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Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism

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Chapter Five

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My Aunt Irene lived in a blue clapboard bungalow on the top of an escarpment that overlooked the reserve. From her front window you could see down Sydney Bay Bluff road, across the 'prairie,' to the peninsula that gave Cape Croker its name. Framing 'the Cape' were the vast cerulean waters of Georgian Bay. From this perch you could watch the people of Neyaashiinigming come and go. Aunt Irene could tell you the family history of each resident that passed by her window, and she knew the stories that made sacred each place they lived. When I was a young boy we would sometimes visit her and she would tell me something about this world. I always enjoyed the soda she served me, but was a little confused by her. As a small boy who spent more time off the reserve than on it, I did not know what to make of the strange world she unfolded to me.

When I was older I began to appreciate the knowledge Aunt Irene carried a little more. I can remember visiting her house with Grandpa Josh (her brother), my mother, and sister, and listening to her reminiscences. Although I would see her on and off through the years, she was never really a big part of my life. Then one day when I was in graduate school I went to ask about the history of the reserve. I was with my mother and Aunt Norma. We spent a few hours there and, in her unforgettable way, Aunt Irene told us the history of our family as it related to Cape Croker. She knew the history of my great-great-great-grandfather and grandmother, and everyone down through their line until my generation. I was amazed. She was a living history book. I finally caught a glimpse of the world that had so perplexed me as a young boy. I realized that the discomfort I once felt owed more to my lack of familiarity with the people she would talk about than to any unusual behaviour on her

part. Her stories now gave me great comfort, as I became aware that I fit into this world she described and was related to it in more ways than I knew.

Aunt Irene's chronicles were deeply insightful and revealing. Aside from relating our family's past, her narrative uncovered a legal history that had been largely hidden from view during my formal university studies. I graduated with so-called distinction from the University of Toronto, with a specialist designation in Canadian political science and history, and then spent three more years in a rigorous Canadian law school, but neither program introduced the kind of information she related. I had sought out Aunt Irene because of my earlier experience with her. I knew there was more to the story of Canada than I was being taught. In particular, I was trying to understand the Canadian foundations of law and governance, but most of the information I found concerned its non-Aboriginal origins. The framework Aunt Irene provided helped me make sense of the fragmentary written and archival material that I had been sorting through prior to that visit. Her wonderful narrative helped me to resolve the papered remnants of our history into something approaching a recognizable representation. I later triangulated her stories with those of my great-uncle Fred, 'Chick' (Walter Johnson), John Nadgiwon, Aunt Norma, and my mother to unearth the details of Anishinabek participation in the foundations of this country.[1]

In these conversations and readings I rediscovered the tremendous implications of the interaction of Canadian and Indigenous legal values for our understanding of the past and continued development of Canada. My ancestors had acted through seven generations to maintain their community ties and apply principles consistent with their ancient teachings. Their efforts, understood in conjunction with principles underlying the rule of law, raise important questions about the justice and validity of Canada's claims to underlying title to its territorial land base and to exclusive sovereignty throughout its so-called Dominion.

Canadian courts have not given sufficient attention to the impact of Aboriginal legal perspectives on the country's foundational legal doctrines, as evidenced in unreflective statements like those made in *R. v. Sparrow*: '[t]here was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [meaning Aboriginal lands] vested in the Crown.'[2] They have too often accepted uncritically Crown proclamations to the effect that sovereignty and underlying title to land throughout the country belongs solely to Canada despite the presence of an unextinguished prior and continuing legal order. The courts' articulation of the rule of law in other contexts, and Aboriginal viewpoints on this matter,[3] suggest that a closer examination of these assumptions are in order.

A faithful application of the rule of law to the Crown's assertion of title throughout Canada would suggest that Aboriginal peoples possess the very right claimed by the Crown. According to the Supreme Court of Canada, the rule of law consists of two interrelated legal principles: it precludes arbitrary state power and requires the maintenance of a positive legal order.[4] Canada's assumption of underlying title and sovereignty throughout its claimed territory violates both of these fundamental principles. It is an arbitrary exercise of power aimed at dismantling Indigenous systems of law and normative order. Canada substantially invalidated Aboriginal peoples' territorial rights in the absence of informed consent, or persuasive legal explanation.[5] Furthermore, Canada's declaration of exclusive sovereignty over Aboriginal peoples violates the second principle of the rule of law because, in the process of this declaration, the Crown suppressed Aboriginal governance and denied these groups indispensable elements of law and order.[6]

Significantly, as I discovered from my visits with Aunt Irene, the rule of law is not the only paradigm violated by the way in which Canada has dealt with Aboriginal rights. Aboriginal perspectives in most corners of the country,[7] including Neyaashiinigming, pose equally strong challenges to the Crown's supposed overarching sovereignty and underlying title.[8] For example, the actions of my ancestors, when placed beside the Court's formulation of the rule of law, similarly demonstrate the tenuous nature of the Crown's claims to assume governance over and a radical interest in Indigenous lands. Contrary to common assumptions, Aboriginal peoples have not been subject to a presumed overriding authority in land or governance. For example, the treaty process has been exposed as a deeply flawed means by which to acquire these interests. In almost every treaty negotiation one can detect dishonesty, trickery, deception, fraud, prevarication, and unconscionable behaviour on the part of the Crown.[9] In most treaties, there was no consensus or 'meeting of the minds' on the question of the Crown receiving sovereignty or underlying title to the land from Aboriginal peoples.[10] Moreover, in many parts of Canada the Crown has never negotiated with Aboriginal peoples to receive a transfer of any rights to land or governance.[11] The Crown has merely asserted such rights, and acted as if their unilateral declarations have legal meaning. Most Aboriginal peoples regard the Crown's assertions and actions in this regard as the gravest injustice ever perpetrated

upon them. They contend that they cannot be dispossesed of their land or governing powers unless they agree to surrender these rights with adequate knowledge and informed consent.

This chapter examines how fundamental constitutional principles combined with Aboriginal legal perspectives could be used to challenge Canada's claim to underlying title and exclusive sovereignty in the country. Such a process is necessary if Canada is to abide by its most valued precepts as 'a free and democratic society'[12] and to respect the legal orders of Indigenous peoples. Legal scrutiny of Crown sovereignty and title could simultaneously enable the country to abandon the colonial treatment of Aboriginal peoples in contemporary Canada and would be consistent with Aboriginal scepticism where Crown assertions are concerned. One should not found a just country on stolen land and repressive government. Many people may believe that some persuasive justification for the displacement of Aboriginal peoples can be coherently articulated in law. That is not the case. Aboriginal peoples have by and large been illegally and illegitimately forced to relinquish or reduce their claims to land and government because of the arbitrary actions of non-Aboriginal governments.[13] This is an issue of justice that directly implicates the rule of law and Aboriginal legal values.

Some Canadians do not realize that the nation is built upon a deeply troubling relationship with the land's original owners and governors. Many people assume that since their experience of life in Canada is one of fairness and justice, most people must experience life in Canada in this same way.[14] However, Canada is a country that does not have an 'even' experience of justice.[15] Aboriginal peoples have often been denied the essential legal rights in property (title)[16] and contract law (treaties)[17] that lie at the heart of our private law ordering.[18] This should be of concern to all Canadians, because such a basic failure of the rule of law presents a threat to the very fabric of our fundamental principles of order. If the rule of law cannot be relied upon to overcome the political and economic exploitation of Aboriginal peoples, what assurances do we have that it will not be equally vulnerable in situations involving non-Aboriginal Canadians? As mentioned in chapter 2, Aboriginal peoples might function like the miner's canary. When the most vulnerable among us suffer from the toxins present in our legal environment, their suffering serves as an important warning about the health of the larger legal climate.

Admittedly, some might argue that the notion that Aboriginal peoples should enjoy the full benefits of the rule of law precipitates the very

problem I am cautioning against. It may be said that recognition of underlying Aboriginal title to lands in Canada, and of co-extensive sovereign powers between Aboriginal peoples and the Crown, would work to undermine Canadian society. On this view, past wrongs cannot be fully addressed because too much in the present relies upon these prior violations and indiscretions.[19] I have no hesitancy in recognizing that a shift of this magnitude would cause significant disruption for many people. Many Canadians are being unjustly enriched through the failure of the rule of law for Aboriginal peoples, and they will not easily give up their accoutrements and power. The struggle over these endowments will not occur without causing significant strain on our institutions. The full application of the rule of law to Aboriginal peoples would necessarily change our political systems and national economy to thoroughly accommodate Aboriginal peoples within a new national framework. Nevertheless, seriously disrupting our socio-political relations is not the same thing as completely undermining those relations, especially when the correction of the injustice may ultimately set the entire society on the path to a more peaceful and productive future.

To draw on a biblical analogy,[20] a house built upon a foundation of sand is unstable, no matter how beautiful it may look or how many people may rely upon it. It would be better to lift the house and place it on a firmer foundation, even if this course of action would create some real challenges for its occupants. Ultimately, replacing the foundation would prolong the structure's life, creating benefits for its inhabitants for generations beyond what would be possible if the house collapsed because of its unsupported weight. Canada is built on a foundation of sand so long as the rule of law is not consistently applied to Aboriginal peoples. This country must be placed on a firmer legal foundation by extending the full benefits of legal ordering to its original inhabitants. While the recognition of underlying Aboriginal title and the affirmation of Aboriginal sovereignty would cause severe disruptions in the Canadian social and economic fabric, it would ultimately set us on a more stable, secure foundation and correct the imperfections of our present ordering. This chapter is written with the understanding that the 'rule of law' and sensitivity to the meaning of the Aboriginal perspective' should be more than hollow phrases used by those who want to govern others to accomplish their own purposes.[21] It is motivated by the very conservative notion that the consistent application of the rule of law and the inclusion of Aboriginal perspectives can provide an important bulwark against arbitrariness and oppression for all Canadians.

I The Rule of Law in Canada

Aristotle observed that '[r]ightly constituted laws should be the final sovereign' in any just political community.[22] He argued that the rule of law (dikaiosyne) is preferable to personal rule because law better distributes and combines moral virtue and important legal customs to make the members of a state just and good (nomos). The sovereignty of law could be threatened if 'the law itself [had] a bias in favour of one class or another' or if the laws were made 'in accordance with wrong or perverted constitutions.'[23] Failure to question the Crown's assertions of underlying title and exclusive sovereignty while Aboriginal assertions are subjected to strict secrutiny appears to create a bias in the law in favour of non-Aboriginal groups. This approach is not consistent with the rule of law. It upholds personal rule to the detriment of Aboriginal peoples and to the advantage of non-Aboriginal people. As discussed in the previous two chapters, the courts' failure to interrogate Crown assertions results in the unjust distribution of legal entitlements[24] and perverts Canada's 'supreme law,' the constitution, which proclaims that 'Canada is founded upon principles that recognize the supremacy of God and the rule of law.'[25] Failure to question personal rule is not consistent with section 52(1) of the Constitution Act, 1982, which states that the constitution is 'the supreme law of Canada.'

Canadian courts do not respect the supremacy of the constitution's rule of law when they unquestioningly support notions of underlying Crown title and exclusive sovereignty in the face of contrary Aboriginal evidence. This uncritical acceptance of government assertions and actions is not typical of the courts' approach to constitutional questions. In the *Manitoba Language Reference*, a case involving the constitutionality of all the laws of Manitoba, the Supreme Court of Canada radically queried the actions of the Manitoba Crown and legislature. The court affirmed the supremacy of law over the government, and wrote: 'The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in ... s. 52 of the Constitution Act, 1982, that this court must find the unconstitutional laws of Manitoba to be invalid and of no force or effect.'[26] The court characterized the province's action in not translating its laws into French, as required by Manitoba's terms of union, as a blunt exercise of arbitrary power. It therefore drew upon the paramountcy of law to declare the province's entire statutory code invalid.[27] This result demonstrates that the 'rule of law constitutes an implied limit on the legislative jurisdiction of Parliament and the provincial legislatures, and that legislation inconsistent with the rule of law will therefore be held to be ultra vires.'[28] The drastic nature of the remedy shows that the courts will refuse to sanction an exercise of arbitrary power.

The Crown's assertion of sovereignty, which deprives Aboriginal nations of underlying title and overriding self-government, is likewise a blunt exercise of arbitrary power. Democratic principles of consultation and consent, though available, were not followed in the First Nations' inclusion in the Dominion's federal structures.[29] All other governments entering into Confederation were included on principles of consultation and consent. Each had the opportunity to make known its views, to craft the terms under which it would join the union, and to send representatives of the people to these discussions. Aboriginal peoples, except perhaps for the Métis in Manitoba, were not recognized as participating in Confederation in this manner, and thus became subject to it through the arbitrary acts of others. This has resulted in negative implications for Indigenous communities and significantly contributed to the devastation of their territories and communities.[30]

As one author states, '[t]he very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so.'[31] Aboriginal peoples have had their status redefined by Canada without persuasively sound juridical reasons. What could be more arbitrary than one nation substantially invalidating a politically distinct peoples' rights without providing an elementarily persuasive legal explanation? The Supreme Court has not effectively articulated how, and by what legal right, assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance. Doctrines of discovery,[32] terra nullius,[33] conquest,[34] and adverse possession[35] have all been discredited in the common law and in international legal systems as legitimate bases to dispossess Aboriginal peoples of their land.[36] Moreover, the Crown's claim to possess Aboriginal land is wholly unsubstantiated by the physical reality at the time of their so-called assertions of sovereignty.[37] Its supposed right to exercise unilateral dominion over Indigenous peoples does not accord with the factual circumstances at the time of contact.[38] These 'vague' and 'unintelligible' propositions 'do not make sense' under the rule of law because they are factually untrue and lack legal cohesion.[39] The Crown's asser-

tion of sovereignty diminishing Aboriginal entitlements is therefore arbitrary in the sense that it has been made without coherent reasons. The assertion of Crown sovereignty over Aboriginal peoples in Canada thus violates the first principle of the rule of law and is unconstitutional.

The unquestioned assertion of Crown sovereignty also violates the second principle of the rule of law: the sustenance of normative legal order through the production and preservation of positive laws. As has been illustrated throughout this work, the predominant interpretation of Crown sovereignty has stifled Aboriginal peoples in the creation and maintenance of laws supportive of their normative orders. The Supreme Court, again in the *Manitoba Language Reference*, described this second aspect of the rule of law in the following terms:

> ... the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life ... As John Locke once said, 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' (quoted by Lord Wilberforce in *Carl Zeiss-Stiftung v. Rayner & Keeler Ltd.*, [1966] 2 All E.R. 536 (H.L.) at p. 577). According to Wade and Philips, *Constitutional Administrative Law* (9th ed. 1977), at p. 89: '... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions.'[40]

Failure to recognize and affirm the positive and customary laws of Aboriginal peoples, which preserve and embody the general principles of their ancient normative orders, has sustained near-anarchy and constant strife within Aboriginal communities. A vague familiarity with the encumbrances placed on Aboriginal governments is sufficient to appreciate this fact. Aboriginal communities have suffered greatly because their governments have been oppressed.[41] The Crown's suppression of Aboriginal governance denies these groups indispensable elements of law and order. It displaces Aboriginal peoples' 'purposive ordering of social relations providing a basis upon which an actual [contemporary, culturally appropriate and effective] order of positive laws can be brought into existence.'[42] Any supposed justification for the denial of Aboriginal community participation in Canadian sovereignty constitutes, in Locke's words, 'a mystery in politics, inconceivable to human capacity and inconsistent with human society.'[43] The repression of Aboriginal powers of governance is therefore contrary to the second principle of the rule of law: it destroys the normative orderliness within Aboriginal communities.

Despite the disorder imposed on Aboriginal peoples by the assertion of Crown sovereignty, some would argue that the second principle of the rule of law must also consider the potential 'chaos and anarchy' that would ensue if the Crown's assertion were held to be invalid and of no legal force and effect. The court would not tolerate a legal vacuum,[44] nor would it tolerate a province being without a valid and effectual legal system.[45] Since the constitution would not suffer a province without laws, temporary validity, force, and effect would be given to those rights, obligations, and other effects that have arisen under those laws until such time as the problem leading to the invalidity could be corrected.[46] In other words, despite the invalidity of Canada's laws (because their arbitrary, non-legal foundation violates the first principle of the rule of law), the second principle of the rule of law would require (1) that Aboriginal normative orders be facilitated by recognizing their powers of governance, and (2) that Canadian laws continue in effect until the parties correct the invalidity by grounding Crown title and sovereignty on a sound, substantiated legal foundation. Therefore, the next time the Supreme Court considers Aboriginal governance in Canada, the second principle of the rule of law would require a recognition of the rights of these communities to maintain and create law and order in their lives. It would further require that the court declare Canada's invalid laws operative until they can be fixed by the federal Crown, negotiating with First Nations to place Crown sovereignty in a workable, but proper, legal framework.[47]

II Courts and the Questioning of Crown Sovereignty

In suggesting that the Supreme Court interrogate Crown assertions of sovereignty a central question remains: are the courts permitted to engage in such an inquiry? The answer is yes. In the groundbreaking *Calder* case, the Supreme Court of Canada held that Canadian courts are not prevented from 'reviewing the manner in which the Sovereign acquires new territory' in cases dealing with Aboriginal title.[48] The 'Act of State' doctrine, which deals with this issue, was examined by the court and found not to apply. Justice Hall gave two reasons why it was inappropriate to extend the Act of State doctrine to cases dealing with Aboriginal

title. First, a finding that this doctrine applied to cases dealing with Aboriginal title would be unsupported by prior jurisprudence.[49] Second, the Act of State doctrine only deals with situations where a 'Sovereign, in dealings with another Sovereign (by treaty or conquest) acquires land.'[50] In Canada the Crown seldom acquired underlying title land by treaty or conquest, and therefore this doctrine would have no application.[51]

The courts are thus permitted to review the effects of the Crown assertion of sovereignty over Aboriginal peoples in Canada. In fact, such oversight of the proper conduct of the other branches of government is required by the independence of the court as an institution, and of the judiciary as individuals within this institution.[52] Judicial independence has been guaranteed for centuries and is a cornerstone of English and Canadian constitutionalism.[53] Canadian courts are separate and autonomous from the Crown and the legislature and do not function as the servants of the Queen or Parliament. They administer the rule of law, which is 'superior and antecedent not only to legislation and judicial decisions but also to the written constitution.'[54] As the British Columbia Court of Appeal noted in *BCGEU v. British Columbia (A.G.)*:

> It must be noted that judicial independence was won in England after centuries of struggle with the executive and legislative branches of government. It was finally established in 1701 by the *Act of Settlement* ... when tenure for the judges was established.
>
> As Sir William Holdsworth, the distinguished British legal historian has said in a *History of English Law*:
>
> > The judiciary has separate and autonomous power just as truly as the King or Parliament; and in the exercise of these powers, its members are not more in the position of servants than the King or Parliament in the exercise of their powers ... The judges have powers of this nature, being entrusted with the maintenance of the Supremacy of law, they are and have long been regarded as a separate and independent part of the constitution.[55]

Judicial independence and the supremacy of law ensures that courts are free to question the actions of the other branches of government as required when an action is brought before them.[56] Presumably, this means that the courts would be permitted to scrutinize unilateral Crown assertions of sovereignty and find them invalid if those assertions failed to comply with the rule of law.[57] The court, as an independent body, would not be disallowed from finding that the laws of Canada or

any province relating to Aboriginal lands and governance are beyond the reach of the Crown or Parliament, if they do not comply with the rule of law as expressed in the constitution's principles or provisions.[58] To be more specific, if the court found that the Crown did not comply with the law in gaining underlying title and overriding sovereignty in Canada it would have to hold that assertions to such title and sovereignty were 'of no legal force or effect' until the parties created a supportable legal framework.[59]

Readers may question whether, despite the institutional possibility, individual judges would ever declare invalid the unilateral exercise of Crown sovereignty over Aboriginal peoples in any part of the country. There would be an enormous temptation to do everything possible to avoid such an outcome, given the stakes involved. After all, it may be asked, who would respect the law and the judiciary if they arrived at this conclusion? It could be argued that too many people throughout Canada would be displaced and subject to immense suffering. Most Canadians would consider a decision to this effect unreasonable, impractical, unrealistic, unsound, and indicative of a lack of knowledge of the law or history of Aboriginal rights. Since few people would understand the court's justification for such a decision, the administration of justice might also be brought into disrepute.

Yet, doesn't this line of inquiry look at the issue only from one side? Aboriginal people and others puzzled by the wide effect of Crown assertions might develop a greater respect for the judiciary if the courts ruled according to principles of law. They would consider such a conclusion reasonable, practical, realistic, sensible, and demonstrative of an understanding of the law and history of Aboriginal rights. They would see that a rejection of Crown assertions to sovereignty could help reduce the suffering of Aboriginal peoples arising from their alienation from their own land and organizing institutions. Such a decision could even enhance the reputation of the administration of justice, as the court would be seen to be applying the law in accordance with its highest principles. The courts' questioning of unilateral Crown assertions of sovereignty would be a substantial development of Canada's legal order. It would highlight the guarantee to every Canadian of an impartial and independent judiciary, which has been described as 'the most important benefit of civilization.'[60]

Regardless of the challenges a judge may encounter in questioning assertions of Crown sovereignty, his or her decision cannot be based on a numeric tally of public opinion.[61] The judiciary is independent.[62]

Conclusions must be legally expressed. They must be coherent and internally inconsistent. It is not appropriate for judges to use their power in any other way. While most judges would no doubt struggle with a ruling that suspends the negative effects on Aboriginal peoples of assertions of Crown sovereignty, if reason led to such a conclusion and they chose to rule otherwise, the very integrity of the Canadian legal fabric would be undermined.[63] If the judiciary is to take the constitution, the rule of law, and its own office seriously, judicial independence mandates 'impartial and disinterested umpires.'[64] Any judge who reviewed the assertion of sovereignty over Aboriginal peoples would be expected to do so in an impartial manner,[65] without bias or a predisposition as to the result.[66] The fair and equitable application of law demands strict adherence to this standard.[67]

III Oral Traditions, the Constitution, and the Rule of Law

How can the exclusive authority Canada has accorded to itself to extinguish or diminish the distinct rights of Aboriginal peoples, without allowing their participation in such decisions, be justified constitutionally? In order to be legally valid and politically legitimate, Canada's claim must be congruent with broader constitutional principles. In the *Quebec Secession Reference*, the Supreme Court of Canada identified some of these principles in ruling that a unilateral declaration of sovereignty by Quebec would be unconstitutional.[68] The court observed that in the Canadian 'constitutional tradition, legality and legitimacy are linked.'[69] Any consideration of the diminishment of Aboriginal rights should therefore review these broader legal principles to assess the legitimacy of the Crown's assertion of sovereignty in Canada. Indeed, the entrenchment of Aboriginal rights in the constitution underscores the need for this wide examination. As the Supreme Court observed in the leading case of *R. v. Sparrow:* 'Section 35 calls for a just settlement for [A]boriginal peoples. It renounces the old rules of the game under which the Courts established courts of law and denied those courts the authority to question sovereign claims made by the Crown.'[70]

When courts question sovereign claims made by the Crown, they must look at the entirety of the Canadian constitutional law framework. As the court counselled in the *Quebec Secession Reference*, their review must take into account an oral tradition 'behind the written word,' 'an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles.'[71] The legality and

legitimacy of the law dealing with Aboriginal peoples depend on these 'fundamental and organizing principles,'[72] which 'are the vital unstated assumptions upon which the text is based.'[73] The unstated precepts that 'inform and sustain the [Canadian] constitutional text' in relation to Aboriginal peoples are two-pronged. They can be drawn from the oral traditions of Aboriginal peoples throughout this country,[74] and they can be sourced in the unwritten traditions of the West.[75] The courts should examine how Aboriginal oral traditions, laws, and perspectives could inform and sustain Canada's constitutional text,[76] just as they have explored the influences of Western law on the constitution. Comparing the Supreme Court's principles in the *Quebec Secession Reference* with Aboriginal reflections on Canadian constitutionalism, like those told to me by my Aunt Irene, demonstrates the potential interaction of the two traditions.

In the *Quebec Secession Reference*, the Supreme Court of Canada identified the fundamental traditions influencing the interpretation of Canada's constitutional text as federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.[77] The court described these precepts as 'underlying constitutional principles' that 'may in certain circumstances give rise to substantive legal obligations which constitute substantive limitations upon government action.'[78] What can these four constitutional principles, considered together,[79] tell us about the legality and legitimacy of the extinguishment of Aboriginal rights prior to 1982, and their justifiable infringement subsequent to 1982? A brief examination of each doctrine reveals that Aboriginal peoples can interrogate and overturn assertions of Crown sovereignty that permit the unilateral extinguishment and diminishment of Aboriginal rights.

A Federalism

The first principle the Supreme Court considered in the *Quebec Secession Reference* was federalism. The court wrote that the federal system is only partially complete 'according to the precise terms of the *Constitution Act, 1867*'[80] because the 'federal government retained sweeping powers that threatened to undermine the autonomy of the provinces.'[81] A simple reading of the Constitution Act, 1867 would seem to confirm the notion that the federal government secured the paramount legislative authority over the provinces in Canada.[82] The court observed that the structure of the document was unbalanced: since 'the written provisions of the Constitution do not provide the entire picture' of the Canadian federal

structure, the courts have had to 'control the limits of the respective sovereignties.'[83] This interpretation was necessary to facilitate 'democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective,' with regard to the diversity of the component parts of Confederation.[84] It limited the power of the federal government relative to provincial governments and resulted in a more appropriate sharing of political power between the two orders.[85] Provincial power has been significantly strengthened under this interpretation.[86]

Applying these principles to the treatment of Aboriginal peoples, would it not also be possible to regard the federal system as only partially complete?[87] It could similarly be argued that the 'federal government retained sweeping powers' relative to Aboriginal peoples 'which threatened to undermine the autonomy' of these groups.[88] Furthermore, since the 'written provisions of the Constitution does [sic] not provide the entire picture' in relation to Aboriginal peoples, the courts could also 'control the limits of the respective sovereignties' by distributing power to the Aboriginal government 'thought to be most suited to achieving [a] particular societal objective.' If the courts can draw on unwritten principles of federalism to fill in the 'gaps in the express terms of the constitutional text'[89] to strengthen provincial powers, could they not apply the same principles to facilitate 'the pursuit of collective goals by [the] cultural and linguistic minorities'[90] that comprise Aboriginal nations? Following the court's reasoning, the principle of federalism could be applied to question assertions of sovereignty that purportedly diminish Aboriginal powers. Federal power over Aboriginal peoples would thereby be circumscribed, allowing Aboriginal people to function as an equal integral part of the federal structure in Canada.

Significantly, Anishinabek traditions would be consistent with principles of Canadian federalism and they provide clues as to how this system could be rebalanced to incorporate Anishinabek interests. Anishinabek law contains 'an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles'[91] in Crown/Aboriginal relations. Some of the stories told by Aunt Irene illustrate this legal genealogy. For instance, in 1763, the generation of my great-great-great-grandparents, First Nations leaders in the Great Lakes and upper Ohio river valley were invited to attend a conference at Niagara with William Johnson, the Crown's chief representative for Indian Affairs, to discuss principles that would govern their relationship.[92] This was the first such meeting of Anishinabek peoples with representatives of the Crown, who had previously been their enemies on the battlefield.[93] The gathering was thus significant in setting the framework by which the parties would relate to one another. Through participation and consent, the Anishinabek and the Crown representatives created a pattern to follow in 'constituting' their relations. The principles agreed to at this inaugural meeting therefore provide pointed guidance for those concerned with Aboriginal peoples' place within Canadian federalism. Those principles include, among others, the recognition of Aboriginal governance,[94] free trade, open migration, respect for Aboriginal land holdings, affirmation of Aboriginal permission and consent in treaty matters, criminal justice protections, military assistance,[95] respect for hunting and fishing rights, and adherence to principles of peace and friendship.[96] The principles elaborated at Niagara have never been entirely abrogated and they underpin Canada's legal structure. Other treaty nations can point to similar promises recognizing their place in Canada's political structures,[97] as such meetings generally involved the negotiation of principles to govern their relationship with the Crown. These agreements have formed the implied term and condition of subsequent treaties[98] and could inform contemporary interpretations of Canada's federal relationship with First Nations throughout the country.

The treaty at Niagara,[99] negotiated through July and August of 1764, was at the time regarded as 'the most widely representative gathering of American Indians ever assembled,'[100] as approximately two thousand chiefs and representatives were in attendance.[101] At least twenty-four nations[102] had gathered with 'representative nations as far east as Nova Scotia, and as far west as the Mississippi, and as far north as Hudson Bay.'[103] The assembled nations included peoples from the great western and eastern Indian confederacies of the day: the Algonquins, Chippewas (Anishinabek), Crees, Fox, Hurons, Pawnees, Menominees, Nipissings, Odawas, Sacs, Toughkamiwons, Potawatomies, Cannesandagas, Caughnawagas, Cayugas, Conoys, Mohicans, Mohawks, Nanticokes, Onondagas, and Senacas.[104] Aboriginal people throughout the Great Lakes and northern, eastern, and western colonial regions travelled for months and weeks to attend this meeting.[105]

When everyone was assembled,[106] Sir William Johnson presented 'the terms of what he hoped would prove a Pax Britannica for North America.'[107] On behalf of the Crown he read the terms of the Royal Proclamation, gave gifts,[108] and presented two different wampum belts to the gathered Indians. In turn, Aboriginal representatives accepted the belts, made speeches, and promised peace to establish a state of mutual

respect between the parties.[109] One belt Johnson passed, the Gus Wen Tah or Two-Row wampum, has been described as follows: 'There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.'[110] The two-row wampum has important implications for federalism because it reflects a conception of governance that recognizes the simultaneous interaction and separation of settler and First Nations societies. An agreement to this effect was first struck by the Haudonosaunee upon contact with Europeans; the principles it represents were renewed by them in 1764 and received for the first time by the Anishinabek in the same year.[111] The two-row wampum belt illustrates a First Nation/Crown relationship founded on peace, friendship, and respect; neither nation will interfere with the internal affairs of the other. The belt contemplates interaction and sharing between First Nations and the Crown, as demonstrated by the three rows of white beads. But it also envisions separation and autonomy between the two governments, as represented by the two parallel rows of purple beads. The twin principles of separation and integration are a recurring theme in Crown–First Nations relations, and they are consistent with a notion of Canadian federalism that respects the need to distribute power to the government thought to be best suited to achieving the particular societal objective, having regard to the diversity of the component parts of Confederation.[112]

The second belt Sir William Johnson presented, which was accepted by the assembled group, also displays themes consistent with Canadian federalism. After referencing the two-row wampum,[113] Thomas Anderson, a Superintendent of Indian Affairs in 1845, described the second belt as follows: 'On the other wampum belt is marked at one end a hieroglyphic denoting Quebec on this continent, on the other, is a ship with its bow towards Quebec; betwixt those two objects are wove 24 Indians, one holding the cable of the vessel with his right, and so on, until the figure on the extreme left rests his foot on the land at Quebec. Their traditional account of this is, that at the time it was delivered to

them (1764) Sir William Johnson promised, in the name of the Government, that those Tribes should continue to receive presents as long as the sun would shine ... and if ever the ship came across the Great salt lake without a full cargo, these tribes should pull lustily at the cable until they brought her over full of presents.'[114] The principles found in this belt similarly envision a political relationship that incorporates autonomy and integration. The Indians and Crown are clearly separate from one another, yet they are connected in important physical ways. The offer of mutual support and assistance (the cable can be pulled from either end) that also respects the independent nature of each party is a powerful archetype for Canada's federal relationships. Sir William Johnson himself, in introducing this belt at Niagara in 1764, captured the mutuality and diversity embedded in this agreement:

> Brothers of the Western Nations, Sachems, Chiefs and Warriors; You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now remains for us only to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this belt to all Nations you will fix one end of it to the Chipeweighs at St. Mary's whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.[115]

The principles symbolized in this belt, together with Johnson's speech and the two-row wampum, are important because they testify to the foundational treaty of alliance and peace between First Nations and the Crown in Canada. Through the exchange of promises, presents, and wampum the parties agreed to subsequently adhere to principles that incorporated two jurisprudential worlds. While these principles find partial expression in the written text of the constitution and the Royal Proclamation, they are given much fuller exposition through the oral and documentary law and history that underlies Canada's constitutional text.[116] Recognition of the Indigenous lineage in Canada's constitutionalism would contribute to working out the legality and legitimacy of Canadian law, consistent with the principles in the *Quebec Secession Reference.*

B Democracy

The second principle considered by the Supreme Court in the *Quebec Secession Reference* was democracy. The court held that 'democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day.'[117] According to the court, democracy 'can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated.'[118] The court's notion of democracy[119] embraces ideas of majority rule, the promotion of self-government and the accommodation of cultural and group identities, the popular franchise, and the consent of the governed. Despite the promises made at Niagara, Canada has rarely followed through with these principles in its dealings with Aboriginal peoples.

Applying the Supreme Court's framework, Canada's unilateral attempts to extinguish Aboriginal rights and repeated denials of the legal right to question this treatment undermine majority rule. Aboriginal peoples were in the majority in most parts of the country at the time their rights were purportedly extinguished, and they were later denied the political and legal means to challenge the Crown's actions.[120] Furthermore, as discussed in the last chapter, the Crown's assumption of overarching sovereignty does not promote community self-government, nor does it accommodate Aboriginal identities. Aboriginal governments were overlaid by elected Indian Act governments, and Aboriginal individuals were subjected to ruthless assimilation policies.[121] Finally, denial of underlying Aboriginal title and the equality of Aboriginal sovereignty does not secure the consent of the governed. Aboriginal peoples in every province and community have consistently resisted the unilateral extinguishment and diminishment of their rights by the Crown.[122] In fact, as Aunt Irene told me, the lives of my great-great-grandparents were strongly influenced by their attempts to resist the contraction of their participation with the land and those who were newly settling on it. Their efforts, and those of others like them, should become more visible in Canada's constitutional structure. Otherwise, Canada will continue to fail to abide by and apply the democratic ideals underlying its constitution.

My great-great-grandparents lived during a time of unparalleled transition in Anishinabek communities, and their response to these changes contains important lessons for Canadian democracy. They maintained a

belief in and practice of consent and participation in government, despite the arrival of hundreds of thousands of settlers who strained their traditional economic, social, and spiritual relationships. Peter Kegedonce Jones, my great-great-grandfather, was chief of the Nawash band in this period and his behaviour exemplified this strong democratic tradition.[123] In 1837, when he was twenty years of age, Peter attended school at Beaverton, Ontario, on the shores of Lake Simcoe, two hours north of Toronto. While he was in school the Rebellion of Upper Canada took place, led by William Lyon Mackenzie. Peter became involved in the Rebellion and his participation was recounted by his grandson: 'I can still recollect hearing him tell me the story of his experiences at this time – how he was recruited as one of Mackenzie's supporters, given a blanket, a musket, powder horn and shot, and after months of weary waiting, was finally taken with others, to the vicinity of Toronto and York, as it was then called. Here they waited, but never had the chance to get into action.'[124] Oral tradition recalls with pride Peter's association with a cause that sought to extend citizen involvement in Canadian politics in community with other Canadians.

Peter's partner, Margaret, also exemplified ideals consistent with Canada's democratic principles. She was born around 1820 in the place now known as Alberta, the child of an Ojibway mother and a Scottish father. Her father, Joseph McLeod, was a fur trader in the Northwest in the early 1800s. When his fur trading days were over, he deserted his Native family and returned to Scotland to live on the Isle of Skye. Margaret's Anishinabek mother, Teresa Riel, raised her daughter in the traditional Ojibway manner. The family eventually migrated from the prairies and settled at La Cloche, on the north shore of Lake Huron. When they heard that Peter was taking people into his community, the McLeods moved from La Cloche to settle at Nawash.[125] Margaret married Peter in the 1840s, when she was in her early twenties.

Margaret developed skills throughout her life that indicate the importance accorded by Anishinabek people to participation in public affairs. She was a midwife and medicine woman who possessed a vast knowledge of herbal remedies for curing various ailments. She would selflessly spend her time gathering the natural harvest of flora, fauna, herbs, and roots from the shores of the lakes, the grasslands, and the forest for the benefit of the community.[126] Margaret shared these medicines and her healing skills freely, without thought of payment or monetary reward. She was also a teacher and educator who spoke three languages: Ojibway, French, and English. French was spoken in the home, Ojibway in

the community, and English when she went off the reserve. As Margaret grew older she became a repository of the traditions, myths, parables, fables, allegories, legends, and stories of our people,[127] and thus greatly assisted in the maintenance of community values and the ancient ethics of participation. In fact, many of the stories recounted in these pages echo her words and themes. They contain strong messages about the importance of participation and consent – principles that are central to democratic thought and could be considered an integral part of Canada's unwritten constitutional heritage.

Unless Aboriginal peoples and perspectives are included in Canada's governing institutions, the country will not create a legitimate framework or legal foundation upon which to build an appropriate political relationship. Despite the strong democratic traditions characteristic of many First Nations, Canadian courts and politicians have not identified and implemented a system that reflects the legal heritage and aspirations of Aboriginal peoples. The political exclusion of Aboriginal people represents a failure of democracy. As the Supreme Court observed in the *Quebec Secession Reference*,

> It is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure.[128]

The court here suggests that the Canadian constitution must create a 'framework' and a 'legal foundation' for people's participation in federal structures. Aboriginal peoples throughout Canada have never received an unencumbered opportunity to participate as traditional or effective governments within the federal structure. They have not been a part of the Canadian 'framework,' and thus have been virtually prevented from officially promoting and implementing normative values consistent with their vision of Canadian democracy. Legally, their exclusion is most telling when it includes the Crown's extinguishment and infringement of Aboriginal rights without requisite participation or consent. Morally, the exclusion from democratic participation is most repugnant when the assumption of extinguishment and infringement leads to forced integration, assimilation, and cultural eradication. Though such labelling may not be completely consistent with usage in international law and treaties, for many Aboriginal peoples, extinguishment is reminiscent of genocide.[129] The principle of democracy, from both the Canadian Supreme Court and Aboriginal legal perspectives, cannot sanction such treatment.

C The Rule of Law

The third principle examined by the Supreme Court in the *Quebec Secession Reference* is the rule of law. While this principle has been discussed in some detail above, it is worth observing that the rule of law must be placed beside federalism and democracy when considering the dispossession Aboriginal people face as a result of the Crown's assertion of underlying title and overarching sovereignty. In the *Quebec Secession Reference*, the court observed that 'at its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.'[130] The unilateral extinguishment of Aboriginal rights before 1982, coupled with the infringement of those rights since 1982, does not ensure a predictable and ordered society: it severely disrupts Aboriginal nations and causes deeply rooted resentment of the federal government.[131] This resentment translates into strained, adversarial relations, periodic blockades, and endless litigation. It tears apart the fabric of Aboriginal communities[132] and leads to instability within the larger population by reducing investment, creating social tension, and causing uncertainty.[133] The consequences of this resentment could further escalate and lead to dissension and violence if left unattended. If relations between Aboriginal peoples and others ever degenerate to the point of frequent, chronic violence, the legal doctrines allowing for non-consensual Crown derogation from Aboriginal rights might be one of the underlying causes of such distress. Such a situation would be partially attributable to the failure of the Canadian state to fully extend the rule of law to Aboriginal peoples.

The failure of the Crown and the courts to protect Aboriginal peoples from arbitrary power has already affected First Nations in at least three

profound ways. First, there were few safeguards to protect the fundamental human rights and individual freedoms of Aboriginal peoples throughout most of Canada's history.[134] As a result, their individual and collective lives were unduly 'susceptible to government interference.'[135] Governmental interference is evidenced through the suppression of Aboriginal institutions of government,[136] the denial of land,[137] the forced taking of children,[138] the criminalization of economic pursuits,[139] and the negation of the rights of religious freedom,[140] association,[141] due process,[142] and equality.[143] A second manifestation of the lack of protection for Aboriginal peoples under the rule of law is that the parties to the creation of Canada did not ensure that, as a vulnerable group, Aboriginal peoples were 'endowed with institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.'[144] This lack of cultural protection led to further vulnerability and violence, as Aboriginal peoples were not extended the institutional means to resist the violation of their rights. A final consequence of the failure to extend the rule of law to Aboriginal peoples is that the political organization of Canada did not 'provide for a division of political power'[145] that would prevent the provincial and federal governments from usurping the powers of Aboriginal governments. Non-Aboriginal governments usurped Aboriginal authority 'simply by exercising their legislative power to allocate additional political power to [themselves] unilaterally.'[146] Consequently, these governments have been unjustly enriched at the expense of Aboriginal peoples. These various transgressions of the rule of law illustrate the problems of founding a country without incorporating the legal perspectives and ideas of all of its inhabitants. They do not produce a stable, ordered, and predictable society. For all these reasons, the courts must not sanction the continued violation of the rule of law with respect to Aboriginal peoples.

Perhaps nothing is more illustrative of Canada's violation of the rule of law with respect to Aboriginal peoples than the Indian Act, first passed in 1876.[147] My great-grandfather, Charles Kegedonce Jones, was the first chief of the Chippewas of the Nawash elected under the Indian Act's provisions. He worked for over fifty years in this position and struggled to make it relevant to the values and activities of the people he served. The Act imposed a normative structure on Aboriginal communities that was largely inconsistent with their own legal and political systems. Charles found it difficult to integrate the statute's authoritarian proscriptions with the consensual approach to governance found within

Anishinabek political and legal thought. His successes in responding to community needs were most often achieved in spite of the Indian Act, and he had to take great steps to preserve the rule of law at Cape Croker, which that statute undermined.

For example, Charles had to overcome threats to Anishinabek normative order and the rule of law in the areas of property law, governance, family relations, education, freedom to contract, and religious freedom. The Indian Act contained provisions that forcibly prohibited or restricted Anishinabek order in all these areas. While Charles and his councils did the best they could to maintain their means of subsistence (for example through Band resolutions dealing with sales of timber on our lands,[148] the lease and pasture of farm land,[149] the acquisition of seeds for cultivation,[150] the purchase of livestock,[151] and the harvesting of their fisheries)[152] the Indian Act's provisions largely prevented them from making the rule of law effective within their community.[153] The Indian Act is an affront to the rule of law throughout Canada. It stands as evidence of the arbitrary nature of Canada's political order relative to Aboriginal peoples. It must be repealed and replaced by a document that facilitates the recreation of normative order in Aboriginal communities.

The rule of law has also suffered in the community's relations with its non-Native neighbours. Charles's father Peter had signed two treaties in 1854[154] and 1857[155] that promised many material goods and services in return for non-Native people settling on Anishinabek territory. In fact, Peter's signature was the first one on the 1857 treaty. These treaties covered over 500,000 acres of prime land in southwestern Ontario, extending east from Goderich on Lake Huron to Arthur in central-southwestern Ontario, and then north to Owen Sound on Lake Huron. Anishinabek people felt (and still feel) deeply for their lands, and making the decision to share them with others was not easy. Yet Peter and his people signed the treaty as an exercise of governance, to obtain promises that would perennially compensate for their loss. The promises secured for sharing the land included, among others, increasing capital payments through trust funds deposits and payments, perpetual medical assistance, the provision of education, the building of infastructure (such as roads, public buildings, and docks), housing, hunting, fishing, and timber rights. The Anishinabek were told 'that from the sale of the land [they] would soon have a large income, would all be able to ride in carriages, roll in wealth and fare sumptuously every day.'[156] The government's promises were not fulfilled, despite Anishinabek adherence to the treaty's terms. Among other problems there were issues with reserve

size,[157] non-native settlement,[158] the development of agricultural lots,[159] the building of schools,[160] the provision of funds,[161] and official sanction for acts undertaken by the Band Council.[162]

Charles and others of his generation repeatedly petitioned Canada to respect the rule of law and adhere to its treaty promises. Canada did not respond to these appeals, and to this day it has not lived up to its commitments. The Nawash have even had to pursue litigation to compel the government to abide by its covenants. The violation of basic legal principles of offer, agreement, and consideration does not bode well for the rule of law in Canada. While Canadians enjoy the material wealth and political benefits that derive from access to such a large piece of land, the Anishinabek are criticized for wanting to enjoy the contemporary benefits that flow from their side of the bargain. Canadians are quite happy to uphold the right for non-Native people to perpetually live on treaty lands but often blanche when Native people assert perpetual rights to housing, education, medical care, or federal transfers of money. The rule of law should not sanction such uneven and arbitrary applications of normative order. The principles embedded in the *Quebec Secession Reference* direct us otherwise.

D The Protection of Minorities

Fourth, and finally, in considering the legality and legitimacy of constitutional principles that relate to the diminishment of Aboriginal rights it should be recalled that the Supreme Court in the *Quebec Secession Reference* held that 'the protection of minority rights is itself an independent principle underlying our constitutional order.'[163] To return to the arguments made at the beginning of this chapter, Aboriginal title and sovereignty must not be unilaterally subject to Crown title and sovereignty because this would fail to protect Aboriginal peoples from the majority in Canada. Aunt Irene's stories, and those of countless thousands of Elders throughout this country, must be incorporated into our understanding of Canadian constitutionalism. Failure to abide by their views would, in the words of the *Quebec Secession Reference*, defeat the 'promise' of section 35, which 'recognized not only the ancient occupation of land by [A]boriginal peoples, but their contributions to the building of Canada, and the special commitments made to them by successive governments.'[164] The Crown's claim that it can define and adjudge Aboriginal rights on its authority alone does not seem consistent with the court's observation that 'the protection of minority rights was clearly an

essential consideration in the design of our constitutional structure.'[165] One wonders how Canadians would respond if the positions were reversed and Aboriginal peoples were vested with the exclusive power to interpret and circumscribe non-Aboriginal rights. They would likely want to be protected in such circumstances and insist on the application of principles similar to those outlined in this chapter. The courts, in one of their roles, are a counter-majoritarian body; they should be ever-mindful of the challenges faced by peoples in a minority situation in Canada and act to protect their rights from unfair occlusion.

The courts must combine the principles of federalism, democracy, the rule of law, and the protection of minorities to assess the legality and legitimacy of Canada's assertions with respect to Aboriginal peoples. If the courts agree with the conclusions suggested in this chapter, then Canada's laws should be declared invalid, though enforceable, by the application of the rule of law until the parties resolve this situation through negotiation, participation and consent. Until this negotiation occurs, Aboriginal peoples will continue to protest the unjust application of Canadian law to their societies. If the relationship between Crown and Aboriginal sovereignties is not resolved through law and negotiation, Aboriginal peoples may one day claim a right to be released from a situation that denies them the fundamental guarantees of a free and democratic society. They may claim they are not subject to Canada's jurisdiction, because Canada's claims over them are not legal or legitimate. As both an Anishinabek and Canadian citizen, I look forward to the day when Aboriginal peoples will be able to claim the benefits of the rule of law – both their own and Canada's. I sincerely hope that the day will never come when rights to live according to Canadian constitutionalism are unalterably withdrawn, and Aboriginal peoples must rely on a declaration of external self-determination to sustain their communities.

IV Conclusion: The Rule of Law and Self-Determination

This chapter has illustrated that the Crown's assertion and the courts' acceptance of a subsequent claimant's non-consensual assertion of rights over another legal ordering is not consistent with the law's highest principles. Any judicial or other sanction of the colonization, subjugation, domination, and exploitation of Aboriginal peoples in Canada is not a 'morally and politically morally defensible conception of [A]boriginal rights.'[166] It 'perpetuat[es] historical injustice suffered by [A]boriginal peoples at the hands of [the] colonizers;'[167] it is illegitimate and

illegal. In the absence of negotiation and reconciliation, this treatment may ultimately result in a claim of a legal right to self-determination for those who suffer such abuses. Ideally, Aboriginal self-determination should receive negotiated expression within Canada through an appropriate extension of the rule of law in matters of federalism, democracy, and minority protection. Otherwise, we might properly regard the Crown's treatment of Aboriginal peoples as 'colonial rule' that leads to their 'subjugation, domination and exploitation' and blocks their 'meaningful exercise of self-determination.'[168]

Under international law, people who are prevented from exercising self-determination within a nation state may have a right of 'external self-determination:' a right to secede from the country in which they live. In commenting on the implications of obstructing self-determination, the Supreme Court in the *Quebec Secession Reference* observed that external self-determination can be claimed in three circumstances: 'the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.'[169] Aboriginal peoples may have an argument for self-determination on the authority of these principles if the Crown's assertions of sovereignty are not tempered in ways suggested in this chapter. If negotiated settlement does not occur, and the principles outlined in the *Quebec Secession Reference* are not extended to them, Aboriginal peoples may be able to argue that they are colonial peoples with a right to external self-determination. They could say in such circumstances that they are 'inherently distinct from the colonialist Power and the occupant Power and that their "territorial integrity," all but destroyed by the colonialist or occupying Power, should be fully restored.'[170] Furthermore, Aboriginal peoples may be able to claim the legal right to self-determination by arguing that Canada's diminishment and extinguishment of their rights has not 'promote[d] ... [the] realization of the principle[s] of equal rights and self-determination of peoples ... bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of friendly relations], as well as a denial of fundamental human rights, and is contrary to the [Charter of the United Nations].'[171] Finally, Aboriginal

people may claim the right to self-determination because the unilateral extinguishment of their rights prior to 1982, and the rules forbidding them to question this injustice, means the Canadian government does not represent 'the whole people belonging to the territory without distinction of any kind.'[172]

If Aboriginal peoples were able to show the force of any one of the arguments developed in this chapter or to establish that they are entitled to the legal right of self-determination, this could take them a great distance in undoing the 'spell' of Crown sovereignty under which they currently function. Even in the absence of an appropriate response from Canada, Aboriginal peoples could use international law principles to work towards eliminating the injustice of unilateral assertions of Crown sovereignty. Each party needs to explore these issues more fully and to negotiate and reconcile their differences through joint effort. Aboriginal perspectives underlying the Canadian constitutional framework need to be brought to light. Adherence to the rule of law requires that the parties develop a conception of participation and citizenship in Canada that respects and includes Aboriginal peoples and their laws more explicitly in its framework.