



ASSEMBLY OF FIRST NATIONS

# Dismantling the Doctrine of Discovery

January 2018

*... all doctrines, policies and practices based on 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 ...*

**UN Declaration on the Rights of Indigenous Peoples, preambular para. 4**

*Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere...*

**International Convention on the Elimination of All Forms of Racial Discrimination, preamble**

*Advancing reconciliation requires bringing Canadian law and policy into line with international human rights law, which has condemned doctrines of superiority, including discovery and terra nullius, as colonial and racist. Yet the racist assumptions and impacts of these doctrines live on in aspects of Canadian law and policy. They are evident in underlying assumptions that assume First Nations are “claimants” in our own lands and that treat First Nations as somehow lacking sovereignty. The assumptions and impacts of these racist doctrines must be uprooted. The path forward will require Canada to acknowledge the truth of our pre-existing and continuing sovereignty as self-determining peoples.*

**National Chief Perry Bellegarde**



How is it possible that any Pope, King or Queen, or explorers from Europe could “discover” lands in the New World if Indigenous Peoples were already occupying such lands, according to our own laws and legal orders?

The Doctrine of Discovery emanates from a series of Papal Bulls (formal statements from the Pope) and extensions, originating in the 1400s. Discovery was used as legal and moral justification for colonial dispossession of sovereign Indigenous Nations, including First Nations in what is now Canada. During the European “Age of Discovery”, Christian explorers “claimed” lands for their monarchs who felt they could exploit the land, regardless of the original inhabitants.

This was invalidly based on the presumed racial superiority of European Christian peoples and was used to dehumanize, exploit and subjugate Indigenous Peoples and dispossess us of our most basic rights. This was the very foundation of genocide.<sup>1</sup> Such ideology led to practices that continue through modern-day laws and policies.

The Assembly of First Nations remains deeply concerned about the contemporary ramifications of the doctrine of discovery and other discriminatory practices. Now is the time for Canada to finally and formally end any reliance on the doctrine of discovery. The AFN recommends that Canada take the following steps:

- **Acknowledge** that this doctrine has had and continues to have devastating consequences for Indigenous peoples worldwide, including First Nations in Canada;
- **Reject** doctrines of superiority as illegal and immoral, and affirm that they can never be a justification for the exploitation and subjugation of Indigenous peoples and the violation of human rights;
- In full partnership with First Nations, **examine** how Canadian history, laws, practices and policies have relied on the doctrine of discovery;
- **Repudiate** all doctrines of superiority in a legislative framework for implementation of the *United Nations Declaration on the Right of Indigenous Peoples*, developed together with Indigenous peoples;
- **Reinterpret** Canadian law in a manner consistent with the *United Nations Declaration on the Right of Indigenous Peoples* and other contemporary international human rights standards;
- **Ensure** that the violation of First Nations’ rights to lands, territories and resources that were taken without their free, prior, and informed consent are effectively redressed; and
- **Ensure** that the doctrine is not in any manner invoked in contemporary court cases or negotiations.

## Legal Background

Cases in Canada, such as *St. Catherines Milling and Lumber Company v. The Queen*, relied upon early U.S. Supreme Court cases such as *Johnson v. McIntosh* that are based on the discovery doctrine. It is worth noting that in these and other relevant legal cases, the Indigenous Peoples affected were not included as direct parties. Such breaches of natural justice serve to further discredit these rulings and the doctrine on which they are based.

Discovery was used as a tool to attempt the “exclusive power to extinguish” Indigenous rights on an ongoing basis.<sup>2</sup> The pre-existing inherent sovereignty of Indigenous Peoples was not considered. Scholar Robert J. Miller summarizes this history, the ongoing contemporary ramifications, and the urgency of addressing discovery:





Europeans, and later the colonial countries, believed they possessed the only valid religions, civilizations, governments, laws, and cultures, and that Providence intended that their institutions should dominate Indigenous peoples. ... As a result, the governmental, property, and human rights of Indigenous peoples were almost totally disregarded as Discovery directed European colonial expansion. In modern times, these assumptions remain dangerous legal and historical fictions.

The common understanding and application of the international law of colonialism was and is potent and lethal to Indigenous peoples and nations. Correcting and erasing the vestiges of Discovery from the modern-day laws and lives of settler societies ... is a task that must be undertaken and that must succeed if the legal and human rights of Indigenous nations and peoples are going to be honored around the world, and if Indigenous peoples are going to have equal rights to self-determination.<sup>3</sup>

Modern court rulings continue to interpret the law relying on the doctrine of discovery. As recently as 2012, the BC Court of Appeal not only validated such destructive acts, but also attempted to extinguish Indigenous rights through judicial ruling:

European explorers considered that by virtue of the “principle of discovery” they were at liberty to claim territory in North America on behalf of their sovereigns ... While it is difficult to rationalize that view from a modern perspective, the history is clear.<sup>4</sup>

In *Haida Nation*, the Supreme Court of Canada confirmed: “Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”<sup>5</sup> Under Canada’s constitutional framework, Crown sovereignty and legislative power are not absolute. In *Haida Nation*, the Supreme Court highlighted: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”<sup>6</sup> Yet such reconciliation has not taken place.

The Supreme Court has taken judicial notice of “such matters as colonialism displacement and residential schools”,<sup>7</sup> which demonstrate how “assumed” sovereign powers were abused throughout history. The root cause of such abuse leads back to the doctrine of discovery and other related fictitious constructs. These legal fictions must therefore be addressed.

## **Tsilhqot’in Nation Victory at Supreme Court of Canada**

Interveners in the landmark *Tsilhqot’in Nation* case, dealing with Indigenous Peoples’ title to land, called for the Supreme Court of Canada to formally repudiate the doctrine of discovery: (Also the Hul’qumi’num Treaty Group intervention.)

“Finally, the “principle of discovery” cannot be relied upon in formulating an approach to Aboriginal title, and must be firmly rejected. The principle of discovery is a “continuation of colonialism” that amounts to a “violation of the Charter of the United Nations ... and the principles of international law.”<sup>8</sup>

While the unanimous ruling did not name discovery directly, the Court did address the related doctrine of *terra nullius*. In referring to the “pre-existing” land rights of Indigenous Peoples, the Supreme Court ruled: “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation (1763)*.”<sup>9</sup>



This is because there are equitable principles<sup>10</sup> in the *Royal Proclamation* that have applied throughout Canada since its creation and such principles preclude any unjust, discriminatory doctrines.<sup>11</sup> Just as the Supreme Court concluded that the *Proclamation* confirms that the doctrine of *terra nullius* never applied in Canada, the same must be true in regard to the doctrine of discovery.<sup>12</sup> Both these doctrines are also inconsistent with the constitutional principle to uphold the honour of the Crown.

It is the Crown's responsibility to demonstrate on what basis it can validly claim Crown sovereignty and where such sovereignty would apply. Such claims must be consistent with the *UN Declaration on the Rights of Indigenous Peoples* and other international human rights law.

The big question remains: how did the Crown obtain title and how does the Crown continue to assert sovereignty? As scholar John Borrows reminds us, "Canadian law will remain problematic for Indigenous peoples as long as it continues to assume away the underlying title and overarching governance powers that First Nations possess."<sup>13</sup>

## United Nations on Discovery

Many Human Rights bodies within the UN system have strongly commended all racist doctrines of superiority. The United Nations Permanent Forum on Indigenous Issues has extensively studied the issue of the doctrine of discovery and the impact of Indigenous Peoples. The Forum has produced two major studies on the topic. The first study concluded:

... International human rights law ... demand (s) that States rectify past wrongs caused by such doctrines, including the violation of the land rights of indigenous peoples, through law and policy reform, restitution and other forms of redress for the violation of their land rights ...

... the Permanent Forum emphasized that redefining the relationship between indigenous peoples and the State as an important way to understand the doctrine of discovery and a way to develop a vision of the future for reconciliation, peace and justice. ... The Permanent Forum encourages the conduct of the processes of reconciliation "in accordance with the principles of justice, democracy, and respect for human rights, equality, non-discrimination, good governance and good faith".<sup>14</sup>

The second United Nations study was completed by Grand Chief Edward John.<sup>15</sup> His study went beyond the history, to deal with redress in a contemporary framework. His study illustrates the critical need to "examine how Crown sovereignty and underlying title could ever have legitimately crystallized through the "discovery" of indigenous peoples' lands and territories. The Doctrine must be unmasked so its manifestations are made visible."<sup>16</sup> Grand Chief John's study concluded:

...fundamental changes must be reflected through constitutional and legislative reforms, policies, and government negotiation mandates in regard to indigenous peoples. ... Decolonization processes must be devised in conjunction with indigenous peoples concerned and compatible with their perspectives and approaches. Such processes must be fair, impartial, open and transparent, and be consistent with the Declaration and other international human rights standards.<sup>17</sup>





## Truth and Reconciliation Commission

The Truth and Reconciliation Commission of Canada (TRC) called on all faith bodies to repudiate the concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*, and the reformation of policies within their institutions that continue to rely on such concepts.<sup>18</sup> Many faith-based groups are responding to this Call to Action by examining discovery and issuing formal statements repudiating. The World Council of Churches has also done so.<sup>19</sup>

The TRC has also called for Canada to jointly develop with Indigenous Peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the *Royal Proclamation of 1763* and the *Treaty of Niagara of 1764*, and reaffirm the Nation to Nation relationship between Aboriginal peoples and the Crown. The proclamation would include a commitment to repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*.<sup>20</sup>

During the closing events of the TRC in Ottawa, June 2015, the AFN co-hosted and participated in “Dismantling the Doctrine of Discovery: The Road to Reconciliation”, an expert panel on the doctrine of the discovery, the ongoing ramifications of the colonial legacy, and suggestions to dismantle the ongoing modern components.<sup>21</sup>

## Canada needs to formally renounce Discovery

While it does not change past injustices, the federal government should formally renounce discovery. This would acknowledge responsibility and recognize the obligations Canada has in the present to First Nations. It would be more than a merely symbolic gesture as it would lay to rest an offensive legal justification based on racial superiority for the subjugation of First Nations and other Indigenous Peoples.

Repudiating discovery and interpreting Canadian law in a manner consistent with the *UN Declaration on the Rights of Indigenous Peoples* and other contemporary international human rights standards will allow a fair and equitable settlement of outstanding issues surrounding lands, territories and resources. Rather than taking an adversarial position against First Nations, Canada must uphold the honour of the Crown and engage in a resolution of land rights that does not seek to minimize our rights to our lands. First Nations should not have to engage in protracted, expensive litigation to have our lands and rights respected.

## A new paradigm to replace the Doctrine of Discovery

It is essential to ensure a paradigm that is truthful about the history of past relations between First Nations and settlers. We must ensure a just process for resolution of outstanding issues of land rights, consistent with our right of self-determination. Such a framework is essential for advancing the reconciliation process between First Nations and non-Aboriginal Canadians. Everyone must recognize that Indigenous Peoples in sovereign nations occupied the land before contact. Settlers are not expected to surrender occupation of lands they live on and return to their ancestral countries of origin. We are all here and must live together.



Canada has a long history of an adversarial relationship with Indigenous Peoples. This is contradictory to reconciliation. When First Nations realize our full potential, individually and collectively, all of Canada benefits. A new paradigm will include the recognition of our laws and legal orders.

King George III issued the *Royal Proclamation of 1763* after the defeat of the French in Québec with the crucial support of First Nations allies. A year later, at Fort Niagara, a gathering of representatives from a couple of dozen First Nations from Nova Scotia to the prairies and north to Hudson Bay, met with Sir William Johnson, Superintendent of Indian Affairs, representing the Crown. At this gathering, the Covenant Chain of Friendship was affirmed—a multi-nation relationship in which no nation gave up its sovereignty, embodied in a two-row wampum belt communicating the promises made. The Proclamation confirms the land rights of Indigenous Peoples and is highlighted in section 25 of the *Canadian Charter of Rights and Freedoms*. Many leading Aboriginal law scholars assert the *Royal Proclamation of 1763* and the *Treaty of Niagara* together form a treaty between First Nations and the Crown that guaranteed Indigenous self-government.<sup>22</sup>

## **A Role for the Pope**

National Chief Bellegarde has met with representatives of the Holy See to discuss this critical issue. First Nations and our supporters have raised the issue with the Vatican on many occasions. Repudiating discovery has been a priority for National Chief Bellegarde and he has raised it in many contexts. It is the hope of AFN that when Pope Francis comes to Canada, he will publically renounce discovery.

In response to the work done by the UN Permanent Forum, at the UN the Holy See has made statements distancing the modern church from those Papal Bulls of the 1400s.<sup>23</sup> The Holy See concludes:

The fact that juridical systems may employ the “Doctrine of Discovery” as a juridical precedent is therefore now a characteristic of the laws of those states and is independent of the fact that for the Church the document has had no value whatsoever for centuries.

The Conference of Catholic Bishops in Canada has also released a statement that repudiates discovery. However, this is not enough. Discovery started with the Pope and First Nations are owed the respect of having the Pope himself apologize and support our efforts to rebuild our Nations.





## Endnotes

- <sup>1</sup> Permanent Forum on Indigenous Issues, *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress* UN Doc. E/C.19/2014/3 (20 February 2014) [Study by Forum member Edward John]
- <sup>2</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).
- <sup>3</sup> Robert J. Miller, “The International Law of Colonialism: A Comparative Analysis”, (2011) 15 *Lewis & Clark L. Rev.* 847 at 922 (Conclusions):
- <sup>4</sup> *Tsilhqot’in Nation v. British Columbia*, 2012 BCCA 285, para. 166.
- <sup>5</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 25.
- <sup>6</sup> *Haida Nation*, *supra*, para. 20.
- <sup>7</sup> *R. v. Ipeelee*, 2012 S.C.C. 13, para. 60.
- <sup>8</sup> *William et al. v. British Columbia*, “Factum of the Interveners Amnesty International and Canadian Friends Service Committee”, Appeal to Supreme Court of Canada, Court File No. 34986, 24 September 2013
- <sup>9</sup> *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para. 69.
- <sup>10</sup> See, e.g., *Rupert’s Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9, Schedule A - Joint Address of the Senate and the House of Commons of Canada, December 1867: “...upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.”
- <sup>11</sup> See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 200 (reasons of La Forest and L’Heureux-Dubé JJ. were delivered by La Forest): “In essence, the rights set out in the Proclamation ... were applied in principle to aboriginal peoples across the country”.  
Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), para. 1: “The history of indigenous peoples’ relationship with Europeans and Canada has positive aspects, such as ... policies of coexistence, the Royal Proclamation of 1763 and the related policy of the British Crown of seeking formal permission and treaty relationships with indigenous peoples before permitting settlement in their territories.”
- <sup>12</sup> See Tracey Lindberg, “Contemporary Canadian Resonance of an Imperial Doctrine” in Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, (Oxford/New York: Oxford University Press, 2012) 126 at 158: “Crown sovereignty could not replace Indigenous sovereignty just by virtue of non-Indigenous peoples settling in Indigenous territories and homelands.”
- <sup>13</sup> John Borrows, “The Durability of Terra Nullius: *Tsilhqot’in Nation v. British Columbia*”, *University of British Columbia Law Review*, (2015) 48 *UBC L Rev* 701 – 742.
- <sup>14</sup> Report on the eleventh session (7 – 18 May 2012), Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2012/43-E/C.19/2012/13.
- <sup>15</sup> Permanent Forum on Indigenous Issues, *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress* UN Doc. E/C.19/2014/3 (20 February 2014) [Study by Forum member Edward John], available at <https://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/241/84/PDF/N1424184.pdf?OpenElement>
- <sup>16</sup> *Ibid*, pg 3.
- <sup>17</sup> *Ibid*, pg 11.
- <sup>18</sup> Call to Action 49.
- <sup>19</sup> World Council of Churches, Statement on the doctrine of discovery and its enduring impact on Indigenous Peoples, 17 February 2012, Online at: <https://www.oikoumene.org/en/resources/documents/executive-committee/2012-02/statement-on-the-doctrine-of-discovery-and-its-enduring-impact-on-indigenous-peoples>
- <sup>20</sup> Call to Action 45.
- <sup>21</sup> *Dismantling the Doctrine of Discovery: The Road to Reconciliation*, June 1, 2015. Panel can be viewed online at: <https://www.youtube.com/watch?v=1NrjoaFuXk4>
- <sup>22</sup> Borrows, John. “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. Vancouver: UBC Press, 1997.
- <sup>23</sup> Permanent Observer Mission of the Holy See, Statement to the 9th session of the UN Permanent Forum on Indigenous Issues, Agenda Item 7, April 27, 2010.



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