Wi Parata v. Bishop of Wellington

canopyforum.org/2023/04/11/johnson-v-mintosh-wi-parata-v-bishop-of-wellington-and-the-legacy-of-the-doctrine-of-discovery-in-aotearoa-new-zealand

April 11, 2023

Johnson v. M'Intosh, *Wi Parata v. Bishop of Wellington*, and the Legacy of the Doctrine of Discovery in Aotearoa-New Zealand

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Lake Mystery, Canterbury, New Zealand by Michal Klajban (CC BY-SA 4.0).

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Here in Aotearoa-New Zealand the doctrine of discovery is, for many, a very new concept. If people knew of it at all, they assumed it to be relevant to the history of the Americas, but not to Aotearoa-New Zealand. This is in part due to our preoccupation with the colonial fiction of a "kind settlement." A concerted grassroots campaign organized during the 2019 national commemorations of James Cook's invasion in 1769 resulted in heightened awareness of his

imperial intent. Consequently, there has been a somewhat belated awakening for Aotearoa-New Zealand to the reality of how the doctrine of discovery arrived here and has come to shape our existence.

Cook has often been heralded as “the last of the great explorers” of the so-called “Age of Discovery” that was set in motion by the doctrine of discovery. Cook carried out proclamations of discovery on behalf of his monarch King George III in Tūranganui a Kiwa (Gisborne), Whitianga (Mercury Bay), Tai Tokerau (Northland), and Tōtaranui (Queen Charlotte Sound). The entitlement of Cook — and of successive waves of colonizers in the late 18th and early 19th centuries — resulted from the racist logic of the doctrine of discovery, which permeated European society. Indeed, this enduring logic continues to underpin tensions between the descendants of these colonizers and Māori to this day.

The doctrine of discovery was referenced by William Hobson in his proclamation of sovereignty “on the grounds of Discovery” over Te Wai Pounamu (South Island). While sovereignty over Te Ika a Māui (the North Island) was said at the time to be expressed based upon cession to the Queen, it is now widely accepted that the “discovery” of Te Tiriti o Waitangi was not the result of a treaty of cession. This has been confirmed by the Waitangi Tribunal (the Crown judicial body which rules on treaty matters). As sovereignty was never ceded, the assertion of Crown sovereignty over Aotearoa-New Zealand cannot be said to be legitimized by Te Tiriti o Waitangi, and is thus, in its entirety, an expression of the doctrine of discovery. Hobson’s proclamation of sovereignty over Aotearoa-New Zealand became the basis of the 1852 Aotearoa-New Zealand Constitution Act which established the Aotearoa-New Zealand government; this therefore makes the Aotearoa-New Zealand Constitution Act and the government it established a violation of the treaty upon which its existence is based.

The doctrine of discovery and Te Tiriti o Waitangi

One of the dominant justifications for dismissing the relevance of the doctrine of discovery in Aotearoa-New Zealand is the Crown’s insistence that it was made redundant by Te Tiriti o Waitangi, and in turn by the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal as the Crown-appointed judicial authority on treaty matters. In the opening dialogues of the 9th session of the Permanent Forum on Indigenous Issues, then-Minister for Māori Affairs Hon. Pita Sharples affirmed Aotearoa-New Zealand’s support of the Declaration on the Rights of Indigenous Peoples; however, he qualified that support by noting the constraints imposed by the Treaty of Waitangi, which is, he noted, the primary instrument for managing the relationship between the Crown and Māori, and providing redress for colonial injustice.

This position was echoed during the 12th session special meeting on the doctrine of discovery; Jane Fletcher, then Deputy Director of the Aotearoa-New Zealand Office of Treaty Settlements stated the following on behalf of the then Aotearoa-New Zealand government:

> "We recognise that by denying indigenous title, the doctrine of discovery has created historic injustices, and has had a wholly negative impact on the relations between indigenous peoples and state governments. In Aotearoa-New Zealand, however, our history is particular. The relationship between the indigenous people of Aotearoa-New Zealand, Māori and the Aotearoa-New Zealand Government has long been, and remains, based on a single Treaty, the Treaty of Waitangi, signed by some representatives of iwi Māori and the British crown on and after 6 February 1840. The Treaty remains of fundamental constitutional and historical importance for Aotearoa-New Zealand."

The intervention then proceeds to outline the Treaty settlement process as the means through which the Aotearoa-New Zealand government is providing redress for the impacts of colonization and "settling the grievances of its Indigenous people."

The presentation of the settlements process as a means for settling the grievances caused by violations of Te Tiriti o Waitangi has more problematic repercussions as well. The Treaty of Waitangi Act, which established the settlements process, limits both the scope and enforceability of possible reparations. For example, the tribunal cannot recommend the return of private land, even when that land has been proven to have been unjustly confiscated by the Crown in the first instance. Further, the settlement process has been described by many who have undergone it as a deeply harmful and traumatizing process, due to the pressure placed upon the process by the Crown, the fact that the tribunal recommendations are not enforceable, and the Crown's self-appointment as the ultimate authority over claims of its own malfeasance. This inhibits the Crown's ability to adequately identify and address colonial racism towards Maori. Accordingly, even though the tribunal itself performs an important function as a truth forum for colonial injustice, the settlement process itself continues to protect the power and privilege ascribed through the doctrine of discovery and to limit state accountability to the violations carried out through its application, including judicial attempts to limit the impact of *Johnson v. M'intosh* in Aotearoa-New Zealand.

The logic of the doctrine of discovery was embedded within Aotearoa-New Zealand's legal, political, and economic framework through numerous acts of Crown malfeasance from the 1840s to the 1870s. The 1877 case of *Wi Parata v. Bishop of Wellington* is of particular relevance. In that decision, Chief Justice James Prendergast drew from *Johnson v. M'intosh* (which utilized the doctrine of discovery as the basis for the extinguishment of Indigenous title), and in doing so explicitly embedded the doctrine of discovery into Aotearoa-New Zealand's judicial precedent history.

The Wi Parata case is centered upon a block of land at Porirua on Te Ika a Māui (North Island) which the resident iwi Ngāti Toa had gifted to the Anglican church in 1848 for the express purpose of building a school for Ngāti Toa youth. No school was built, but in 1850 the Crown issued a grant allowing the land to remain with the church, rather than having it

returned to Ngāti Toa, who sued for the land back. In his findings, Chief Justice Prendergast drew heavily from doctrine of discovery logic, denying that “savage barbarians” could have any pre-existing proprietary rights, and stating:

> “[T]he Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, jure gentium, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government…”

And continued:

> “It is enough to refer, once for all, to the American jurists, Kent and Story, who, together with Chief Justice Marshall, in the well-known case of *Johnson v. McIntosh*, have given the most complete exposition of this subject.”

Finally concluding that:

> “[I]n the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.”

In a young colony like New Zealand, it was not unusual for colonial judges to utilize precedents set in other colonial nations for their findings, just as it was not unusual for colonial militia to “note swap” with other colonial militia overseas for effective tools to exterminate Indigenous opposition. In Prendergast’s use of *Johnson v. M’intosh* as a precedent, the doctrine of discovery became a foundation of Aotearoa-New Zealand law, with far-reaching consequences. *Wi Parata v. Bishop of Wellington* has been, in turn, invoked as a precedent in numerous claims brought for breaches of the Treaty well into the twentieth century.

These subsequent cases not only relied upon the precedent set by Prendergast in *Wi Parata v. Bishop of Wellington*, but also reasserted the assumptions of the doctrine of discovery. Even in 1901 when the Privy Council, the senior most judicial body of the time, found that Prendergast had over-reached in his extinguishment of native title, the domestic Aotearoa-New Zealand judiciary took the rare steps of ignoring the Privy Council’s ruling. It was only in 2003 when *Wi Parata v. Bishop of Wellington* was finally, conclusivelyoverruled by Chief Justice Sian Elias, who ruled that:

> “I am of the view that the approach taken by Turner J in the supreme court and by the court of appeal in In Re: the Ninety-Mile Beach can be explained only on the basis that they were applying the approach taken in *Wi Parata v Bishop of Wellington*. On that approach, Māori property had no existence in law until converted into land held in fee of the Crown. Until then it was assumed to be Crown property… For the reasons already given, such view is contrary to the common law.”

In response, however, the government drafted legislation that, in direct conflict with these findings, vested ownership of the entire Aotearoa-New Zealand foreshore and seabed with the Crown — a move which prompted Māori to march upon parliament in the tens of thousands, calling the act the largest colonial land-grab of modern times.

While there has been a concerted effort within Waitangi Tribunal, and more recently through the judiciary, to address the harms delivered through the logic exemplified and embedded in Aotearoa-New Zealand law by *Johnson v. M'intosh*, these attempts continue to be hindered by the Crown's assumption of indisputable and ultimate parliamentary sovereignty, which remains its most consistent application of the doctrine of discovery. The fact that the Crown refuses to repudiate the doctrine (even as they acknowledge its irrelevance to Aotearoa-New Zealand) can be seen as an implicit acknowledgment of its continued importance to colonial domination in Aotearoa-New Zealand. ♦

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Recommended Citation

Ngata, Tina. "Johnson v. M'intosh, Wi Parata v. Bishop of Wellington, and the Legacy of the Doctrine of Discovery in Aotearoa-New Zealand." *Canopy Forum*, April 11, 2023. https://canopyforum.org/2023/04/11/johnson-v-mintosh-wi-parata-v-bishop-of-wellington-and-the-legacy-of-the-doctrine-of-discovery-in-aotearoa-new-zealand/.