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The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn

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Review Essay



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The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn

Abstract

This is a review essay discussing two books: *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and *Reconciling Sovereignties: Aboriginal Nations and Canada*, by Felix Hoehn.

Keywords

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*Reconciling Sovereignties: Aboriginal
Nations and Canada*, by Felix Hoehn²**

KENT MCNEIL³

THERE CAN BE NO DOUBT that the Indigenous nations in North America, Australia, and New Zealand were factually independent and sovereign prior to the arrival of Europeans.⁴ They occupied specific territories and had viable

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1. (Oxford: Oxford University Press, 2010) [Miller et al, *Discovering Indigenous Lands*].
 2. (Saskatoon: University of Saskatchewan Native Law Centre, 2012) [Hoehn, *Reconciling Sovereignties*].
 3. Professor, Osgoode Hall Law School, York University. I would like to thank John Borrows, Kathy Simo, Kerry Wilkins, and John Wunder for reading and providing very helpful feedback on drafts of this essay.
 4. De facto sovereignty does not require acknowledgement by any particular legal system, nor does it depend on Eurocentric conceptions of sovereignty. See Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) 37 [McNeil, "Factual and Legal Sovereignty"].

social, political, and legal systems that suited their needs and were adapted to the circumstances in which they lived.⁵ Consequently, the European powers should not have been able to acquire territorial sovereignty by original means such as discovery and settlement; instead, sovereignty would have had to be acquired derivatively from the Indigenous nations by conquest or cession.⁶ With the exception of Australia, the British Crown's acceptance of this was to some extent confirmed by the fact that it entered into numerous treaties with the Indigenous peoples, which can be regarded as acknowledgement of their sovereign status.⁷ And yet for many years the highest courts in the four settler nations of the United States, Canada, Australia, and New Zealand have relied, explicitly or implicitly, on the so-called discovery doctrine that was judicially articulated by Chief Justice Marshall of the United States Supreme Court in his seminal 1823 decision in

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5. Even in the European law of nations up to the nineteenth century, this would have been sufficient for them to have sovereignty. See *e.g.* Michel Morin, *L'Usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* (Montréal: Boréal, 1997) at 31-62; Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758), translated by Joseph Chitty (London: S Sweet, 1834), § 206. Vattel observes that “[i]f a number of free families, scattered over an independent country, come to unite for the purpose of forming a nation or state, they all together acquire the sovereignty over the whole country they inhabit.”
 6. See *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 [*Western Sahara*]. In international and British colonial law at the relevant time, the principal means by which territorial sovereignty could be acquired were occupation/settlement and conquest/cession. See DP O’Connell, *International Law*, 2nd ed (London: Stevens & Sons, 1970) vol 1 at 408-17; James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 220-29; Charles James Tarring, *Chapters on the Law Relating to the Colonies*, 4th ed (London: Stevens & Haynes, 1913) at 3-24; Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 99-112. For critical discussion, see Patrick Macklem, “What is International Human Rights Law? Three Applications of a Distributive Account” (2007) 52:3 McGill LJ 575 at 590-94.
 7. See Robert A Williams, Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997); Michael Belgrave et al, eds, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (South Melbourne: Oxford University Press, 2005); James (Sa’ke’j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Carswell, 2007).

Johnson v McIntosh.⁸ Why is legal doctrine so at odds with reality and historical practice, as well as with current standards of equality of peoples?

In *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, four leading Indigenous scholars critically analyze and assess the origins and application of the doctrine of discovery in these four settler states. Robert Miller, a citizen of the Eastern Shawnee Tribe of Oklahoma and professor at Lewis and Clark Law School in Portland, Oregon, introduces the subject and examines the legal adoption and historical application of the doctrine in the United States. Tracey Lindberg, a Cree citizen (Neheiywak) from the Kelly Lake Cree Nation, professor of law at the University of Ottawa, and professor of Indigenous Studies at Athabasca University, writes about the doctrine of discovery in Canada. Larissa Behrendt, a Eualeyai/Gamillaroi woman and professor of law and director of research at the Jumbunna Indigenous House of Learning at the University of Technology in Sydney, assesses the use of the doctrine in Australia. Jacinta Ruru, a senior lecturer in law at the University of Otago who is of Ngati Raukawa (Waikato), Ngati Rangi, and Pakeha descent, examines the application of the doctrine in Aotearoa/New Zealand and concludes the book with a comparison of discovery in these former English colonies.

In this review essay, it is not my intention to summarize the history and case law that the authors of *Discovering Indigenous Lands* have so ably presented and critiqued. They have amply demonstrated how the doctrine of discovery has been used in the settler states to attempt to justify the Crown's acquisition of sovereignty and lands and to legitimize the continuing domination of Indigenous peoples by the four nation-states after they achieved independence from Britain. In so doing, the authors have gone far beyond previous critiques of the doctrine

8. 21 US (8 Wheat) 543, 5 L Ed 681 (1823) [*Johnson* cited to Wheat]. For relatively recent affirmation of the doctrine of discovery in the United States, see *County of Oneida, New York v Oneida Indian Nation of New York State*, 470 US 226 at 434, 105 S Ct 1245 (1985), referred to in *City of Sherrill v Oneida Indian Nation of New York*, 544 US 197 at 203 n1, 125 S Ct 1478 (2005). The Supreme Court of Canada, however, has recently begun to distance itself from the discovery doctrine. See *infra* notes 86-95 and accompanying text.

that have tended to focus on one jurisdiction, typically the United States.⁹ Their comparative approach and comprehensive analysis are what make *Discovering Indigenous Lands* such a significant contribution to our understanding of how law has been used to justify British colonization and the continuing impact this has had on the Indigenous peoples in the settler states discussed in the book.

Felix Hoehn's book, *Reconciling Sovereignties: Aboriginal Nations and Canada*, was published after *Discovering Indigenous Lands*. As the title indicates, the focus is on Canada and the tension between pre-existing Indigenous sovereignty and unilateral Crown assertion of sovereignty. Like the authors of *Discovering Indigenous Lands*, Hoehn concludes that the doctrine of discovery is premised on notions of European superiority that are inherently racist and have no place in modern-day Canada. However, Hoehn's book is the more forward looking and optimistic of the two. Relying on the Supreme Court of Canada's 2004 decisions in *Haida Nation v British Columbia (Minister of Forests)*¹⁰ and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*,¹¹ and the distinction Chief Justice McLachlin drew in her judgments in those cases between de facto and de jure sovereignty, he suggests that a paradigm shift in legal thinking is underway in which the doctrine of discovery has no place. He argues that this shift could lead to a reconciliation of Indigenous and Crown sovereignty in a reconstructed Canada that is no longer based on racist premises.

My modest goals in this review essay are two-fold: first, to support the conclusions of the authors of *Discovering Indigenous Lands* that the doctrine of discovery as formulated by Chief Justice Marshall is seriously flawed and to argue that even his flawed formulation has been misapplied in subsequent jurisprudence; and second, to assess Hoehn's contention that the Supreme Court of Canada (SCC) has already abandoned the doctrine and is moving towards a position that is more respectful of the pre-existing sovereignty of the Indigenous peoples and their present right to govern themselves and their territories. My

9. See e.g. Vine Deloria, Jr, *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985) at 85-111; David E Wilkins & K Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, Okla: University of Oklahoma Press, 2001) at 19-63; Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009) at 88-115. For recent articles focusing on other jurisdictions, see Jennifer Reid, "The Doctrine of Discovery and Canadian Law" (2010) 30:2 Can J Native Stud 335; Blake A Watson, "The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand" (2011) 34:2 Seattle UL Rev 507 [Watson, "Impact of the Doctrine of Discovery"].

10. 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

11. 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

focus is therefore on the application of the doctrine of discovery in North America and its present-day relevance to Canada in particular.

I. CHIEF JUSTICE MARSHALL AND THE DOCTRINE OF DISCOVERY

Johnson, the case in which the doctrine of discovery emerged as a legal concept in American law, involved rival claims to approximately 43,000 square miles of land north of the Ohio River in what became the states of Illinois and Indiana. The land had been purchased by the Illinois and Wabash Companies from the Illinois and Piankeshaw Indian Nations in 1773 and 1775, at a time when Great Britain claimed sovereignty over the territory where the lands are located. Britain's claim to sovereignty was based primarily on the Treaty of Paris of 1763, whereby it had acquired La Nouvelle France, which allegedly extended southwest from the Great Lakes to the Mississippi River.¹² France's claim to sovereignty over the region was based on discovery, exploration, and symbolic acts of possession, which were followed by the establishment of a few forts and settlements, mainly along the Mississippi River.¹³ As a result of the American Revolution and the 1783 Treaty of Paris, Britain's claim to this region passed to the United States. Pursuant to its policy of purchasing lands from the Indian nations, the US government, by treaty with the Illinois and Piankeshaw Nations, acquired the same lands that had been purchased by the Illinois and Wabash Companies prior to the American Revolution. The government then granted some of these lands to private persons, giving rise to the rival claims that were the subject of the litigation in *Johnson*.¹⁴

12. French Louisiana, including New Orleans and territory on the west side of the Mississippi River, had been ceded by France to Spain by the Treaty of Fontainebleau in 1762.

13. In 1682, La Salle had descended the Mississippi to its mouth and claimed the entire watershed on behalf of the King of France. See e.g. John W Monette, *History of the Discovery and Settlement of the Valley of the Mississippi, by the Three Great European Powers, Spain, France and Great Britain*, vol 1 (New York: Harper and Brothers, 1846) at 144; John Anthony Caruso, *The Mississippi Valley Frontier: The Age of French Exploration and Settlement* (Indianapolis: Bobbs-Merrill Company, 1966) at 159-81; Carl J Ekberg, *French Roots in the Illinois Country: The Mississippi Valley Frontier in Colonial Times* (Urbana, Ill: University of Illinois Press, 1998) at 22.

14. This summary is a simplification of a complex series of events leading up to the litigation. See Eric Kades, "History and Interpretation of the Great Case of *Johnson v. McIntosh*" (2001) 19:1 L & Hist Rev 67; Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005) [Robertson, *Conquest by Law*].

Chief Justice Marshall decided that the purchases of the lands of the Illinois and Piankeshaw Nations by the Illinois and Wabash Companies were unenforceable in the courts of the United States for three reasons. First, discovery of parts of North America by Europeans gave the discovering nation an underlying title to the land and an exclusive right to purchase the Indians' right of occupancy. Second, if these lands were purchased under the laws of the Illinois and Piankeshaw Nations, the purchases were subsequently annulled by the sale of the same lands by these nations to the United States and could not be enforced in American courts. Third, the British Crown had prohibited private purchases of Indian lands by the Royal Proclamation of 1763, and this proclamation applied to the lands in question in 1773 and 1775. For the purposes of this review, our discussion will be limited to analyzing the first of these reasons.

Chief Justice Marshall began his exposition of the discovery doctrine by explaining that, on discovery of North America, "the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire."¹⁵ But given that they all were in pursuit of basically the same objective, he said that

it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.¹⁶

Chief Justice Marshall went on to say that, because the discovering nation was legally entitled to exclude all other Europeans from the discovered territory, it had "the sole right of acquiring the soil from the natives, and establishing settlements upon it."¹⁷ Moreover, the pre-existing sovereignty and land rights of the Indian nations were impaired:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.¹⁸

15. *Johnson*, *supra* note 8 at 572.

16. *Ibid* at 573.

17. *Ibid*.

18. *Ibid* at 574. See also *ibid* at 603.

The Chief Justice then went a step further, asserting that the discovering nation, because it had “the ultimate dominion,” also had “a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.”¹⁹

In five short paragraphs, Chief Justice Marshall thus laid down some of the fundamental legal principles that still determine the rights of the Indian nations in the United States. He dealt first with European acquisition of territorial sovereignty, which was achieved by discovery, subject only to the apparent qualification that this title needed to be “consummated by possession.”²⁰ Discovery also gave the government of the European nation on whose behalf it was made the exclusive right to acquire land from the Indian nations. While this would have been sufficient for Chief Justice Marshall to conclude that the private purchases from the Illinois and Piankeshaw Nations were invalid, he nonetheless went on to hold that the European nation also acquired title to the land by discovery, reducing pre-existing Indian rights to a right of occupancy.²¹ For this reason, the European nation could validly grant Indian lands, thus conveying a good title to the grantee that would be subject to the Indian right of occupancy.²² After the American Declaration of Independence, this authority to grant passed to the individual States, and then to the United States in the western regions that were ceded by States to the United States after the ratification of the Constitution in 1789.²³

19. *Ibid* at 574.

20. See *supra* note 16 and accompanying text.

21. See Blake A Watson, “The Doctrine of Discovery and the Elusive Definition of Indian Title” (2011) 15:4 Lewis & Clark L Rev 995 [Watson, “Doctrine of Discovery”]. Chief Justice Marshall’s reliance on a supposed doctrine of international law to explain the British Crown’s underlying title to Indian lands has been effectively critiqued by Howard Highland, who argues that the Crown’s title to land in the Thirteen Colonies prior to the American Revolution should have been derived from the domestic law doctrine of tenure rather than the doctrine of discovery, but the unpopularity of feudal-based tenure in the young republic would have made that explanation unpalatable for the Chief Justice. See Howard Highland, *Constitutional Realism and Third Party Property Rights in Tsilhqot’in Nation v. British Columbia and Oneida Nation v. New York* (LLM Thesis, York University, Osgoode Hall Law School, 2011) [unpublished] at 92-123.

22. In the English law that applied in the American colonies, what would have been granted was a fee simple estate, but in remainder after the Indian right of occupancy rather than in possession. This had already been suggested by the Marshall Court in *Fletcher v Peck*, 10 US (6 Cranch) 87, 3 L Ed 162 (1810) [*Fletcher* cited to Cranch]. This decision was affirmed by Chief Justice Marshall in *Johnson*, *supra* note 8 at 592.

23. *Johnson*, *ibid* at 584-86.

Lindsay Robertson, in his illuminating study of the background and political context of *Johnson*, has argued convincingly that Chief Justice Marshall went beyond the parameters of the case as pleaded and argued in order to uphold land grants by Virginia to Revolutionary War militiamen in western areas where the Indian title had not yet been acquired by treaty.²⁴ As Robertson has pointed out, Chief Justice Marshall could have disposed of the case before him quite easily by relying on the Royal Proclamation of 1763. Instead, he formulated the doctrine of discovery as a means for asserting that France and Great Britain had title to lands within the territories claimed by them in North America, and that the States succeeded to the title of Britain after they declared their independence. According to Robertson, Marshall thereby fulfilled his purpose, which was clearly outside the scope of the case, of supporting the validity of the militia grants.

In addition, Robertson has shown how flimsy the authority really was for the doctrine of discovery, as formulated by Chief Justice Marshall. Much of the support for it was extracted from Marshall's own much criticized work as a colonial historian in volume one of his *Life of George Washington*, originally published in 1804.²⁵ As Marshall did not have access to primary sources in writing the history of the American colonies contained in this volume, he relied almost exclusively on the work of a few prominent authors, whose own methodology was open to question. Moreover, he ignored alternative histories, such as Thomas Jefferson's *Notes on the State of Virginia*,²⁶ that would have provided different perspectives.²⁷

Foremost among the authorities Marshall relied upon in volume one of his *Life of George Washington* was George Chalmers, who published his *Political Annals of the Present United Colonies from their Settlement to the Peace of 1763* in 1780.²⁸ Regarding European colonization of North America, Chalmers had written: "It soon became a law among the European nations, that the counties which each should explore shall be deemed the absolute property of the discoverer,

24. Robertson, *Conquest by Law*, *supra* note 14 at 77-112.

25. John Marshall, *The Life of George Washington, Commander in Chief of the American Forces, During the War Which Established the Independence of His Country, and First President of the United States* (Philadelphia: CP Wayne, 1804) vol 1. For a passage-by-passage comparison, see Lindsay G Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Doctrine of Discovery" (1997) 13:4 JL & Pol 759 [Robertson, "John Marshall as Colonial Historian"].

26. (1784, reprinted Chapel Hill, NC: University of North Carolina Press, 1955) vol 1. Personal animosity may have contributed to this omission, as it is well known that Marshall and Jefferson were antagonists. See Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Company, 1996) at 11-14, 333-34.

27. Robertson, *Conquest by Law*, *supra* note 14 at 102-3.

28. (reprinted New York: Burt Franklin, 1968).

from which all others shall be entirely excluded.”²⁹ The major problem with this assertion was that it is not apparent that such a rule was ever part of the European law of nations. From the time Columbus first arrived in the Americas in 1492, the European nations had relied on a variety of methods to assert their territorial claims. These included discovery, papal grants, symbolic acts of possession, colonial charters, and effective occupation by settlement. There was, however, no agreement among Europeans over the effectiveness of these various acts, apart perhaps from effective occupation. While Spain and Portugal favoured discovery and papal grants because it was generally in their interests to do so, France and Britain relied more on symbolic acts, colonial charters, and occupation.³⁰

Moreover, Chalmers himself, in the paragraphs preceding the passage just quoted, acknowledged these alternative methods and, while rejecting the efficacy of papal grants, seems to have endorsed the position of Emer de Vattel, probably the most influential international jurist of the time, on the acquisition of territorial sovereignty by occupation.³¹ Vattel wrote that,

[When] a nation finds a country uninhabited, and without an owner, it may lawfully take possession of it: and, after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus, navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name

29. *Ibid* at 6.

30. See e.g. L Oppenheim, *International Law: A Treatise*, vol 1 (London: Longmans, Green, 1905) at 265; MF Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green & Co, 1926); Friedrich August Freiherr von der Heydte, “Discovery, Symbolic Annexation and Virtual Effectiveness in International Law” (1935) 29:3 Am J Int’l L 448; Julius Goebel, Jr, *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* (Port Washington, NY: Kennikat Press, 1971) at 47-119; John Thomas Juricek, “English Claims in North America to 1660: A Study in Legal and Constitutional History” (PhD Dissertation, University of Chicago Department of History, 1970) [unpublished]; Brian Slattery, *French Claims in North America 1500-59* (Saskatoon: University of Saskatchewan Native Law Centre, 1980); Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50; Patricia Seed, *Ceremonies of Possession in European Conquest of the New World, 1492-1640* (Cambridge: Cambridge University Press, 1995); Ali Friedberg, “Reconsidering the Doctrine of Discovery: Spanish Land Acquisition in Mexico (1521-1821)” (1999) 17:1 Wis Int’l LJ 87. Compare Arthur S Keller, Oliver J Lissitzyn & Frederick J Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* (New York: Columbia University Press, 1938).

31. Chalmers, *supra* note 28 at 5.

of their nation: and this title has been usually respected, provided it was soon after followed by a real possession.³²

Elaborating on his important qualification that the discovery and formal act of taking possession had to be “soon after followed by a real possession,” Vattel questioned “whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate.”³³ He accordingly concluded:

The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. In effect, when navigators have met with desert countries in which those of other nations had, in their transient visits, erected some monument to shew their having taken possession of them, they have paid as little regard to that empty ceremony, as to the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal.³⁴

Ignoring the fact that Vattel was referring to uninhabited countries of which possession had actually been taken, Chalmers concluded that by virtue of voyages of discovery and exploration of the east coast of North America by Sebastian Cabot, Sir Humphrey Gilbert, and Sir Walter Raleigh, “the sovereigns of England acquired, by the equity of first discovery and prior possession, a title, in right of the crown, to a great part of the North-American continent.”³⁵ Chalmers concluded as well that the Indians of North America presented no barrier in law to the acquisition of this title, as “[t]he roving of the erratic tribes over wide extended deserts does not form a possession which excludes the subsequent occupancy of emigrants from countries overstocked with inhabitants.”³⁶ Here too Chalmers relied on Vattel, who had opined that the principle that no nation could appropriate for itself more territory than it could effectively occupy and use meant that nations with scant populations could not have title to immense regions used only for hunting, fishing, and gathering. But while Vattel concluded from this that one does not “deviate from the views of nature in confining the Indians within narrower limits,”³⁷ his approach would not have permitted

32. Vattel, *supra* note 5, § 207.

33. *Ibid.*, § 208.

34. *Ibid.*

35. Chalmers, *supra* note 28 at 5.

36. *Ibid.*

37. Vattel, *supra* note 5, § 209.

Europeans to acquire by occupation areas that were more intensively used by the Indian nations for agriculture and other purposes.³⁸ In this regard as well, Chalmers went well beyond the authority of Vattel on which he relied.³⁹

In a footnote, Chalmers also referred to William Blackstone's *Commentaries on the Laws of England*,⁴⁰ without acknowledging that Blackstone had expressed contrary views on the acquisition of European sovereignty in North America. In a particularly scathing passage, Blackstone had written in reference to acquisition of territory by occupation:

[S]o long as it was confined to flocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.⁴¹

Consistent with this, Blackstone had concluded that Britain's American colonies had generally been acquired, not by occupation of legally vacant territory, but by conquest and treaty.⁴²

So Chalmers' views on the law of nations in relation to acquisition of North America by English discovery and exploration were not supported by the authorities upon which he purported to rely. By depending on Chalmers in his exposition of the doctrine of discovery in volume one of the *Life of George*

38. On Indian land use in New England, see William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill & Wang, 1983). On the disregard of Indian agriculture by Americans in the early years of the nineteenth century, see Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Harvard University Press, 2005) at 150-60.

39. It is worth noting that in *Johnson v M'Intosh*, Chief Justice Marshall declined to "enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right on abstract principles, to expel hunters from the territory they possess, or to contract their limits" (*supra* note 8 at 588). Instead, somewhat inconsistently with his formulation of the doctrine of discovery, he concluded that "[c]onquest gives a title which the Courts of the conqueror cannot deny" (*ibid*). However, he obviously had some difficulty with this explanation, as later in his judgment he described "the pretension of converting the discovery of an inhabited country into a conquest" as "extravagant" (*ibid* at 591).

40. Chalmers, *supra* note 28 at 9, n 16, citing William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69).

41. *Ibid*, vol 2 at 7 [*sic*]. Significantly, Blackstone was writing in the decade immediately after the publication of Vattel's celebrated work in 1758 and less than 15 years before Chalmers' book was published.

42. *Ibid*, vol 1 at 108-09.

Washington, Chief Justice Marshall committed the same errors. These errors were then transposed into his judgment in *Johnson*. But in fact his assertion in that case that all the colonizing European nations agreed that territorial sovereignty in North America could be acquired by discovery was simply not true.⁴³ Moreover, Chief Justice Marshall should have known better, as he was familiar with the well-known and influential works of Vattel and Blackstone.⁴⁴

Lindsay Robertson has pointed out that Chief Justice Marshall changed his views on the doctrine of discovery in *Worcester v Georgia*,⁴⁵ after he saw how *Johnson* was being used to subject the Indians to State laws and force their removal west of the Mississippi.⁴⁶ In *Worcester*, Chief Justice Marshall acknowledged the independence of the Indian nations and questioned the value of discovery as a means of acquiring territorial sovereignty in North America:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.⁴⁷

Chief Justice Marshall was not, however, prepared to discard entirely the doctrine of discovery he had formulated nine years earlier in *Johnson*. Instead, he modified it by stating that it only governed relations among the colonizing European powers—it did not affect the prior rights of the Indian nations. He wrote that,

43. See *supra* note 30.

44. Marshall's legal education included the study of Blackstone. See Smith, *supra* note 26 at 75-78. Vattel was cited in relation to the rights of the Indian nations in argument in *Fletcher*, *supra* note 22; Blackstone was referred to by Chief Justice Marshall in his judgment in that case at 138, 144. Chief Justice Marshall is said to have cited Vattel more often than any other author on the law of nations. See James G Apple, "Emmerich de Vattel (Switzerland), 1714-1767" (2013), online: International Judicial Monitor <http://www.judicialmonitor.org/archive_spring2013/leadingfigures.html>.

45. 31 US (6 Pet) 515, 8 L Ed 483 (1832) [*Worcester* cited to Pet]. See also Kent McNeil, "Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims" (2000) 39:3 J West 10 at 11-14; Mark D Walters, "The Morality of Aboriginal Law" (2006) 31:2 Queen's LJ 470 at 503-09; Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hart Publishing, 2014) at 51-58.

46. Robertson, *Conquest by Law*, *supra* note 14 at 118-35.

47. *Worcester*, *supra* note 45 at 542-43.

[Discovery] was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.⁴⁸

But by then, Robertson contends, it was too late: The doctrine of discovery and the consequential acquisition of title to Indian lands by the discovering sovereign (subject to a continuing Indian right of occupancy), as propounded by Chief Justice Marshall in *Johnson*, was already fueling Indian removal, and this process could not be stopped by a revision of the law. Moreover, appointees to the US Supreme Court by President Andrew Jackson, a key proponent of removal, supported the policy and its juristic underpinnings in subsequent decisions, effectively nullifying Chief Justice Marshall's revision of the doctrine in *Worcester*.⁴⁹

There can be no doubt that Chief Justice Marshall's doctrine of discovery, as initially formulated in *Johnson*, was seriously flawed. We have already seen that it was not supported by the authorities cited by Chalmers, who was subsequently relied upon by the Chief Justice. Moreover, it was inconsistent for Chief Justice Marshall to conclude, as he did in his judgment in that case, that the Indian nations' "rights to complete sovereignty" had been diminished by European discovery,⁵⁰ because if the Indian nations had been sovereign then their territories could only have been acquired derivatively by conquest or cession.⁵¹ The self-serving, imperialist foundations, as well as the racist assumptions, underlying the doctrine of discovery are also glaringly apparent, as made abundantly clear

48. *Ibid* at 544.

49. Robertson, *Conquest by Law*, *supra* note 14 at 135-42; Pommersheim, *supra* note 9 at 100; Watson, "Doctrine of Discovery," *supra* note 21 at 1006-07. See e.g. *Martin v Waddell's Lessee*, 41 US (16 Pet) 367 at 409, 10 L Ed 597 (1842). Chief Justice Taney wrote:

The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.

50. See *supra* note 18 and accompanying text.

51. The International Court of Justice reached this conclusion in its advisory opinion in relation to northwest Africa. See *Western Sahara*, *supra* note 6. On the distinction between original and derivative territorial acquisition, see O'Connell, *supra* note 6; Crawford, *supra* note 6; Tarring, *supra* note 6; Roberts-Wray, *supra* note 6.

in *Discovering Indigenous Lands*.⁵² Furthermore, as Chief Justice Marshall realized when he wrote his judgment in *Worcester*, any agreement among the European powers on the rules for acquisition of territorial sovereignty overseas would have been binding only among themselves, not on the Indian nations who were not parties thereto.⁵³

As we have seen, Lindsay Robertson has argued convincingly that Chief Justice Marshall's formulation of the doctrine of discovery in *Johnson* was influenced by his desire to uphold the legal validity of Virginia's grants to Revolutionary War veterans. But did it serve other purposes that may or may not have been in Marshall's mind? At stake at the relevant times were not only land titles of grantees of the States, but also the territorial ambitions of the United States further west that came to be expressed by the concept of manifest destiny.⁵⁴ In 1803, President Thomas Jefferson had purchased the Louisiana Territory from France, supposedly doubling the size of the United States.⁵⁵ That was the year before Chief Justice Marshall published volume one of his *Life of George Washington*. In 1819, the uncertain western boundary of that territory was settled with Spain by the Adams-Onís Treaty.⁵⁶ In the four years between the signing of that treaty and the US Supreme Court's decision in *Johnson*, the Oregon boundary dispute with Britain had heated up to the point where Congress was openly debating unilateral occupation.⁵⁷ To what extent were these territorial claims supported by Marshall's doctrine of discovery?

52. See Robert A Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 308-17. See also *supra* note 9.

53. In international law, as well as in domestic contract law, agreements are generally binding only on the parties thereto. See *Direct United States Cable Company v Anglo-American Telegraph Company* (1887) 2 AC 394 at 421; *Clipperton Island Case* (1932), 26 Am J Int'l L 390 at 394; Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 309-21; Charles G Fenwick, *International Law*, 4th ed (New York: Appleton-Century-Crofts, 1965) at 412; Crawford, *supra* note 6 at 384-85; Malcolm N Shaw, *International Law*, 7th ed (Cambridge: Cambridge University Press, 2014) at 672-74.

54. See DW Meinig, *The Shaping of America: A Geographical Perspective on 500 Years of History*, vol 2 (New Haven: Yale University Press, 1993); Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (New York: Hill and Wang, 1996).

55. See Jon Kukla, *A Wilderness So Immense: The Louisiana Purchase and the Destiny of America* (New York: Alfred A Knopf, 2003).

56. See Thomas Maitland Marshall, *A History of the Western Boundary of the Louisiana Purchase, 1819-1841* (Berkeley: University of California Press, 1914); Philip Coolidge Brooks, *Diplomacy and the Borderlands: The Adams-Onís Treaty of 1819* (Berkeley: University of California Press, 1939).

57. Donald A Rakestraw, *For Honour or Destiny: The Anglo-American Crisis Over the Oregon Territory* (New York: Peter Lang, 1995) at 17-19.

As Robert Miller demonstrates in chapter three of *Discovering Indigenous Lands*, the doctrine of discovery provided them with significant support.⁵⁸ In so far as the Louisiana territory was concerned, Jefferson thought French discovery and formal possession, followed by the establishment of a few settlements on the Gulf Coast and along the Mississippi, provided the foundation for the United States' claim to the entire western drainage basin of the Mississippi River, up to the continental divide in the Rocky Mountains as far north as present-day Montana.⁵⁹ Jefferson then sent Meriwether Lewis and William Clark, and their Corps of Discovery, to explore the Missouri River to its source and find a practicable route from there to the Pacific for the purposes of commerce.⁶⁰ This expedition to the West Coast, combined with the earlier discovery of the mouth of the Columbia River by the American Captain Robert Gray in 1792, was relied upon by the United States in diplomatic exchanges with Great Britain as establishing American title to the Oregon country by priority of discovery.⁶¹

In formulating his doctrine of discovery in volume one of the *Life of George Washington* and *Johnson*, did Chief Justice Marshall have the Louisiana Purchase

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58. *Supra* note 1. See also Robert J Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (Westport, Conn: Praeger, 2006); Pommersheim, *supra* note 9 at 96.
59. See Thomas Jefferson, "The Limits and Bounds of Louisiana" in Saul K Padover, ed, *The Complete Jefferson, Containing His Major Writings, Published and Unpublished, Except His Letters* (Freeport, NY: Books for Libraries Press, 1943) 259. Significantly, Jefferson's views on the territorial extent of the Louisiana Purchase have been generally accepted by geographers and historians. See e.g. Meinig, *supra* note 54 at 12; Robert H Ferrell, "Louisiana Purchase" in Howard R Lamar, ed, *The New Encyclopedia of the American West* (New Haven: Yale University Press, 1998) xxx at 657. Even Howard Zinn, whom one would expect to view the matter more critically, wrote that "Jefferson's Louisiana Purchase had doubled the territory of the United States, extending it to the Rocky Mountains." See Howard Zinn, *A People's History of the United States, 1492-Present*, rev ed (New York: Harper Collins, 1999) at 149. These views were not, however, supported by the international law of the time. See McNeil, "Factual and Legal Sovereignty," *supra* note 4 at 44-47.
60. "Instructions to Captain Lewis" in Merrill D Peterson, ed, *The Portable Thomas Jefferson* (New York: Penguin Books, 1975) 308.
61. See Travers Twiss, *The Oregon Territory; Its History and Discovery* (New York: D Appelton & Co, 1846); Frederick Merk, *History of the Western Movement* (New York: Alfred A Knopf, 1978) at 310; Rakestraw, *supra* note 57 at 5-26.

and the Oregon boundary dispute in mind?⁶² Did he intend to further American territorial ambitions west of the Mississippi? As he obviously would have been aware of these matters at the time he was writing,⁶³ it is difficult to believe the Chief Justice would not have seen the connection between them and the doctrine of discovery he articulated and applied. However, in the absence of any direct evidence that his decision in *Johnson* in particular was influenced by the territorial claims of the United States, no conclusive answers to these questions are available.⁶⁴

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62. In *Johnson*, Chief Justice Marshall referred to the “magnificent purchase of Louisiana,” observing that it “was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered an aggression which would justify war.” See *supra* note 8 at 587. See also *American Insurance Company v Canter*, 26 US (1 Pet) 511 at 542, 7 L Ed 242 (1928). Here Chief Justice Marshall held that the “Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty.” While that decision related to the acquisition of Florida from Spain by the 1819 Adams-Onís Treaty (see *supra* note 56 and accompanying text), the same reasoning would have applied to the Louisiana Purchase. See *Sere v Pitot*, 10 US (6 Cranch) 332, 3 L Ed 240 (1810) (addressing Congressional authority over the Territory of Orleans within the area of the Louisiana Purchase). See also *Foster v Neilson*, 27 US (2 Pet) 253 at 300, 8 S Ct (1829) (addressing the location of the boundary between French Louisiana and Spanish Florida immediately prior to the cession of Louisiana to the United States in 1803). Here Chief Justice Marshall observed: “Without tracing the title of France to its origin, we may state with confidence that, at the commencement of the [Seven Years’] War of 1756, she was the undisputed possessor of the province of Louisiana, lying on both sides the Mississippi and extending eastward beyond the Bay of Mobile.” However, he went on to decide that the boundary issue was a political matter on which the Court had to defer to the US government.
63. Chief Justice Marshall rendered his judgment in *Johnson* on 10 March 1823. From December 1822 to February 1823, Congress had spent several days debating a bill for occupation of the Oregon country, introduced by Dr. John Floyd in the House of Representatives. See United States, *The Debates and Proceedings in the Congress of the United States, Seventeenth Congress, Second Session* (Washington, DC: Gales & Seaton, 1855).
64. My search of the US Supreme Court and Library of Congress holdings relating to *Johnson* did not turn up anything that would shed light on these questions. Nor have I found *The Papers of John Marshall*, 12 vols, to be of assistance in this regard. See Herbert A Johnson & Charles F Hobson, eds, *The Papers of John Marshall* (Chapel Hill, NC: University of North Carolina Press, 1974-2006). However, we know that Chief Justice Marshall was revising the first volume of his *Life of George Washington*, *supra* note 25, published separately in 1824 as a *History of the American Colonies*, at the same time *Johnson* was before the Court, and that his judgment in that case was heavily influenced by what he had written on the subject in that volume twenty years earlier. See Letter from John Marshall to Bushrod Washington (3 May 1823) in Hobson, *ibid*, vol 9, 303. See also Editorial Note on *Johnson v McIntosh*, *ibid*, 279 at 281; Robertson, “John Marshall as Colonial Historian,” *supra* note 25.

But regardless of whether he was so influenced or not, I agree with Robert Miller that reassessment and rejection of the doctrine of discovery are well overdue.⁶⁵ It is shameful that American courts still rely on a historically inaccurate, doctrinally flawed, and blatantly racist doctrine to explain the acquisition of European, and hence American, sovereignty in North America.

II. RECONSIDERING THE APPLICATION OF THE DOCTRINE OF DISCOVERY IN CANADA

In chapters four and five of *Discovering Indigenous Lands*, Tracey Lindberg has critically assessed the early development of the doctrine of discovery during the colonization of Canada, the adoption and application of the doctrine by the SCC, and the continuing reliance on the doctrine by the government of Canada.⁶⁶ I think the Court is becoming increasingly uncomfortable with the doctrine and agree with Felix Hoehn that a judicial reassessment of its application in Canada is already underway.

The application of the doctrine of discovery in Canada is complicated by the fact that, as in the United States, parts of the country were colonized by the French before being acquired by Britain. The standard explanation for acquisition of Crown sovereignty in the parts first colonized by France is that Britain acquired them derivatively from France by conquest and cession, first of Acadia in 1713 and then of La Nouvelle France in 1759–1763.⁶⁷ The rest of Canada is presumed to have been acquired by settlement,⁶⁸ which is the British imperial law equivalent of effective occupation in international law. The foundation for French sovereignty, whether priority of discovery, symbolic taking of possession, effective occupation, or some other means, usually remains unanalyzed in the case law.⁶⁹ However, Justice Taschereau, in his concurring judgment in *St Catharines*

65. See Deloria, *supra* note 9; Wilkins & Lomawaima, *supra* note 9; Pommersheim, *supra* note 9; Robertson, “John Marshall as Colonial Historian,” *supra* note 25; Watson, “Impact of the Doctrine of Discovery,” *supra* note 9; Watson, “Doctrine of Discovery,” *supra* note 21.

66. See also Watson, “Impact of the Doctrine of Discovery,” *supra* note 9 at 529–38.

67. See *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at para 71 [*Marshall; Bernard*]; *Sioui v Quebec (Attorney General)*, [1990] 1 SCR 1025 at 1051–52, 70 DLR (4th) 427 [*Sioui*].

68. However, as the extent of French Canada has never been authoritatively determined, the boundaries between the conquered and ceded parts of Canada and the settled parts remain uncertain. See e.g. Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

69. See e.g. *R v Adams*, [1996] 3 SCR 101 at paras 31–33, 138 DLR (4th) 657; *R v Côté*, [1996] 3 SCR 139 at paras 42–54, 138 DLR (4th) 385; *Marshall; Bernard*, *supra* note 67 at para 71.

Milling and Lumber Company v The Queen,⁷⁰ did rely expressly on discovery as the basis for French sovereignty in La Nouvelle France, and Justice Patterson in *R v Syliboy* explained French sovereignty in Acadia in the same way,⁷¹ but the issue was not addressed by the Privy Council on appeal of the former case,⁷² and Justice Patterson's judgment was discredited by the Court in *R v Simon*.⁷³ In his unanimous decision in *Sioui*,⁷⁴ Justice Lamer (as he then was) referred to "France's *de facto* control in Canada" prior to the British victory on the Plains of Abraham in 1759 and the capitulation of Montreal in 1760, but also concluded on the basis of "the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations."⁷⁵ This hardly seems consistent with European acquisition of sovereignty by discovery.

And yet in *R v Sparrow*,⁷⁶ decided just one week after *Sioui*, Chief Justice Dickson and Justice La Forest, delivering the unanimous judgment of the Court, simply assumed that Crown sovereignty had been acquired in British Columbia "from the outset," without specifying how that had occurred: "It is worth

70. (1887), 13 SCR 577 at 643-44, 13 OAR 148.

71. [1929] 1 DLR 307 at 313 (Co Ct), 4 CNLC 430. Justice Patterson stated:

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

72. *St Catherine's Milling and Lumber Company v The Queen* [1888] UKPC 70, 14 App Cas 46.

Note that the spelling of the company's name is not consistent in the reports.

73. [1985] 2 SCR 387 at 399, 24 DLR (4th) 390. Chief Justice Dickson observed that "the language used by Patterson J, illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."

74. *Sioui*, *supra* note 67 at 1052-1053.

75. *Ibid* at 1052-53 [emphasis in original]. Justice Lamer continued:

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson (*The Papers of Sir William Johnson*, 14 vol.), who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians (at 1053).

76. [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

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 vested in the Crown.⁷⁷ The main authority they gave to support that assumption was *Johnson*,⁷⁸ which as we have seen is the American case where Chief Justice Marshall first put the judicial stamp of approval on the discovery doctrine.⁷⁹ The Court therefore seems to have accepted discovery as the basis for Crown sovereignty in British Columbia.⁸⁰ Yet the contrast between *Sioui* and *Sparrow* could not be starker in this regard, even though they must have been written at virtually the same time, albeit by different Supreme Court justices. The major distinction appears to be the very different histories in eastern Canada and British Columbia: In the former, as Justice Lamer recounted, the French and British both treated the Indigenous peoples as independent nations up to 1760 because they needed them as allies, whereas on the West Coast where colonization took place later the British Crown simply asserted sovereignty. Governor Douglas entered into fourteen treaties with Coast Salish and Kwakiutl peoples on Vancouver Island in the 1850s, but these agreements were for the acquisition of lands and did not acknowledge the pre-existing sovereignty of the Indigenous parties.

The issue of Crown sovereignty came up more directly in *Delgamuukw v British Columbia*,⁸¹ in which the Court decided that Aboriginal title depends on proof of exclusive occupation of land by Indigenous peoples at the time of Crown assertion of sovereignty. Chief Justice Lamer, writing the principal judgment, accepted the trial judge's decision, not disputed on appeal, that the date of Crown sovereignty in British Columbia was the Oregon Boundary Treaty of 1846,⁸² whereby the United States and Britain agreed that the 49th parallel would be the boundary between their respective territories in the Pacific Northwest from the

77. *Ibid* at 1103. For critical commentary, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 *Alta L Rev* 498.

78. See also *Guerin v The Queen*, [1984] 2 SCR 335 at 377-78, 13 DLR (4th) 321 (Justice Dickson, as he then was, citing *Johnson* and apparently accepting the doctrine of discovery).

79. Chief Justice Dickson and Justice La Forest also cited *Calder v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder* cited to SCR]. See *ibid* at 328, Judson J; *ibid* at 383, 402, Hall J.

80. See also *ibid* at 320-21, Judson J; *ibid* at 380-85, Hall J.

81. [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR].

82. See Bruce Hutchison, *The Struggle for the Border* (Don Mills, ON: Longman Canada, 1970) at 288-98; Norman L. Nicholson, *The Boundaries of the Canadian Confederation* (Toronto: Macmillan, 1979) at 45-47.

Rocky Mountains to the Strait of Georgia.⁸³ This may be a partial retreat from reliance on the discovery doctrine, as English/British discovery occurred much earlier, possibly in 1579 by Sir Francis Drake during his circumnavigation of the globe, and certainly no later than the voyages of Captains Cook and Vancouver in the latter part of the 18th century.⁸⁴ Nonetheless, by relying on an international treaty to which Indigenous peoples were not party, the Court implicitly denied their pre-existing sovereignty, and indicated that the British Crown could acquire sovereignty by simply asserting it and having it acknowledged by another member of the international community from which Indigenous peoples were excluded at the time.⁸⁵

As Felix Hoehn has argued persuasively in his book,⁸⁶ the first serious judicial reconsideration of the basis for Crown sovereignty in British Columbia was undertaken by Chief Justice McLachlin in her unanimous judgments in *Haida Nation v British Columbia*⁸⁷ and *Taku River Tlingit First Nation v British Columbia*,⁸⁸ delivered the same day in 2004. As those cases involved the Crown's duty to consult where Aboriginal title is claimed but has not yet been established, the issue of sovereignty was not as directly relevant as in *Delgamuukw*. The Chief Justice nonetheless took the opportunity to make significant statements that reveal a definite shift in the Court's understanding of the matter. For the first time, the Court referred to "pre-existing Aboriginal sovereignty," and said that the promise of rights recognition in section 35 of the *Constitution Act, 1982*⁸⁹ "is realized and sovereignty claims reconciled through the process of honourable

83. *Delgamuukw*, *supra* note 81 at para 145. See also *Calder*, *supra* note 79 at 325-26, Judson J; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*]. For critical commentary, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537; Kent McNeil, "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.

84. For consideration of alternative dates prior to 1846, see Justice Vickers' trial judgment in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, [2008] 1 CNLR 112 at paras 585-602. He rejected discovery as a means for Crown acquisition of sovereignty, but nonetheless accepted 1846 as the appropriate year.

85. On the transition from inclusion of Indigenous peoples in the early law of nations to their exclusion in positivist 19th century international law, see Morin, *supra* note 5.

86. *Reconciling Sovereignties*, *supra* note 2 at 33-36. My own analysis of this aspect of *Haida Nation* and *Taku River* relies heavily on Hoehn's much more detailed discussion.

87. *Supra* note 10.

88. *Supra* note 11.

89. Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

negotiation.”⁹⁰ “Treaties,” Chief Justice McLachlin said, “serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty.”⁹¹ Prior to this, the reconciliation that the Court has said is at the heart of section 35 was between prior Aboriginal occupation and Crown sovereignty.⁹² In other words, the prior factual presence of Aboriginal peoples had to be reconciled with the apparently legal sovereignty of the Crown. In *Haida Nation* and *Taku River*, the prior occupation and sovereignty of the Aboriginal peoples—which must have been legal under their systems of law—has to be reconciled with “*de facto* Crown sovereignty.”⁹³ It therefore appears that the sovereignty of the Crown, while undeniable as a matter of fact, in some sense lacks legality until provided with legitimacy through negotiated treaties.⁹⁴ This is a far cry from the discovery doctrine. Instead of being acquired by discovery, sovereignty was obtained by “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of lands and resources that were formerly in control of that people.”⁹⁵

But was Crown sovereignty acquired by assertion, *de facto* control, or a combination of the two? If by mere assertion, it would not have been *de facto* until the Crown actually exercised jurisdiction and control on the ground.⁹⁶ We know as a historical matter that this did not happen all at once, and certainly had not occurred in most of British Columbia—including the territories of the Gitksan and Wet’suwet’en that were at issue in the *Delgamuukw* case—by 1846. And yet that was the year accepted by the SCC as the time of Crown assertion of sovereignty over their territories, and applied by the Court more recently to the territory of the Tsilhqot’in people in its 2014 decision in *Tsilhqot’in Nation*.⁹⁷ It is therefore difficult to avoid the conclusion that to some extent the Court is still clinging to the notion that the Crown could acquire *de jure* sovereignty over Indigenous peoples and their territories by mere assertion, which, like the discovery doctrine, seems to involve denial of the pre-existing sovereignty of the Indigenous peoples. There thus appears to be unresolved tension between the

90. *Haida Nation*, *supra* note 10 at para 20.

91. *Ibid.*

92. See e.g. *R v Van der Peet*, [1996] 2 SCR 507 at paras 31, 43, 137 DLR (4th) 289.

93. *Taku River*, *supra* note 11 at para 42. See also *Haida Nation*, *supra* note 10 at para 32.

94. See also Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 SCLR (2d) 433 at 436-38; Walters, *supra* note 45 at 513-17; Gordon Christie, “Aboriginal Title and Private Property” in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009) 177.

95. *Haida Nation*, *supra* note 10 at para 32.

96. See McNeil, “Factual and Legal Sovereignty,” *supra* note 4 at 37.

97. *Supra* note 83.

Court's acknowledgment of that pre-existing sovereignty in *Haida Nation* and the Court's continuing reliance on assertion as a means by which the Crown acquired sovereignty. Nor is this tension resolved by trying to distinguish between assertion and acquisition of sovereignty. While the Court has tended to use the term "assertion" in this context, in *Delgamuukw* Chief Justice Lamer decided that Aboriginal occupation has to be proven at the time of assertion of Crown sovereignty because this is when Aboriginal title crystallized:

Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.⁹⁸

Although the Court has not been particularly forthright in explaining how the Crown got its underlying title, it seems to be based on the common law doctrine of tenure, by which the Crown is presumed to have the radical or underlying title to all lands within its dominions.⁹⁹ As the common law would not have applied in British Columbia before the Crown acquired de jure sovereignty, Chief Justice Lamer's judgment in *Delgamuukw* must be understood as equating Crown assertion of sovereignty with de jure sovereignty, which does not appear to require actual exercise of jurisdiction, as most of British Columbia was not occupied or controlled by the Crown at the relevant time in 1846. In *Tsilhqot'in Nation*, Chief Justice McLachlin followed this aspect of Chief Justice Lamer's decision, despite her earlier acknowledgement of pre-existing Indigenous sovereignty in *Haida Nation*.¹⁰⁰

98. *Delgamuukw*, *supra* note 81 at para 145.

99. See Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 79-84, 241-43 [McNeil, *Common Law*]; Highland, *supra* note 21. The High Court of Australia has been more explicit in applying the doctrine of tenure in this context. See especially *Mabo v Queensland [No 2]*, [1992] HCA 23, (1992) 175 CLR 1 at 25-31, 46-48 [*Mabo*]. For insightful criticism and an alternate approach, see Secher, *supra* note 45 at 147-96, 286-335.

100. *Tsilhqot'in Nation*, *supra* note 83. Chief Justice McLachlin observed that:

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. 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 of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown (at para 69).

III. TOWARDS RESOLUTION AND RECONCILIATION

Our examination of Chief Justice Marshall's judgment in *Johnson* revealed the same kind of contradiction that has now surfaced in the judgments of Chief Justice McLachlin in *Haida Nation* and *Tsilhqot'in Nation*: The pre-existing sovereignty of the Indigenous nations is acknowledged, and yet the Crown in some sense was able to acquire sovereignty over them and their territories unilaterally by discovery or assertion. The contradiction lies in the fact that, given the Indigenous nations' pre-existing sovereignty, the Crown should only have been able to acquire sovereignty derivatively by conquest or cession, neither of which occurred in British Columbia.¹⁰¹ And yet we also know as a matter of fact that the United States acknowledged the Crown's sovereignty there by the Oregon Boundary Treaty of 1846, that the Crown gradually acquired de facto sovereignty through the unilateral exercise of control and jurisdiction, and that the international community has since accepted the Crown's sovereignty over British Columbia as part of Canada.¹⁰²

Chief Justice Marshall attempted to resolve this contradiction in *Worcester* by limiting the application of the doctrine of discovery to the colonizing European nations. As we have seen, he realized that a doctrine of the law of nations that had been created by agreement among the European powers could not apply to the Indigenous nations of North America who were not parties to that agreement.¹⁰³ On this revised formulation, the doctrine regulated the territorial rights of the European powers among themselves, but did not affect the pre-existing rights of the Indigenous nations, including their sovereignty that was acknowledged by the Chief Justice in *Johnson* and affirmed in *Worcester*. For the European powers to acquire sovereignty vis-à-vis the Indigenous nations, something more was required: treaties, conquest, or the equivalent of conquest by imposition

101. See *Haida Nation*, *supra* note 10. Chief Justice McLachlin stated that "Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so" (at para 25).

102. Canada's membership in the United Nations and its adherence to numerous international conventions are evidence of this. There are, however, unresolved issues regarding the extent of Canada's claims in the Arctic.

103. See *supra* note 48 and accompanying text.

of jurisdiction without necessarily engaging in armed conflict.¹⁰⁴ Conquest and imposition of jurisdiction could not occur without the actual exercise of authority and control on the ground. It is this actual exercise of authority that Chief Justice McLachlin must have had in mind in *Haida Nation* and *Taku River* when she referred to the Crown's de facto control and de facto sovereignty in non-treaty areas of British Columbia. But de facto sovereignty could not have been achieved by mere assertion or by a bilateral treaty between the United States and the British Crown in 1846. If Crown sovereignty was acquired by either of those means, it could not have been de facto at the time in most of the province where the Crown was not in effective control, and so must have been de jure.¹⁰⁵

Unlike de facto sovereignty, de jure sovereignty has to be assessed in the context of a specific system of law. If two or more legal systems are potentially applicable, it is possible for a claim to sovereignty to be legally valid in one system and invalid in another. A modern example is provided by Rhodesia during the white-minority regime of Ian Smith from the time of the Unilateral Declaration of Independence (UDI) in 1965 to the downfall of his government in 1980.¹⁰⁶ During this period the Smith regime, though racist and undemocratic, exercised

104. See *Tee-Hit-Ton Indians v United States*, 348 US 272 at 279, 75 S Ct 313 (1955). Justice Reed writes that “[t]he position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained” [emphasis added]. He also acknowledged the pre-existing sovereignty of the Indigenous nations in observing that “[a]fter conquest, they [the Indian tribes] were permitted to occupy portions of territory over which they had previously exercised ‘sovereignty’, as we use that term” (*ibid*).

105. For an example from another part of Canada, see *R v Powley*, 2003 SCC 43, [2003] 2 SRC 207 [*Powley*]. The Court held that effective European control of the Sault Ste Marie area of what is now Ontario was not obtained “until just prior to 1850” (*ibid* at para 40). The Court said this is “the time when Europeans effectively established political and legal control in a particular area” (*ibid* at para 37). As effective European control must be equivalent to de facto sovereignty, this means that assertions of sovereignty by the French as early as 1671 and the Crown's claims to sovereignty as a result of cession of La Nouvelle France to Britain in 1763 would have been de jure but not de facto. On France's formal assertion of sovereignty at Sault Ste Marie in 1671, see Francis Borgia Steck, *The Jolliet-Marquette Expedition, 1673* (Glendale, CA: Arthur H Clark Company, 1928) at 125-30; John Anthony Caruso, *The Mississippi Valley Frontier: The Age of French Exploration and Settlement* (Indianapolis: Bobbs-Merrill Company, 1966) at 151-53. See also *Sioui*, *supra* note 67 at 1052. Regarding Crown sovereignty, Justice Lamer (as he then was) stated that “Great Britain's *de jure* control of Canada took the form of the Treaty of Paris of February 10, 1763.”

106. For other examples and more detailed discussion, see McNeil, “Factual and Legal Sovereignty,” *supra* note 4 at 41-44.

the effective control required for de facto sovereignty.¹⁰⁷ But because Smith's government was illegal by international standards, Rhodesia's independence was generally not acknowledged by the international community. Consequently, in international law Rhodesia was not acknowledged to be a sovereign state and de jure sovereignty was denied.¹⁰⁸ Similarly, in English law Rhodesia was not accorded de jure sovereignty because Rhodesian independence was rejected by the British government¹⁰⁹ and English courts declared UDI to be illegal.¹¹⁰ However, after some hesitation, courts within Rhodesia did recognize the Constitution of 1965 and thus the legality of the Smith government, thereby acknowledging the de jure sovereignty of Rhodesia.¹¹¹ De jure sovereignty can therefore depend on a choice of law—in this instance, Rhodesia was a sovereign state in Rhodesian domestic law but not in international or English law. The Rhodesian example also illustrates that de facto sovereignty does not necessarily result in de jure sovereignty in a particular legal system.

So when Chief Justice Marshall decided in *Worcester* that the doctrine of discovery only applies among the European nations, he was acknowledging that a claim to sovereignty can be valid in one legal system and apply to the polities (the European nation states) that have legal personality in that system, without being valid in other legal systems vis-à-vis polities (the Indigenous nations in North America) that have legal personality in those legal systems.¹¹² This insight can be used to help understand the relationship between Indigenous and Crown sovereignty in Canada. The analysis needs to start by distinguishing between

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107. See DJ Devine, "The Status of Rhodesia in International Law" (1973) *Acta Juridica* 1 at 78-89; Isaak I Dore, "Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems" (1980) 13:1 *Vand J Transnat'l L* 25 at 33-38; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987) at 91.
108. See Dore, *supra* note 107; Dugard, *supra* note 107 at 90-98. Compare Devine, *supra* note 107 at 70-78 (opining that the Rhodesian UDI and the situation resulting from it were "extra-legal," not "illegal").
109. See *e.g.* Southern Rhodesia Constitution Order 1965, SI 1965, No 1952.
110. See *Madzimbamuto v Lardner-Burke*, (1968), [1969] 1 AC 645, [1968] 3 All ER 561 (PC); *Adams v Adams* (1970), [1971] P 188, [1970] 3 All ER 572 [*Adams* cited to All ER].
111. See *Madzimbamuto v Lardner-Burke, NO* [1968] 2 S Afr LR 284 & 457, (RAD); *Dhlamini and Others v Carter, NO* [1968] 2 S Afr LR 445 & 464, (RAD); *Dhlamini and Another v Carter, NO* [1968] 2 S Afr LR 467, (RAD); *R v Ndhlovu* [1968] 4 S Afr LR 515, (RSA). For commentary, see Dugard, *supra* note 107 at 90; Claire Palley, "The Judicial Process: U.D.I. and the Southern Rhodesia Judiciary" (1967) 30:3 *Mod L Rev* 263; SA de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968) 7 *West Ont L Rev* 93; FM Brookfield, "The Courts, Kelsen, and the Rhodesian Revolution" (1969) 19:3 *UTLJ* 326.
112. Chief Justice Marshall CJ acknowledged the existence of the legal and political systems of the Indigenous peoples. See *Johnson*, *supra* note 8 at 593-94; *Worcester*, *supra* note 45 at 559-61.

de facto and de jure sovereignty.¹¹³ De facto sovereignty is self-evidently an empirical matter that has to be established by evidence of effective “political and legal control in a particular area.”¹¹⁴ De jure sovereignty is sovereignty that is acknowledged as such by a particular legal system. Unlike de facto sovereignty, de jure sovereignty is relative: It applies only in the context of a particular legal system in relation to the polities that have legal personality within that system.¹¹⁵ I think it should be obvious that, prior to European colonization, the Indigenous peoples of North America had de facto sovereignty, as well as de jure sovereignty within their own systems of law.¹¹⁶ Their systems of law would include both the domestic law of each Indigenous nation and the inter-nation law that governed their relations with one another. The colonizing European nations were not part of those legal systems and could not have acquired de jure sovereignty by virtue of them. Instead, the European nations were governed by their own systems of law, which were also domestic and inter-nation. One can therefore assess the de jure validity of a European nation’s assertion of sovereignty under its own domestic law or under the European law of nations, which by the 19th century had become known as international law despite the fact that most non-European nations were excluded from its scope.¹¹⁷ In reality, it remained *European* inter-nation law throughout the period of colonization of North America.¹¹⁸

I have examined 19th century European “international” law on the acquisition of colonies elsewhere,¹¹⁹ so will provide only a brief summary here. After much uncertainty in the law of nations over the adequacy of discovery, papal bulls, symbolic acts of possession, and so on as means of acquiring sovereignty over territories that were either vacant or populated by Indigenous peoples whose

113. For a more detailed discussion, see Hoehn, *Reconciling Sovereignties*, *supra* note 2.

114. *Powley*, *supra* note 105 at para 37.

115. For more detail, see Kent McNeil, “Indigenous Nations and the Legal Relativity of European Claims to Territorial Sovereignty in North America” in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills, ON: Oxford University Press, 2013) 242 [McNeil, “Indigenous Nations”].

116. This is not to say that Indigenous peoples have the same conception of sovereignty as Europeans. See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999) at 55-69; Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 57-70; Leroy Little Bear, “An Elder Explains Indigenous Philosophy and Indigenous Sovereignty” in Tomsons & Mayer, *supra* note 115, 6. What I mean when I say that Indigenous peoples had de jure sovereignty is that they exercised jurisdiction over their territories and peoples in accordance with their own values, political organizations, and laws.

117. See Morin, *supra* note 5 at 163-82.

118. See McNeil, “Indigenous Nations,” *supra* note 115 at 246-47.

119. *Ibid.* See also McNeil, “Factual and Legal Sovereignty,” *supra* note 4.

pre-existing sovereignty was not acknowledged by the European powers,¹²⁰ by the 19th century a consensus had emerged that effective occupation—the actual exercise of political jurisdiction and legal authority on the ground—was necessary.¹²¹ In other words, in international law de jure sovereignty followed de facto sovereignty in these territories, not the other way around. So for the Crown to have de jure sovereignty in British Columbia under this European legal system, it would first have had to effectively exercise political and legal authority there. However, this approach still relied on denial of the pre-existing sovereignty of the Indigenous peoples, which the Court has now rejected. Moreover, according to the advisory opinion of the International Court of Justice in the *Western Sahara* case,¹²² by the time that part of Africa was colonized by European nations in the 1880s, sovereignty over territory occupied by a people with a social and political organization, even if they were nomadic, could not be acquired by simple occupation as if the territory was *terra nullius*. The sovereignty of Indigenous peoples has therefore been acknowledged in international as well as in Canadian domestic law. However, given the Crown's de facto exercise of sovereignty over all of British Columbia for many years (albeit later than 1846 in most of the province), and the acceptance of that sovereignty by the international community, it is unlikely that an international tribunal would deny de jure sovereignty to the Crown today. The tribunal might rely on the prescription doctrine (peaceful and uninterrupted exercise of jurisdiction for a sufficiently long time for it to confer territorial title) to uphold the Crown's longstanding exercise of political

120. See *supra* note 30.

121. See Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (Oxford: Clarendon Press, 1884) at 196-211; Oppenheim, *supra* note 30 at 275-80; TL Lawrence, *The Principles of International Law*, 4th ed (London: Macmillan and Co, 1911) at 148-61; von der Heydte, *supra* note 30. Since sovereignty involves the exercise of jurisdiction, effective occupation in this context is not just a matter of physical presence. Administrative control and enforcement of law are essential ingredients of the effective occupation required for de jure sovereignty in international law. See William Edward Hall, *A Treatise on International Law*, 8th ed, by A Pearce Higgins (Oxford: Clarendon Press, 1924) at 139-40; Lindley, *supra* note 30 at 139-51; Crawford, *supra* note 6 at 221-23. For applications of this approach see *Island of Palmas Case* (1928), 2 RIAA 829; *Legal Status of Eastern Greenland Case* (5 April 1933) 2 PCIJ (Series A/B) No 53, 22; *Minquiers and Ecrehos Case*, (1953) ICJ Rep 47.

122. *Supra* note 6.

and legal authority, but this is by no means certain, as acquisition of sovereignty by prescription depends on acquiescence by the displaced sovereign.¹²³

Turning to domestic law, in British law relating to the acquisition of colonies, otherwise known as colonial or imperial law, acquisition of overseas territory is within the prerogative of the Crown over foreign affairs.¹²⁴ Moreover, domestic courts are unwilling to judge the legality of Crown assertions of sovereignty, which they classify as acts of state that are outside of the jurisdiction of the courts.¹²⁵ So although domestic courts acknowledge asserted Crown sovereignty, this does not mean it is legal. This helps to explain the Canadian case law we have examined in this review essay: Cases such as *Calder*, *Guerin*, *Sparrow*, and *Delgamuukw* simply assume Crown sovereignty without inquiring into its legality. In *Delgamuukw*, the Court accepted a certain date, 1846, as the time when the Crown asserted sovereignty in British Columbia because a date had to be specified for proof of the exclusive Indigenous occupation required to establish Aboriginal title. Then in *Haida Nation* and *Taku River*, the Court demonstrated that it was becoming uncomfortable with unquestioned Crown sovereignty, given the realization that Indigenous nations in the province had sovereignty (de facto, and de jure under their own systems of law)¹²⁶ prior to British colonization. Not wanting to rule on the legality of Crown sovereignty, which due to the act of state doctrine is supposed to be outside the jurisdiction of domestic courts, Chief Justice McLachlin described the Crown's sovereignty as de facto. But that characterization failed to explain how the Crown could have acquired sovereignty in 1846 when it was not, in fact, in political and legal control of most of the

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123. See DHN Johnson, "Acquisitive Prescription in International Law" (1950) 27 Brit YB of Int'l L 332; RY Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 20-28; Yehuda Z. Blum, *Historic Titles in International Law* (The Hague: Martinus Nijhoff, 1997) at 6-37; Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff, 1997) at 107-19; Crawford, *supra* note 6 at 229-35; Shaw, *supra* note 53 at 364-66; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 38-41. Moreover, as pointed out by Asch, even if the Crown were found to have sovereignty in international law, this would not mean it is morally right or legitimate (*ibid*).
124. *Post Office v Estuary Radio*, [1968] 2 QB 740 at 753, 1 WLR 1396 (CA) [*Estuary Radio*]; *New South Wales v Commonwealth of Australia*, [1975] HCA 58, 135 CLR 337 at 388, 490; Roberts-Wray, *supra* note 6 at 116.
125. *Estuary Radio*, *supra* note 124; *R v Kent Justices Ex p Lye* [1967] 2 QB 153, 1 All ER 560 at 564; *Adams*, *supra* note 110 at 583, 585; *Mabo*, *supra* note 99 at paras 31-32. On the act of state doctrine, see Harrison W. Moore, *Act of State in English Law* (London: John Murray, 1888); McNeil, *Common Law*, *supra* note 99 at 161-80; Hoehn, *supra* note 2 at 38-44.
126. On these systems of law, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*].

province. In *Tsilhqot'in Nation*, she reverted to unquestioning acceptance of Crown assertion of sovereignty in 1846, ignoring the fact that the de facto sovereignty she referred to in *Haida Nation* and *Taku River* could only have been acquired later.

As Tracey Lindberg and Felix Hoehn have so ably demonstrated in *Discovering Indigenous Lands and Reconciling Sovereignties*, Canadian law faces a crisis over the unresolved tension between pre-existing Indigenous sovereignty and asserted Crown sovereignty.¹²⁷ The moral foundations of this country are called into question by continuing reliance on the false racist assumptions that Indigenous peoples were inferior to Europeans and therefore not sovereign at the time of European colonization.¹²⁸ Hoehn asserts that a new paradigm is urgently required to resolve the crisis, based on the principle of equality of peoples. Acknowledging the equality of the Indigenous peoples involves recognizing that they had pre-existing sovereignty that could not be taken away unilaterally by the Crown. Indigenous sovereignty, though impaired by the Crown's imposition of its own de facto sovereignty and ignored by the courts until Chief Justice McLachlin's decisions in *Haida Nation* and *Taku River*, continued de jure under their own legal systems. We are thus faced with a situation today where the Crown exercises de facto sovereignty and claims de jure sovereignty domestically and internationally, while Indigenous nations have de jure sovereignty under their own systems of law and demand acknowledgement of their sovereignty in Canadian constitutional law and international law. Where legal systems are in conflict, resolution of the

127. See also Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1, Origins to 1939*, vol 1 (Montreal: McGill-Queen's University Press, 2015), online: <http://publications.gc.ca/collections/collection_2015/trc/IR4-9-1-1-2015-eng.pdf>. For discussion of reliance on the doctrine of discovery to justify European assertions of sovereignty, see *ibid* at 15-20, 24. See also Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation*, vol 6 (Montreal: McGill-Queen's University Press, 2015) at 29-33, 37-38, 42-43, 90, 230-31 (recommending repudiation of the doctrine in Canada). See especially recommendation 47:

We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts (*ibid* at 231).

128. See also Walters, *supra* note 45; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 107-31; Christie, *supra* note 94 at 200-04; Borrows, *Indigenous Constitution*, *supra* note 126 at 13-22; Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145; Asch, *supra* note 123; Arthur Manuel & Grand Chief Ronald M Derrickson, *Unsettling Canada: A National Wake-up Call* (Toronto: Between the Lines, 2015) at 108-09, 176-77.

conflict involves assessment of the matter from the perspective of legitimacy, which is more a matter of moral values than law. There can be no doubt that European colonization of North America involved ethical wrongs that undermine the moral legitimacy of the Canadian state. Unfortunately, history cannot be redone—we have to move forward from where we are.¹²⁹ I agree with Lindberg and Hoehn that this involves accepting the continuing existence of Indigenous sovereignty and legal systems, and attempting to reconcile them with the reality of Crown sovereignty through honourable and respectful negotiations. As Hoehn has argued, this requires a paradigm shift in political and legal thinking in Canada, a shift that has been courageously initiated by Chief Justice McLachlin. The reconciliation of Indigenous and Crown sovereignty that she envisaged as taking place through the treaty process requires Canada to accept the continuing de jure sovereignty of the Indigenous nations and share de facto sovereignty with them on a nation-to-nation basis.

129. See *Delgamuukw*, *supra* note 81 at para 186. Here, at the end of his judgment, Chief Justice Lamer put it this way: “Let us face it, we are all here to stay.”