From *Terra Nullius* to *Affirmation*: Reconciling Aboriginal Rights with the Canadian Constitution

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Introduction
The Canadian state presents itself to the world as tolerant, anti-colonial and self-critical. While there are many actions Canada has taken that exemplify such a self-image, there is at least one arena in which actions strongly contradict it. I have in mind, in particular, the manner in which Canada explains its acquisition of sovereignty and underlying title with respect to Indigenous peoples. Here, Canada relies on legal doctrines and political tenets that follow from colonialist conceptions. Ironically, these generally take the very form that Canada has itself condemned as, for example, when it voted in favour of United Nations’ resolutions concerning the self-determination of peoples under colonial regimes.

Specifically, Canada assumes that its acquisition of sovereignty and underlying title with respect to Indigenous peoples is unproblematic. Where treaties were negotiated, it is presumed that acquisition was always the result of a willing cession on the part of the First Nations. Where treaties were not negotiated, as in many parts of British Columbia, Indigenous sovereignty is understood to have been extinguished by the mere assertion of sovereignty by the Crown. These positions rely on colonialist presumptions about Indigenous peoples and about the status of Indigenous culture. In this paper, I intend to briefly address these matters and outline an alternative formulation that seeks to establish the acquisition of sovereignty by Canada in a manner that is consistent with, rather than contradictory to, Canada’s image as a self-critical, anti-colonial power.

Canada’s Legal Theory of the Acquisition of Sovereignty
Canada subscribes to the English legal system. As Brian Slattery has pointed out, English law provides four primary means by which Canada or any state can justify the acquisition of new territories. These are: (1)

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1 I wish to acknowledge with thanks the assistance of Neil Vallance in preparing this paper.
2 I am using sovereignty in the sense that it is used when describing the sovereignty enjoyed by states as that is commonly understood.
3 This is not a view generally shared by Indigenous peoples. For example, Antonia Mills points out: “To the Gitksan and Witsuwit’en, [in British Columbia] it was, and is, not apparent that the federal government has ever clearly established a right to their land”. A. Mills, *Eagle Down Is Our Law* (Vancouver: University of British Columbia Press, 1997) at 5.
4 B. Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown’s Acquisition of the Territory* (PhD dissertation, University of Oxford 1979) [unpublished].

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conquest or the military subjugation of a territory over which the ruler clearly expresses the desire to assume sovereignty on a permanent basis; (2) cession or the formal transfer of a territory (by treaty for example) from one independent political unit to another; (3) annexation or the assertion of sovereignty over another political entity without military action or treaty; or (4) settlement or acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.

Elsewhere, I have undertaken an analysis of court decisions and have concluded that Canada relies on the "settlement" thesis to justify its acquisition of sovereignty. This thesis rests on the concept that the territory claimed by the colonists was previously a *terra nullius*: a territory without people, to reiterate, one that was either previously unoccupied or not recognized as belonging to another political entity. When looked at from a strictly logical perspective, the settlement thesis may safely be presumed to be unproblematic in the colonial context only where it can be presumed there were no inhabitants at the time the colonists first arrived. While it is perhaps reasonable to make such a presumption about Antarctica, clearly it cannot be presumed about the whole territory that was later to become known as Canada.

Reliance on the "settlement thesis" when colonists claim sovereignty and underlying title to lands where Indigenous peoples already live, as in Canada, has proven difficult and has required a certain elasticity of logic. The rationale has been to rely on the presumption that the territory colonised was not "recognized as belonging to another political entity." The first premise of this approach has been to assert that, in law, the original inhabitants did not possess political rights or underlying title that required recognition by the colonisers.

This form of legal reasoning has a long history in English law. It can be dated back at least to 1608 and the beginning of the British colonial period. In that year, the English court was called upon to decide, in *Calvin's Case*, whether the Scots kept their lands after their conquest by the English. Judge Cook set out conditions where the original inhabitants' rights were to be protected and where they did not require protection. Given that the decision

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was rendered during the Elizabethan era, it is not surprising that the distinction between the two was made on religious grounds. As the court said:

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vito et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidels are abrogated, for that they be not only against Christianity, but against the law of God and of nature ...7

Similar forms of reasoning, although couched in different terms, have been used in subsequent periods to justify the unilateral assertion of sovereignty and underlying title by colonists in the face of Indigenous sovereignty. For example, in the 19th century, the division of the world between cultivators and non-cultivators was crucial. Based on this reasoning, the Australian state, at least prior to the 1992 *Mabo* decision which recognized the repugnant nature of such reasoning, presumed that the land was a *terra nullius* precisely because the Aborigines did not practice agriculture. The agricultural form of the *terra nullius* thesis was popular to justify unilateral assertions of underlying title in other settler countries.

By the second decade of the 20th century, British colonial law had come to rely on 19th century racist evolutionary theory as a basis for the dichotomy. This division presumed that the world could be divided between “civilized” and “primitive” cultures. This approach was first advanced in a seminal 1919 judgement, *In Re: Southern Rhodesia*, offered by the Law Lords of the Privy Council of Great Britain, then the highest judicial authority in the British Empire. In it, they stated:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor ‘richer than all his tribe.’ On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very

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7 *Calvin’s Case* (1608), 7 Co Rep 1a, 2 State Tr 559.
Canadian Aboriginal Rights and the Terra Nullius Hypothesis

The division between "civilized" and "primitive" cultures, found in In Re: Southern Rhodesia, has been adopted in Canadian law as the basis upon which to determine the extent to which the Crown was required to recognize the sovereignty of the Indigenous peoples it originally encountered. Specifically, the thesis that has emerged from judicial decisions is that, without exception, the Indigenous people who lived in Canada prior to colonization were too "primitive" to have a form of sovereignty and underlying title that required recognition by colonial authorities. Therefore, despite the fact that people lived here and have certain rights, called Aboriginal rights with respect to sovereignty and underlying title, Canada was a terra nullius prior to the arrival of the colonists.

An early expression of this thesis was advanced in Calder, the landmark court decision that initiated contemporary determinations of Aboriginal rights in Canadian law. In Calder, the Nishga (now Nisga’a) sought legal recognition that Aboriginal peoples had rights that existed prior to contact with colonists and that these rights continued up to the present. In 1970, Chief Justice Davey of the Appeals Court of British Columbia, with the two other members concurring, concluded, following from the terra nullius doctrine, that the Nisga’a do not have any on-going Aboriginal rights because:

... in spite of the commendation of Mr. Duff, a well-known anthropologist, of the native culture of the Indians on the mainland of British Columbia, they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property. [...] (Therefore) I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation.  

On the other hand, on appeal to the Supreme Court of Canada in January 1973, the situation was viewed differently. In two opinions it was argued that Aboriginal rights existed prior to contact with Europeans. As Justice Judson asserted, “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ...” Indeed, in one of the most significant judicial statements made on this topic, Justice Hall, in a stinging rebuke to Justice Davey asserted that Aboriginal rights must be interpreted:

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9 In Re: Southern Rhodesia (1919) AC 210 (PC) at 233.
10 "Errors in Delgamuukw", supra note 5.
...in the light of present-day research and knowledge, disregarding ancient concepts formulated when understanding of the customs and cultures of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws, or culture, in effect a subhuman species ...  

With this statement, Justice Hall brought contemporary anthropological theory, and particularly the concept of cultural relativism, into legal discourse to counter 19th century racist evolutionary thought. In fact, when examined in terms of anthropological theory, the history of court decisions in the contemporary period is in effect a contest between racist evolutionism and cultural relativism. The former was a school of thought that dominated anthropological discourse in the late 19th and early 20th century and the latter the school that superseded it in the early 1920s.

As an analysis of recent court decisions demonstrates, courts and ultimately government have come to rely on the orientation expressed through Hall's remarks in determining rights connected with what I have termed "way of life" rights with respect to Aboriginal peoples. These include such matters as the right to hunt for subsistence, rights to hold ceremonies on traditional lands, and other similar matters. However the courts have continued to rely on 19th century racist evolutionary theory to explain the underpinning or context of these rights.

Three examples will suffice to illustrate the point. The first is Mr. Justice Mahoney's decision in Baker Lake. In this 1979 case, Inuit of Baker Lake, Northwest Territories (now Nunavut), applied for an injunction to stop mining exploration activities on the grounds that they interfered with the Inuit Aboriginal right to hunt and fish. Here, Justice Mahoney had occasion to determine who might legitimately bring forward an Aboriginal rights claim. Following Calder, he asserted that one requirement was "that they (the plaintiffs) and their ancestors were members of an organized society." Thus, to determine whether Inuit had standing to request the injunction, Mahoney provided a description of what might constitute "an organized society" in relation to them. After citing a number of authorities and in particular In Re: Southern Rhodesia, he stated:

The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and

14 Ibid. at 169-70.
16 M. Asch, "Errors in Delgamuukw", supra note 5 at 221.
18 Hamlet of Baker Lake v. Minister of Indian Affairs (1979), 107 D.L.R. (3d) 513 (F.C.). This decision was at the trial division of the Federal Court. It was not appealed.
19 Ibid. at 557.
essential to sustain human life there. That was about all they could do: hunt and fish and survive.20

In short, Mr. Justice Mahoney asserted that it was possible to have an "organized society" in the sense used by the Supreme Court in Calder that had institutions respecting occupation and use of land ("hunt and fish and survive") which were sufficiently civilized for recognition by colonists, but may not have had institutions sufficiently elaborate to require recognition of sovereignty, and political rights. His reasoning has not been challenged by subsequent courts.

The second example is found in the 1991 trial court decision by Mr. Justice McEachern in Delgamuukw, a case which specifically dealt with the question of political jurisdiction. In rendering his judgement, Justice McEachern asserted that the Gitksan-Wet'suwet'en did not hold underlying title, jurisdiction or sovereignty over their traditional lands that was sufficiently significant to warrant recognition by colonists, and stated that:

... It would not be accurate to assume that even pre-contact existence in the territory was in the least idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs [sic], that aboriginal life in the territory was, at best, "nasty, brutish and short."21

Further, he argued, against all norms of contemporary reasoning that:

I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.22

Such a presumption is a throwback to 19th century racist evolutionary thought. While McEachern's comments were roundly criticized by academics,23 they were not remarked upon by the judges of the Supreme Court of Canada in their appeal decision.

The third example is in the Supreme Court of Canada's decision in Sparrow. With respect to the content of a "way of life" right, - in this case a right to fish, - the Court clearly articulates a thesis compatible with the orientation of Hall in Calder. Thus, the Court states on the one hand that:

[t]he evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day.24

20 Ibid.
23 A special issue of BC Studies (No.95, 1992) was devoted to excoriating McEachern's reasons for judgment in Delgamuukw.
At the same time, the Court asserts that:

It is worth recalling that while British policy toward 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 vest in the Crown.25

As Patrick Macklem and I indicate26 the presumption that Crown sovereignty and underlying title arise “from the outset” of colonization must derive from the premise that prior to colonization Canada is considered in law to be a terra nullius.

Given the thrust of Hall’s comments in Calder, there was hope that the presumption of the equality of cultures might eventually persuade the courts to recognize that no Indigenous community can be presumed to be too primitive for the courts to assume that the concept of sovereignty and jurisdiction over its territories and peoples is not applicable. Therefore, a case might emerge where the court might either affirm that Aboriginal rights, as a matter of Canadian constitutional law, included original sovereignty, or at least state, - as the courts in Australia have done, – that questions about sovereignty are beyond the jurisdiction of domestic Canadian courts. However, the Court took another direction in R. v. Van der Peet27, which obviated the need to consider such a question. Here, the Court argued that Aboriginal rights were not to be defined “on the basis of the philosophical precepts of the liberal enlightenment;”28 and that they were not “general and universal rights” (such as a right to self-determination) because if they were they would be held by all Canadians. Rather, Aboriginal rights in the Constitution arise solely “from the fact that aboriginal peoples are aboriginal.”29 Second, they argued that the purpose of the clause on Aboriginal rights in the Canadian constitution is to provide “the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.”30 Therefore, as Aboriginal rights provide a means to reconcile Aboriginal occupation with sovereignty, it cannot become the means by which that sovereignty itself may be challenged.

Problems with the Terra Nullius Doctrine

Given Justice Hall’s remarks in Calder, it is unacceptable for Canada to rely on a doctrine to legitimate the acquisition of sovereignty that presumes another culture is sufficiently primitive that, in law, their land is terra

25 Ibid. at 404.
26 Asch and Macklem, supra note 5.
28 Ibid. at 534.
29 Ibid. [emphasis theirs].
nullius. In fact, there is good evidence, as well, to support my assertion. Here are some examples.

First, the doctrine has been discredited by the High Court in Australia, - another settler state that arose from British colonization. Initially, in Milirrpum, a case decided in 1970, the trial judge asserted that, notwithstanding any factual evidence that might be produced by Aborigines, in law Australia was a "settled or peaceably occupied colony" and as such in law the territory had been a terra nullius prior to colonization. Later, however, in Mabo v. Queensland, a 1992 decision of The High Court of Australia, the judges rescinded this premise because, as Justice Brennan states, it relies on "a discriminatory denigration of indigenous inhabitants, their social organization and customs." He then continues "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination." Two other members of the High Court were even more explicit and argued to reject the terra nullius doctrine because it treated:

the Aboriginal people of the continent ... as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands.

Second, the doctrine has been rejected by the world community. It was rejected as a general principle as, for example, in the "Declaration on the Granting of Independence to Colonial Countries and Peoples" which implicitly suggests this where it states "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

The terra nullius doctrine has also been rejected by the International Court of Justice in circumstances directly parallel to those found in Canada. In their 1975 "advisory opinion" in Western Sahara, the Court was asked to determine whether the Western Sahara (Rio de Oro and Sakiet El Hamra) was, at the time of colonization by Spain, a territory that belonged to no one (terra nullius). They responded that it was not, largely because:

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31 P. Macklem comes to a similar conclusion in a recent book: "[i]nternational law regarded North America as vacant because it viewed Aboriginal nations to be inferior to European nations", and "[g]iven its inherent ethnocentrism, the proposition of Aboriginal inferiority cannot stand as a valid reason for excluding Aboriginal nations from the distribution of sovereignty on the continent" (Indigenous Difference, supra note 6 at 121).


34 Ibid.

35 Mabo, supra note 33 at 82; Spalding, supra note 33 at 221.


... the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.38

The situation is very similar to that in Canada. Spain entered into treaty arrangements with local inhabitants in the late 19th Century39 and therefore did not treat the Indigenous peoples as living in a terra nullius. In Canada, the Crown entered into treaties; the texts of which indicate that the Crown recognized the existence of political authorities that could negotiate on the behalf of collectivities.40 Furthermore, the British Crown entered into such treaties much earlier than the 19th century and continued the practice into the 20th. Therefore, according to the Western Sahara judgment, the Crown ought to have made treaty prior to settlement in all areas of what is now Canada.41

Third, there is reason to believe that the written versions of the treaties may not have accurately reflected the terms negotiated with Indigenous peoples. Many written versions, such as the numbered treaties, state categorically that the Indigenous party agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King, and His successors forever, all their rights, titles and privileges whatsoever.”42 That is, by mutual agreement, treaties extinguished whatever political and other rights the Indigenous party had in return for benefits specified in the treaty. In particular, they voluntarily gave up sovereignty and underlying title to their lands.

At the same time, this view is not universally held by Indigenous parties to the treaties. Such examples include the perspectives of Indigenous parties to Treaties 7 and 8.43 A similar disagreement with the written version can be found in the views of those Dene who participated in Treaty 11, which was negotiated in the Northwest Territories in 1921. During my first research with the Dene, which I undertook in 1969 and 1970, I discussed treaty negotiations with a number of individuals who participated in or witnessed the treaty negotiations at Wrigley (now Pi Dze Ki), Northwest Territories. Among those I was privileged to interview was Julian Yendo, the Chief at Pi Dze Ki in 1921, and whose signature appears on the treaty, as well as Philip Moses, the son of the Elder who advised Yendo at the time the Treaty was negotiated.

38 Ibid, at 39.
39 Ibid.
40 Home and Native Land, supra note 36.
41 This position is echoed by Kent McNeil: “No Canadian court has yet come up with a convincing explanation of what happened to Aboriginal sovereignty, or how that sovereignty can be denied in light of the Indian treaties which Canada continued to sign after Confederation” (Emerging Justice, supra note 6 at 101).
42 Quoted with respect to Treaty 11 in R. Fumoleau, As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939 (Toronto : McClelland & Stewart, 1975) at 166.
Here is what Philip Moses (in translation) says about the land:

The old man heard these rumors about treaties, that people had a hard time after that. Old man wanted to see if they were after land or something. But they said no.

Nothing about land was said at the treaty. That’s what the old man was trying to make sure.

If something were said, they wouldn’t accept the treaty. Government officials made false reports that the Indians gave their land away.

The Commissioner must be a good liar because he told the Indians a good lie. He told a lie to the King too.

On other points, there is a similar level of disagreement. For example, the oral version states that the Dene were free to hunt, fish and trap, while the written version says that these activities were to come under the control of the Crown. Thus, Philip Moses responded to my question about such restrictions as follows: "The person who paid out treaty never said nothing about hunting or fishing or mining or anything". And respecting obeying British law, I asked: "Did they make the Indians promise to observe the treaty and to conduct themselves as loyal subjects of his majesty the king?" Moses replied:

Nothing like that was mentioned. If the Indians gave their land away then everybody should sign it or witness what was given away, but he didn’t even see the old Chief grab the pencil and sign. Nothing.

In fact, Dene understanding is that the specific purpose of the Treaty was for "peace and friendship." According to an Elder in Wrigley, in an interview with Shirleen Smith, another researcher who worked in the region, the government negotiators stated that "we are here to help each other and to live like brothers and sisters, one relation. This is a peace treaty." It was also intended, according to interviews by Fumoleau, to allow subjects of the Crown to use Dene lands for settlement and to continue trading. It is a view also supported by Bishop Breynat, the Roman Catholic Bishop who accompanied the treaty party and was, in his view, largely responsible for the Dene’s acceptance of the treaty terms. He was so incensed at the written version that he swore out an affidavit in which he stated that the Commissioner made a number of specific promises at the negotiations that were not found in the text. These specifically included his agreement on behalf of the Crown that the Dene would be free to pursue their way of life, in all of its aspects, as before. He stated that these matters were crucial to the Dene and that, if the Commissioner had refused, the Dene would not have agreed to take treaty. He was particularly upset because he stated that he staked his own reputation by vouching for the honour of the Crown.
In short, in the Dene version, the Treaty did not concede the land. Rather, as I learned on other occasions, it was seen as an opening up of a political relationship with Canada, beginning with a Peace and Friendship treaty that allowed for non-Dene settlement in Dene territory.48 As this example and others cited above indicate,49 it is at least arguable that the actual negotiations did not include any discussion of land cession or extinguishment of sovereignty.

Fourth, the doctrine of *terra nullius* has been rejected as inconsistent with the contemporary understanding concerning the nature of human societies. It is true that in 1919, when *In Re : Southern Rhodesia* was written, there was a presumption that there could be people “... so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society.” However, anthropological evidence had produced sufficient results on this topic that, by 1930, the pseudo-evolutionary view had been completely discredited.50 Rather, the evidence accumulated from that period and since indicates that there are very few, if any, societies that existed at the time of colonization that would not have concepts about jurisdiction reconcilable to “rights arising under English law.”51 It is therefore inappropriate for Canada to rely on a doctrine that is factually incorrect.52

Fifth, Canada has played a significant role in the decolonization process by supporting United Nations’ declarations, by providing aid to newly decolonized countries, and through its readiness to engage as a peace keeper in situations where colonialism or its aftermath have caused significant problems for local populations. Therefore, at least by implication, Canada

49 There are many examples of the view, on the part of Indigenous peoples, that treaties did not extinguish sovereignty and were, in fact, intended to develop political relations. Some of these are: P. Williams, “Kayunerener Teskenonheronne: Relations Between the Haudenosaunee and the Crown, 1664-1993” prepared for the Royal Commission on Aboriginal Peoples [unpublished, 1993] and B. Wicken, “An Overview of the 18th Century Treaties Signed Between the Mi’kmaq and Wastuwiuk Peoples and the English Crown, 1725-1928” report submitted to the Royal Commission on Aboriginal Peoples [unpublished, 1993].
51 *Re: Southern Rhodesia*, supra note 9.
52 B. Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall L. J. 681. Slattery develops an analogous argument which he bases on the presumption of a “Principle of Territoriality” which suggests that “every human society whose members draw the essentials of life from territories in their possession ... has a right to these territories as against other societies and individuals.” He later (ibid. at 701) uses this principle to assert that the lands in Canada and the United States could not have been “legally vacant territories” prior to colonization and hence that a *terra nullius* thesis is inapplicable. While I accept that the Principle of Territoriality may be useful in certain circumstances, I believe that the principle that human societies always contain institutions and values reconcilable to the concepts of sovereignty and underlying title, as constituent elements of their nature, is a firmer basis upon which to rest the rights discussed here.
has rejected theories, such as *terra nullius*, that had been used to justify continued colonial rule in such situations. It is therefore an affront to its own self-understanding as a player internationally for Canada to justify its sovereignty and underlying title on the very same doctrine, *terra nullius*, used by colonial powers to legitimate their occupation of colonial territories.

The *terra nullius* thesis is completely dissonant with Canada’s self-identity on the world stage. Equally, it is also dissonant with most Canadians attitudes towards the nature of the country. It may in fact be in violation of human rights covenants to which Canada is a party. But what, to my mind, is even more crucial is that we Canadians pride ourselves on being humane and sensitive on Aboriginal issues. I find people are often shocked when they hear pronouncements such as those of Mr. Justice Davey, which presume the inferiority of Aboriginal cultures. I also find many aghast at the idea that the legitimacy of the acquisition of Canadian sovereignty is founded in law on the presumption that Indigenous peoples were so primitive at the time of contact that they had no polity that demanded recognition by the more “civilized” settlers. In short, the doctrine of *terra nullius* is a creature of colonialism. As a foundational doctrine, it creates a line of explanation that requires a colonial reading of history; a colonial explanation of the place of the Indigenous “other” within official state ideology.

Alternatives

Canadian governments and courts are not content to rely on the *terra nullius* doctrine. In fact, work is being done, principally by the Supreme Court of Canada, to move beyond it. The approach, however, is one that will remove the issue of the acquisition of sovereignty from discussion rather than explore the limitations inherent in the *terra nullius* doctrine. There are numerous negotiations taking place in Canada today over land questions, both in areas where treaties were negotiated and in those where they were not. The bottom line for governments in all negotiations has been to insist on a clause in each agreement that requires the Indigenous party to accept the sovereignty of Canada. At the same time, the courts, following upon the description of Aboriginal rights in *Van der Peet*, are attempting to avoid the *terra nullius* doctrine by defining Aboriginal rights in a manner that puts abstract political rights outside the purview of constitutional protection.

These moves by the courts and governments are highly practical. However, they have a serious defect. By avoiding the issue of the acquisition of sovereignty, these solutions do nothing to counter the colonial approach that dominates our understanding of our historic relationship with

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54 From *Calder to Van der Peet*: supra note 17.
Indigenous peoples. For this reason, among others, it is not an approach to which I would subscribe.

The alternative I advocate is based on the presumption that Aboriginal sovereignty remains unextinguished and that Canadian sovereignty must be founded on a just relationship with the continued existence of that sovereignty. This alternative has been described in a paper authored by Norman Zlotkin, a scholar of constitutional law, and myself, as "affirmation," – a term that derives from the phrase in the constitution that Aboriginal and Treaty rights are recognized and affirmed.

We are not alone in thinking about resolving relations through some form of affirmation. The Royal Commission on Aboriginal Peoples (RCAP) also eschewed the terra nullius thesis. Indeed, one of their recommendations was that a constitutional amendment be passed that would disallow the use of the settlement thesis to explain the acquisition of territory.

To be specific, RCAP asserted that resolution to the question of the political status of the parties would be achieved through mutual recognition that both Canada and Indigenous peoples hold sovereignty today. In this view, Indigenous peoples’ sovereignty is understood to derive from their original occupation of the land and, in stark contrast the terra nullius thesis, would be seen as continuing to exist, notwithstanding European settlement. At the same time, Canadian sovereignty would be explained on the basis of a concept known in international law as “prescription,” a term which Slattery describes as follows:

...[it] may be argued that for reasons associated with other basic values and principles of justice, territories illegitimately acquired may sometimes, by passage of time, be transformed into legitimate dominions – a process traditionally termed “prescription.”

Thus, it is argued that, through conscious acts as well as through long experience of living side-by-side, relations between Aboriginal peoples and colonists evolved in such a way that Aboriginal sovereignty gradually became incorporated into what was originally a British Crown that was solely within the polity of the colonists. This was accomplished largely without the active assent of the Aboriginal parties. Nonetheless, because the Crown has been broadened to incorporate, rather than extinguish, Aboriginal sovereignty, a form of sovereignty exists in law whether or not it is explicitly recognized by constitutional provision. Thus, along with the

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55 Among these, an attempt to resolve the relationship in a manner that promotes justice as Canada has seen it in the context of other colonial situations ranks highly in my mind.

56 “Affirming Aboriginal title”, supra note 53.

57 Royal Commission on Aboriginal Peoples, “Partners in Confederation” (Ottawa: Minister of Supply and Services, 1993) [hereinafter “Partners in Confederation”].

58 The RCAP argument is taken up in some detail by Judge Binnie of the Supreme Court of Canada in some obiter remarks in the recent case of Mitchell v. M.N.R.I, [2001] 1 S.C.R. 9, where he describes with approval the American concept of “residual” aboriginal sovereignty. In Emerging Justice, Kent McNeil proposes a similar approach, which acknowledges the “limited territorial sovereignty of the Aboriginal peoples as nations within Canada”, supra note 6 at 95.
Provincial and the Federal, the Aboriginal constitutes one of three constitutionally recognized “sovereigns” within Canada.\(^60\)

The problem with this form of affirmation is in the reliance on prescription to explain Canada’s acquisition of sovereignty. To suggest that Canada acquired its title through “the passage of time” really begs the acquisition question rather than answers it. For such an approach to be convincing it would require detailed examination of the process by which prescription took place and confirmation by Aboriginal peoples that they accept that the process was legitimate. Further, “prescription” rests on an appeal to “basic values and principles of justice.” Yet, no evidence is provided to justify it in the Canadian case. And, given the long history of colonization and the sorry history of relations between Aboriginal peoples and Canada, it is clearly not self-evident how such an appeal could be applied convincingly in the Canadian situation. There are practical consequences as well. As the powers of the Indigenous, third order of government are not written out in the Canadian constitution, these powers will likely be seen to exist solely in spaces where no other order of government has clearly specified powers. As these powers are laid out exhaustively in the 1867 constitution act, it seems highly unlikely that recognition on this basis would change the political relationship significantly.

I believe the form of affirmation advanced by Zlotkin and myself is preferable to the prescription approach because it accepts that Canadian sovereignty has no basis independent of Indigenous sovereignty. Rather, Canadian sovereignty must be derived through the affirmation of a negotiated connection with that sovereignty. Such an approach would enable Canadians to construct their constitutional identity in connection with, rather than as a radical departure from, the history of this land and the people who lived here before European settlement.

What then would be the consequences of acknowledging the proposition that Canadian sovereignty must derive from honourable negotiations with Indigenous nations? The process would certainly necessitate reopening negotiations on many contemporary treaties as well as repudiate the cession clauses in the written versions of historic treaties, unless it could be demonstrated that they occurred voluntarily. This would be a vast undertaking that could take a long time. It is one that many, no doubt, would fear, could bankrupt the state. Another fear is that such negotiations could

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\(^{60}\) P. Macklem also advocates a “distribution” of sovereignty among three levels of government (Indigenous Difference, supra note 6 at 123). However, there is a question as to the strength of the powers of the Aboriginal vis-à-vis those of the Provincial and Federal levels which are explicitly recognized in the constitution. While the specifics have, of course, yet to be resolved, the approach taken does seem to point to an American style resolution to the issue whereby the Aboriginal sovereign exists but is, in an ultimate sense, subordinate to the Congress, – or in the Canadian case the Parliament and, perhaps, the legislatures. The difference would be that, because Aboriginal rights are constitutionalized in Canada, passage of laws that interfered with them would undergo a specific process not required by normal legislation.
destabilize the state. These fears are real and must be addressed. There is no pre-set answer.61

Still, an examination of Indigenous discourse on the topic of negotiations leads me to believe there is also reason for optimism. A dominant theme in this discourse is the assertion that the goal of negotiations is to enter into a permanent relationship with the settlers on the basis of sharing. Here is how this view has been articulated by Indigenous spokespersons and scholars. Chief Harold Turner of the Swampy Cree Tribal Council stated during the hearings of the Royal Commission on Aboriginal peoples that “...[t]he treaties were signed as a symbol of our good faith to share the land.”62 Sharon Venne, in an article interpreting Treaty 6 asserts that “Indigenous Chiefs dealt with the arrival of non-Indigenous settlers ... in the same manner as they dealt with others entering their jurisdiction. (That) sharing the land through treaty-making was a known process.”63 And, as one Dene leader stated, contrasting his nation’s goals with those of Québec: “While others are trying to negotiate their way out of Confederation, we are trying to negotiate our way in.”64 This view is eloquently summarized in the following passage by Leroy Little Bear:

The Indian concept of land ownership is certainly not inconsistent with the idea of sharing with an alien people. Once the Indians recognized them as human beings, they gladly shared with them. They shared with Europeans in the same way they shared with the animals and other people. However, sharing here cannot be interpreted as meaning the Europeans got the same rights as any other native person, because the Europeans were not descendants of the original grantees, or they were not parties to the original social contract. Also, sharing certainly cannot be interpreted as meaning that one is giving up his rights for all eternity.65

That is the concept, the attitude, to which I am drawn in seeking a way to reconceptualize and reconstruct the relationship between Canada and Indigenous peoples in a truly post-colonial manner.

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61 One vision of the future is articulated by G. Alfred in *Heeding the Voices of Our Ancestors* (Toronto: University of Toronto Press, 1995) at 103 where he says “Mohawks see the consideration of self-government arrangements as part of the inevitable process of divesting themselves from colonized status and regaining the status of an independent sovereign nation.”

62 Royal Commission on Aboriginal Peoples, Transcripts of the Public Meetings of the Royal Commission on Aboriginal Peoples, The Pas, Manitoba (20 May, 1992) at 252.


64 Home and Native Land, supra note 36 at 105

Conclusions

I am sufficiently realistic to recognize that moving to such an approach requires much further examination and may take a long time to become actualized. However, it is my view that Canada needs to adopt an understanding that our legitimacy flows out of resolving issues with Indigenous nations in a just manner; one that enables growth beyond a colonial vision of Canadian history. Interestingly, it is the courts that are the first to respond seriously to this critique. Thus, two Supreme Court of Canada Justices, McLachlin and L’Heureux-Dube categorically rejected and debunked the settlement thesis in their dissent in the *Van der Peet* case cited above.

Also, when *Delgamuukw* reached the Supreme Court of Canada, Chief Justice Lamer denounced the ethnocentric bias of relying on the superiority of written evidence in establishing facts, saying that such an approach negatively prejudices the oral traditions of Indigenous peoples. This clears the way for nations, such as the Dene, to reopen interpretations of the facts of treaties, such as Treaty 11, where, up until now, the written versions have been presumed to carry the significant weight in evidence. This has been confirmed recently by the Supreme Court of Canada in the *Marshall* decision, which admitted extrinsic evidence to reveal additional or expanded terms in two eighteenth-century treaties with the Mi’kmaq.

Further, the Court in the *Delgamuukw* judgement has asserted that Aboriginal title includes a right akin to private property. While the decision did not challenge the settlement thesis, it did recommend that outstanding land questions be resolved by negotiation, which could include jurisdictional arrangements. This would represent an important step along the way.

The change in attitude and values has been summarized succinctly by Ted Chamberlin, a leading scholar on Aboriginal issues and comparativist, when he said (to paraphrase): Canadians tell our history as though our presence in Canada were Chapter 15 of the story of another place. What we need to do is change our orientation so that we learn history in a manner that enables us to understand that our presence here is also Chapter 15 of the story of this place.

That statement, to my mind, truly captures the essential difference between colonial and post-colonial thinking; between *terra nullius* and affirmation. The difference, as stated by Dene and others so often, between extinguishment and the opening up of a relationship based on peace and friendship which, when nurtured, can intertwine and grow to the mutual benefit of both parties. And I believe that recognition of the need to redefine Canadian constitutional identity on this basis holds a key to working through the constitutional issues that face Canada.

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Résumé

L'État canadien se présente comme tolérant, anti-colonial et auto-critique. Cependant, la justification légale de la Couronne pour acquérir souveraineté et juridiction sur les Peuples autochtones et leurs terres s'appuie sur la doctrine coloniale de la *terra nullius* qui est fondée sur le postulat que les peuples indigènes étaient inférieurs au point de permettre à la Couronne de présumer que leurs terres étaient inoccupées. L'article analyse comment la doctrine de la *terra nullius* a fini par s'appliquer en droit canadien et ses limites en tant que proposition acceptable dans la contemporanéité. Dans un second temps, il évalue des alternatives proposées dans des milieux variés pour déterminer si la conceptualisation et la mise en œuvre d'une relation politique et légale entre les Premières nations et le Canada qui serait post-coloniale dans sa perspective et pratique, est possible.

Abstract

The Canadian state presents itself as tolerant, anti-colonial and self-critical. Yet, the legal justification for the Crown's acquisition of sovereignty and jurisdiction concerning Indigenous peoples and their lands, relies on the colonial era doctrine of *terra nullius* which is based on the proposition that Indigenous peoples were sufficiently inferior to enable the Crown to presume that their territories were unoccupied. This paper discusses how the doctrine of *terra nullius* becomes applied in Canadian law and its limitations as an acceptable proposition at this time in history. It then discusses and evaluates alternatives to that doctrine which have been proposed in various quarters in order to determine the possibilities for the conceptualization and establishment of a political and legal relationship between First Nations and Canada that is post-colonial in its approach and practice.

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