"The Contemporary Presence of Discovery's Assertion in Canada" by Mark Tremblay

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The Contemporary Presence of Discovery's Assertion in Canada

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"First Nations dancers watch the Canada Day celebrations in Calgary, Alberta – 2022" by Dwayne Reilander / Wikimedia CC-BYSA-4.0.

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Many groups and organizations have taken actions to repudiate the Doctrine of Discovery. In an opinion piece published in Canada's *Globe and Mail* in Aug 2022, Douglas Sanderson asserts that the Doctrine of Discovery had little influence on the relationship between Indigenous peoples and the French and English who treated Indigenous nations as equals.

The Doctrine of Discovery seeks to explain how European nations dispossessed Indigenous peoples of their land and rights. Sanderon claims that giving force to the Doctrine of Discovery (which he understands as an American legal fiction) in Canada misrepresents Indigenous history. Further, Mr. Sanderson explains that after the invention of this doctrine which, “neatly explained Indigenous dispossession in a sentence or two” no one cared about the past and “the story of relationships based in diplomacy and alliance slipped almost from memory.”

I think Mr. Sanderson provides a reminder of what can easily be forgotten in Indigenous–settler relations — namely, the relationship. In 2015, the Truth and Reconciliation Commission (TRC) called the relationship between Canada and Indigenous peoples “broken.” It advanced the United Nations Declaration on the Rights of Indigenous People as the framework for reconciliation. Call to Action 47 asked for the repudiation of the Doctrine of Discovery and other colonial concepts that reinforce European sovereignty over Indigenous peoples and lands. There are both negative and positive actions required to begin the long process of establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples. This is what the TRC identifies as reconciliation. Attitudes and lives must change. The following attempts to show how the Doctrine of Discovery continues to be a barrier in Canada to the kind of reconciliation the TRC advocates.

One of the striking features of chief justice John Marshall’s articulation of the Doctrine of Discovery is the assertion that Indigenous sovereignty and rights were necessarily diminished and impaired. This was necessary because, to paraphrase Marshall, the act of discovery gave exclusive title to the discoverer. It wouldn’t take too long before countries also determined that discovery alone wasn’t enough — one had to occupy what was discovered. It was essential that people live on and farm that claimed land. The logical inference from Marshall’s observation about discovery was that European monarchs asserted that they alone had ultimate dominion over the lands their subjects had discovered. While it will be seen that progress has been made by the Supreme Court of Canada (SCC), this assertion of sovereignty has become the centerpiece of Canadian law dealing with and determining Indigenous rights. The assertion of sovereignty has made it difficult for settler law makers and settler law interpreters to see treaties as a nation-to-nation activity. The effect of this assertion has imposed a forced submission. The Court identifies its purpose in cases involving Indigenous rights, and the interpretation of treaties, to reconcile Indigenous sovereignty and rights with the assertion of Crown sovereignty.

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This means that, real or fiction, American or not, discovery is part of the problem in Canada. It is not part of my interest here to evaluate the nature and quality of the relationships Indigenous peoples had with settlers at earlier times. Removing discovery does not change what happened! It does seem that Marshall was correct that European monarchs diminished Indigenous sovereignty and to a large extent impaired their rights. Marshall's opinion had been cited by the SCC a few times prior to 1996. Since that time, the SCC has found creative ways to hide discovery while keeping it foremost in its deliberations. The following will expose how this legal fiction continues to direct Canada's dealings with Indigenous peoples.

Marshall articulated what he understood to be the principle that described and explained the actions of European monarchs and their settlers. Discovery provided some conceptual language to begin understanding what they did. As far as I can tell, to date, the SCC has not challenged or disagreed with Marshall on this. Steven Newcombe has also provided some conceptual language to help understand these actions. He shows the effect or purpose of discovery to be domination. The effect of European assertion of sovereignty over Indigenous peoples was the domination and displacement of these nations. The justification for those actions, however they are described or interpreted, whatever the effect or results of those actions, lies elsewhere. I think it was H. Grotius who relates an ancient Roman Story about an inscrutable thief. When asked what right he had to take what he had taken as his own, he replied that it was his because he had taken it. Just because individuals and nations may justify their actions doesn't make them legally or ethically right.

Against the language of discovery and domination, Sanderson would like the story of relationships to be told from the perspective of diplomacy and alliance. He holds that, while it was a complicated relationship, it came, "undone once the British went home and the young dominion government turned its back on centuries-old allies and partners." As the Constitution is the justification for the assertion of sovereignty, it is important to understand how this assertion is made.

There are two sections of the The Constitution Act (1867) that could be used to direct Canada's relationship with Indigenous peoples. Section 91, dealing with the distribution of Legislative powers provided one line referencing Indigenous Peoples. It delineates the powers of the Federal Government, and claims exclusive legislative authority for Parliament in a variety of matters, including "Indians and the lands reserved for Indians." The other Section is found in miscellaneous provisions regarding the Canadian government's Treaty obligations. I think it is fair to say that even the recognition of treaty obligations was skewed through the government's exclusive legislative authority over all Indigenous matters. As the world changed through the twentieth century and Canadian politicians learned the new language of human rights, the Canadian government began a process of constitutional revision.

The Constitution Act (1982) added a Charter of Rights and Freedoms along with 6 other parts. Here, as well, there are two sections that direct Canada's relationship with Indigenous peoples. Within the Charter itself there is a section that provides a guarantee to Indigenous peoples. Section 25 declares:

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

The second part of the revision begins with a strong declaration: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Further, it prescribes that Amendments to Section 91.24 and section 25 of the Charter must be considered through a constitutional conference called by the Prime Minister and the first ministers of the provinces with representatives of Indigenous peoples to participate in the proposed amendments. Adding the provincial first ministers to the table surrenders the exclusive Parliamentary authority granted in 1867 and changes the directive of the Royal Proclamation of 1763. The SCC has determined that the interpretation and application of section 35 must be understood in relation to section 91.24.

Forty-one years ago, one might have been optimistic that the constitutional revision based on human rights could correct and protect the rights and sovereignty of Indigenous Peoples. It was in the mid-nineties that the language the SCC uses in Indigenous cases changed. Direct reference to Marshall and discovery was dropped, and a new language was invented by the Court. But the residue of Marshall's language and the influence of his opinion are evident. One might have thought that the human rights-based revisions would erase the colonial domination of indigenous people, but that doesn't seem to have happened. That is what happens when the hermeneutical aperture is narrowed to the point that only considerations that were present or existing when the constitution was written can be legally considered.

Two principles — the assertion of sovereignty and the honour of the Crown — now frame the basis of its deliberation. Just as Marshall claimed that European monarchs "asserted ultimate dominion to be in themselves," the SCC recognizes that the government of Canada alone has sovereignty and asserts this sovereignty over Indigenous peoples. It has claimed that the constitution is the very instrument that asserts that sovereignty. The honour of the Crown, a principle whose purpose is to reconcile Indigenous rights with the assertion of sovereignty, is present whenever Indigenous rights are considered. While section 35(1) affirms existing aboriginal and treaty rights, the Court insists that these rights are not guaranteed and must be proven.

A brief review of the SCC's decision on the appeal of the Tsilhqot'in nation in 2014 illustrates this. The case dates back to 1983 when the provincial government of British Columbia (BC) granted a commercial logging license on land considered by the Tsilhqot'in to be part of their traditional territory. The responsibility of establishing Aboriginal title lies with the Indigenous group claiming it. The task for the Court was "to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms." The Court ruled that there must be sufficient, continuous and exclusive "occupation" to establish Aboriginal title:

> The issue in cases such as this is how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act*, *1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

While the Supreme Court of BC held that the Tsilhqot'in established a claim of occupation, the BC Court of Appeal held that they did not. The SCC held that the appeal should be allowed and that a declaration of Aboriginal title should be granted. It marked a huge victory for Indigenous rights and sovereignty.

The relevant point was made by law professor John Borrows, who observed that the case showed that the SCC recognized that the Tsilhqot'in "legal traditions can give rise to enforceable obligations within Canadian Law." As the SCC has said since Guerin in 1984, Aboriginal interest in land is "an independent legal interest." Not only does the ruling point to the importance of the continuation of Indigenous legal traditions, but it also begins to show the possibility that there can be more than one source of power that contributes collectively to our understanding of rights. One does not have to be submitted or reconciled to the other.

However, there are also comments that raise concern about the abiding presence of colonial principles like the Doctrine of Discovery and *terra nullius*. The Court states in the Tsilhqot'in decision that the content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it. The Court quoted from the Guerin decision again to support the Crown's underlying title. It noted at "the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province." The establishment of Aboriginal title is not exclusive or independent. The Crown has an underlying title which the Court claims involves a fiduciary duty and a right of extinguishment.

> These assertions of sovereignty cannot be disputed in or by the Courts. The question of sovereignty is a political matter and not a justiciable issue.

Examining other SCC decisions as stated in *R. v. Sparrow* (1990), one can see that this duty and right arises from the Court's interpretation of section 35(1). This interpretation also demonstrates the Court's view that the Crown Title is paramount, and has the power to infringe or extinguish Indigenous rights that it had before the 1982 revision. In Calder (1973), quoting Kent's commentaries concerning "Native Title," it stated, "for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen' s exclusive right to extinguish it." Later, in Manitoba Metís (2013), the Court stated that the "Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation." The invocation of the Doctrine of Discovery did not begin with the assertion of Crown sovereignty, it began long before with the assertion of European sovereignty. It is difficult to understand the Court's claim that *terra nullius* never applied in Canada.

These assertions of sovereignty cannot be disputed in or by the Courts. The question of sovereignty is a political matter and not a justiciable issue. Quoting Marshall in Calder (1972), the Court noted that "the exclusive right of the United States to extinguish" Indian title has never been doubted. Marshall also wrote that a society has the right to prescribe those rules by which property may be acquired and preserved. Those rules cannot be put into question. The title to lands depends entirely on the law of the nation in which they lie. He uses this as justification for narrowing the lens of interpretation and claims that his judgement is based on those principles "which our own government has adopted in the particular case, and given us as the rule for our decision."

Sanderson and the TRC Report's Calls to Action draws attention to the importance of Canada's relationship with Indigenous peoples. Is the story we want to live and tell only about displacement and domination, or is it also about partnership and mutual respect? The problem is the constitution and the lack of political will to recognize Indigenous sources of title and power that can exist and do exist alongside the power of provincial and federal leaders. To date, while constitutional revision has allowed for movement, human rights-based legislation has been hampered by colonial baggage under the influence of the Doctrine of Discovery and *terra nullius*. Politicians cannot merely vote to repudiate a fiction without providing direction for what should replace it. The failure of weak-willed politicians to provide that direction exposes the fragility of our modern democracy. There is, however, a glimmer of hope. On 21 June 2021, the Government of Canada passed the UNDRIP Act into law. The purpose of the Act is to affirm the Declaration on the Rights of Indigenous People as an international human rights instrument that can help interpret and apply Canadian law. Time will tell what effect this will have on colonial principles that have been used and created to sustain the assertion of sovereignty imposed by the Constitution and whether the Court can continue to utilize the expanded conception of sovereignty that they followed in the Tsilhqot'in case. We must never forget the past, but perhaps we might live into a future that is based on a mutually respectful relationship. ♦

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