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# Indigenous Sovereignty and the Legality of Crown Sovereignty: An Unresolved Constitutional Conundrum

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Let me start by acknowledging and thanking the Enoch Cree Nation, on whose territory we are meeting.

So here we are, 150 years after Confederation, and yet the legal basis for Crown sovereignty over Canada remains uncertain.

The standard explanation is that the Crown acquired sovereignty over French Canada by cession of Acadia (French possessions in what became the Maritime Provinces) by the Treaty of Utrecht in 1713, and by conquest of New France in 1759-60 and cession by the Treaty of Paris in 1763. However, this leaves unexplained how France got sovereignty over territories that were occupied and controlled by Indigenous peoples. The extent of the French possessions in Canada is also an open question.

Over the rest of Canada, the Crown apparently got sovereignty by discovery, settlement, or mere assertion – all these possibilities have been offered, though none of them has been adequately explained.

To properly analyze this issue, I think a clear distinction has to be made between *de facto* and *de jure* sovereignty. *De facto* sovereignty involves effective control of a territory and the actual exercise of jurisdiction on the ground. It can be shown by factual evidence of the exercise of jurisdictional control through military presence and the exercise of governmental authority by officials such as bureaucrats, police officers, judges and so on who apply and enforce the law. It can also be established by the provision of government services such as surveying, postal services, the building and maintaining of roads and other infrastructure, etc.

In Canada, the Crown gained *de facto* sovereignty over centuries by gradually extending its actual control and exercise of jurisdiction. In the North, this wasn't complete until sometime well into the 20<sup>th</sup> century, and even now Crown sovereignty over the Northwest Passage is contested by some foreign states.

*De jure* sovereignty, on the other hand, involves acknowledgment by a particular legal system of acquisition of sovereignty. This raises a choice of law question: which legal system should be used to determine who has sovereignty?

In Canada, there are several choices:

1. The legal systems of the Indigenous peoples in the territory being colonized. These include both the internal, domestic legal system of each Indigenous nation, and inter-nation legal systems that governed their relations with one another.
2. The legal systems of the colonizing Europeans. Again, there are two possibilities here: the legal system of the colonizing power, and the law of nations or international law, which I prefer to call the European law of nations.
3. Intersocietal law developed through interaction between the Indigenous peoples and the colonizing nations, primarily through treaties.

The answer these legal systems each give to the question of who has sovereignty will not necessarily be the same.

*De jure* sovereignty is therefore relative – it depends on the application of a particular body of law and applies only to the entities with legal personality in that body of law. Taking the law of nations as an example, it would have applied only to the European nations that created and were subject to it.

Choosing which legal system to use to determine whether a particular entity like the Crown has sovereignty raises a normative issue of legitimacy: which legal system should be used? This is really a political and ethical issue, not a legal one.

So how have Canadian courts dealt with this matter of sovereignty? With respect, I would say in a confused, embarrassed manner.

In *Delgamuukw v. British Columbia* in 1997, Chief Justice Lamer accepted the decisions of the lower courts that Crown sovereignty in B.C. had been acquired in 1846 when Britain and the United States signed the Oregon Boundary Treaty. This implies a choice of international law as the basis for Crown sovereignty because it depends on an international treaty.

The Crown sovereignty the Court regarded as acquired in 1846 had to be *de jure* sovereignty because at the time the Crown clearly did not have effective control over the Gitksan and Wet'suwet'en territories that were at issue in *Delgamuukw*.

So why should a bilateral international treaty determine sovereignty over these Indigenous nations that were not subject to international law and that had both the control necessary for *de facto* sovereignty and their own equivalent of *de jure* sovereignty in their own legal orders?

Then in the *Haida Nation* and *Taku River Tlingit First Nation* decisions in 2004, the Supreme Court began to show some awareness of the confused judicial reasoning on this issue. In those cases, Chief Justice McLachlin acknowledged the pre-existing sovereignty of the First Nations in British Columbia for the first time and described Crown sovereignty as *de facto*.

She suggested that the two had to be reconciled through mutually respectful negotiations leading to treaties. Felix Hoehn's book, *Reconciling Sovereignties: Aboriginal Nations and Canada* (2012), contains a very good analysis of this aspect of these decisions.

And then in the *Tsilhqot'in Nation* decision in 2014, Chief Justice McLachlin reverted to the position in *Delgamuukw* that Crown sovereignty in B.C. dated from the Oregon Boundary Treaty of 1846. What, one may ask, happened to pre-existing Aboriginal sovereignty and the distinction between *de facto* and *de jure* sovereignty acknowledged in *Haida Nation*?

I now want to shift my focus from British Columbia to the Prairies where some of the numbered treaties were entered into. I'm going to talk about one obscure case, *Canada (MNR) v. Ochapowace Ski Resort*, [2002] 4 CNLR 76, from Saskatchewan in 2002. Yes, there are ski resorts in Saskatchewan, where I'm from, in this instance in the Qu'Appelle Valley!

The Ochapowace First Nation has a ski resort on its reserve, which is in the area of Treaty 4 that was entered into in 1874. They refused to collect GST for Canada because they assert that they are in a nation-to-nation relationship with Canada and do not have to collect tax for another government. They created their own tax for the patrons of their ski resort, most of whom are not First Nations people. They were convicted for violation of the *Canada Excise Tax Act* by Justice Rathgeber.

Now this was only a Provincial Court decision so it is not of much value as a legal precedent, but in it the issues and the attitude and assumptions of Canadian courts were very clearly articulated. It is therefore valuable for illustrative purposes.

I also have a personal interest in the case because I was one of the expert witnesses for the First Nation, on the international law requirements for *de jure* sovereignty to be acquired in the 19<sup>th</sup> century.

A number of Elders also testified along with some prominent historians and other academics, among them Sarah Carter, Jim Miller, Blair Stonechild, and Sharon Venne. In my opinion, these witnesses clearly established that the Indigenous nations who had entered into Treaty 4 exercised *de facto* sovereignty over the treaty area prior to 1874, and that the Crown did not have the necessary control before the treaty for it to have *de facto* sovereignty.

The international law witnesses, including myself, testified that in the 1870s this body of law would not have conferred *de jure* sovereignty on the Crown because it was not in effective control of the territory.

So the argument for the Ochapowace First Nation was that it had sovereignty – *de facto*, and *de jure* under its own laws – prior to entering into the treaty, and that the treaty was about sharing sovereignty on a nation-to-nation basis, as well as about sharing the land. One way of understanding this would be to think of the treaty as creating intersocietal law for the sharing of sovereignty and land.

The Crown did not call any witnesses to rebut the evidence provided by the experts to support this argument. And yet, Justice Rathgeber decided that the Indigenous parties to Treaty 4 had not been sovereign and that the Crown acquired sovereignty by discovery and the exercise of control at the latest in 1818 when Britain and the

United States entered into an international convention whereby they agreed that the 49<sup>th</sup> parallel would be the boundary between their respective territories on the Prairies. He said the evidence of the experts was “to some extent disappointing and in some cases they would more properly be called advocates.” How he was able to dismiss the evidence of those witnesses and arrive at contrary conclusions when the Crown did not call any witnesses of its own to rebut this evidence is a good question.

But what this case really reveals is the judicial mindset in Canada. Judges are very reluctant to take pre-existing and continuing Indigenous sovereignty into account. There was a glimmer of hope in the *Haida Nation* decision in 2004, decided two years after the *Ochapowace* case, but that glimmer mysteriously disappeared in the *Tsilhqot’in Nation* decision.

Justin Trudeau’s government has said it will implement the UN Declaration on the Rights of Indigenous Peoples and seek reconciliation with the Indigenous peoples of Canada on a nation-to-nation basis.

But actions speak louder than words – the Crown needs to stop relying on the worn-out dogma that it acquired sovereignty in Canada by discovery and mere assertion.

It needs to acknowledge the pre-existing and continuing sovereignty of the Indigenous peoples in both the treaty and the non-treaty areas of Canada, and work with Indigenous peoples to achieve reconciliation on that basis.

This should of course have happened long ago, but surely Canada’s 150th birthday is a good time to start to make it actually happen!

**More detailed discussion of the issue of Indigenous and Crown sovereignty can be found in some of my publications:**

“The Doctrine of Discovery Reconsidered: Reflecting on Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* and Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada*” (2016) 53:2 *Osgoode Hall Law*

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“Sovereignty and Indigenous Peoples in North America” (2016) 22:2 *University of California Davis Journal of International Law and Policy* 81

“Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions”, in Julie Evans, Ann Genovese, Alexander Reilly, and Patrick Wolfe, eds., *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai‘i Press, 2013), 37

“Indigenous Nations and the Legal Relativity of European Claims to Territorial Sovereignty in North America”, in Sandra Tomsons and Lorraine Mayer, eds., *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills, Ontario: Oxford University Press, 2013), 242

“Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest”, in Alexandra Harmon, ed., *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008), 35