BACK TO THE FUTURE—RECONCILIATION AND INDIGENOUS SOVEREIGNTY AFTER *TSILHQOT'IN*

Felix Hoehn*

The Final Report of the Truth and Reconciliation Commission of Canada (TRC) and its 94 calls to action are an ambitious blueprint for reconciliation between Aboriginal and non-Aboriginal Canadians.[1] The overwhelmingly positive political reception the Report received gives grounds for optimism that these recommendations can be a vehicle for reconciliation. Prime Minister Justin Trudeau issued a statement promising, among other things, a "total renewal of the relationship between Canada and Indigenous peoples. We have a plan to move toward a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership…"[2] He promised to "fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples."[3]

This paper will focus on the TRC's calls to remove the doctrine of discovery from Canadian law. These calls conflict with the doctrine of Aboriginal title, including the Supreme Court of Canada's recent decision of *Tsilhqot'in Nation v British Columbia*.[4] This decision has justifiably been hailed as an important step toward repairing relationships with Indigenous peoples,[5] even though its potential for furthering reconciliation is compromised by its reliance on the doctrine of discovery, which should long ago have been discarded as a disgraced part of Canada's colonial past. Therefore, *Tsilhqot'in* represents both the past and the future. It is a

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* Assistant Professor, College of Law, University of Saskatchewan. The author thanks Rarihokwats for his helpful advice.

1 The Final Report of the Truth and Reconciliation Commission of Canada (Montreal: McGill-Queen's University Press, 2015) [TRC Final Report].

2 Canada, "Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission" (December 15, 2015), online: <pm.gc.ca>. This echoes earlier promises, see Susana Mas, "Trudeau lays out plan for new relationship with indigenous people" *CBC News* (December 8, 2015), online: <wws.cbc.ca>. Trudeau said "it is time for a renewed, nation-to-nation relationship with First Nation peoples, one that understands that the constitutionally guaranteed rights of First Nations in Canada are not an inconvenience but rather a sacred obligation." He promised Indian Chiefs assembled in Gatineau, Que. to implement five promises made during the recent election campaign. These included implementing all 94 recommendations from the Truth and Reconciliation Commission, launching a national public inquiry into missing and murdered Indigenous women, and repealing all legislation unilaterally imposed on Indigenous peoples by the previous government.

3 Ibid.

4 Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 257 [Tsilhqot'in].

5 This praise comes from Aboriginal scholar John Borrows, even though he also denounces the role the doctrine of discovery in the decision. See John Borrows, "The Durability of *Terra Nullius: Tsilhqot'in Nation v British Columbia"* (2015) 48 UBC L Rev 701 at 703 [Borrows, "*Terra Nullius*"], citing also Brenda Gunn, "Case Note: *Tsilhqot'in Nation v British Columbia* 2014 SCC 44" 8:14 Indigenous L Bull 27.

manifestation of the past because it applies the immoral and discriminatory doctrine of discovery to the prejudice of Indigenous peoples. At the same time, it points the way to the future, because it implicitly recognizes the sovereignty and territories of Indigenous nations. This holds the potential of leading toward the nation-to-nation relationship and partnership envisaged by the Prime Minister and the Truth and Reconciliation Commission.

Canadian Aboriginal law in general and the doctrine of Aboriginal title in particular, rely on the doctrine of discovery to explain how the Crown gained sovereignty without the consent of Indigenous nations. It does so by denying the sovereignty of Indigenous nations.[6] Having thus supposedly rendered the land free of sovereign powers, the Crown's sovereignty could fill this vacuum and be effective just by being asserted. The results of this racist and ethnocentric legal fiction are not just of academic interest – they have real and detrimental practical and legal implications.[7]

In spite of the entrenched position of the doctrine of discovery in Canadian Aboriginal law, the Supreme Court of Canada has recognized Indigenous sovereignty both explicitly and implicitly in a number of contexts. In *Tsilhqot'in*, Indigenous sovereignty could not be directly in issue because a claim for Aboriginal title as presently understood necessarily concedes an underlying Crown title. In spite of this, the Supreme Court's formulation of Aboriginal title implicitly acknowledges the need to reconcile Aboriginal title and Aboriginal sovereignty with the Crown's title and Crown sovereignty.

The purpose of this paper is to suggest that the time has come for the Supreme Court of Canada to cure Canadian law from its dependence on the doctrine of discovery. Maybe it was once considered necessary to cling to this disparaging fiction, but its time has passed. The Truth and Reconciliation Commission got it right

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[6] While there may be good reasons to prefer the term "Indigenous" over "Aboriginal", this paper will sometimes use "Aboriginal" because this term is used and defined in s 35 of *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), c 11 [*Constitution Act, 1982*]. Section 35 reads as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[7] See below, and see Borrows, "*Terra Nullius*", *supra* note 5 at 727–740. Borrows focuses on the following four consequences: a) the Crown's power to infringe Aboriginal title, b) the onus for proving Aboriginal title falls on Indigenous peoples, c) the Crown can subject Indigenous peoples to provincial jurisdiction, and d) the Crown can characterize Aboriginal title as existing in a "legal vacuum" in the absence of Provincial legislation.

when it said that we no longer need the doctrine of discovery because we have other means of supporting Crown sovereignty.[8]

Since the doctrine of discovery denied Indigenous sovereignty, abolishing this doctrine will allow Indigenous sovereignty to be recognized. The Supreme Court has already taken us to the threshold of a new paradigm of Aboriginal law with decisions that recognized the sovereignty of Indigenous nations and the need for treaties to reconcile sovereignties. Nonetheless, *Tsilhqot'in* contains too many elements of the old paradigm that rely on the discovery doctrine. At the same time, it also reflects some elements of a new paradigm that recognizes Indigenous sovereignty.[9]

This paper argues that Canada is ready to shed the discovery doctrine, and that it is time for the Supreme Court to reclaim the catalytic role toward reconciliation that it played when it rendered its decision in *Calder v British Columbia (Attorney General)*.[10] At that time, recognizing Aboriginal title as an enforceable legal right was a necessary and important step toward a just settlement for Indigenous peoples, even though it relied on the doctrine of discovery. It took more than 40 years to go from *Calder* to *Tsilhqot'in*, the first judicial recognition of the title an Indigenous nation held in its territory. In the meantime, Canadian society has matured to a point where it is wants true reconciliation with Indigenous peoples as equal partners in Confederation, and Canadian Aboriginal law has matured because it has developed the outlines of a post-discovery doctrine theoretical framework.

The purpose of this paper is to underline the importance of moving to this framework, and to describe some of the elements of that framework that already exist in Canadian law.

I. THE FUTURE OF RECONCILIATION—THE TRC AND CALLS FOR AN END TO THE DISCOVERY DOCTRINE

The Truth and Reconciliation Commission (TRC) has helped to bring the need for reconciliation into the consciousness of Canadians. The TRC was part of a response to the legacy of Indian Residential Schools, which was intended to acknowledge the injustices and harms this system brought to Indigenous people and the need for healing.[11] Political support for implementing the TRC's recommendations appears to be widespread among Canadian leaders. Prime Minister Justin Trudeau's

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[8] *The Final Report of the Truth and Reconciliation Commission of Canada: Canada's Residential Schools: Reconciliation,* vol 6 (Montreal: McGill-Queen's University Press, 2015) at 33, online: <www.trc.ca> [*TRC* vol 6].

[9] For an analysis of a similar contradiction operating in the Australian law of Native title, see Ben Silverstein, "Submerged Sovereignty: Native Title within a History of Incorporation" in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) 60.

[10] *Calder v British Columbia (Attorney General*), [1973] SCR 313, 34 DLR (3d) 145 [*Calder*].

[11] Truth and Reconciliation Commission of Canada, "Our Mandate", online: <www.trc.ca>.

unqualified support has already been referred to above. Almost half a year earlier, Canada's provincial and territorial leaders had already promised to implement all the TRC's recommendations.[12]

This brief summary cannot do justice to the scope, depth, and documentation offered by the TRC's Final Report, and cannot begin to offer an adequate depiction of the vast and tragic scale of the harm that was caused by colonialism in general and residential schools in particular. Nevertheless, it might be possible to gain some sense of what follows in the Final Report from the first paragraph of the introduction to the first volume:

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."[13]

If only we could confidently speak about this legacy of colonialism in the past tense. For example, the latest statistics show that the percentage of inmates in Canadian prisons that are Aboriginal has reached a record high of over 25%. Correctional Investigator of Canada, Howard Sapers attributed the increasing numbers to poverty, colonialism and the effects of the residential school system as reasons why alcoholism and other problems bring so many Aboriginal people in conflict with the justice system.[14] Another example of colonialism continuing to operate in Canada is the doctrine of discovery, which is a fundamental part of the Canadian law of Aboriginal title.

Faced with the daunting scale of the task of reconciliation, it was appropriate for the TRC to recommend changing many laws, norms and practices of Canadian society. The TRC defined reconciliation as "an ongoing process of establishing and maintaining respectful relationships."[15] This is a multi-faceted process, and includes apologies, reparations, and actions that demonstrate a true change in society. Indigenous laws and governance systems should be revitalized, and "as non-Aboriginal Canadians increasingly come to understand Indigenous history within Canada, and to recognize and respect Indigenous approaches to

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[12] Robert Benzie, "Premiers vow to implement Truth and Reconciliation Commission Recommendations", *The Toronto Star* (15 July 2015), online: <www.thestar.com>; Jorge Barrera, "PM Trudeau's Words Leave TRC Commissioners Cautiously Optimistic", *APTN National News* (8 December, 2015), online: <aptn.ca>.

[13] *The Final Report of the Truth and Reconciliation Commission of Canada: Canada's Residential Schools: The History, Part I, Origins to 1939,* vol 1 (Montreal: McGill-Queen's University Press, 2015) at 3, online: <www.trc.ca>.

[14] "Prison watchdog says more than a quarter of federal inmates are aboriginal people", *CBC News* (14 January 2016), online: <www.cbc.ca>. The same report indicated that Aboriginal women make up more than 36 per cent of women in prison.

[15] *TRC* vol 6, *supra* note 8 at 11.

establishing and maintaining respectful relationships, Canadians can work together to forge a new covenant of reconciliation."[16]

The TRC found that Indigenous peoples recall the original relationship of mutual support, respect and assistance they had with the Crown, which was confirmed by the Royal Proclamation of 1763 and treaties that their leaders negotiated in good faith. The trust has been broken, however, because of the impacts of residential schools, the *Indian Act*, and the Crown's broken treaty promises. To repair this trust, the TRC has called for "a new vision for Canada – one that fully embraces Aboriginal peoples' right to self-determination within, and in partnership with, a viable Canadian sovereignty."[17] This is needed to resolve long-standing conflicts between the Crown and Aboriginal peoples over Aboriginal and treaty rights, lands, resources, education and health. The TRC warned that failing to find this new vision would prevent reconciliation from happening, and the unrest seen today among young Aboriginal people could become a challenge to Canada's security and well-being.[18]

The TRC observed that Indigenous peoples and the Crown have different and conflicting views about how to achieve reconciliation. The federal government appears to believe that reconciliation required Indigenous peoples to accept "the reality and validity of Canadian sovereignty," while Indigenous people see reconciliation "as an opportunity to affirm their own sovereignty and to return to the 'partnership' ambitions they held after Confederation."[19]

A. United Nations Declaration on the Rights of Indigenous Peoples

The TRC adopted the *United Nations Declaration on the Rights of Indigenous Peoples*[20] as a framework for reconciliation. It agreed with S. James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples, who observed that it was best to understand the *Declaration* and the right of self-determination that it affirms as instruments of reconciliation, and as animating reconciliation with oppressed peoples. Anaya explained that,

> Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suffocation. It does not do so to

[16] *Ibid* at 11–12.

[17] *Ibid* at 20.

[18] *Ibid.*

[19] *Ibid* at 25.

[20] GA Res 61/295, UN GAOR, 61st Sess, UN Doc A/61/L.67 (2007) [*UNDRIP*]. The TRC observed that Canada initially refused to adopt the *Declaration* because, among other things, it objected to provisions dealing with lands and resources. In 2010, Canada endorsed the *Declaration* as a "non-legally binding aspirational document" (citing Canada, Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

> condone vengefulness or spite for past evils, or to foster divisiveness but rather to build a social and political order based on relations of mutual understanding and respect. That is what the right of self-determination of indigenous peoples, and all other peoples, is about.[21]

The TRC called on federal, provincial and municipal governments to fully adopt and implement the *Declaration* as a framework for reconciliation, and called on the Government of Canada to develop a national plan to achieve the goals of the *Declaration*.[22] With respect to the subject of this paper, in addition to articles relating to the rights of Indigenous peoples to their lands,[23] the most pertinent portions of the *Declaration* are articles 2, 3, and passages from the recitals. Article 2 recognizes that Indigenous peoples "are free and equal to all other peoples … and have the right to be free from any kind of discrimination…." Article 3 recognizes the right of self-determination, and the right of Indigenous peoples to freely determine their political status and to freely pursue their economic, social and cultural development. The TRC has observed that the Indigenous peoples' right to self-determination is "the centralizing principle from which all other rights flow, including the right to access and practice their own laws."[24]

The recitals to the *Declaration* also affirm that Indigenous peoples "are equal to all other peoples" and in an obvious reference to the doctrines of discovery and *terra nullius,* they state "that all doctrines, policies and practices *based on or advocating superiority of peoples* or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust."[25]

B. The Doctrine of Discovery

The TRC observed that European states used the doctrine of discovery and the concept of *terra nullius* (lands belonging to no one) to colonize Indigenous peoples and their lands, and that this Doctrine remains relevant because it underlies the basis for the Crown's claim of sovereignty over Indigenous peoples and their lands.[26] Assertions of sovereignty without either conquest or a treaty that cedes territory

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[21] *TRC* vol 6, *supra* note 8 at 25, quoting James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 184 at 196.

[22] *Ibid at* 28–29 (Calls to action 43 and 44).

[23] See, among others, articles 26 and 27, which provide that Indigenous peoples have rights to their traditional lands and a right to an independent process to adjudicate rights of indigenous peoples to their land, and a right to participate in this process (*UNDRIP*, *supra* note 20).

[24] *TRC* vol 6, *supra* note 8 at 74–75.

[25] *UNDRIP*, *supra* note 20 [emphasis added].

[26] *TRC* vol 6, *supra* note 8 at 29.

implicitly presume that Indigenous nations are inferior to European nations.[27] Methods invoked in North America to assert sovereignty, such as "discovery", symbolic acts of planting a cross or a flag, or occupying a territory and gaining effective control over it, would not have displaced a prior sovereign power according to European standards of international law at the time of colonization.[28] Consequently, assertions of sovereignty by these methods rested on the premise that North America, if not vacant in fact, was "juridicially" a vacant territory, or *terra nullius*,[29] a premise also known as the "settlement thesis".[30]

The TRC reiterated the findings of the Royal Commission on Aboriginal Peoples, which concluded that these concepts "have no legitimate place in characterizing the foundations of this country, or in contemporary policy making, legislation or jurisprudence,"[31] and it recommended that Canada acknowledge that such concepts are "factually, legally and morally wrong,' and must no longer form the basis of federal lawmaking, policy development, or the Crown's legal arguments in court."[32]

The TRC considered the theological origins of the doctrine of discovery, and observed though these origins may have receded in importance, "the doctrine's influence in Western law and its destructive consequences for Indigenous peoples have been well documented by scholars and other experts."[33] It also observed that in

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[27] See Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L Rev 498 at 512; Patrick Macklem, "Distributing Sovereignty: Indian Nations and the Equality of Peoples" (1993) 45 Stan L Rev 1311 [Macklem, "Distributing Sovereignty"]. See also Kent McNeil, "Sovereignty on the Northern Plains" (2000) 39:3 Journal of the West 100 and sources cited therein. On the Eurocentric world view that drove colonialism in the Americas see James (Sa'kej) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving U.N Recognition* (Saskatoon: Purich, 2008) at 13–23. For criticism of the Supreme Court's unquestioning acceptance of Crown assertions of sovereignty in *Delgamuukw*, *infra* note 54, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537 [Borrows, "Sovereignty's Alchemy"]. For a thorough demonstration that the Crown's assertion of sovereignty over Aboriginal peoples and their territories fails to meet legal requirements of modes of acquisition at international law and also fails to comply with fundamental principles of liberalism, see Karen Drake, *The Answer, Not the Problem: An Examination of the Role of Aboriginal Rights in Securing a Liberal Foundation for the Legitimacy of the Canadian State* (LLM Thesis, University of Toronto Faculty of Law, 2013). See generally Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

[28] Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall LJ 681 at 686.

[29] *Ibid* at 685.

[30] On the settlement thesis and its assumptions of superiority of Christians over heathens, the superiority of agriculture over hunting and gathering, or the superiority of certain conceptions of property or skin colours, see also Michael Asch & Patrick Macklem, *supra* note 27 and Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 113ff.

[31] *TRC* vol 6, *supra* note 8 at 29 citing *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* vol 1 (Ottawa: Supply and Services Canada, 1996), chapter 16 at 695 [*Aboriginal Peoples Report,* vol 1].

[32] *Ibid* at 29.

[33] *Ibid* at 31, and quoting as an example at note 34, an American legal scholar who observed that the decision of Chief Justice John Marshall of the United States Supreme Court in *Johnson v M'Intosh*, 21

his report to the UN Permanent Forum, Grand Chief Edward John observed that the Supreme Court of Canada has recognized the need for reconciliation of "pre-existing [A]boriginal sovereignty with assumed Crown sovereignty"[34] and has encouraged courts to take judicial notice of "such matters as the history of colonialism, displacement and residential schools."[35] He argued that the root causes of these problems lead back to the doctrine of discovery and related fictitious constructs which must therefore be addressed.

As a result of the doctrine of discovery, Aboriginal title claims place the onus on Indigenous claimants to prove occupation of land at the relevant times.[36] This evidence often relied on oral testimony from acknowledged Elder experts. For many years Indigenous claimants were precluded from accessing legal advice or the courts, and many of these Elders have passed on without being able to give their evidence. The TRC considered it "manifestly unfair" for Indigenous claimants to be held to the onus of proof throughout legal proceedings. [37]

Scholars have also questioned the courts' application of the doctrine of discovery and *terra nullius* to give the Crown the underlying title and to place the onus of demonstrating a right to recognition of title by the Canadian state on Indigenous peoples.[38] John Borrows observed that the cost of litigation places Aboriginal nations at a substantial disadvantage. The *Tsilhqot'in* case cost tens of millions of dollars and was partially publicly funded as a test case, a subsidy that will probably not be available to other cases.[39]

To address this inequity caused by the doctrine of discovery, the TRC called on governments and the courts to accept the legal principle that Aboriginal title

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US 543, 5 L Ed 681 (1823) "represents the most influential legal opinion on indigenous peoples' human rights ever issued by a court of law in the Western world. All the major English-language-speaking settler states adopted Marshall's understanding of the Doctrine of Discovery and its principle that the first European discoverer of lands occupied by non-Christian tribal savages could claim a superior right to those lands under the European Law of Nations. Canada, Australia, and New Zealand all followed Marshall's opinion as a precedent for their domestic law on indigenous peoples' inferior rights to property and control over their ancestral lands" (Robert A Williams, Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave MacMillan, 2012) at 224).

[34] *Ibid* at 32, citing United Nations Permanent Forum on Indigenous Issues, "A Study on the Impacts of the Doctrine of Discovery on Indigenous Peoples, Including Mechanisms, Processes, and Instruments of Redress", E/C.19/2014/3, 12–23 May 2014, para 13, online: <undesadspd.org> [United Nations Permanent Forum]; John was quoting *Haida Nation*, *infra* note 122 at para 20.

[35] *Ibid*. John was quoting *R v Ipeelee,* 2012 SCC 13 at para 60, [2012] 1 SCR 433.

[36] *Ibid* at 90.

[37] *Ibid*.

[38] Kent McNeil, "The Onus of Proof of Aboriginal Title" in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia,* (Saskatoon: Native Law Centre, 2001) 136; Felix Hoehn, *Reconciling Sovereignties*: *Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012) at 114; Drake, *supra* note 27 at 137, 141, 144, and 147; John Borrows, "*Terra Nullius*", *supra* note 5 at 729–31;. .

[39] John Borrows, "*Terra Nullius*", *ibid* at 730–31.

claims should be accepted when the claimant has established occupation over a particular territory at a particular point in time (the TRC indicated this could be at contact or at the assertion of Crown sovereignty).[40] Once this has been established, "the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation."[41] The resources of federal government lawyers opposing Aboriginal title and rights claims are formidable. The TRC quoted an April 2015 Report from Douglas R. Eyford, Ministerial Special Representative, which stated that in the previous five years Department of Aboriginal Affairs and Northern Development Canada (AANDC) had been a party in 452 proceedings involving s. 35(1) rights, and had spent over $100 million for litigation legal services over the previous five years. In addition to AANDC there are other federal Aboriginal departments and agencies involved in Aboriginal rights litigation.[42]

The call for transformative change permeates the TRC's discussion of reconciliation. This includes the repeal of colonial legal premises, and numerous calls to action refer to the need to "repudiate concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*."[43] The TRC stated that "there are other means to establish the validity of Crown sovereignty, without undermining the important principle established in the Royal Proclamation of 1763, which is that the sovereignty of the Crown requires that it recognize and deal with Aboriginal title in order to become perfected."[44] The TRC did not lay out specifics of these other means of validating Crown sovereignty, but its statements about treaties suggest an answer. The TRC said that without treaties, Canada "would have no legitimacy as a nation. Treaties between Indigenous nations and the Crown established the legal and constitutional foundation of this country."[45]

The TRC is right that the sooner the doctrine of discovery becomes a relic of Canada's colonial past, the better. As will be discussed further below, the Supreme Court of Canada has already pointed us to alternatives, and it is time to negotiate treaties that will reconcile Indigenous and Crown sovereignties to form a legitimate and constitutional Canadian sovereignty.

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[40] *TRC* vol 6, *supra* note 8 at 90–91 (Call to action 52). The TRC's position is consistent with Article 26 of UNDRIP, *supra* note 20, which provides that Indigenous people "have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."

[41] *Ibid*.

[42] *Ibid* at 24, quoting Douglas R Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights", Report to the Minister of Aboriginal Affairs and Northern Development Canada (20 February 2015), online: <www.aadnc-aandc.gc.ca>.

[43] *Ibid* at 230–31 (Call to action numbers 45, 46, 47 and 49).

[44] *Ibid* at 33.

[45] *Ibid.*

II. *TSILHQOT'IN* AND ABORIGINAL TITLE – SEEKING THE FUTURE IN THE PAST

A. The Discovery Doctrine in *Tsilhqot'in*

The sovereignty of the Tsilhqot'in Nation is obvious from the Supreme Court's summary of the Nation's history:

> For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.[46]

This paragraph describes a sovereign nation, regardless of how exactly one may choose to define "sovereignty".[47] It describes a group of people with a common culture and history that occupied and controlled territory, defended it from invaders, and set the terms of entry for foreigners. As the Court says, from the perspective of the Tsilhqot'in people, this land has always been theirs – it has always been the territory of the sovereign Tsilhqot'in nation.

Although the Supreme Court acknowledged the strong factual basis for the Tsilhqot'in perspective that the land had always been theirs, the Court found that the Tsilhqot'in lost the "radical or underlying title" to their land "at the time of the assertion of European sovereignty".[48] Although the Court did not mention the discovery doctrine by name, it is essential to the case law the Court referred to for the origin of the doctrine of Aboriginal title. The Court cited Justice Dickson's concurring judgment in *Guerin v The Queen*.[49] Dickson J reviewed the origin of the doctrine of Aboriginal title, and observed that the Supreme Court's decision in

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[46] *Tsilhqot'in*, *supra* note 4 at para 3.

[47] In spite of the importance of the concept of "sovereignty" to the discussion in this paper, I will not attempt to provide a precise definition. A benefit of a flexible conception is that it is more amenable to compromises and creative interpretations, such as the federalism that already exists in Canada, which allows each government to be sovereign within its sphere. Also, the concept may have different meanings for Aboriginal peoples than for Europeans: see e.g. Gerald R Alfred, *Heeding the Voices of Our Ancestors: Khanawake Mohawk Politics and the Rise of Native Nationalism* (Oxford: Oxford University Press, 1995) at 102–03, describing the Khanawake Mohawks as seeing the essence of sovereignty as harmony, including a spiritual aspect, and seeking "a balanced and respectful relationship" among Mohawk people, between the Mohawk people and the land, and between Mohawk people and other communities." For the 1998 Declaration of Sovereignty by the "General Assembly of the Chilcotin Nation", see <www.tsilhqotin.ca/PDFs/98DeclarationSovereignty.pdf>. See also the Mi'kmaq of Nova Scotia Nationhood Proclamation, online: <mikmaqrights.com/uploads/NationhoodProclamation.pdf> For an insightful historical and contemporary analysis of the meaning of "sovereignty" in the context of relations between the Crown and Indigenous people, see Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions", in Evans, *supra* note 9 at 37.

[48] *Tsilhqot'in*, *supra* note 4 at paras 12, 69.

[49] *Guerin v The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120 [*Guerin* cited to SCR].

Calder was consistent with the view of Chief Justice Marshall in the United States Supreme Court cases of *Johnson v M'Intosh,*[50] and *Worcester v Georgia*,[51] cited by Judson and Hall JJ. In *Guerin*, Justice Dickson wrote that the rights in traditionally occupied lands survived claims to sovereignty of European nations in territories in North America. According to Dickson J., these claims to sovereignty were "justified" by the principle of discovery, which gave the ultimate title to the nation that had discovered it. He allowed that this meant that "the Indians' rights in the land were obviously diminished" but maintained that their rights of occupancy and possession were not affected. To explain this principle, Dickson J quoted the following passage from the judgment of Marshall CJ in *Johnson v M'Intosh*:

> The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans would interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
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> ln the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[52]

This passage reveals that the doctrine of discovery robbed Indigenous peoples of their sovereignty, leaving only property rights arising from possession. The value and flexibility of these property rights were further diminished by excluding the power to alienate, a power that normally comes with ownership. Nevertheless, at a time when Canadian governments denied the existence of any Indigenous rights, even recognition in *Calder* of this greatly diminished interest was enough to motivate governments to return to treaty negotiations.[53] In the forty years between *Calder* and *Tsilhqot'in*, the Supreme Court developed the doctrine of

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[50] *Johnson v M'Intosh,* 8 Wheaton 543 (1823) [*M'Intosh*].

[51] *Worcester v Georgia,* 6 Peters 515 (1832).

[52] *M'Intosh*, *supra*, note 50 at 573–74, as quoted in *Guerin*, *supra* note 49 at 378 [emphasis added; emphasis of Dickson J omitted].

[53] For the catalytic effect of *Calder*, see *R v Sparrow,* [1990] 1 SCR 1075 at 1103–04, [1990] 3 CNLR 160 [*Sparrow*]; Norman K Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference,* Discussion Paper No 15 (Kingston, Ont: Queen's University Institute of Intergovernmental Relations, 1983) at 20–21; Peter H Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask L Rev 247 at 259–60.

Aboriginal title, most significantly in *Guerin, Delgamuukw v British Columbia (Attorney General),*[54] and *R v Marshall; R v Bernard*.[55]

For the Tsilhqot'in Nation, the loss of this underlying title due to "discovery" by a European nation meant that they had to present mountains of evidence over years of litigation. The doctrine of discovery relieved the Crown of any onus to demonstrate a lawful claim to the underlying title, and instead placed the onus on the Indigenous nation to show that the legal test for Aboriginal title, which "burdens" the Crown's underlying title,[56] had been satisfied. If we look at this from the Tsilhqot'in perspective, however, this onus seems to be misplaced. They are a sovereign nation that has not been conquered. Moreover, the Supreme Court acknowledged that the Tsilhqot'in have not entered into any treaty that ceded their territory.[57] It would seem natural for the Tsilhqot'in to expect the onus to falls on the Crown to demonstrate the legitimacy of its claim to sovereignty or an underlying title.

B. The Legal Consequences of the Crown Gaining the Underlying Title by Discovery

Having accepted the premise of the Crown's underlying title,[58] the Supreme Court's judgment in *Tsilhqot'in* considered the legal characteristics and incidents of Aboriginal title that flow from this. If we add the implicit loss of Indigenous sovereignty as the first consequence, we can outline them as follows: (1) The Indigenous interest is reduced from a sovereign interest to a property interest; (2) the Crown acquires a fiduciary duty to Aboriginal peoples when dealing with Aboriginal lands;[59] (3) the Crown assumes power to encroach on Aboriginal title in the broader public interest, subject to justification under s. 35 of the *Constitution Act, 1982*;[60] and (4) the collective title is held not only for the present generation but for all succeeding generations, and therefore (a) the title cannot be alienated except to the Crown, and (b) title cannot be encumbered or used in ways that would deprive future generations of the benefit of the land.[61]

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[54] *Delgamuukw v British Columbia (Attorney General),* [1997] 3 SCR 1010, [1998] 1 CNLR 14 [*Delgamuukw*].

[55] *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220.

[56] *Tsilhqot'in, supra* note 4 at para 69.

[57] *Ibid* at para 4.

[58] *Ibid* at paras 12, 69.

[59] *Ibid* at para 71.

[60] *Ibid*.

[61] *Ibid* at para 74.

1. The Indigenous interest is reduced from a sovereign interest to a property interest

This is the fundamental demotion of the Indigenous interest, from which the remainder of the consequences flow. Only the Crown's sovereignty is recognized, and it is manifested by the superior, underlying title. The Indigenous interest is demoted to a "burden" on the underlying interest of the Crown. Since the doctrine of Aboriginal title only recognizes the Crown's sovereignty, only the Crown is seen as having authority to legislate in the public interest. If the Indigenous interest were recognized as sovereign and so equal to the quality of the Crown's interest, the Crown would not have a unilateral power to negotiate and infringe. This would not preclude limits to the exercise of the jurisdiction of either the Crown or the Indigenous nation. However, a position of equality would give rise to an expectation that limits to sovereignties would be determined through treaties or through mutual consultation or accommodation, with the involvement of the courts only if those methods proved inadequate.

2. The Crown's fiduciary duty to Aboriginal peoples when dealing with Aboriginal lands

The Crown's fiduciary interest, as currently understood, reflects the hierarchical relationship between the Crown and Aboriginal peoples that is at the heart of the doctrine of Aboriginal title. This fiduciary interest was first articulated by the Supreme Court in *Guerin*.[62] The Crown had breached its fiduciary obligation to the Musqueam Indian Band when it leased surrendered reserve land to a third party on terms less favourable to the Band than the terms approved by the Band upon surrender of the lands to the Crown. Dickson stated that the fiduciary relationship had its roots in the concept of Aboriginal title, "but also depends on the additional proposition that the Indian interest in the land is inalienable except upon surrender to the Crown."[63] He said the Crown first "took this responsibility upon itself" in the Royal Proclamation of 1763 and that it was still recognized in the surrender provisions of the *Indian Act.*[64]

In *Guerin*, Justice Dickson cited Professor Ernest Weinrib for the principle that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."[65] This was an apt description of the power imbalance inherent in the Crown's application of the surrender provisions of the *Indian Act*. For constitutionally protected Aboriginal title lands, the Crown's fiduciary duty is more likely to be triggered when the Crown seeks to limit Aboriginal title rights.[66] The Crown's underlying title is held "for the benefit of the

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[62] *Guerin*, s*upra* note 49 at 341–48.

[63] *Ibid* at 376.

[64] *Ibid.*

[65] *Ibid* at 384, citing Ernest Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1 at 7.

[66] *Tsilhqot'in*, *supra* note 4 at para 18.

Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group."[67] Respect for the communal nature of the interest means that infringements that would "substantially deprive future generations of the benefit of the land" cannot be justified.[68] The fiduciary duty also requires any infringement to be proportional.[69]

Although the Crown's fiduciary duty ostensibly protects the Aboriginal interest, its existence and formulation underlines the vulnerable and inferior nature of the Aboriginal title in relation to the underlying interest the Crown asserts based on its "discovery" of the land.

3. The Crown's power to encroach on Aboriginal title in the broader public interest, subject to justification under s. 35 of the *Constitution Act, 1982*

The Crown has no beneficial interest in Aboriginal title lands,[70] but the Crown's underlying title allows it to use Aboriginal title land to serve broad public interest objectives, as long as the Crown can meet the justification test for limiting a section 35 right. In *Tsilhqot'in*, the Supreme Court reiterated its *obiter* comments in *Delgamuukw* that the range of legislative objectives that can justify an infringement of Aboriginal title is "fairly broad", and include "the development of agriculture, forestry, mining, hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."[71]

This broad range of objectives dramatically demonstrates that the "*sui generis"* property interest of Aboriginal title is much weaker than the ordinary fee simply form of ownership most Canadians are familiar with. Even though a fee simple ownership interest is also subject to the Crown's ultimate title, it would be unimaginable for the Crown to decide that a parcel of land owned in fee simple by a private owner should be used, for example, to settle foreign populations or for hydroelectric power generation, without the land being expropriated with full compensation. While section 35 likely prevents the Crown from expropriating land subject to Aboriginal title by extinguishing the Aboriginal title, the Supreme Court apparently expects the Crown to be able to achieve the same ends through

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[67] *Ibid* at para 85.

[68] *Ibid* at para 86.

[69] This means that any infringement must have a rational connection to the governmental objective that purports to justify the infringement, it must not impair Aboriginal rights any more than necessary to achieve that objective, and the benefits expected from the objective are not outweighed by the adverse effects on the Aboriginal interest. Gordon Christie has observed that this undermines Indigenous authority because it casts the Crown as the "superordinate" decision maker while Aboriginal title holders are treated as mere interest holders: Gordon Christie, "Who Makes Decisions Over Aboriginal Title Lands?" (2015) UBC L Rev 743 at 778.

[70] *Tsilhqot'in*, *supra* note 4 at para 70.

[71] *Ibid* at para 83, quoting *Delgamuukw*, *supra* note 54 at para 165 [emphasis deleted].

infringement. To further underscore the comparative weakness of the Aboriginal title interest, in Justice La Forest's reasons in *Delgamuukw* he opined that though compensation should be available if Aboriginal title is infringed, it would not be equated with the value of the fee simple interest, but rather "must be viewed in terms of the right and in keeping with the honour of the Crown."[72]

The Court's reasoning for considering such a broad range of objectives as sufficiently important to warrant infringing Aboriginal title is that "most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community'".[73]

The problem with the Court's infringement analysis in relation to Aboriginal title interests yielding to broad governmental social policy objectives is that this results in the Crown's underlying title weakening the Tsilhqot'in Nation's rights over its territory not just once, but twice. The first effect of the Crown's underlying title was to the strip the Tsilhqot'in Nation of its sovereignty and with it the Nation's underlying title to their traditional territory. This placed the onus on the Tsilhqot'in Nation to establish a property interest according to the test for title formulated by the courts. One onerous aspect is the requirement that the Indigenous nation demonstrate exclusive occupancy of the land at the time the Crown asserted sovereignty. In *Delgamuukw*, Chief Justice Lamer explained that this requirement derives from the definition of Aboriginal title itself, because he defined it "in terms of the right to exclusive use and occupation of land."[74] He added that exclusivity gives the Aboriginal community which holds title the ability to exclude others. This means that "the proof of title must, in this respect, mirror the content of the right."[75] Without the requirement of exclusivity "it would be possible for more than one Aboriginal nation to have title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and possession over it."[76]

Chief Justice Lamer's requirement that the proof of title mirror the content seems logical, except that the breadth of the acceptable legislative objectives for the infringement of title mean that the robust proof of title is mirroring an ephemeral image. The broad range of acceptable Crown objectives that justify infringement belies the picture the Court draws of Aboriginal title conferring "ownership rights similar to those associated with a fee simple, including the right to decide how the

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[72] *Delgamuukw*, *supra* note 54 at para 203, L'Heureux-Dubé J concurring. Article 28 of UNDRIP (*supra* note 20) requires "just, fair and equitable compensation" for infringements against rights in land, and unless otherwise freely agreed to, should "take the form of land, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

[73] *Tsilhqot'in*, *supra* note 4 at para 83, quoting *Delgamuukw, supra* note 54 at para 165, which in turn was quoting *R v Gladstone*, [1996] 2 SCR 723 at para 73, [1996] 4 CNLR 65.

[74] *Delgamuukw, supra* note 54 at para 155 [emphasis in original].

[75] *Ibid.*

[76] *Ibid.*

land should be used, the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[77]

As noted above, the fundamental effect of the doctrine of discovery giving the Crown the underlying title is the demotion of the Indigenous nation's sovereign interest to a property interest. Property interests are generally understood to be subordinate to the state's power of regulation. The problem with this hierarchical structure is that jurisdiction to determine the purpose of government regulation appears to lie exclusively with the Crown.[78] Moreover, the degree and scope of the contemplated infringements conflicts with articles 26 and 32 of UNDRIP. Article 26 recognizes the right of Indigenous peoples to "own, use, develop and control" their territories, and requires recognition of the "customs, traditions and land tenure systems *of the [I]ndigenous peoples concerned.*"[79] Under article 32, Indigenous peoples have, among other things, "the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."[80]

4. The collective title is held not only for the present generation but for all succeeding generations

If the doctrine of discovery did not annul the sovereignty of an Indigenous nation, then that nation would have jurisdiction over its territory. It would have authority to regulate the ownership, alienability and use of its territory much as provincial governments ordinarily have this authority.

Within the constraint of property rather than sovereign interests, the doctrine of Aboriginal title attempts to create a proxy for Indigenous jurisdiction through the device of collective ownership. Accordingly, in *Tsilhqot'in,* the Supreme Court describes this as a "…an important restriction – it is collective title held not only for the present generation but for all succeeding generations."[81] According to the Court, this means that it cannot be alienated except to the Crown or encumbered or used in a way that would deprive future generations of the benefit of the land,[82] or that "cannot be reconciled with the communal and ongoing nature of the group's attachment to the land."[83]

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[77] *Tsilhqot'in*, *supra* note 4 at para 73. Others have argued that despite the broad range of acceptable Crown objectives that can support infringement, the justification test is difficult to satisfy: see Peter Hogg & Daniel Styler, "Statutory Limitations of Aboriginal and Treaty Rights: What Counts as Justification?" (2015) 1 Lakehead LJ 4 at 13.

[78] On this point, see generally Gordon Christie, *supra* note 69.

[79] *UNDRIP, supra* note 20 [emphasis added].

[80] *Ibid.*

[81] *Tsilhqot'in*, *supra* note 4 at para 74.

[82] *Ibid.* As Drake observed, restricting alienation to the Crown creates a monopsony for the sale of Indigenous land, which reduces its value: see Drake, *supra* note 27 at 64, citing Robert J Miller, "The

The Court presented the rationale for these inherent limits as due to the nature of Aboriginal title as a legal interest, "which flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty."[84] This only restated the effect of the discovery doctrine to demote the Indigenous interest from sovereignty to a property interest. Acting with authority the Court purported to draw from the Crown's assertion of sovereignty, the Court declared the shape and limits of this *sui generis* property interest, but why impose these particular limits?[85] In the past, the Court has said that the restriction on alienation was intended "to ensure that Indians are not dispossessed of their entitlements"[86] The inherent limit restricting use of the land may also be well-intentioned, but it is not consistent with a nation to nation relationship based on mutual recognition as equals. It is also not consistent with the Court's recognition elsewhere of Indigenous nations having laws that govern land; indeed the Court refers to the laws of the "Aboriginal group" as relevant to determining whether the Court's criteria for establishing title are met.[87]

Since these restrictions are considered internal to the nature of the Aboriginal title right itself, they do not need to be justified as an infringement of the right. In substance, however, they restrict the ability of the Indigenous nation to apply its own laws whenever they conflict with the restriction on alienability or the Court's view that their application would allow uses that would deprive future generations of the benefit of that land.

How does a Canadian court determine what uses would conflict with the nature of the Tsilhqot'in Nation's attachment to the land, or which uses should be considered inconsistent with benefits from the land that should accrue to future generations? The answers to such questions are best known by the Tsilhqot'in people themselves, and should be answered by Tsilhqot'in governing bodies according to Tsilhqot'in laws. Moreover, insofar as it is only the territory and property of the Indigenous Nation that is at stake in these decisions, these inherent limits conflict with several clauses of UNDRIP, including article 4, which provides that the right of self-determination of Indigenous peoples includes "the right to autonomy or self-government in matters relating to their internal and local affairs."[88] Article 25

Doctrine of Discovery" in Robert J Miller et al, *supra* note 27 at 4 and Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 235).

[83] *Ibid* at para 67.

[84] *Ibid* at para 75.

[85] Gordon Christie has questioned the Court's statement that Aboriginal title *sui generis* characteristics simply "flow from the special relationship between the Crown and the Aboriginal group in question" and "is what it is" without acknowledging that this concept has been shaped unilaterally by the Court. See Christie, *supra* note 69 at 783–84.

[86] *Delgamuukw, supra* note 54 at para 129.

[87] *Tsilhqot'in, supra* note 4 at paras 35, 41. See also references to trespass laws as relevant to proving occupancy and exclusivity in passages the Court quotes with approval at paras 39 and 49, and also as references to treaties with other nations at paras 48–49.

[88] *UNDRIP, supra* note 20.

recognizes the right of Indigenous peoples to "maintain and strengthen their distinctive spiritual relationship" with their traditional territories. Notably, while the latter article refers to Indigenous peoples upholding "their responsibilities to future generations in this regard" it expresses these responsibilities as a *right* of the Indigenous peoples, not as a limitation on rights to control, use and develop their territories described in other provisions of UNDRIP.[89]

C. *Tsilhqot'in* and Indigenous Sovereignty

Paradoxically, while the doctrine of discovery purports to deny Indigenous sovereignty, the spirit of Indigenous sovereignty pervades virtually all aspects of Aboriginal title as described by the Supreme Court in *Tsilhqot'in*. An early example of this is the Court's acknowledgement that the Aboriginal title claim is a consequence of the lack of a treaty between the Tsilhqot'in Nation and the Crown.[90] This is language befitting a sovereign with unceded territory, not just a "group" seeking common law recognition of a possessory title based on mere occupation.[91]

Similarly, while ordinary land owners depend on the state to issue and enforce their title to a parcel of *land*, sovereigns typically control *territory*, and by virtue of that control they determine where, how and to whom titles should be issued. As Kent McNeil has pointed out, "title to territory entails sovereignty and jurisdiction, whereas title to land is merely proprietary."[92] Accordingly, it is significant that the Supreme Court rejected the British Columbia Court of Appeal's approach that would have resulted in small patches of title surrounded by larger areas where the group possessed only Aboriginal rights to carry on specific activities like hunting and trapping. Even though the Tsilhqot'in people were semi-nomadic, the Supreme Court endorsed the trial judge's approach, which was summed up by the Court as allowing them to "enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty."[93]

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[89] *Ibid,* articles 26 and 32, summarized above (see text accompanying notes 79–80).

[90] *Tsilhqot'in*, *supra* note 4 at para 4.

[91] The doctrine of discovery removed the need for the Crown to seek a treaty to cede Aboriginal sovereignty to the Crown (see Drake, *supra* note 27 at 95), and also accounts for the Court's assumption that the lack of a treaty left only a claim to Aboriginal title, and not a claim to Aboriginal sovereignty. There is overwhelming evidence to indicate that Aboriginal peoples did not agree to cede sovereignty to the Crown in historical treaties in Canada, and that the Crown did not seek provisions ceding sovereignty because the Crown assumed it was sovereign by virtue of discovery. See e.g. Peter W Hutchins, "Cede, Release and Surrender: Treaty-Making, the Aboriginal Perspective and the Great Judicial Oxymoron or Let's Face It – It Didn't Happen" in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book, 2009) and Drake, *supra* note 27 at 95 to 118.

[92] Kent McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title" in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) 102 at 131, note 158, citing for this distinction, among others, M de Vattel, *Le droit de gens* (A Leide, aux Dépens de la Compagnie, 1758), Bk I, Ch 18, §§ 204–5; Sir John Salmond, *Jurisprudence,* 7th ed (London: Sweet and Maxwell, 1924) at 554.

[93] *Tsilhqot'in*, *supra* note 4 at para 29. In support of the Court's adoption of the territorial approach to title, see also paras 43, 56 and 62 of the decision.

Like the Supreme Court's earlier jurisprudence that developed the Canadian doctrine of Aboriginal title, the use of discovery to insert the Crown's sovereignty in the form of the underlying title results in an Indigenous interest that is, at least nominally, a mere property interest. Nevertheless, the sovereignty of the Tsilhqot'in Nation and Indigenous nations in general receives tacit recognition in virtually all aspects of the doctrine, from the elements of the test to establish title, the rights that come with title, and the test for infringement.

1. Sovereignty as the Test for Title

Prominent in the means by which the Supreme Court expects an Indigenous nation to prove title are typical indicators of sovereignty, such as treaties with other nations and laws governing trespass and residency. Although sufficiency of occupation can be demonstrated through more mundane indicators like regular use for hunting, fishing or cultivation, it can also be demonstrated by taking into account the "*laws,* practices, customs and traditions of the group."[94] The Court also reiterated that evidence in support of exclusivity of occupation can include proof of trespass laws or treaties with other Indigenous nations, including treaties that deal with the subject of when permission to members of other "[A]boriginal groups" to use or temporarily reside on the land.[95]

2. Constitutionally Protected Jurisdiction over Territory

As it had previously in *Delgamuukw*, the Court defined Aboriginal title as a collective interest.[96] While ordinary ownership interests may also be held jointly by many individuals or even by corporations with countless shareholders, when this is combined with other rights that come with Aboriginal title, as described in *Tsilhqot'in*, what emerges is constitutionally protected jurisdiction over territory, not mere ownership rights over land.

The Supreme Court held that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes."[97] The Court acknowledged that these aspects of Aboriginal title, as well as rights to manage the land, decide how it is to be used, and possess and profit from the land are similar to the familiar fee simple form of ownership.[98] However, the Court also reminded us that although comparisons to fee simple ownership may help

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[94] *Ibid* at para 35, citing *Delgamuukw*, *supra* note 54 at para 148 [emphasis added].

[95] *Tsilqot'in*, *ibid* at paras 48–49, quoting *Delgamuukw*, *supra* note 54 at para 157.

[96] *Tsilhqot'in*, *ibid* at para 74.

[97] *Ibid* at para 67, quoting *Delgamuukw*, *supra* note 54 at para 117.

[98] *Tsilhqot'in*, *ibid* at para 73.

us understand some aspects of Aboriginal title, it is not the same as fee simple ownership, and it is different than "traditional property law concepts."[99]

If we look more closely at the Supreme Court's explanation of the "right to control the land" that comes with Aboriginal title we see how the Court elevates Aboriginal title over other property interests in a manner that reflects Aboriginal title's sovereign origins. The Court explains that this means "that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[100] The Court's emphasis is on the rights Aboriginal title confers against "governments" – with all types of private parties lumped into the added category of "and others". This emphasis on governments is repeated in the immediately following sentence, where the Court stated, "If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*."[101] Therefore, Aboriginal title entitles an Aboriginal nation to a constitutionally protected sphere of jurisdiction over the use of land. Such jurisdiction is exclusive to *governments* in Canada, because it is precisely this constitutional protection that makes these governments sovereign. Before s. 35 was included in the Constitution, courts generally only recognized federal and provincial governments as having constitutionally protected jurisdiction over land.[102]

3. Infringement and Qualifications on the Crown's Underlying Title

In Canada, early judicial considerations of Aboriginal title concluded that it was a weak interest in comparison to an underlying Crown interest that was effectively absolute. In 1885 the Judicial Committee of the Privy Council described it as only "a personal and usufructuary right, dependent on the good will of the Sovereign."[103] As late as *Guerin*, Dickson J said that while it "did not, strictly speaking, amount to a beneficial ownership, neither is its nature completely exhausted by the concept of a personal right." [104] Not until *Delgamuukw* was Aboriginal title described as "a right to the land itself" that was "a burden on the Crown's underlying title."[105]

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[99] *Ibid* at para 72.

[100] *Ibid* at para 76.

[101] *Ibid.*

[102] See also Borrows, "*Terra Nullius*", *supra* note 5 at 723, on the Court's description of Crown title as "burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival" and *Tsilhqot'in*, *supra* note 4 at para 69, observing that this is a substantial subtraction on the Crown's estate that legitimately constrains Crown sovereignty. On the constraints that section 35(1) places on Crown sovereignty see also John Borrows, "Let Obligations Be Done" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, The Calder Case, and the Future of Aboriginal Rights* (Vancouver, BC: UBC Press, 2007) 201 at 212.

[103] *St Catherine's Milling and Lumber Company v The Queen* (1888), 14 App Cas 46 (PC) at 54.

[104] *Guerin, supra* note 49 at 382.

[105] *Delgamuukw, supra* note 54 at paras 138, 140, 145.

Since *Tsilhqot'in*, at least with respect to lands in which Aboriginal title has been recognized, the Crown's sovereignty, at least in the form of its underlying title, is no longer unqualified. When the Court considered the Crown's fiduciary duty in the context of justification of infringements of Aboriginal title rights, the Supreme Court stated that "the Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group."[106] The Court attributed two consequences to this qualification on the underlying title. One qualification was that this fiduciary duty added a proportionality analysis to the justification process.[107] The other may be both more interesting and more significant, because it places an ultimate limit on Crown infringement of territory to which an Indigenous nation holds title. The Court said that the Crown's fiduciary duty obliges the government to act in a manner that is respectful of Aboriginal title being a beneficial interest that "vests communally" and belongs to present and future generations. This means that incursions on Aboriginal title "cannot be justified if they would substantially deprive future generations of the benefit of the land."[108]

This ultimate limit on infringement reveals another way in which Aboriginal title can be seen as a tacit recognition of Indigenous sovereignty. One of the features of the system of land tenure Canada inherited from Britain is that all land in private hands is subject to the Crown's underlying title – that is, it is held of the Crown.[109] Regular titles are subject to the Crown using its sovereign authority to expropriate. While overt extinguishment of Aboriginal title has not been possible since section 35 of the *Constitution Act, 1982* came into force, this limitation on the Crown's underlying title is important because it sends a clear signal that infringement of a degree or scale that would effectively remove the beneficial interest of Aboriginal title lands from future generations of members of the Indigenous Nation would breach this fiduciary duty.

The fiduciary duty attached to the Crown's underlying title may also be timely because of its appearance in the same decision in which the Supreme Court rejected the doctrine of interjurisdictional immunity (IJI) for Aboriginal and treaty rights. Some have suggested that the removal of IJI might call into question the previous conventional wisdom that provinces could not extinguish Aboriginal title through legislation or by conveying land to a third party.[110] The protection from provincial powers offered by IJI was especially important for actions that took place before the Crown was constrained by s. 35 of the *Constitution Act, 1982*. It can now be argued that this fiduciary duty should protect the Aboriginal title interest, since actions that would deprive present and future generations of this communal interest

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[106] *Tsilhqot'in*, *supra* note 4 at para 85.

[107] *Ibid* at para 87.

[108] *Ibid* at para 86.

[109] Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 69.

[110] See e.g. David M Rosenberg QC & Jack Woodward QC, "The *Tsilhqot'in* Case: The Recognition and Affirmation of Aboriginal Title in Canada" (2015) 48 UBC L Rev 943 at 965.

would have breached this fiduciary duty. Such actions would also violate the honour of the Crown, which is engaged "in situations involving reconciliation of Aboriginal rights with Crown sovereignty"[111] and the honour of the Crown has itself been recognized as a "constitutional principle."[112] Since the underlying title results from the assertion of Crown sovereignty, Crown actions which would have the effect of dispossessing an Indigenous nation of Aboriginal title lands fit the criteria for engaging this principle.

III. INDIGENOUS SOVEREIGNTY AND THE SUPREME COURT OF CANADA – ON THE THRESHOLD OF A NEW PARADIGM

Our consideration of *Tsilhqot'in* has shown that the doctrine of Aboriginal title relies on the doctrine of discovery and *terra nullius*. These doctrines assume that Indigenous peoples were not organized into nations when Europeans came to North America, or if they were, then their sovereignty was not cognizable by European powers, and so did not stand in the way of Europeans dividing sovereignty over North America between themselves. As discussed below, the Supreme Court has long recognized that the reality was different, and this understanding is apparent even in the Court's development of the Aboriginal title doctrine by references, for example, to the "laws" of Indigenous nations. Nevertheless, in an apparent effort to remain at least nominally faithful to the fictions of the past, in *Tsilhqot'in* Indigenous sovereignty is only implicitly recognized, or, as aptly described by John Borrows, it was "submerged" by a notional underlying Crown title.[113]

This submersion of Indigenous sovereignty is an unfortunate "blast from the past", since in the past two decades the Supreme Court's jurisprudence has increasingly come to recognize Indigenous sovereignty. The Supreme Court's first consideration of section 35(1) in *R v Sparrow*[114] was criticized because of its contradictory signals on this point.[115] However, if we see these apparently contradictory passages as the court first taking a look into the past and then into the future, the apparent contradiction disappears. The first passage that is of interest to this discussion is a reflection on the colonialism of the past, in which the Crown's sovereignty had been beyond question. The Court does not describe this as a past Canada can be proud of:

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[111] *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 68, [2013] 1 SCR 623 [*Manitoba Métis*].

[112] *Ibid,* citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Beckman*].

[113] John Borrows, "*Terra Nullius*", *supra* note 5 at 742.

[114] *Sparrow, supra* note 53.

[115] See especially Michael Asch & Patrick Macklem, *supra* note 27 at 510; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L J 382.

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown [citations to *Johnson v M'Intosh,* the Royal Proclamation,[116] and *Calder* omitted]. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R. 654. As MacDonald J stated in *Pasco v. Canadian National Railway Co.,* [1986] 1 CNLR 35 (BCSC) at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."[117]

The Court then reviews how the rights of Indigenous peoples to land were ignored for many years, until *Calder*. The Court then considers the effect of s. 35(1) of the *Constitution Act, 1982*, and observes that it provides a solid constitutional base for subsequent negotiations, protects Indigenous peoples against provincial legislative power, and clarifies issues related to the enforcement of treaty rights. The Court follows this with a look into the future of s. 35(1) jurisprudence in which the Crown's claims to sovereignty are no longer beyond question:

> In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, says the following about s. 35(1), at p. 100:
>
> > … the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[118]

Since the Crown's assertions of sovereignty are no longer beyond question, the courts may now question fictions like the doctrine of discovery, and can recognize the reality of Indigenous sovereignty. When deciding *Sparrow* the Supreme Court would undoubtedly have had the reality of Indigenous sovereign powers in North America freshly in their minds, since they acknowledged the strength of those powers in *R v Sioui,*[119] a decision about a 1760 treaty with the Huron Nation. In its review of the historical context of the signing of this treaty, the Supreme Court found that the European powers did everything they could to secure

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[116] Royal Proclamation, 7 October 1763 (3 Geo III) [Royal Proclamation] as reproduced in RCAP, vol 1, *supra* note 23 at Appendix D. The Royal Commission found that this text is truer to the original text of the Royal Proclamation printed by the King's Printer, Mark Baskett, London 1763, than the reproduction at RSC 1985, App II, No 1.

[117] *Sparrow, supra* note 53 at 1103 [emphasis added].

[118] *Ibid* at 1105–6.

[119] *R v Sioui,* [1990] 1 SCR 1025, [1990] 3 CNLR 127 [*Sioui* cited to SCR].

the Indigenous nations as allies, and that "[t]his clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations."[120] The Supreme Court also quoted with approval the Chief Justice of the United States Supreme Court, who in an 1832 decision described the British policy toward Indigenous nations as "nations capable of maintaining the relations of peace and war, of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged."[121]

As we have seen, in *Tsilhqot'in* the Supreme Court applied the discovery and Aboriginal title doctrines to derive property rights based on occupation before the assertion of Crown sovereignty. However, in two seminal decisions ten years earlier, *Haida Nation v British Columbia (Minister of Forests)*,[122] and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*,[123] the Court had already recognized Indigenous peoples as *sovereigns*, rather than just *occupants*, and suggested that in the absence of a treaty Crown sovereignty may exist in a practical sense, but it lacked legitimacy. In *Haida Nation,* the Court explicitly recognized that Indigenous sovereignty existed before Crown sovereignty, and that this gave rise to a need for treaties: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35…".[124] Therefore, without a treaty that reconciled sovereignties, Crown sovereignty was only assumed,[125] asserted,[126] or existed only "*de facto*".[127]

The Court's treatment of Crown and Indigenous sovereignty in *Haida Nation* and *Taku River* caused a number of scholars to perceive a paradigmatic shift in the Court's Indigenous law jurisprudence.[128] Brian Slattery wrote that these decisions "mark the emergence of a new constitutional paradigm governing

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[120] *Ibid* at 1053.

[121] *Ibid* at 1054, quoting *Worcester v State of Georgia*, 31 US (6 Pet) 515 (1832) at 548–49.

[122] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

[123] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

[124] *Haida Nation, supra* note 122 at para 20.

[125] *Ibid.* See also para 32, referring to Crown's "*de facto* control" over lands and resources that were formerly in the control of Aboriginal peoples.

[126] *Ibid* at para 32.

[127] *Ibid* and *Taku River*, *supra* note 123 at para 42.

[128] See Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L J 470 at 513–15; Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 at 285 [Slattery, "Metamorphosis"]; Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011); Hoehn, *supra* note 38.

[A]boriginal rights."[129] Mark Walters acknowledged that while judges will not "start dismantling the Canadian state",[130] recognizing Indigenous sovereignty would have profound significance for issues relating to legal rights and obligations *within* Canada, and therefore "…it is possible to subject Crown sovereignty to critical reinterpretation without denying its existence."[131]

It is natural and generally wise for the Supreme Court to limit its analysis to what is required to resolve the issues that litigants bring to the Court, and so opportunities to examine broader issues of Indigenous and Crown sovereignty will not often arise. Nevertheless, in the years between *Haida Nation* and *Tsilhqot'in*, there were continued indications of the Court's understanding of a need for movement away from narrow conceptions of Aboriginal title and a denial of Indigenous sovereignty. One example of this is the Court's description of the source and content of the Crown's duty to consult. It said this duty "embodies what Brian Slattery has described as a 'generative' constitutional order, which sees 'section 35 as serving a dynamic and not merely a static function.'"[132] This is remarkable because it expresses approval of Slattery's description of a "generative" role for section 35, which he described as emerging out of the paradigmatic shift arising from the Court's recognition of the Crown's claim of sovereignty coming "in the face of pre-existing Indigenous sovereignty and territorial rights."[133]

The Supreme Court renewed its approval of Slattery's approach and the conception of the Crown gaining only *de facto* control over sovereign Indigenous nations when describing the concept of the honour of the Crown in *Manitoba Métis.*[134] In what is probably the clearest recognition of Indigenous sovereignty since *Haida Nation*, the Court said:

> … Aboriginal nations were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language…. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice. As explained by Brian Slattery:
>
> > … when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and

[129] Slattery*, ibid*.

[130] Walters, *supra* note 128 at 502.

[131] *Ibid* at 502–3.

[132] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38, [2010] 2 SCR 650 [*Rio Tinto*], citing Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433 at 440 [Slattery, "Honour of the Crown"].

[133] Slattery, "Metamorphosis", *supra* note 128 at 285–6. See also Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 SCLR (2d) 595 [Slattery, "Generative Structure"]. On Slattery's generative constitutional order, see also the text accompanying notes 180 to 186 below.

[134] *Manitoba Métis, supra* note 111 at para 67.

> territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.[135]

The cases considered above demonstrate the Supreme Court's recognition of the sovereignty of Indigenous nations. In addition, the Court understands that Crown assertions of sovereignty brought with it a foreign legal system that did not recognize the legitimate jurisdiction of Indigenous nations over their territories. In many cases, the Crown purported to impose its legal system and limitations on Indigenous sovereignty without the consent of Indigenous nations. Since Indigenous nations have not been conquered, they remain sovereign, and Crown pretensions of sovereignty over them remain constitutionally illegitimate no matter how boldly they are asserted.

IV. RECOGNITION LEADS TO RECONCILIATION

The discussion in the previous section demonstrated that the Supreme Court recognizes that the path to the future does not follow unilateral assertions of Crown sovereignty but lies instead in the challenge of seeking and acquiring the consent of Aboriginal peoples in the form of treaties. Unfortunately, the Court adheres, perhaps unconsciously, to a conception of Aboriginal title that rests on a foundation of the doctrine of discovery. This section will provide additional reasons for why this provides neither a moral nor a practical way forward, and will outline some alternatives, some of which the Supreme Court has already pointed us to.

A. Moral and Practical Dilemmas

In 1973, when *Calder* was decided, neither Canadian courts nor Canadian society as a whole were ready to give up the colonialist perspective that Europeans had "discovered" North America, and the accompanying legal fiction that the Crown received the underlying title to vast territories simply because of this discovery. In the more than four decades that have passed since *Calder*, however, Canadian law and Canadian society has matured to the extent that such racist and ethnocentric ideas are no longer acceptable.

If we look back at the societal context in which *Calder* was decided, we can see how far Canada has come. Today the reconciliation between Aboriginal and non-Aboriginal peoples and communities in Canada may still seem like a formidable goal, but at that time this objective had not even been articulated in these terms. The Supreme Court observed in *Sparrow* that *Calder* followed a long time in which Aboriginal rights were not the subject of academic or public discussion, and came at a time when the federal government denied that Aboriginal rights had any legal

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[135] *Ibid* [other citations omitted]. On the development of the principle of the honour of the Crown in *Manitoba Métis*, see Brian Slattery, "The Aboriginal Constitution" (2014) 67 SCLR (2d) 319 [Slattery, "Aboriginal Constitution"].

status.[136] Remarkably, less than ten years after *Calder* affirmed the legal status of Aboriginal rights, they had gained constitutional recognition in s. 35(1) of the *Constitution Act, 1982*. This later led the Supreme Court to articulate reconciliation as the "grand purpose" of section 35,[137] and as the purpose of Aboriginal law.[138]

Recognizing that prior occupancy of Indigenous peoples gave rise to legally enforceable present-day rights was ground-breaking and radical for the Canada of that time – even though this (and at least a form of Indigenous sovereignty) had been recognized by the Supreme Court of the United States over a century earlier.[139] As we have seen, *Calder* and *Guerin* used Chief Justice Marshall's decisions to provide the basis for the Aboriginal title doctrine, but Marshall's recognition of the sovereignty of the nations that occupied North America was neglected in Canada.

It is not clear why the Supreme Court has not yet transferred its recent acknowledgement of Indigenous sovereignty to the Aboriginal title doctrine. The fallacy and immorality of continuing to rely on the doctrine of discovery is palpable, has long been criticized, and lacks legal authority except for unpersuasive repetition for generations.[140] Perhaps the Court hesitates to reverse this position in spite of its lack of basis in law precisely because it has now become entrenched through time and repetition. Yet the Court has shown a willingness to modernize the law in other areas, and Canada's rejection of colonialism also qualifies as a situation where there is a change in circumstance or evidence that "fundamentally shifts the parameters of the debate."[141]

The doctrine of Aboriginal title is a paradox. On the one hand, it extends support to limited rights of Indigenous peoples because the common law's doctrine of continuity allows recognition of the laws and property rights of peoples present before the arrival of the colonizers.[142] This softens the impact of colonization, and it

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[136] *Sparrow*, *supra* note 53 at 1103.

[137] *Beckman*, *supra* note 112 at para 10.

[138] See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 12, [2011] 3 SCR 535.

[139] For an excellent discussion of the decisions of Chief Justice Marshall on this point in contrast to the Canadian courts' denial of Aboriginal sovereignty, see Walters, *supra* note 128 at 503–509.

[140] Borrows, "*Terra Nullius*", *supra* note 5 at 725, citing Kent McNeil, "Indigenous Nations and the Legal Relativity of European Claims to Territorial Sovereignty in North America", in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills, Ont: Oxford University Press, 2013). Borrows commented that "[i]t requires a discriminatory denigration of Indigenous peoples' laws and ways of life to hold that Indigenous title and governance is subject to non-Indigenous paramount interests as a by-product of European sovereign assertions."

[141] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44, [2015] 1 SCR 331; *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 42, [2013] 3 SCR 1101.

[142] The doctrine of continuity presumes that Aboriginal laws, customs and property rights continued after a change in sovereignty unless extinguished, voluntarily surrendered by treaty, or inconsistent with the sovereignty of the new regime. See *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 10 and sources cited therein.

allows the colonial power to recognize and preserve at least some rights of Indigenous peoples that might otherwise be ignored or denied. At the same time, Aboriginal title rests on a morally unacceptable foundation, because it concedes the crucial underlying title to the Crown based only on the doctrine of discovery. This doctrine, in turn, rests on the racist and demeaning assumption that North America, before the arrival of the European nations, was a *terra nullius*.

In *R v Simon*[143] the Supreme Court recognized that rejecting racist assumptions of the past must lead to changes in Aboriginal law. The Court condemned the racist and demeaning assumptions of Acting County Court Judge Patterson in the 1929 decision of *R v Syliboy*[144] when he held that the Indians of Nova Scotia were not civilized, sovereign nations that could enter into a treaty. Patterson J had said that treaties were "unconstrained Acts of independent powers", but

> …the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[145]

The Supreme Court observed that this language "reflects the biases and prejudices of another era in our history. Such language *is no longer acceptable in Canadian law* and indeed it is inconsistent with a growing sensitivity to native rights in Canada." [146] Along with the prejudices, the Court discarded the conclusion that had been drawn from them: that Nova Scotia First Nations lacked capacity to enter into treaties. It is time for the Court to discard another conclusion drawn from the same prejudices – that European nations "discovered" a North America devoid of sovereign nations – a conclusion that continues to harm Indigenous peoples.

Some cracks are appearing in the willingness of the judiciary to maintain the legal fictions of discovery and *terra nullius.* When the British Columbia Court of Appeal dismissed the Tsilhqot'in Nation's appeal, it revealed discomfort with the underlying assumptions of the doctrine of Aboriginal title. The Court observed that as had been acknowledged by Justice Vickers at trial, First Nations had occupied the land that became Canada long before the arrival of Europeans, but they were not been recognized as nation states by the European colonizers, who relied on the doctrine of discovery to claim territory on behalf of their sovereigns.[147] The Court

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[143] *R v Simon,* [1985] 2 SCR 387, [1986] 1 CNLR 153 [*Simon* cited to SCR].

[144] *R v Syliboy,* [1929] 1 DLR 307, 50 CCC 389 [*Syliboy* cited to DLR].

[145] *Simon, supra* note 143 at 399, quoting *Syliboy, ibid* at 313–14.

[146] *Simon, ibid* [emphasis added]. For a discussion of this passage, see also Hutchins, *supra* note 91 at 440.

[147] *Tsilhqot'in Nation v British Columbia* (*sub nom William v British Columbia)*, 2012 BCCA 285 at para 166, [2012] 3 CNLR 333.

acknowledged that "[w]hile it is difficult to rationalize that view from a modern perspective, the history is clear".[148]

Earlier in the Court of Appeal's judgment, the Court observed that in the Court below and according to earlier jurisprudence the "crystallization date" for Aboriginal title was determined by the relinquishment in the Oregon Treaty of American claims to what is now British Columbia, because this was accepted as recognition of Crown sovereignty.[149] The Court remarked that although it was "curious that a treaty that had no practical impact on relations between the Crown and the Tsilhqot'in can be seen as the defining moment for a claim of Aboriginal title, the parties do not, in this Court, challenge the determination to that effect, and the determination is in accordance with earlier case law."[150] The implicit assumption that Indigenous peoples and their territories passed to the Crown under a treaty with another settler nation as though they were inert chattels and fixtures is painfully similar to the passage in *Syliboy* that had been condemned by the Supreme Court in *Simon*. It is no less false or prejudiced for being implicit instead of explicit, and, to echo what the Court said in *Simon,* this "is no longer acceptable in Canadian law…."[151]

Only a little more than a month after the Supreme Court released its decision in *Tsilqhot'in*, the Ontario Court of Appeal examined the character of Aboriginal title when determining whether Certificates of Possession in reserve land could be seized by a First Nation to satisfy a debt.[152] The unanimous judgement was delivered by Justice Harry S. LaForme, the first Aboriginal person ever to have been appointed to sit on a Canadian appellate court.[153] LaForme J. reviewed some of the essential elements of Aboriginal title, including the doctrine of discovery, and observed that the Supreme Court had not addressed this doctrine directly in *Tsilhqot'in*.[154] He then added the following reservation to his description of the doctrine of Aboriginal title:

> Parenthetically, in the past several years the legal principle that "discovery" by European nations in colonial times gave rise to the astounding consequences to indigenous peoples found by *Johnson*

[148] *Ibid,* citing *Guerin, supra* note 49 at 378 and *Sparrow, supra* note 53 at 1103.

[149] *Ibid* at para 32. In *Delgamuukw*, *supra* note 54 at para 145, the Supreme Court explained the "crystallization" of Aboriginal title as follows: "Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted." For an excellent critique of this aspect of Aboriginal title, see Borrows, "Sovereignty's Alchemy", *supra* note 27.

[150] *Ibid.*

[151] *Simon, supra* 143 at para 21.

[152] *Mohawks of the Bay of Quinte v Brant*, 2014 ONCA 565 at para 58–62, 121 OR (3d) 561 [*Brant*].

[153] Ontario Courts, "Brief Biographical Note of Justice Harry S LaForme", online: <www.ontariocourts.ca/coa/en/judges/laforme.htm>.

[154] *Brant*, *supra* note 152 at paras 58–61.

> *v. McIntosh* and *St. Catharine's Milling*, has come under criticism for its use as a valid legal principle.[155] However, once again, that is not an issue that is before this court nor is it one that we have been asked to comment on.[156]

In *Tsilhqot'in*, Chief Justice McLachlin, delivering the unanimous decision of the Supreme Court, appeared to recognize the odious character of the doctrine of *terra nullius* because she made a point of observing that "the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada."[157] Other scholars have already provided rebuttals of this notion.[158] The Crown's unilateral assertion of sovereignty necessarily requires accepting a version of *terra nullius.*[159] The Chief Justice's claim is true only to the extent that Canadian courts have not allowed this doctrine to be used to deny that Indigenous peoples were present and had *property* rights before the Crown asserted sovereignty. The same courts, however, continue to use this doctrine to deny that Indigenous peoples were *sovereign* before the Crown asserted sovereignty, for this is a necessary element for the operation of the doctrine of discovery. In international law, *terra nullius* describes territory which is not subject to the sovereignty of any state, and over which sovereignty may be achieved by occupation.[160]

Even if we leave aside the immorality of an Aboriginal title doctrine that relies on discovery and *terra nullius*, there are serious practical problems with the doctrine as it currently exists.[161] The inordinate expense of litigating Aboriginal title claims has already been referred to above and the length of the trials themselves have been extraordinary. Both trials stretched over many years, with *Delgamuukw* occupying 374 court days and *Tsilhqot'in* 339 days.[162]

In spite of how long it took and how much it cost, the *Tsilhqot'in* case was relatively straightforward. Not only is this comparative simplicity apparent from the

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[155] At this point the passage referenced footnote 3: "The international indigenous community has recommended to the United Nations to declare that the doctrine of discovery is illegal and cannot be relied upon by state governments in law making, policy development or in litigation: United Nations Permanent Forum on Indigenous Issues, 11th Sess., *The North American Indigenous Peoples' Caucus Statement,* May 8, 2012."

[156] *Brant*, *supra* note 152 at para 62. On the immorality of requiring Aboriginal jurists to apply a legal framework that is false and demeaning to their peoples, see Hoehn, *supra* note 38 at 91–95.

[157] *Tsilhqot'in Nation*, *supra* note 4 at para 69.

[158] John Borrows, "Terra Nullius", *supra* note 5; Gordon Christie, "Who Makes Decisions Over Aboriginal Title Lands?" (2015) 48 UBC L Rev 743 at 768-771.

[159] John Borrows, *supra* note 5 at 703.

[160] See generally Robert J Miller et al, *supra* note 27; see specifically *ibid* at 7–8, 21, explaining that *terra nullius* is a necessary element of the doctrine of discovery and that its meaning included a country without a sovereign recognized by European authorities.

[161] For a more detailed discussion of difficulties with the practical application of the doctrine, see Hoehn, *supra* note 38 at 96–110.

[162] *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185 at 199, [1991] 5 CNLR 1 (BCSC); *Tsilhqot'in*, *supra* note 4 at para 7.

overview of the facts provided by the Supreme Court and quoted above, there were no adverse claims from other Indigenous groups, and the Tsilhqot'in Nation limited their claim to only five percent of what they regarded as their traditional territory. They also simplified their action by withdrawing claims against privately owned or underwater lands.[163] Claims in the other parts of Canada without treaties relating to rights to land, which includes, among others, the Maritime Provinces and much of British Columbia, promise to be more difficult, and will also inevitably run up against significant third party interests. Expecting courts to sort out these competing interests in a manner conducive to reconciliation is expecting too much from them. As we have seen, it is Indigenous peoples' interests that are most vulnerable and that the doctrine of Aboriginal title places at a disadvantage. Brian Slattery foresaw this kind of problem when he warned of the dilemma that Aboriginal title claims pose for the courts:

> "The courts are torn between a desire to right a great historical wrong – the unlawful dispossession of Indigenous peoples – and deep misgivings about doing so at the expense of third parties and the larger society."[164]

Slattery warns that an effort to protect third parties and the interests of society as a whole may cause courts to take an excessively narrow approach to Aboriginal title rights, or they may take a generous view of how title may have been extinguished. Either approach will conflict with the objective of reconciliation.[165]

B. Recognition – A Prerequisite for Reconciliation

In view of the dilemmas posed by Aboriginal title and the need to remove the doctrine of discovery from Canadian law, it must either be abandoned altogether or salvaged in some other form.

Perhaps Aboriginal title can be salvaged if we find a way to reform it and recast it in a manner that recognizes Indigenous and settler legal systems as equals. Gordon Christie has suggested that Aboriginal title not be viewed as just an instrument of Canadian law, but as "a malleable legal instrument lying at the border of Crown-Indigenous relations, a legal instrument Indigenous peoples can play an equal and competing role in defining."[166]

A reformed doctrine of Aboriginal title would also have to be true to the principle of the equality of peoples[167] by abandoning its foundation of the doctrine of

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[163] *Tsilhqot'in*, *supra* note 4 at paras 6, 9. For a thorough consideration of how the potential conflict between privately held lands and Aboriginal title lands might be mediated, see John Borrows, "Aboriginal Title and Private Property" (2015) 71 SCLR (2d) 91 [Borrows, "Private Property"].

[164] Brian Slattery, "Metamorphosis", *supra* note 128 at 256–57.

[165] *Ibid* at 282.

[166] Christie, *supra* note 158 at 787–792.

[167] See *UNDRIP*, *supra* note 20 and text accompanying note 25 above. See also Macklem, *supra* note 27.

discovery and *terra nullius*. This means the Crown would no longer have the underlying title by default, and this allows the onus of proof for establishing title to be adjusted, as called for by the TRC. This also leaves the ownership of the underlying title as an open question. As the original legal occupants, logic suggests the Indigenous nation's underlying title should be recognized unless the Indigenous nation agrees to share or transfer the title.[168]

The Supreme Court has pointed to the Honour of the Crown and recognition of Indigenous sovereignty as an alternative to applying the doctrine of discovery. In *Haida Nation* the Court set out a strategy for reconciling Indigenous sovereignty with the *de facto* sovereignty of the Crown. After stating that the rights of Aboriginal peoples who have not yet reconciled their claims with the sovereignty of the Crown are protected by section 35, the Court stated:

> The Honour of the Crown requires that these rights be determined, recognized and respected. *This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.* While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[169]

Two other passages in *Haida Nation* confirm that the source of the Crown's duty to negotiate, to consult and, if appropriate, accommodate, flows from the Crown's "assumption"[170] or "assertion"[171] of sovereignty. There can be no doubt that recognizing the Crown's duty to consult and accommodate has furthered the objective of reconciliation. Much less attention has been paid to the Crown's duty to negotiate, which the Supreme Court reiterated in *Tsilhqot'in* by stating that "Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands."[172] This duty is consistent with the Court's longstanding preference for negotiated over litigated solutions to title claims.[173] It is also consistent with the Court's statement in *Haida Nation* that treaties define Aboriginal rights.[174] As Slattery has foreseen,[175] the harder claims of Aboriginal title to come will require

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[168] On the utility of affirming underlying Aboriginal title, see Michael Asch & Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 208. On an Aboriginal underlying title and sharing sovereignty, see Hoehn, *supra* note 38 at 122–124 and 148–150. For the possibility that Indigenous laws and governance systems may protect non-Indigenous private property interests, see Borrows, "Private Property", *supra* note 163, especially at 112–118.

[169] *Haida Nation*, *supra* note 122 at para 25 [emphasis added].

[170] *Ibid* at para 20.

[171] *Ibid* at para 32.

[172] *Tsilhqot'in, supra* note 4 at para 18. On the Crown's duty to negotiate, see also Slattery, "Aboriginal Constitution", *supra* note 135 at 334–335.

[173] *Delgamuukw*, *supra* note 54 at paras 186 (Lamer CJ) and 207 (La Forest J).

[174] *Supra* note 122 at para 20.

[175] See text accompanying notes 164–165 above.

compromise and political accommodation, and courts have neither the capacity nor the political mandate to resolve those issues.

In the past, hopes of Indigenous peoples that the Crown will negotiate in good faith and in a timely manner have often been disappointed. John Borrows recently described the 20 year-old treaty process in British Columbia as a "dismal failure", leaving First Nations with debts due to the high cost of negotiation and with few signed agreements.[176]

In a context of stalled and seemingly futile negotiations it is hard to blame litigants for bringing Aboriginal title claims, even though seeking that remedy requires claimants to implicitly concede that the Crown obtained its underlying title by operation of the offensive doctrine of discovery. However, the Supreme Court's recent recognition of Indigenous sovereignty combined with greater societal understanding of the need for reconciliation in the wake of the TRC reinforces the need for other options. It should now be possible to convince a court to refuse to apply the doctrine of discovery in favour of the Crown.

As the TRC has argued, the Crown does not need to rely on the discovery doctrine to validate its sovereignty – the route to legitimation of Crown sovereignty lies in negotiated treaties.[177] Since Aboriginal peoples cannot be left without recourse if the Crown refuses to negotiate treaties in good faith or in a timely manner or refuses to ensure that negotiators on both sides have adequate resources for the task, courts must be prepared to enforce the Crown's duty to negotiate in a manner consistent with the honour of the Crown. So far there have not been many attempts to enforce the Crown's duty to negotiate, but some have been successful. [178]

In addition to applying to courts for relief if the Crown breaches its duty to negotiate, abolition of the discovery doctrine would enable an Indigenous nation to ask a court to recognize its continuing sovereignty, and its right to exercise core areas of its jurisdiction until its sovereignty can be reconciled with the Crown's *de*

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[176] John Borrows, "*Terra Nullius*", *supra* note 5 at 731–2.

[177] See above, text accompanying notes 44 to 45. See also generally Hoehn, *supra* note 38.

[178] This duty was successfully invoked in Taku River Tlingit First Nation v Attorney General of Canada, 2016 YKSC 7. Canada had accepted the Taku River Tlingit Yukon Transboundary claim for negotiation in 1984, but little or no progress had been made. Canada took the position that it would not negotiate the transboundary claim in Yukon until an agreement in principle had been reached in the British Columbia treaty process. The Court declared that having accepted the claim for negotiation, Canada must participate and proceed to negotiate honourably. The Court referred to acceptance of the claim as though it was a prerequisite for the duty to negotiate to arise, but the Court did not need to determine this question because the claim's acceptance was not disputed. According to Haida Nation, the honour of the Crown and the duty to negotiate are triggered by the Crown's assertion of sovereignty (see text accompanying notes 169–172 above), and it could be argued that once triggered it exists regardless of whether Canada had formally accepted the claim. In another case the Court ruled against the Crown on the narrow issue of whether the Minister had fettered his discretion when taking the position that Canada's Specific Claims Policy did not allow land-based settlements: Mohawks v the Bay of Quinte v Canada (Minister of Indian Affairs and Northern Development), 2013 FC 669, [2013] 4 CNLR 196.

facto sovereignty.[179] As we saw above, the Supreme Court has already indicated that it may be open to such an approach by endorsing Brian Slattery's conception of a "generative" constitutional order.[180] Slattery's description of a generative constitutional order, at the page cited with approval by the Supreme Court, is one in which section 35 binds the Crown to negotiate treaties that take into account the current interests of Indigenous peoples as well as the interests of the broader Canadian society:

> …[S]ection 35 does not simply recognize a static body of specific Aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances – *historical* rights for short. Rather, the section binds the Crown to take positive steps to identify Aboriginal rights in a contemporary form, with the consent of the Indigenous parties concerned – what we may call *settlement rights*. First, they represent contemporary restatements of Aboriginal rights in a form that renders them useful and commodious for indigenous groups in modern conditions. Second, settlement rights perforce take account of the interests of the broader society, of which Aboriginal peoples are members.[181]

Only "historical rights" are static and can be ascertained by the application of legal criteria, such as the test for Aboriginal title, to historical circumstances. "Settlement rights", on the other hand, must take the interests of the whole of society into account. This means they can only be negotiated – they cannot be imposed by the courts. What Slattery is describing and the Court appears to endorse, is consistent with what the Supreme Court said in *Haida Nation* when it referred to treaties serving to define rights and to reconcile Aboriginal and Crown sovereignties.[182] It is also consistent with article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides that Indigenous peoples have a right to an independent process to adjudicate the rights of indigenous peoples to their land, and a right to participate in this process.[183] A treaty process meets those requirements, and court rulings do not.

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[179] For further discussion of "core" areas of Aboriginal jurisdiction, see infra notes 184–185 and accompanying text. For a more detailed discussion of the feasibility of a declaration of the sovereignty of an Aboriginal nation see Hoehn, supra note 38.

[180] *Rio Tinto, supra* note 132 at para 38 and see discussion in the text accompanying notes 132–133 above.

[181] Brian Slattery, "Honour of the Crown", *supra* note 132 at 440. For further development of Slattery's theory of generative rights, see Slattery, "Generative Structure", *supra* note 133, and Slattery, "Metamorphosis", *supra* note 128.

[182] *Haida Nation*, *supra* note 122 at para 20. The Court later made a similar comment in *Beckman*, *supra* note 112: "Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations" (para 108).

[183] *UNDRIP*, *supra* note 20.

Brian Slattery's generative theory only allows courts to implement an "inner core" of rights without negotiation.[184] Space does not permit a full discussion of this proposal, but in essence this proposal is consistent with recognizing a justiciable core of Aboriginal jurisdiction[185] but requiring larger issues, particularly those with intergovernmental or broad societal implications, to be negotiated. According to Slattery, the "Principles of Recognition" developed by the Court should include guidelines for accommodating the rights and interests that third parties hold within traditional territories, and they should create "strong incentives for negotiated settlements to be reached within a reasonable period of time."[186]

The Supreme Court need not fear disruptive consequences from a declaration of Indigenous sovereignty. The Court has already acknowledged that Crown sovereignty is only *de facto* where it lacks legitimacy derived from a treaty, but left the Crown in place to govern.[187] The rule of law and the *de facto* doctrine[188] will protect existing third party interests for as long as negotiations reasonably require. We already know that the Crown's sovereignty lacks constitutional legitimacy in the absence of treaties that reconcile Crown and Indigenous sovereignty. What is needed now is to engage the courts to enforce the Crown's duty to negotiate to achieve this end. Those courts should remind the Crown that its extraordinary ability to continue to govern even where the Crown's claim to sovereignty lacks constitutional legitimacy is limited by section 35 of the *Constitution Act* and by the *de facto* doctrine's requirement that unconstitutional laws can only remain in place in exceptional circumstances and for a limited time.[189] If called upon to resolve disputes about jurisdiction between Indigenous nations and the federal and provincial governments, the Courts can draw on the expertise they have developed in almost 150 years of adjudicating jurisdictional disputes related to

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[184] Brian Slattery, "Metamorphosis," *supra* note 128 at 262–63. For the distinction between an inner core and a negotiated "penumbra", Slattery refers readers to Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at 36–48 and to *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship,* vol 2 (Ottawa: Minister of Supply and Services Canada, 1996) at 213–24.

[185] For a discussion of a justiciable core of Aboriginal jurisdiction, see Hoehn, *supra* note 38 at 141–144. For a similar approach which also satisfies the TRC's concerns about a need for a shift in onus to accompany renouncing the doctrine of discovery, see Drake, *supra* note 27 at 144–46.

[186] Brian Slattery, "Metamorphosis", *supra* note 128 at 284–85.

[187] The "act of state" doctrine, which places limits on the justiciability of Crown assertions of sovereignty over foreign lands or peoples, does not prevent courts from questioning the legitimacy of these assertions: see Hoehn, *supra* note 38 at 38–44 and Drake, *supra* note 27 at 36–41. In short, as stated by Drake at 36, "the rationale underlying the act of state doctrine remains intact as long as courts examine only the Crown's claim to exercise *de jure* sovereignty, without disturbing the Crown's *de facto* sovereignty".

[188] For an example of the application of the "*de facto* doctrine," see *Manitoba Language Reference,* [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Language Reference*]. See also John Borrows, *Recovering Canada*: *The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 119 and Hoehn, *supra* note 38 at 44–51.

[189] Manitoba Language Reference, ibid at 762–63.

Canadian federalism, since the principle of federalism gives courts "the responsibility to control the limits of the respective sovereignties."[190]

V. CONCLUSION

The TRC's work heightened awareness of the great injustices that colonialism and cultural genocide have wrought on Indigenous peoples in Canada. Its Calls to Action present a framework that, if implemented, can bring Canada into a future in which reconciliation between Aboriginal and non-Aboriginal peoples in Canada can occur. The Report's virtually universal positive reception offers an unprecedented opportunity for political action in support of this objective.

The *Tsilhqot'in* decision represented a major victory for the Tsilhqot'in Nation in its struggle to gain recognition of its traditional territory within Canadian law. The common law doctrine of Aboriginal title has been an important lever for the pursuit of Aboriginal rights in the face of a long history of a lack of recognition. Nevertheless, its basic principles are grounded firmly in Canada's colonial past and clash with modern Canadian values that reject racism and are consistent with the equality of peoples.

The TRC's calls for a repudiation of concepts such as discovery, used to justify European sovereignty over Indigenous peoples, present a pressing reason for courts to reconsider precedents that have relied on such concepts. In a number of cases since 1990 the Supreme Court has demonstrated that it recognizes the sovereignty of Indigenous peoples. In Aboriginal title cases, however, the Court has so far chosen to remain in a framework that is founded on these obsolete and offensive colonial doctrines, though even in those cases the sovereignty of Indigenous nations is implicit in much of the court's approach.

Without the doctrine of discovery at its foundation, the doctrine of Aboriginal title will either disappear from our legal landscape or be seriously transformed. This is needed in any event, because Aboriginal title is not a vehicle that can bring Canada into a future conducive to reconciliation. Only treaties that result from honourable negotiations that treat Indigenous and Crown sovereignty on an equitable basis can craft Aboriginal and settler rights in a just manner. Adjudicating Aboriginal rights on the basis of accepting unilateral assertions of Crown sovereignty is not consistent with the objective of reconciliation. It places courts into what Justice Vickers, the trial judge in *Tsilhqot'in*, described as an "invidious position" which comes about "…because governments at all levels, for successive generations, have failed in the discharge of their constitutional

[190] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 56. On the support the institutions and laws of Aboriginal peoples can gain from the principle of federalism, see also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 198–201. See also generally James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241.

obligations. Inevitably this decision and others like it run the risk of rubbing salt into open wounds."[191]

Just settlements can only be negotiated; they cannot be imposed by courts. Courts can assist the process of negotiations by enforcing the duty to consult and the duty to negotiate, all of which flow from the honour of the Crown. The TRC has said that Canada gains its legitimacy as a nation from treaties. The Supreme Court has also underlined the importance of treaties for reconciling sovereignties and for defining rights. Recognizing Indigenous sovereignty and abolishing the doctrine of discovery will make the important work of creating and renewing treaties easier, and this will lead us to a Canada with a constitutionally legitimate sovereignty, or collectivity of sovereignties, in which all Canadians share.

[191] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 1368, [2008] 1 CNLR 112 (BCSC). Justice Vickers understood that the doctrine of Aboriginal title needed fundamental re-examination, and at paras 1363–1372 he endorses in some detail Brian Slattery's theory of generative rights as set out in Slattery, "Metamorphosis", *supra* note 128. Slattery's generative "constitutional order" was later endorsed by the Supreme Court in *Rio Tinto* (see *supra* note 132 and accompanying text).