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THE IMPACT OF *ST CATHERINE'S MILLING*

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A Introduction

St Catherine's Milling may seem like a peculiar choice as one of the three constitutional cases that helped to define Canada as a nation, given that most of the legal principles affirmed by Lord Watson, writing for the Privy Council, have been overruled. This paper identifies the principles from *St Catherine's Milling* which are still good law, and argues that the logic that underlies and shapes those principles is the logic of the doctrine of discovery and the principle of *terra nullius*.

Jurists have articulated different versions of the doctrine of discovery and disagreed about its precise requirements.² At its essence, the doctrine allows a nation to acquire sovereignty over foreign territory by being the first to discover it; on some versions, it was necessary to not only discover but also effectively occupy the territory.³ Traditionally, this mode of acquiring sovereignty applied only to *terra nullius*, that is, territory not yet possessed by a socially and

¹ Associate Professor, Osgoode Hall Law School at York University. I would like to thank Jessica Karjanmaa for her diligent research assistance and Kent McNeil for his helpful comments on an earlier draft. Any errors are my responsibility alone.

² See Robert J Miller, "The Doctrine of Discovery" in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) 1 at 22 (arguing that "Europeans occasionally disagreed over the exact meaning of Discovery, and even sometimes violently disputed their divergent claims; but one principle they never disagreed about was that the Indigenous peoples and nations lost sovereign, commercial, and real property rights immediately upon their 'discovery' by Europeans"). 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Liberal Foundation for the Legitimacy of the Canadian State* (LLM Thesis, University of Toronto Faculty of Law, 2013) [unpublished] at 50-62 (identifying and analyzing three different versions of the doctrine of discovery).

³ See John H Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at 275.

politically organized community.⁴ Some European nations, however, deemed Indigenous territories to be *terrae nullius* for the sake of asserting sovereignty over them by means of discovery.⁵ Their rationale was the supposed inferiority of Indigenous peoples.⁶

The operation of the doctrine of discovery and the principle of *terra nullius* within *St Catherine's Milling* is not immediately apparent. Neither of these phrases appears in Lord Watson's decision. Nor does his decision contain any discussion of Marshall CJ's trilogy establishing the doctrine of discovery in American law, including *Johnson v M'Intosh*⁷ which has been cited at length in modern Canadian decisions.⁸ Nor did Lord Watson explicitly accuse Indigenous peoples of inferiority, as Chancellor Boyd did so openly in the trial decision.⁹ Yet, as others have recognized, the doctrine of discovery is enmeshed within Lord Watson's analysis.¹⁰

Canada has many things to be proud of during its sesquicentennial, but the doctrine of discovery is not one of them. While Canadians rightfully celebrate our many accomplishments, the doctrine of discovery remains our national shame. This state of affairs is not unavoidable. Our elected governments have it within their power to repudiate the doctrine of discovery and expunge its implications from Canadian law. As citizens, we have it within our power to hold our governments accountable for laws that perpetuate prejudice instead of embodying principles of equality, consent, and respect.

⁴ See Currie, *ibid*; Drake, *supra* note 2 at 48.

⁵ See Miller, *supra* note 2 at 21.

⁶ See Miller, *ibid* at 8; MF Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (New York: Negro Universities Press, 1969) at 18-19; *Johnson v M'Intosh* (1823), 8 Wheaton 543 at 576, 21 US 543 (USSC) [*Johnson v M'Intosh*].

⁷ *Johnson v M'Intosh*, *ibid*.

⁸ See especially *Guerin v Canada*, [1984] 2 SCR 335 at 378, Dickson J [*Guerin*]; *R v Van der Peet*, [1996] 2 SCR 507 at paras 35-36, 49 Lamer CJ [*Van der Peet*]; *Mitchell v MNR*, 2001 SCC 33 at paras 112-13, Binnie J, minority opinion. See also *R v Sparrow*, [1990] 1 SCR 1075 at 1103 (holding that "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" and citing *Johnson v M'Intosh*, *supra* note 6, as support for this proposition) [*Sparrow*]; *Tsilhqot'in Nation v British Columbia*, 2012 BCCA 285 at para 166.

⁹ *R v St Catharines Milling and Lumber Company* (1885), 10 OR 196 (Ch) [*St Catharines Milling Trial Decision*].

¹⁰ See Leroy Little Bear, "A Concept of Native Title: The Legal Terms in the Battle for Land" (summer 1977) *Awkesasne Notes* 28; Tracey Lindberg, "The Doctrine of Discovery in Canada" in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) 89 at 120-21.

B Two Paradigms: Doctrine of Discovery or Equality of Peoples

Many scholars have recognized that the doctrine of discovery is the explanation and justification for Canada's assertion of sovereignty endorsed within Canadian law. These scholars have criticized this justification because it depends on a deep inequality; it asserts the inferiority of some humans and the superiority of other humans.¹¹ Many have also noted that the doctrine of discovery is inconsistent with the actions of representatives of the British government, who entered into nation-to-nation relationships with Indigenous peoples, as illustrated by the Treaty of Niagara.¹² In recent years, the Supreme Court of Canada has seemed less willing to endorse the doctrine of discovery, perhaps because of these critiques. Felix Hoehn identifies the Court's reluctance in terms of a paradigm shift in the Aboriginal rights jurisprudence, in which the Court begins to distance itself from the doctrine of discovery paradigm and instead affirms a new paradigm based on the principle of equality of peoples.¹³ Building on the work of Brian Slattery, Hoehn argues that this shift is most vividly illustrated by the Court's description of the Crown's assertion of sovereignty in the absence of treaties with Aboriginal peoples as *de facto* as opposed to *de jure*, which means legitimate or rightful.¹⁴ According to Slattery, the Court's "language suggests that the Crown's claims of sovereignty over Aboriginal peoples will continue to be

¹¹ See e.g. Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall LJ 681; Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995- 1996) 21 Queen's LJ 173 at 187-88; James Sákéj Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 at 38 (arguing that judicial decisions establishing and affirming the doctrine of discovery "should have no judicial authority in postcolonial law; they are unconscionable and represent the prejudice and bias of another legal era"); Lindberg, *supra* note 10 at 94; John Borrows, "The Durability of *Terra Nullius: Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 723-26 [Borrows, "Durability"].

¹² See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) [Borrows, "Wampum at Niagara"].

¹³ Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 1-2.

¹⁴ Hoehn, *ibid* at 34, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42 [*Taku River*]; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup Ct L Rev (2d) 433 at 437-38 [Slattery, "Honour of the Crown"].

legally deficient until there has been a just settlement of their rights through negotiated treaties.”¹⁵ Indeed, the Court in *Haida Nation* describes treaties as doing the heavy lifting within the project of justifying the Crown’s assertion of sovereignty: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”.¹⁶ Similarly, a few paragraphs later, the Court states: “Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties.”¹⁷ This new paradigm is also reflected in the following statement from a majority of the Court in *Beckman v. Little Salmon/Carmacks First Nation*: “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.”¹⁸ The Supreme Court of Canada’s most recent Aboriginal title decision, *Tsilhqot’in*,¹⁹ seems to confirm Hoehn’s thesis. In this decision, the Court explicitly rejects the concept of *terra nullius*: “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)*”.²⁰ Thus, this emerging paradigm provides that the legitimacy of the Crown’s assertion of sovereignty is grounded within treaties with Aboriginal peoples, rather than in the doctrine of discovery.

This raises the question of the interpretation and significance of treaties. There are at least two different ways in which treaties could legitimate the Crown’s assertion of sovereignty, neither of which presupposes or affirms the doctrine of discovery. On the one hand, treaties can be understood as agreements to share the land on a nation-to-nation basis, as opposed to a surrender of land or sovereignty. On this view, treaties do not subordinate the sovereignty of Indigenous peoples to that of the Crown. Rather the Crown sovereignty that is legitimated by the treaties is a shared sovereignty. The research of the Royal Commission on Aboriginal Peoples reveals that this is the understanding of the so-called historical land surrender treaties held by

¹⁵ Slaterry, “Honour of the Crown”, *ibid* at 438, cited by Hoehn, *supra* note 13 at 34.

¹⁶ *Haida Nation*, *supra* note 14 at para 20, cited by Hoehn, *supra* note 13 at 35 and by Slaterry, “Honour of the Crown”, *supra* note 14 at 438.

¹⁷ *Haida Nation*, *supra* note 14 at para 25, cited by Hoehn, *supra* note 13 at 35.

¹⁸ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 8. See also Hoehn, *supra* note 13 at 71-72 (discussing the way in which this decision supports the new paradigm based on equality and treaties).

¹⁹ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot’in*].

²⁰ *Tsilhqot’in*, *ibid* at para 69.

most, if not all, Indigenous treaty signatories in Canada.²¹ This view is consistent with the Gus Wen Tah—or Two Row Wampum—exchanged between the Haudenosaunee and the British, and with the Treaty of Niagara as reflected in the Covenant Chain belt exchanged between the Anishinaabe and the British.²² On this view, the Treaty of Niagara informs the interpretation of subsequent treaties executed by those at Niagara in 1764.²³ This view is also consistent with Hoehn’s vision of a new paradigm based on equality of peoples,²⁴ and it is endorsed by the Truth and Reconciliation Commission, whose 45th Call to Action calls on Canada “to jointly develop with Aboriginal 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.”²⁵

On the other hand, treaties can be understood as a surrender of sovereignty. At international law, treaties can effect a surrender of sovereignty in two contexts: as a concomitant to conquest or as a standalone surrender of sovereignty. According to the doctrine of conquest, the victor in war is entitled to claim sovereignty over the conquered people and their territory.²⁶ When conquest was still accepted as a means of acquiring sovereignty at international law,²⁷ a vanquished nation would sometimes execute a treaty of cession which acknowledged the

²¹ See Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 40. See also Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2013) at 15.

²² See Borrows, “Wampum at Niagara”, *supra* note 12; Mark D Walters, “Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 187.

²³ See Borrows, “Wampum at Niagara”, *supra* note 12 at 167.

²⁴ Hoehn, *supra* note 13 at 148-50 (although Hoehn prefers the term “sharing” over “shared” sovereignty: 149-50).

²⁵ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRCC, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> [TRC, *Calls to Action*].

²⁶ See Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 8.

²⁷ See Currie, *supra* note 3 at 279-80 (explaining that since at least the Second World War and possibly the early part of the twentieth century, conquest is no longer a valid principle of international law).

conquest and surrendered the vanquished nation's sovereignty to the victor.²⁸ Cession, which is another recognized means of acquiring sovereignty, refers to "the transfer of sovereignty over territory pursuant to agreement between the ceding and acquiring states."²⁹ In other words, a nation can cede sovereignty to another nation through a treaty even without a conquest having first occurred. According to this view, treaties, such as the historical land surrender treaties, legitimate the Crown's sovereignty because the Indigenous signatories ceded their sovereignty to the Crown in those treaties.

Neither of these views—neither the shared sovereignty view nor the surrender of sovereignty view—operates within the doctrine of discovery paradigm. Rather, they both assume the equality of Indigenous peoples insofar as they affirm that Indigenous peoples who entered into treaties were sovereign and thus were able to agree to either share sovereignty or surrender their sovereignty. The remainder of this paper seeks to determine whether the aspects of the *St. Catherine's Milling* decision which are still good law support either of these two views or whether they operate within the doctrine of discovery paradigm. To answer this question, it is necessary to first examine the decision in *St. Catherine's Milling* and to determine which aspects of it are still good law.

C The Case

In 1883, the St. Catherine's Milling and Lumber Company (the Company) cut approximately 2,000,000 feet of timber around Wabigoon Lake in northwestern Ontario pursuant to a licence granted by the Dominion government.³⁰ The Ontario government took issue with the licence, arguing that the land where the timber was cut belonged to Ontario, not the Dominion government, and thus only Ontario had authority to issue such a licence.³¹ The trial judge, Chancellor Boyd, held in favour of Ontario.³² Each of the Company's appeals—to the Ontario

²⁸ See Korman, *supra* note 26 at 123.

²⁹ See Currie, *supra* note 3 at 283.

³⁰ *St Catherine's Milling and Lumber Company v Ontario (AG)* (1888), 14 App Cas 46 (PC) at 47 [*St Catherine's Milling PC*]; *St Catharines Milling Trial Decision*, *supra* note 9 at 197.

³¹ *St Catherine's Milling PC*, *supra* note 30 at 47.

³² *St Catharines Milling Trial Decision*, *supra* note 9 at 235.

Court of Appeal,³³ to the Supreme Court of Canada,³⁴ and to the Privy Council³⁵—was dismissed.

The outcome of the case, as well as the arguments of both the parties and the Dominion government as intervener before the Privy Council,³⁶ hinged on the existence and nature of Indian title (now referred to as ‘Aboriginal title’).³⁷ The area where the cutting occurred was within the territory covered by Treaty Three, which had been executed in 1873.³⁸ According to the written text of Treaty Three,

The Saulteaux Tribe of the Ojibbeway Indians and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the [boundaries described in the treaty].³⁹

The Company and the Dominion government argued that prior to entering into Treaty Three, the First Nation signatories held “absolute title”, or in other words, “a complete proprietary interest” in their land which was limited only “by an imperfect power of alienation.”⁴⁰ In other words, Indian title is almost equivalent to a fee simple estate in land; the difference is that Indian title is alienable only to the Crown. The effect of Treaty Three’s surrender provision, reproduced above, was to transfer the First Nations’ proprietary interest from the First Nations to the Crown in right of the Dominion.⁴¹ That is, the written words of the surrender provision explicitly state that the

³³ *St Catharines Milling and Lumber Co v R*, 1886 CanLII 30 (ONCA).

³⁴ *St Catharines Milling and Lumber Co v R*, (1887) 13 SCR 577.

³⁵ *St Catherine's Milling PC*, *supra* note 30.

³⁶ *St Catherine's Milling PC*, *ibid* at 47, 53.

³⁷ But see Mark D Walters, “The Aboriginal Charter of Rights: The Royal Proclamation of 1763 and the Constitution of Canada” in Terry Fenge & Jim Aldrige, eds, *Keeping Promises – The Royal Proclamation of 1763, Aboriginal Rights and Treaties in Canada* (Quebec: McGill-Queen’s University Press, 2015) 50 at 61-62 (explaining that the *St Catherine’s Milling* case was “as much about the vision of federalism that would prevail in Canada as about the nature of Aboriginal title”) [Walters, “Aboriginal Charter”].

³⁸ *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, online: Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679> [Treaty Three].

³⁹ Treaty Three, *ibid*.

⁴⁰ *St Catherine's Milling PC*, *supra* note 30 at 48, 49.

⁴¹ *St Catherine's Milling PC*, *ibid* at 47, 49.

First Nations have ceded their title to their land “to the Government of the Dominion of Canada”. Ontario was not a party to the treaty, the text of the treaty does not refer to Ontario as a recipient of title, and the Dominion government provided the consideration for the transfer of Indian title.⁴² According to this line of reasoning, given that title was transferred to the Dominion government, the Dominion government was entitled to issue a licence allowing the Company to cut timber on the land.

Ontario denied that Indian title is an “absolute title”, as claimed by the Dominion.⁴³ Rather, ‘Indian title’ is no more than a moral claim to occupy the land, which was extinguished by Treaty Three.⁴⁴ The underlying title to the land, both before and after Treaty Three was executed, was held by the Crown.⁴⁵ As between the province and the Dominion, the underlying title was held by the Crown in right of Ontario pursuant to various provisions of the *British North America Act*,⁴⁶ including section 109,⁴⁷ which provides for provincial ownership of lands within the four original post-confederation provinces.⁴⁸ On this line of reasoning, Treaty Three did not transfer title to the Dominion government because the First Nation signatories never had any legal or equitable interest that could be transferred in the first place.⁴⁹ As others have noted, the positions, perspectives, and arguments of the First Nations who signed Treaty Three were not considered by any level of court in *St Catherine’s Milling*, given that First Nations took no part in the case, as neither parties, nor interveners, nor witnesses.⁵⁰

⁴² *St Catherine’s Milling PC*, *ibid* at 47, 49; *St Catharines Milling Trial Decision*, *supra* note 9 at 198.

⁴³ *St Catherine’s Milling PC*, *ibid* at 49.

⁴⁴ *St Catherine’s Milling PC*, *ibid*; *St Catharines Milling Trial Decision*, *supra* note 9 at 199.

⁴⁵ *St Catherine’s Milling PC*, *ibid*.

⁴⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II No 5, ss 108, 117 [*Constitution Act, 1867*].

⁴⁷ *Constitution Act, 1867*, *ibid*, s 109.

⁴⁸ *St Catharines Milling Trial Decision*, *supra* note 9 at 200.

⁴⁹ *St Catherine’s Milling PC*, *supra* note 30 at 49; *St Catharines Milling Trial Decision*, *supra* note 9 at 199.

⁵⁰ See Kent McNeil, “Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s” (1999) 38:1 J West 68 at 69 (explaining that “...the sole witness in the case was Alexander Morris, one of the Canadian commissioners who had negotiated the treaty”) [McNeil, “Social Darwinism”]; D’Arcy Vermette, “Colonialism and the Suppression of Aboriginal Voice” (2008-2009) 40:2 Ottawa Law Review 225 at p 231-32. For a discussion of First Nations’ perspectives on Treaty Three, see Sara J Mainville, “Treaty Councils and Mutual Reconciliation Under Section 35” (2007) 6 Indigenous LJ 141.

The trial judge endorsed Ontario's reasoning, including, as others have noted, Ontario's rationale for denying that Indian title was a transferable legal or equitable right.⁵¹ Put simply, Indian title was less than a proprietary interest because of the inferiority of First Nations.⁵² Chancellor Boyd was not shy about articulating this rationale; he wrote: "As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with...the general prosecution of colonization."⁵³ Throughout his decision, Chancellor Boyd described First Nations as "untaught", "uncivilized" and "rude red-men" who live in a "primitive state".⁵⁴ Kent McNeil argues that Chancellor Boyd's reasoning was based not on facts but on racist stereotypes embedded within the social Darwinism which was popular at the time and which gave those racist stereotypes a veneer of scientific validity.⁵⁵ For example, McNeil explains:

It is also plain that [Chancellor Boyd's] views of Indians in general, and of the Saulteaux [who signed Treaty 3] in particular, were based on racist stereotypes rather than on facts. Referring to the Saulteaux of the Treaty 3 area, he admitted that "little is known of the people in this remote region." And yet he was able to conclude that they were "a more than usually degraded Indian type."⁵⁶

⁵¹ *St Catharines Milling Trial Decision*, *supra* note 9 at 234-35. See Anthony J Hall, "The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada" in Kerry Abel & Jean Friesen, eds, *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Manitoba: University of Manitoba Press, 1991) 267 at 275 (explaining that Ontario's argument rested on the notion that First Nations were too primitive to have a proprietary interest in their land, given that property is a "creature of law", but First Nations were lawless and so they could "not be regarded as...capable of holding lands"); McNeil, "Social Darwinism", *supra* note 50 at 73.

⁵² *St Catharines Milling Trial Decision*, *supra* note 9 at 206. See McNeil, "Social Darwinism", *supra* note 50 at 73 (explaining that the trial judge "regarded the Indians as inferior, and that was the main reason they had no land rights apart from the reserves").

⁵³ *St Catharines Milling Trial Decision*, *supra* note 9 at 206.

⁵⁴ *St Catharines Milling Trial Decision*, *ibid* at 211, 230. See also McNeil, "Social Darwinism", *supra* note 50 at 73 (summarizing the epithets applied by the trial judge to First Nations).

⁵⁵ McNeil, "Social Darwinism", *supra* note 50 at 72, 73. See also Hall, *supra* note 51 at 277.

⁵⁶ McNeil, "Social Darwinism", *supra* note 50 at 73. See also Sidney L Haring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1998) at 138 (explaining that the trial judge gave "no indication of what, in his view, made these Indians more 'degraded' than others or what legal purpose was served by his description").

Donald Smith illustrates that the North West Resistance also contributed to the backdrop of the *St Catherine's Milling* trial.⁵⁷ In the spring of 1885, just before the start of the trial, Chancellor Boyd's two oldest sons—Alex and Leonard—volunteered to fight on the side of the Canadians, against the First Nations and Métis.⁵⁸ Alex fought at Cut Knife Hill, where eight Canadians were killed and fourteen wounded.⁵⁹ Smith notes that by the time the *St Catherine's Milling* trial began, “Poundmaker and Big Bear still remained at large”, and during the period when Chancellor Boyd was writing his decision, his sons were still away from home.⁶⁰

The Privy Council's decision, delivered by Lord Watson, employed the same logic as Ontario's arguments and Chancellor Boyd's analysis, although Lord Watson's reliance on derogatory stereotypes was not explicit.⁶¹ According to Lord Watson, title to the relevant land was always—both before and after Treaty Three was executed—held by the Crown.⁶² By virtue of section 109 of the *British North America Act*, title was held by the Crown in right of Ontario, not the Dominion.⁶³ The First Nations did not hold title to the land, even before they signed Treaty Three. Instead, their Indian ‘title’ was merely a “personal and usufructuary right”.⁶⁴ Lord Watson declined to explain this phrase; the Privy Council did “not consider it necessary to express any opinion” on “the precise quality of the Indian right”.⁶⁵ Whatever else Lord Watson might have meant, he concluded that Indian title is inalienable; it is not the kind of right that can be sold or transferred.⁶⁶ It can only be extinguished, by surrender to the Crown or otherwise.⁶⁷ Thus, the Dominion government did not receive title to the land delineated within Treaty Three because before Treaty Three was executed, Ontario already had title to the land in question; Lord

⁵⁷ Donald Smith, “Aboriginal Rights a Century Ago: The St Catharines Milling Case of 1885 Hardened Attitudes toward Native Land Claims”, *The Beaver* (February/March 1987) 4 at 9-10. See also Harring, *supra* note 56 at 138.

⁵⁸ Smith, *supra* note 57 at 9-10, 11.

⁵⁹ Smith, *ibid* at 10.

⁶⁰ Smith, *ibid* at 10, 11.

⁶¹ Walters, “Aboriginal Charter”, *supra* note 37 at 62 (explaining that “Lord Watson, speaking for the Judicial Committee [of the Privy Council], did not adopt the extreme views of judges like Boyd”).

⁶² *St Catherine's Milling PC*, *supra* note 30 at 55, 58.

⁶³ *St Catherine's Milling PC*, *ibid* at 57-58.

⁶⁴ *St Catherine's Milling PC*, *ibid* at 54.

⁶⁵ *St Catherine's Milling PC*, *ibid* at 55.

⁶⁶ *St Catherine's Milling PC*, *ibid* at 54.

⁶⁷ *St Catherine's Milling PC*, *ibid* at 55.

Watson describes the province's title as "a substantial and paramount estate" and as "a present proprietary estate in the land", which underlies the Indian title.⁶⁸ The Indian title is "a mere burden" on the province's title.⁶⁹ The effect of Treaty Three (and presumably all other so-called land surrender treaties) is not to transfer anything but merely to remove this burden; as a result, the province's title becomes "a plenum dominium"—or unencumbered by the burden of Indian title—whenever Indian title is extinguished, for example by surrender through a treaty.⁷⁰ Even though the Dominion government executed Treaty Three and provided the remuneration to the First Nation signatories, it received nothing from the deal because the Treaty simply erased the burden of Indian title, leaving the province with an unblemished title. Accordingly, Lord Watson concluded that Ontario must relieve the Dominion government of the Crown's treaty's obligations.⁷¹

D The Impact of *St Catherine's Milling*

Almost none of the legal principles enshrined within the Privy Council's decision are still good law.⁷² This section shows how three of these principles have been overruled by subsequent jurisprudence. The first principle is that the source of Indian title is the *Royal Proclamation, 1763*, the second is that Indian title is a personal and usufructuary right, and the third is that Indian title is dependent on the good will of the sovereign. I then argue that the key principle from *St Catherine's Milling* which remains good law is the doctrine of discovery, including the concomitant principle that what is now Canada was *terra nullius* when Europeans first arrived here. These two principles profoundly shaped, and continue to shape, Canada as a nation. They are what make Canada a colonial nation not only historically but also now, at this moment.

1) The Source of Indian title is the *Royal Proclamation, 1763*

⁶⁸ *St Catherine's Milling PC*, *ibid* at 55, 58.

⁶⁹ *St Catherine's Milling PC*, *ibid* at 58.

⁷⁰ *St Catherine's Milling PC*, *ibid* at 55.

⁷¹ *St Catherine's Milling PC*, *ibid* at 60.

⁷² See Haring, *supra* note 56 at 147.

Lord Watson held that the source of Indian title is the *Royal Proclamation, 1763*.⁷³ As such, the other aspects of Lord Watson's analysis, discussed above, are derived from his interpretation of the text of the *Royal Proclamation, 1763*. More importantly, this principle means that Aboriginal rights are not common law rights,⁷⁴ and so if not for the *Royal Proclamation, 1763*, First Nations would have had no rights or interests in their territory.⁷⁵ Put differently, *St Catherine's Milling* stands for the principle that Aboriginal title is a contingent right, as opposed to an inherent right. Michael Asch and Patrick Macklem explain that according to a contingent rights approach, the existence of Aboriginal rights—including Aboriginal title—is contingent on legislative, executive, or constitutional recognition.⁷⁶ According to an inherent rights approach, in contrast, Aboriginal rights exist "independently of the legal creation of Canada and [do] not [require] explicit legislative or executive recognition for their existence."⁷⁷ Instead, inherent rights are common law rights.⁷⁸

The notion that Aboriginal title is a contingent right which owes its existence to the *Royal Proclamation, 1763* has been rejected by subsequent jurisprudence,⁷⁹ including by both Judson J

⁷³ *St Catherine's Milling PC*, *supra* note 30 at 54 (holding that "[t]heir possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown"). See Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access Just 17 at 25. See also Walters, *supra* note 37 at 62-63 (discussing the significance of the *Royal Proclamation, 1763* as the source of Indian title).

⁷⁴ McNeil, "Social Darwinism", *supra* note 50 at 74.

⁷⁵ *Contra Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 at 322-23, Judson J (stating that Lord Watson in *St Catherine's Milling* did not mean that the *Royal Proclamation, 1763* was the exclusive source of Indian title) [*Calder*].

⁷⁶ Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L Rev 498 at 500.

⁷⁷ Asch & Macklem, *ibid*.

⁷⁸ See Asch & Macklem, *ibid* at 502-503.

⁷⁹ See Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L Rev 301 at 314 [McNeil "Extinguishment"].

and Hall J in *Calder*,⁸⁰ by Dickson J in *Guerin*,⁸¹ and by the majority and the minority in *Delgamuukw*.⁸² Although Aboriginal title is *sui generis* insofar as “its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems”,⁸³ it is a common law right insofar as its existence is not contingent on legislative or executive recognition.⁸⁴

2) Indian Title is a Personal and Usufructuary Right

Lord Watson also held that Indian title is a personal and usufructuary right.⁸⁵ Although he left the nuances of this characterization unexplained, subsequent cases and commentators provide guidance. The term ‘personal’ has been interpreted to mean at least two things: first, that Indian title is not a property right and thus does not benefit from the traditional common law protections for property rights,⁸⁶ and second, that Indian title is inalienable such that it can only

⁸⁰ *Calder*, *supra* note 75, Judson J at 328 (holding “that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, [and] the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries”), Hall J at 375 (holding that “the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial”). See also Asch & Macklem, *supra* note 76 at 502.

⁸¹ *Guerin v The Queen*, [1984] 2 SCR 335 at 379, Dickson J (holding that “is a pre-existing legal right not created by *Royal Proclamation*, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision”) [*Guerin*]. See also Asch & Macklem *supra* note 76 at 503.

⁸² *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 114, 189 [*Delgamuukw*].

⁸³ *Delgamuukw*, *ibid* at para 114.

⁸⁴ But see Asch & Macklem, *supra* note 76 at 500-501 (arguing that although the Supreme Court of Canada initially adopts an inherent rights approach with respect to Aboriginal rights in *Sparrow*, it “attempts to avoid one of its implications, namely, a constitutional right to aboriginal sovereignty, by abruptly switching to a contingent theory of aboriginal right and unquestioningly accepting Canadian sovereignty over its indigenous population”).

⁸⁵ *St Catherine's Milling PC*, *supra* note 30 at 54.

⁸⁶ Patrick Macklem, “Indigenous Peoples and the Ethos of Legal Pluralism in Canada” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 17 at 25-26.

be surrendered to the Crown.⁸⁷ The term ‘usufructuary’ comes from Roman law and refers to a right to use something without having complete ownership of it.⁸⁸

These principles have been modified or rejected by the Supreme Court of Canada’s Aboriginal title jurisprudence. The “personal and usufructuary” characterization was critiqued by Judson J in *Calder*,⁸⁹ by Dickson J in *Guerin*,⁹⁰ and by the majority in *Delgamuukw*.⁹¹ Justice Dickson explains that the term “personal” is “somewhat inaccurate” insofar as the nature of Indian title is not “completely exhausted by the concept of a personal right.”⁹² Indian title is personal in the sense that it is inalienable,⁹³ but it is more accurately characterized as *sui generis*—or unique—given that upon surrender, the Crown is subject to a fiduciary duty to “deal with the land for the benefit of the surrendering Indians.”⁹⁴

McNeil documents additional Supreme Court of Canada decisions holding that “Aboriginal title is only ‘personal’ in the sense of being inalienable”, but not in the sense of being non-proprietary.⁹⁵ As McNeil explains, although Aboriginal title is *sui generis*, the case law establishes that “it is a proprietary interest in land that stands on an equal footing and is entitled to the same respect as common law interests such as fee simple estates.”⁹⁶

Turning to the term ‘usufructuary’, the content of Aboriginal title is no longer limited to a mere license to use the land; the Supreme Court of Canada in *Tsilhqot’in* held that “Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to

⁸⁷ See *Attorney General for Quebec v Attorney General for Canada*, [1921] 1 AC 401 at 408, cited by Hall J in *Calder*, *supra* note 75 at 390.

⁸⁸ See Hall, *supra* note 51 at 280; Max Radin, “Fundamental Concepts of the Roman Law” (1924-1925) 13 Cal L Rev 207 at 218.

⁸⁹ *Calder*, *supra* note 75, Judson J at 328.

⁹⁰ *Guerin*, *supra* note 81, Dickson J at 382 (describing the terms “personal” and “usufructuary” as “somewhat inappropriate” with respect to Indian title); see Shin Imai, “Treaty Lands and Crown Obligations: The ‘Tracts Taken Up’ Provision” (2001) 27 Queens LJ 1 at 40.

⁹¹ *Delgamuukw*, *supra* note 82 at para 112.

⁹² *Guerin*, *supra* note 81, Dickson J at 382.

⁹³ See also *Delgamuukw*, *supra* note 82 at paras 113, 129, 131 (confirming that Aboriginal title is inalienable and can only be surrendered to the Crown).

⁹⁴ *Guerin*, *supra* note 81, Dickson J at 382. See also *Tsilhqot’in*, *supra* note 19 at paras 69, 71 (confirming that Aboriginal title “gives rise to a fiduciary duty on the part of the Crown”).

⁹⁵ McNeil, “Extinguishment”, *supra* note 79 at 313-14, citing *Canadian Pacific Ltd v Paul*, [1988] 2 SCR 654 at 677; *Delgamuukw*, *supra* note 82 at paras 112-13.

⁹⁶ McNeil, “Extinguishment”, *supra* note 79 at 314.

possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”⁹⁷ To summarize, the notion that Aboriginal title is nothing more than a non-proprietary right to use the land is no longer good law, and while it is still personal in the sense of being inalienable, it is also unique insofar as a surrender of Aboriginal title gives rise to a fiduciary duty on the part of the Crown.

3) Indian Title is Dependent on the Good Will of the Sovereign

Finally, Lord Watson held that Indian title is “dependent on the good will of the Sovereign.”⁹⁸ McNeil explains that “[s]ome Canadian judges have taken this to mean that Aboriginal title is subject to the will of the Crown, and so is extinguishable by the executive without legislative authorization.”⁹⁹ If this is the meaning of Lord Watson’s phrase, then his statement is no longer good law, as it is inconsistent with principles subsequently affirmed by the Supreme Court of Canada. In *Sparrow*, the Supreme Court established that prior to April 17, 1982 when section 35(1) came into force, Aboriginal rights—which includes title—could be extinguished by competent legislation; to effect an extinguishment, the legislation must have exhibited a clear and plain intention to extinguish the Aboriginal right.¹⁰⁰ As McNeil explains, this high threshold for extinguishment follows from the characterization of Aboriginal title as a property right, which can “only be unilaterally extinguished by or pursuant to clear and plain legislation.”¹⁰¹ The notion of unilateral extinguishment by the executive was coherent as long as Aboriginal title was non-proprietary, but not once the Court affirmed the proprietary nature of Aboriginal title.¹⁰²

⁹⁷ *Tsilhqot’in*, *supra* note 19 at para 73.

⁹⁸ *St Catherine's Milling PC*, *supra* note 30 at 54.

⁹⁹ McNeil, “Extinguishment”, *supra* note 79 at 311, referring to *Attorney General for Ontario v Bear Island Foundation* (1985), 49 OR (2d) 353 at 436 (Ont SC), *aff’d* 68 OR (2d) 394 at 410-13 (CA). Note, however, that the Supreme Court of Canada articulates its decision in this case not in terms of extinguishment by executive acts but in terms of extinguishment by surrender: [1991] 2 SCR 570 at para 7.

¹⁰⁰ *Sparrow*, *supra* note 8 at 1099. See also *Delgamuukw*, *supra* note 82 at para 180.

¹⁰¹ McNeil, “Extinguishment”, *supra* note 79 at 315.

¹⁰² See McNeil, “Extinguishment”, *ibid.*

To summarize, Lord Watson's conclusions that Indian title (i) owes its existence to the *Royal Proclamation, 1763*, (ii) is personal and usufructuary, and (iii) is dependent on the good will of the sovereign, have all been rejected or modified.

4) Indian Title is a Burden on the Crown's Underlying Title

The aspect of Lord Watson's reasoning which has not been overruled, and which was affirmed by the Supreme Court of Canada in *Tsilhqot'in*, is the principle that even before any so-called land surrender treaty was executed, the Crown in right of the province held underlying title to the land, and Aboriginal title was a mere burden on the Crown's underlying title. As discussed above, Lord Watson describes the Crown's title as "a substantial and paramount estate" and "a present proprietary estate" which is "underlying the Indian title".¹⁰³ The Indian title is a burden on the Crown's underlying title which becomes a "plenum dominium" when the Indian title is extinguished.¹⁰⁴ Although *Tsilhqot'in* no longer describes the content of the Crown's underlying title in terms of "a substantial and paramount estate" or "a present proprietary estate", it affirms the logic from *St Catherine's Milling* depicting Aboriginal title as a burden on the Crown's already existing underlying title: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival."¹⁰⁵ Later the Court reiterates that Aboriginal title is "a burden on the underlying title asserted by the Crown at sovereignty."¹⁰⁶

The characterization of Aboriginal title confirmed in *Tsilhqot'in* coheres with the principle of the inalienability of Aboriginal title. There is no need for a treaty to transfer title from Aboriginal peoples to the Crown because the Crown already has underlying title to all land in Canada by virtue of having asserted sovereignty over it. Instead, treaties merely extinguish or erase the burden attached to the Crown's underlying title, thereby leaving the Crown with an unblemished title. The Court in *Tsilhqot'in* affirmed the inalienability of Aboriginal title, although its language could be more precise. The Court states that Aboriginal title "cannot be

¹⁰³ *St Catherine's Milling PC*, *supra* note 30 at 55, 58.

¹⁰⁴ *St Catherine's Milling PC*, *ibid* at 55.

¹⁰⁵ *Tsilhqot'in*, *supra* note 19 at para 69.

¹⁰⁶ *Tsilhqot'in*, *ibid* at para 75.

alienated except to the Crown”.¹⁰⁷ This statement seems to imply that Aboriginal title can be alienated (but only to the Crown), as opposed to the principle that it can only be surrendered. It is unlikely, though, that the Court meant for this *obiter dicta* to effect a change in the law, especially given its renewed commitment to the depiction of Aboriginal title as a burden on the Crown’s already-existing underlying title. The logic underlying the image of the Crown holding an already-existing underlying title suggests that this title can be perfected by removing any burdens, rather than by transferring anything from another party to the Crown. Accordingly, the Court’s statement here is more likely an instance of imprecise language.

E The Doctrine of Discovery Paradigm

Which paradigm does the logic introduced in *St. Catherine’s Milling* and confirmed in *Tsilhqot’in* fall within: the doctrine of discovery paradigm or the equality paradigm? This section argues that it falls within the former, given the principle that Aboriginal title is a mere burden on the Crown’s already existing and underlying title. According to this logic, the Crown acquired the radical or underlying title to land when it asserted sovereignty, which occurred prior to executing any treaty.¹⁰⁸ When the Crown does finally execute a treaty, the treaty is not capable of either establishing a sharing of sovereignty or of extinguishing the sovereignty of Aboriginal peoples, because Aboriginal peoples do not have sovereignty at this point, according to this logic. Rather, all that Aboriginal peoples have, even before executing a treaty, is a burden on the Crown’s underlying title. This burden is not the kind of thing that can be transferred; the effect of the treaty is merely to extinguish the burden. Thus, what Aboriginal peoples were surrendering in the numbered treaties was not their sovereignty. In other words, not only were the treaties not a cession of sovereignty according to the Indigenous perspective, they also were not a cession of sovereignty according to the British/Canadian perspective reflected within the common law. Modern narratives that claim that Canada’s sovereignty can be grounded in Aboriginal surrenders of sovereignty in the treaties are thus revisionist and based on an inaccurate understanding of the actual legal framework articulated in *St Catherine’s Milling* and confirmed in *Tsilhqot’in*.

¹⁰⁷ *Tsilhqot’in*, *ibid* at para 74.

¹⁰⁸ *Tsilhqot’in*, *ibid* at para 69.

One might still wonder whether the *St Catherine's Milling/Tsilhqot'in* logic requires that the Crown's assertion of sovereignty—which gives rise to its radical, underlying title—necessarily was based on discovery, or whether it could have been based on one of the other modes of acquiring sovereignty, such as prescription or conquest.¹⁰⁹ Prescription provides that a state can gain sovereignty over foreign territory by, among other things, effectively occupying that territory for a sufficiently long period of time, even if the territory is already occupied.¹¹⁰ This could not have been the means by which the Crown acquired sovereignty prior to extinguishing the burden of Aboriginal title in the treaties, because the Crown did not exercise effective control over the land in question prior to executing many of the so-called historical land surrender treaties. This is particularly true with respect to Treaty Three. The very reason the Dominion government entered into Treaty Three was because it was obligated—pursuant to section 11 of the *British Columbia Terms of Union*—to build a railway connecting British Columbia to central Canada;¹¹¹ however, the Dominion was not capable of building the railway through what would become Treaty Three territory without the consent of the Indigenous peoples who controlled the territory. In describing the situation on the ground just before Treaty Three was executed, the trial judge in *Keewatin* held:

By 1873, the security of travellers over the Dawson Route and of surveyors preparing for the construction of the Canadian Pacific Railway ("CPR") was a concern. Canada feared it would have to incur the costs of

¹⁰⁹ See James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 220 (identifying occupation (discovery), accretion, cession, conquest, and prescription as the traditionally recognized modes of acquiring sovereignty at international law). See also Currie, *supra* note 3 at 285 (explaining that accretion refers to “natural processes that have the effect of gradually adding to...the extent of territory already under the sovereignty of a state”). Thus, accretion is not relevant to the question of how Britain or Canada purports to have acquired sovereignty over what is now Canada.

¹¹⁰ See Currie, *ibid* at 281. But see Crawford, *supra* note 109 at 229-30 (discouraging the categorization of prescription as a mode of acquiring sovereignty). For a critique of the application of prescription to Indigenous laws, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 19; Drake, *supra* note 2 at 120-32.

¹¹¹ *Order in Council respecting the Province of British Columbia, Order-in-Council*, 16 May 1871, SC 1872, lxxxiv, s 11 [*British Columbia Terms of Union*]. See also *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6 at para 342 [*Daniels*], aff'd 2014 FCA 101, aff'd 2016 SCC 12.

stationing troops in the area. The CPR needed to be completed between the Red River and Lake Superior by December 31, 1876.¹¹²

Similarly, the trial judge in *Daniels* found as a fact that the Indigenous population “stood in the way” of the railway construction insofar as those constructing the railway were subject to attack by Indigenous people.¹¹³ In order for construction of the railway to proceed, it was necessary to maintain “peaceful relations” with the Indigenous population.¹¹⁴ This was accomplished by executing the numbered treaties. Specifically, the expert evidence in *Keewatin* indicated that the Dominion’s reason for executing Treaty Three was to secure “the as yet unceded territory of the Saulteaux” which the railway would need to pass through.¹¹⁵ Thus, for whatever reason, stationing troops along the railway route in order to protect those building the railway from attack by Indigenous peoples was not a feasible option for Canada. Canada needed to get the consent of Indigenous peoples through treaties in order to proceed with railway construction. In other words, Canada was not in effective control of the relevant territory prior to executing Treaty Three.

The other potentially relevant mode of acquiring sovereignty is conquest, discussed above.¹¹⁶ In his decision, Lord Watson acknowledged Britain’s conquest of France’s territories in the Seven Years’ War, which included the territory at issue in *St Catherine’s Milling*.¹¹⁷ Did Britain also acquire sovereignty vis-à-vis Aboriginal peoples by means of its conquest of France’s colonies? This question must be answered in the negative, given the logic of *St Catherine’s Milling* and *Tsilhqot’in*. According to the common law, when Britain effected a conquest, the law of the conquered people continued in force until altered by legislation.¹¹⁸ The common law did not provide that conquest transformed the laws of a conquered people into the kind of burden on the Crown’s underlying title which could later be extinguished through treaty. As discussed above, treaties of surrender were sometimes executed concomitantly with conquest,

¹¹² *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 at para 50 [*Keewatin*], rev’d on other grounds 2013 ONCA 158, rev’d on other grounds 2014 SCC 48.

¹¹³ *Daniels*, *supra* note 111 at para 351.

¹¹⁴ *Daniels*, *ibid*.

¹¹⁵ *Keewatin*, *supra* note 112 at para 291.

¹¹⁶ See text accompanying notes 26-28.

¹¹⁷ *St Catherine’s Milling PC*, *supra* note 30 at 53.

¹¹⁸ See Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters Canada Limited, 2007) 5th ed, vol 1 (loose-leaf 2016 supplement) ch 2 at 8.

but this was done shortly after the conquest occurred and what was surrendered was the sovereignty of the vanquished nation. Treaties of surrender were not executed over one hundred years after the conquest occurred.¹¹⁹

If Britain and/or Canada did not acquire sovereignty vis-à-vis Aboriginal peoples by means of cession, prescription, or conquest, that leaves discovery as the only remaining option. The Supreme Court of Canada seems uncomfortable with this result, given its statement in *Tsilhqot'in* that 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)*”.¹²⁰ As John Borrows notes, however, “Canadian law still has *terra nullius* written all over it.”¹²¹ It is true that since *Calder*, when Aboriginal title was recognized as an inherent and thus a common law right, what is now Canada was not viewed as being utterly devoid of humans at the time of European arrival. That being said, the doctrine of *terra nullius* is still operative. The reason Aboriginal peoples have a mere burden on the Crown’s pre-existing and underlying title, instead of sovereignty, is because the land was viewed as *terra nullius*, or in other words empty of any people whose social and political organization was considered equal to that of Europeans. As a result, Europeans could acquire sovereignty over Indigenous territory by means of ‘discovery’ despite the presence of socially and politically organized Indigenous societies. The only blemish on a title acquired by discovery is the ‘burden’ which has come to be known as Aboriginal title. Thus, the doctrine of discovery and the principle of *terra nullius* are still operative within Canadian law.¹²²

As discussed at the beginning of this paper, the doctrine of discovery has been widely criticized for enshrining in law the supposed inferiority of Indigenous peoples.¹²³ I have witnessed people, when confronted with this fact, argue in response that it is problematic to try to hold societies of the past to today’s standards and values. Similarly, I have witnessed people argue that Aboriginal peoples should ‘get over it’ because their complaints are about ancient

¹¹⁹ Britain’s conquest of France’s colonies occurred in 1759-60, but Treaty Three was executed in 1873.

¹²⁰ *Tsilhqot'in*, *supra* note 19 at para 69.

¹²¹ John Borrows, “The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*” (2015) 48:3 UBC L Rev 701 at 702 [Borrows, “Durability”].

¹²² See Borrows, “Durability”, *ibid* at 723-26.

¹²³ See *supra* note 11.

history and one should look forward and focus on building a bright future rather than wallow in the past. The problem with these responses is that they are factually incorrect. The doctrine of discovery is not history; it is operative within Canadian law now. It is the current legal explanation for why Aboriginal peoples have only Aboriginal title (if they can pass the hurdle of satisfying the test for Aboriginal title) instead of sovereignty.¹²⁴ Borrows demonstrates that this issue is not merely academic when he traces the negative practical implications that flow from characterizing Aboriginal title as a burden on the Crown's underlying title acquired through discovery.¹²⁵ In this way, a deep prejudice exists at the heart of current Canadian law regarding Aboriginal peoples.¹²⁶

F Conclusion

For those who value principles such as equality, consent, and respect, which are so foundational to liberal democracies, the way forward is clear. As Justice Harry LaForme explains,

the roots of the Aboriginal law tree are rotten and are incapable of bearing anything that is sustainable. Our attempts to graft new and creative branches on to this tree - as we have witnessed since 1982 - will not bring health to the tree's roots. I believe that nothing less than a new approach is required, which includes discarding the false discovery doctrine and all that grew out of it...¹²⁷

The calls to expunge the doctrine of discovery and the concept of *terra nullius* from Canadian law are growing, and include exhortations from the Royal Commission on Aboriginal Peoples,¹²⁸ the *United Nations Declaration on the Rights of Indigenous Peoples*,¹²⁹ and the Truth and

¹²⁴ See Hoehn, *supra* note 13 at 104.

¹²⁵ Borrows, "Durability", *supra* note 121 at 727-40.

¹²⁶ Borrows, "Durability", *ibid* at 740.

¹²⁷ Harry LaForme, "Resetting the Aboriginal Canadian Relationship: Musings on Reconciliation" (Paper delivered at the Ontario Bar Association's Institute Conference, 7 February 2013) at 11 [unpublished].

¹²⁸ Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group—Publishing, 1996) at 685 (calling on federal, provincial, and territorial governments to acknowledge "that concepts such as *terra nullius* and the doctrine of discovery are factually, legally and morally wrong" and to declare "that such concepts no longer form part of law making or policy development by Canadian governments").

¹²⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007,

Reconciliation Commission.¹³⁰ The only question that remains is: Do we as Canadians have the courage of our convictions to do what we know is right?

GA Res 61/295 (UNGAOR, 61st Sess, Suppl no 49) (affirming in the preamble 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”).

¹³⁰ TRC, *Calls to Action*, *supra* note 25, Calls to Action 45, 46, 47, 49.