Covenant Chain was to be kept by the Ojibway at Michilimackinack (St. Mary's, Ontario) on behalf of the Western nations, as recommended by Superintendent Johnson. Hence, the wampum were to

be specially protected like any other system of law, for which we assign a protecting place (e.g., the Supreme Court). These agreements, then, mark a mutual recognition of the rule of law, despite the absence of a dominant single system of law. Since the rule of law is based on a fiduciary relationship cementing those in power to principles of honour and integrity, principles that apply both internally to a culture and externally between cultures, it can be the basis for democratic cross-cultural agreement. Indeed, it seems to be a critical ground upon which the legal relationship between the Chippewas and Crown was initially based. The internal respect for the rule of law of both cultures, in effect, defined the legal relationship between the cultures.

Being founded on some primary commitment to ethical values and principles, engendered to protect the freedom and dignity of persons, the concept of the rule of law commits us as citizens of democratic communities and cultures to formulate good laws in accordance with respect for the conditions of freedom. For this reason, the rule of law is a concept indicating a collective repulsion toward arbitrary rule and the use of this rule to undermine cultural, community, and other conditions (honour etc.) of freedom. Ruling by virtue of one's *de facto* dominance is a primary form of such arbitrary rule. As such, the notion of the rule of law articulates the collective passion that democratically minded people have for protecting the autonomy of cultures and communities against rule by dominance and other non-morally legitimated forms of rule.

In light of the forgoing, the date, 1836-47, should come to represent not so much a starting point for the legal relationship, but a point of degeneration of that relationship, and in a profound sense, the failure of the rule of law. Here, the legal system became, in effect, dysfunctional and cancerous to its own foundations.

The post 1836-47 process is an affront to the rule of law in more than one way. First, it implicitly abandons the respect for the freedom and conditions of freedom of the Chippewas by imposing legal terms of reference that serve the settler community and disenfranchise the Chippewa community. Second, it demonstrates the complete reversal of the intent of the rule of law, by using the law not to protect against arbitrary rule by a dominant sector, but precisely to rule capriciously through dominance.

Reconstituting Respect for the Conditions of Freedom

Justice, in the form of recovering the rule of law, demands a restoration of respect and conditions of freedom. If it is correct that the Crown's abrogation of its commitment to the rule of law is the proper analysis of its fiduciary failure, then this failure must be understood at a level that funda-

mentally captures what respect means cross-culturally, and what freedom means to the victim community.

What cannot remain ignored in the Crown's fiduciary failure is the fact that ways of life (e.g., hunting and fishing, community organizations) were destroyed both in the treaty/surrender process and in the later assimilation programmes supported by the Canadian government. During this period, the Chippewas became disenfranchised by virtue of having their political and legal traditions deliberately excluded from the law-making and decision-making arena. Disenfranchisement is reflected in the following: i) denial of culturally determined terms of reference and values; ii) paternalistic denial of recognition in an equal partnership based on friendship. Here, respect is completely denied in the all-too-obvious contempt that the Crown demonstrated toward the Chippewa tradition. Whatever a recovery of respect is to mean, it must be understood against this backdrop.

During the disenfranchisement process, the Chippewas faced the onslaught of foreign values as traditional and community values were destroyed and fragmented in the assimilation process and later through the replacing of traditional hunting and fishing systems with government imposed management systems. It must also be noted that these effects were tied to the other devices used by the government to disenfranchise the First Nations (e.g., residential schools, the Reserve system, banning of language use, religious and cultural practices).

This disenfranchisement and fragmentation, together with the undermining of community values in the process of inculcating foreign values, marks the fact that the disintegration of the rule of law is intimately tied to the dissolution of British commitment to the principles of freedom, a fact most clearly represented in the colonization process. Colonization, by implication, is a contempt for the conditions of freedom, or, autonomy of a people. Abandoning of the rule of law was, at the same time, an onslaught and entrenchment of foreign values as they reshaped the expectations, sense of self, sense of community, religious perspectives, in short, the conditions of freedom of a once autonomous Chippewa community. The recovery of respect, as tied to the protection of the conditions of freedom, fundamentally involves the recovery of the measure of freedom for the community, from the perspective of the community and its traditions. Recovery of this measure is what it would take to recover the rule of law. The rule of law is nothing, unless it ensures respect for the exercise and flourishing of values that shape free individuals and communities. At the root of the recovery of the rule of law, then, is an overturning of the systemic contempt for these values that are entrenched in the legal and political systems. Recovering the measure of freedom, the rule of law, and indeed

the honour of the Crown, demands a deep critique of the assumptions and entrenched values that govern our thinking and decision-making.

Recovering the Rule of Law: Trust

Recovering the measure of freedom involves recovering the disposition to place honour, integrity and dignity in highest regard. And this measure is tied intimately to the recovery of trust relations. As argued by Walter Berns (1992), laws designed to protect the basic values of a society are united and grounded in deeply held and shared passions to protect freedom; they represent a collectively shared system of values that shape our intuitions, if not conceptions of the good. These values are not merely negatively defined, as some liberals would assert, but are grounded in a mutual recognition of what it takes to lead a good life: the fulfilment of basic needs, such as the need for a supportive community, to be treated with dignity and for having a sense of belonging. These needs are, in effect, passions, expressions of positive values, on the basis of which we design protective laws. They are pre-rational in the sense that they do not derive from rational construction of principles and rules, but are the underlying reasons or motivations for the construction of rational principles and rules. They are recognized and experienced at a pre-rational level and supported in trust relationships.

Personal values based on the passion for freedom, are not only pre-rational, they are collective, in the sense that they are shared and form the foundation for protective laws. As such, they indicate a common ground of understanding, a ground without which there could be no reason to form a free and democratic society. I make no apology here for flying in the face of those who would counter by asserting that democracies are formed from just the opposite motivations: privacy, individualism, contract. Such a view simply fails to capture the fact that we can, do, and must recognize one another's values and related needs for freedom and flourishing, for democracy to be possible. There would be no fear of a loss of freedom, as previously mentioned, were it not for actually having positive values (dignity etc.) that demand exercise and flourishing.

In the final analysis, recovering the measure of freedom requires a recognition of the context of values and passions grounding a free society; and this context cannot take shape without relationships of trust, because enforcement alone cannot generate respect for the values and passions at issue. At some point, we must be able to place confidence in others, especially those in power, that they understand and respect the passions and values grounding the desire for freedom. Hence, the conditions underlying a free and democratic society have to do fundamentally with a

confidence engendered by people having reason to trust. Developing trust takes work at a pre-rational and personal level. It takes work to develop a trustworthy character. The problem of restoring the rule of law, then, cannot genuinely be achieved apart from engaging in the work necessary to restore the trustworthiness of the Crown and of its agents. This work will involve developing an understanding of what it means to be respectful of the conditions of freedom in a cross-cultural context. Individual denial and failure to uphold the rule of law in the history of the Crown-Chippewa relationship was responsible for the systemic entrenchment of injustice; it will take individuals as well as institutions to accept the responsibility of restoration.

Recovering the Honour of the Crown

The Supreme Court of Canada, as cited, has recognized that the honour of the Crown is in jeopardy as it faces the task of responding to the history of injustice of honouring the treaties in the breach. If the recovery of honour is to be accomplished within the context of the fiduciary relationship, then the responsibilities of the Crown are well recognized in the Constitution Act, 1982, Section 35(1). But honouring treaties should by now be recognized as a profoundly difficult task, because of the depth of respect for the conditions of freedom and commitment to restoring trustworthiness required for the task.

Whether intended or unintended by the Court, its emphasis on the *sui generis* nature of the Aboriginal-Crown relationship is well-suited to the task of plumbing to the depths of responsibility for restoring the honour of the Crown. Since a *sui generis* relationship cannot be pre-defined to accord with any one particular frame of reference, protocol, or set of expectations, it must be based on mutually recognizable foundations, which, as I have argued, are ready-made in the recognition of the rule of law. Further, the Court has also argued that taking Aboriginal perspective into the substance of agreements must be demonstrated,²⁹ partly because "The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship."

When the Supreme Court advances the need to form mutual understanding in the interest of government and the Canadian public, it does so under the assumption that some values and honour-based commitments are collective, cross-culturally identifiable and acceptable. Hence, we could interpret the justices as saying that recovering the honour of the Crown is cross-culturally intelligible, legally possible (in the appropriate context) and a binding moral obligation.

Although the relationship is *sui generis*, it is not without direction. We have simply to look closely at our history for clues. If at one time in our history we were capable of coming to an at least acceptable form of cross-cultural understanding through the wampum, there is no reason to assume that modeling the relationship is impossible today. This may be a somewhat outrageous conclusion for many, but the wampum, as analyzed even to the minimal extent that I have provided, gives expression to the possibility of forming the sorts of cross-cultural agreements and forms of understanding that are necessary for developing the *sui generis* relationship. Moreover, study of the wampum structure and process also promises to attune those in the political and legal systems to the foundational values and virtues that motivate Canadian commitments to the rule of law, and hence, to the values that give grounding to the honour of the Crown.

Some indicators of how the Crown can recover its honour and the rule of law have implicitly been captured in the analysis of colonization. Encroachment, abandonment of fiduciary responsibilities and the disintegration of the rule of law have all been tied to the colonization of Aboriginal lands, minds and culture.³⁰ Hence, de-colonization affords us a further conceptualization for how we ought to proceed. In my view, it does little good to try simply to re-capture traditions and practices as they existed generations and centuries ago. But the attempt to try to re-capture the values and virtues represented in these practices could very well be applicable across these temporal spans.

Although the attempt at reconstructing the past is not likely to be productive, analyzing the process of colonization can help to identify the sorts of values that are at stake when attempting the de-colonization process. It could very well help to provide clues as to how to articulate terms of reference that would suit a distinctive Aboriginal perspective. This part of the process obviously focuses on the communities themselves as the task of value identification and re-formulation can rest only with those who live in accordance with them. But at the same time, the task of governments and Canadians in general is to facilitate this process by identifying and removing the barriers to this process, barriers that have been imposed in the assimilation and colonization processes.

Since the process of colonization is identified with disenfranchisement and with undermining the conditions of freedom, the concept of de-colonization affords us a way to understand how the *sui generis* relationship can begin, because it calls us first to assess our institutions and assumptions as tools of colonization. Once critique is in place, a foundation for re-constructing a trust relationship will also be in place, since such a critique helps determine what must be avoided in reconstructing the rule of law. I have

already suggested that a renewed examination of the wampum-proclamation relationship could provide inroads to understanding how more positive directions can be formulated. And since this relationship involves all of the values foundational to a cross-culturally free and democratic society and may in fact express the purest form of the rule of law, it would seem a good place to start in establishing the measure of respect for the rule of law.

Conclusion

I have introduced a many-tiered analysis of the injustices done to the Chippewas of Nawash in order to demonstrate how under-analysis of the Aboriginal situation hides a multiplicity of deeper injustices, which penetrate all the way down to the rule of law and its founding values. With the final few sections on colonization, I mean primarily to outline the many-faceted aspects involved in recovering the rule of law. I am certain that I have missed other aspects. The attempt to show how history and valuational issues must be incorporated into the analysis of injustice is intended to show how mis-analysis of Aboriginal issues has contributed to the deeply entrenched, systemic forms of injustice that Aboriginal peoples, and the Chippewas of Nawash particularly, face.

This paper, despite the legal language and framework used, has not essentially been about Aboriginal rights. In fact, I am uneasy about the use of such language as I have indicated elsewhere (Morito, 1996). The focus has been placed on responsibility of governments and the Canadian public in general. The focus on responsibility and the interest in recovering the rule of law and the honour of the Crown will, hopefully, advance initiatives for developing a difference in quality in the attitudes and approaches governments take in envisaging a renewed relationship with Aboriginal peoples at every level of that relationship.

Recovering the rule of law through recovering the measure of freedom and respect for Aboriginal peoples is likely to have another significant effect; it may just remind us of what it means to live in a truly free and democratic society.

Notes

1. I am indebted to Michael McDonald of the Philosophy Department, University of British Columbia for reading a previous draft of the paper and for his helpful comments and criticisms. A referee of the previous draft is also to be gratefully acknowledged for helpful comments.
2. "Crown" refers to the pre-Confederation British authority that came to be imposed on First Nations in Canada as well as to the post-Confederation Canadian authority as exercised at the federal and provincial

levels. I rely on the historical context of the paper to ensure clarity of reference throughout the paper, as well as to explicit qualifications as to which expression of Crown authority that is being addressed.

3. Cited in Williams (1982).
4. *R. v. Sparrow*, [1990] File No.: 20311, Supreme Court Records, (S.C.R), 1103.
5. This statement is taken from Treaty 45, signed by Bond Head and 16 Aboriginal signatories, Manitowaning (Manitoulin) 9th August, 1836. In, *Indian Treaties and Surrenders* (Queen's Printer, 1891). Reprinted in Coles Publishing Co. (Toronto, 1971) (3 Vols.).
6. Haering (1998) demonstrates how impoverishment and the resulting duress of the people were used by the British Crown as a means for leveraging compliance by Aboriginal communities. He cites the McCauley Report of 1836 to affirm this pattern as part of the government's intentions.
7. I am indebted to Dr. Darlene Johnston for providing materials on the Chippewas of Nawash perspective and evidentiary material. For corroboration on the position of Chief Metigwob see Ontario Court (Provincial Division), *R. v. Jones and Nadjiwon*, *Ontario Reports 1993*, 14, 437 (henceforth, *R. v. Jones*), Dickason (1992).
8. Harring (1998:151) notes the pattern of using duress and alcohol to gain compliance from the Iroquois, while Johnson (1990), shows how the government either used settler encroachment by design or through opportunity to place the Chippewa community around the north shore of Lake Ontario under duress for purposes of gaining land surrenders. He cites *The Correspondence of the Honourable Peter Russell* (Toronto: Ontario Historical Society, 1832), Vol. 1, 49-50; also in I, 98, National Archives of Canada, RG 10, Indian Affairs, Red Series, Lieutenant Governor's Correspondence Vol. 1:294-96, Minutes of Council with the Mississauga, held Aug. 1, 1805.
9. While the legal status of a treaty may be subject to question, treaty agreements, nevertheless, have the status of legal agreements. One might argue that a treaty between sovereign nations cannot be signed under the anticipation that a higher authority and enforcement agency will guarantee adherence to the terms of the agreement. As Johnston (1993) has indicated, "Treaties are a matter of honour."

As Johnston argues, rights are established in a treaty, and they do not disappear just because one party fails to live up to its obligations. Treaties, then, perhaps even more than statutory law, reflect how the idea of the rule of law operates in the democratic psyche, as I will argue later.

10. *R. v. Sparrow*, 1990:1108, File No.: 20311, Supreme Court Records.
11. A point that Williams (1982:179) notes is that, during the same period, references to the Chippewas as a nation disappear from the records and agreements as paternalism becomes the de facto relationship.
12. *R. v. Jones*, 1993:437-439, *Ontario Reports* 14.
13. See *Ibid.*:438.
14. Declaration by Her Majesty in favour of the Ojibway Indians respecting certain Lands on Lake Huron, June 29, 1847. Imperial Proclamation of 1847, National Archives of Canada, RG 68, Vol. liber ag, special grants, 1841-1854, microfilm reel C*-4158, folio # 293-294.
15. *R. v. Jones*, 1993:437-438, *Ontario Reports* 14.
16. Much more could be said about the systemic mode of prejudicing the legal system against Aboriginal rights. Darlene Johnston has also remarked, for instance, that only Aboriginal rights are the sorts of rights that governments have earmarked for possible extinguishment. *op. cit.* Why this is the case has to do with an underlying and indefensible prejudice that rights of Aboriginal peoples are established on less binding commitments than they are for others.
17. As noted in *R. v. Jones*, at 440, Judge Fairgrieve agreed with the limitation that the Ministry insists upon. He argued that the law assigns an Aboriginal right, but not title to the fisheries.
18. *R. v. Sparrow*, p. 1097-1099; *R. v. Jones*, 431.
19. *R. v. Jones*, 448.
20. As stated at a "public information dissemination" session presented by the Ontario Ministry of Natural Resources, business people in the county of Grey Bruce, sportsmens and commercial associations, held April 20, 1997 at Owen Sound, Ontario. The session was entitled, "SOS: Save Our Sports Fishery."
21. *R. v. Sparrow*, 1115-1116.
22. *Ibid.*, 1112.
23. *R. v. Jones*, 448.
24. *R. v. Sparrow*, 1115.
25. Here, I have Paul Jones to thank for correcting earlier mistakes I made in representing the Chippewa view.
26. *R. v. Sparrow*, 1106.
27. I leave aside the argument based on the assumption of Crown sovereignty. No court can question the ultimate sovereignty of the Crown over First Nations, without at the same time undermining its own authority to adjudicate. The disparity between a moral and legal

analysis is most apparent at this point. Honour among the allies was a recognition of a mutual dependency. Clearly, however, the British Crown acted under the assumption that it had ultimate sovereignty, even though it had noted that the Western and Six Nation Confederacies saw themselves at least as equals with the Crown. The right of discovery that underlies the Crown's assumption, however, cannot morally be taken seriously, since it is such an arbitrary ground. Further, right to sovereignty through conquest may apply to the Spanish occupied territories, but it does not apply to Canada. The only other criterion to serve as a ground for Crown sovereignty would be cession by the First Nations. But if McDonald (1992) is correct, at least fifty percent of Canada is not under treaty, and many of those areas that are under treaty are not perceived by Aboriginal peoples as legitimately subject to Crown sovereignty. Hence, at least from many First Nations' perspectives, no cession of these lands ever took place. They were simply assumed to be subject to Crown sovereignty by virtue of its dominance.

28. Canadian *Constitution Act, 1982*, Part 1, Canadian Charter of Rights and Freedoms, which states: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law..."
29. *R. v. Sparrow*, 1108.
30. I was amply reminded of this view by Butch Elliott, former Chief of the Chippewas of Nawash, during a talk he presented at the National Inland Fisheries Conference, Sault St. Marie, Ontario, Canada, April 7-9, 1997.

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