

HOW INDIANS HOLD LAND

UNPACKING SOME FOUNDATIONS OF CANADIAN LAW

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THE UNRESOLVED ISSUE OF SOVEREIGNTY

- R v. Guerin, 1984 2 SCR 885: “Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown” (Justice Dickson)
- R v. Sparrow, 1990 1 SCR 1075: “It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands ... 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” (CJ Dickson and Justice Laforest)
- Aboriginal title is a burden on the underlying Crown title

SOVEREIGNTY AND THE DOCTRINE OF DISCOVERY

- *Johnston v. McIntosh* and *Worcester v. State of Georgia* adopt the doctrine of discovery into American law
- Informed by the papal bulls
- American land was considered terra nullius – legally deemed to be unoccupied or uninhabited
- Upon "discovery", the Indians had lost "their rights to complete sovereignty, as independent nations,"
- Principle adopted into Canadian law in the *Guerin* case (1984)

IMPLICATIONS FOR ABORIGINAL LAW

- Indian people can only sell their land to the Crown
 - Gives rise to the fiduciary duty
- If Indian people do not own their land, it cannot be garnished
 - No guarantees for mortgages on-reserve land
 - Only Indians can collect debts against Indians (on-reserve)
- If Indian people do not own their land, they cannot be taxed on it
 - Section 87 of the Indian Act – income earned on reserve
- If Indian people do not own their land, they cannot consent to what happens on it and the Government can infringe Aboriginal rights and title as they wish

“JUSTIFIED INFRINGEMENT IS FAIRLY BROAD”

- “In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.” (CJ Lamer, Delgamuukw, 1997, 3 SCR 1010)

RECONCILIATION

“Canada’s Aboriginal peoples were here when Europeans came, and were never conquered” (CJ McLachlin, Haida Nation, 2004 SCC 73)

Truth and Reconciliation Calls to Action, 45
(i) (ii)

- i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius. ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation



UNDRIP

- United Nations Declaration on the Rights of Indigenous Peoples
- Canada recently adopted UNDRIP (after several years of rejecting)
- Increasing international pressure to require free, prior, and informed consent (“FPIC”) regarding development of Indigenous land
- States should cooperate in good faith with Indigenous peoples in order to obtain FPIC prior to:
 - Article 19 – adopting and implementing legislative or administrative measures that may affect them.
 - Article 32(2) – to the approval of any project affecting their lands or territories and other resources, particularly with the development, utilization or exploitation of mineral, water or other resources.
 - Article 18 - the right to participate in decision-making in matters which would affect their rights.

UNDRIP ARTICLE 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

UNDRIP –ARTICLE 27

- States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to **indigenous peoples' laws, traditions, customs and land tenure systems**, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

CAPACITY BUILDING

- What are customs, traditions and land tenure systems?
- To what extent are First Nations ready to implement their own Indigenous legal systems?
- Decolonizing ourselves – unpacking a lot of programming
 - Hierarchies vs. circularity
 - Revaluing who we are
 - Reconciliation with the land

FEDERAL REVIEW OF LAW AND POLICY

“No relationship is more important to Canada than the relationship with Indigenous Peoples. Our Government is working together with Indigenous Peoples to build a nation-to-nation, Inuit-Crown, government-to-government relationship – one based on respect, partnership, and recognition of rights.”
(PM Justin Trudeau, June 21, 2017)



RECONCILIATION: WHY CAN'T THEY JUST GET OVER IT

"My answer has always been: Why can't you always remember this? Because this is about memorializing those people who have been the victims of a great wrong. ...We should never forget, even once they have learned from it, because it's part of who we are. It's not just a part of who we are as survivors and children of survivors and relatives of survivors, it's part of who we are as a nation. **And this nation must never forget what it once did to its most vulnerable people.**" (Justice Murray Sinclair, April 4, 2017)



A STORY OF RESILIENCY



River of Hope 