THE DOCTRINE OF DISCOVERY AND CANADIAN LAW

Jennifer Reid

University of Maine Farmington 270 Main Street Farmington, Maine USA, 04938 jirenereid@gmail.com

Abstract / Résumé

This article will focus on a set of fifteenth-century assumptions regarding sovereignty known as the Doctrine of Discovery. The doctrine was the "legal" means by which Europeans claimed preemptive rights in the New World, and it underlies the relationship between Indigenous and non-Indigenous peoples to this day. This article will explore the Doctrine's development from its inception to its integration into Canadian law. By demonstrating continuity between fifteenth century papal bulls, the Royal Proclamation, the Constitution Act, 1982, and Supreme Court holdings, I will argue that Aboriginal title in Canada was—and continues to be—entrenched in the Doctrine of Discovery.

L'article se concentre sur un ensemble d'hypothèses du XV° siècle au sujet de la souveraineté, connu sous le nom de « doctrine de la découverte ». La doctrine a été le moyen « légal » qu'ont utilisé les Européens pour faire valoir des droits de préemption dans le Nouveau Monde et elle sous-tend toujours les liens entre Autochtones et non-Autochtones. L'article examine l'élaboration de la doctrine, de sa création à son intégration dans le droit canadien. En démontrant la continuité entre les bulles papales, la Proclamation royale, la Loi constitutionnelle de 1982 et les décisions de la Cour suprême, l'auteure met de l'avant que le titre ancestral au Canada a été et continue d'être inscrit dans la doctrine de la découverte.

The Canadian Journal of Native Studies XXX, 2(2010):335-359.

Most non-Aboriginal Canadians are aware of the fact that Indigenous peoples commonly regard land rights as culturally and religiously significant. Fewer non-Natives, I suspect, would consider their own connection with property in the same light; and fewer still would regard the legal foundation of all land rights in Canada as conspicuously theological. In fact, however, it is. The relationship between law and land in Canada can be traced to a set of fifteenth century theological assumptions that have found their way into both common law and the Canadian Constitution. These assumptions, collectively referred to as the Doctrine of Discovery, were initially formulated to mediate rivalries among European states vying for sovereignty rights in the New World. Although there were antecedents to the doctrine, it was Pope Alexander VI who applied them to the Atlantic World of the fifteenth century, in a two-part papal bull known as Inter caetera. The Doctrine of Discovery was the legal means by which Europeans claimed rights of sovereignty, property, and trade in regions they allegedly discovered during the age of expansion. These claims were made without consultation with the resident populations in these territories - the people to whom, by any sensible account, the land actually belonged. The Doctrine of Discovery is a critical component of historical relations between Europeans, their descendants, and Indigenous peoples; and it underlies their legal relationships to this day, having smoothly transitioned from Roman Catholic to international law. Upon discovery of a territory, the doctrine held that Indigenous peoples could not claim ownership of their land, but only rights of occupation and use. In this way, colonial powers claimed preemptive rights while conceding only restricted title to a territory's owners (Miller 2006: 4).

It has been suggested that law regarding Aboriginal peoples is the "most uncertain and contentious body of law in Canada," the result of the fact that no legal principles relating to the rights of Indigenous peoples existed at the time of the assumption of British sovereignty (McNeil 1997: 117). This is not entirely accurate, since the Doctrine of Discovery was a firmly entrenched principle of international law that guided earliest British relations with First Nations and, as I will presently point out, the drafting of the Royal Proclamation of 1763 which has loomed large in the history of Aboriginal rights in Canada. Issues relating to Aboriginal title, sovereignty, and self-government, for instance, are complicated precisely because underlying title was assumed by the British Crown in 1763. The principle of discovery thus forced Aboriginal peoples into an ongoing position of dependence on colonial governments and courts for the recognition of rights that Aboriginals take for granted (Assembly of First Nations 2005). Neither the Constitution nor common law, however, has

been able to define these rights in a comprehensive manner (Asch and Zlotkin 1997: 212). Attempts to do so were a focus of a series of constitutional conferences in the wake of their inclusion in s.35 of the *Constitution Act*, 1982, but no resolution was reached; and the courts, which have consequently been the principle arena for adjudicating this issue, have had limited success. Despite this lack of resolution, one principle has never been called into question: namely, the legitimacy of the Crown's assumption of underlying title and the attendant limitation of Aboriginal rights to those of occupation and use.

Aboriginal Canadians do not generally regard their title to land as merely involving these kinds of usufructuary rights. Rather, they trace title back to pre-contact relationships with land and rights of self-governance. Fundamentally, then, title is not considered something that should be subject to the legal or political system; and s.35 of the Constitution is regarded as having acknowledged already existing rights. From this perspective, the courts' struggle to define the scope of these rights, rather than to implement them, has been an error; and the Canadian government's claim to underlying title is based on a misconception. Leroy Little Bear described the mistake in this fashion: "[Aboriginal peoples] are not the sole owners under the original grant from the Creator; the land belongs to past generations, to the yet-to-be-born, and to the plants and animals. Has the Crown ever received a surrender of title from these others?" (Little Bear 1986: 247, Asch and Zlotkin 1997: 215-217). From the standpoint of dominant voices in the ongoing conflict over issues of sovereignty, title, and self-government, however, Native rights are considered to be common law rights stemming from—and subordinate to the British Crown's earliest sovereignty claims.

The Doctrine of Discovery

The Doctrine of Discovery is not simply an artifact of colonial history. It is the legal force that defines the limits of all land claims to this day and, more fundamentally, the necessity of land claims at all. To call it into question, even now, would change the rules of the argument entirely. As one journalist puts it: "It is the federal and provincial governments of Canada who are trying to make a claim to land, a claim based on the Doctrine of Discovery" (Steinhauer 2006). The roots of the doctrine can be traced back at least as far as the Crusades, although some would claim that its foundation rests in Augustine's teachings on "just war," through which the Catholic Church became morally obligated to meddle in international affairs (Washburn 1995: 4-5). It was during the Crusades, however, that the Church had to fully confront the thorny issues of invading other peoples' territories and determining the property

rights, or *dominium*, of Muslims. One of the most significant pronouncements on the subject came from Pope Innocent IV, who concluded in 1240 that despite the fact that infidels possessed natural rights, they could be legally deprived of these by virtue of the pope's obligation to oversee the spiritual needs of all people. The issue of property rights was at the core of Innocent's influential statement, as it dealt specifically with the question of the legitimacy of invading non-Christian territories and claiming sovereignty therein. He ruled, not surprisingly, that invasions of this kind were "just wars" fought in the service of Christendom (Miller 2006: 12-13, Miller 2005: 8-9).

Contention over control of Lithuania in the early fifteenth century led to a church ruling that would impact directly on the development of the Doctrine of Discovery. In staking a claim against that of the Teutonic knights, Poland turned to Innocent IV's earlier ruling in favor of just war, and the Council of Constance ruled in 1414 that Poland did indeed have the right to disregard the natural law rights of (in this case, Lithuanian) pagans if they violated Catholic notions of natural law. Conquest and subjugation were thus permissible in the interest of spreading Christianity. It was Pope Nicholas V who established the legal principle by which Europeans could claim enemy territories. In two Bulls, Dum diversas (1452) and, especially, Romanus Pontifex (1455), Nicholas sanctioned the conquest of north Africa by the Portuguese, and ultimately provided the legal foundation for European colonialism and the slave trade (Miller 2005: 9, Miller 2007).² Although the fifteenth century papal bulls served Portugal well, they effectively barred Spain from African exploration. In response, Spain turned its attention westward with the voyages of Christopher Columbus, who was instructed by the Crown to assume the admiralty of the territories he was to "discover and acquire." Upon his return to Spain, King Ferdinand and Queen Isabella immediately sought papal validation of their title to Columbus' discoveries in the Caribbean, and Pope Alexander VI subsequently issued three bulls legitimizing the claim, the most important of which was Inter caetera, which fully articulated the Doctrine of Discovery with specific reference to the Americas. Alexander's bulls divided the globe from the North to the South Poles along a line running about 500 kilometers west of the Azores. In order to pursue the "holy and laudable work" of expanding the Christian world, Spain was given title to all discovered and later to be discovered territories west of this boundary. While the bull defined the limits of Iberian discovery claims, Spain and Portugal mutually agreed to shift the boundary through the Treaty of Tordesilla in 1494. The pope endorsed the agreement with another bull, Ea qua in 1506, which allowed Portugal limited access to the Atlantic world. As a result it was able to claim discovery

rights in Brazil (Alexander VI: 1493).

Papal constraint on discovery claims would be the object of a great deal of re-interpretation by European crowns and their legal and theological advisors; but on two points, at least, they were in agreement: (i) the pope's primary authority to grant sovereignty, and (ii) the assumption that Indigenous peoples lost underlying title to their land. The latter would remain a point of European international law.3 Initially, discovery claims could be made through any one of a number of symbolic acts: the planting of a cross or a flag, the burying of coins, or, in the case of the Spanish conquistadors, the reading of an official pronouncement called the "Requerimiento" (requirement). The document, written by the Spanish jurist Palacios Rubios in 1510, asserted that the Spanish Crown had sovereign rights in the Americas based on Inter caetera. By the turn of the sixteenth century, canon and international law had melded with respect to the Doctrine of Discovery largely through the application of the doctrine to Portuguese and Spanish claims in the New World. England and France followed the Iberians closely into the age of exploration, and the crowns of both were guided by the doctrine not merely as a point of international law. Rather, the law was regarded as originating in papal bulls, and since both nations were Catholic at the time of their early explorations, concern over contravening the Church's mandate for Spain loomed large in their respective imaginations, and resulted in the emergence of new legal concepts that became associated with the original doctrine. Intellectuals in both nations scrutinized the bulls and other Church law in order to find justification for new claims to title in the New World that would not undermine the original papal regulations. English scholars, in particular, became adept at the practice, advising Henry VII that he would not be in contravention of the 1493 bull if claims to title were limited to territories not yet discovered by Spain or Portugal (or any other Christian nation). Those advising Elizabeth I honed the theory further by arguing that claims to sovereignty could not be made by symbolic acts alone, but required actual occupation of a territory (Miller 2006:

Thus British monarchs began the practice of directing their subjects to lay claim to those regions not already in the possession of other nations. In his charter to John Cabot and his sons, for instance, Henry VII gave John Cabot and his sons "...full and free authority, faculty and power to sail to all parts, regions and coasts of the eastern, western and northern sea, under our banners, flags and ensigns,...to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians. We have also...given licence to

set up our aforesaid banners and ensigns...acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands so discovered..." (Biggar 1911: 7-10). The French and English also developed the idea of terra nullius ("vacant land") to further substantiate their right to assert sovereignty over regions belonging to non-Europeans. By this principle, land could be regarded as empty, and underlying title could be claimed, if non-Europeans were failing to make use of it in accordance with European expectations or if they had migratory subsistence patterns. Despite these refinements of the doctrine, however, England and France continued to accompany their claims to title in the New World with the established symbolic acts of planting crosses and flags, burying items such as coins, or reading from a commission (Miller 2005: 18-19). Propagation of the Christian faith and assertions of political sovereignty continued to be melded with one another such that explorers (especially those representing the French Crown) generally erected insignia on discovered territory that bore both religious and political symbols.

On the basis of John Cabot's explorations of 1496 through 1498, England laid claim to the entire eastern seaboard of North America. Upon reaching North America, wrote one of Cabot's Venetian contemporaries, he "placed on his new-found land a large cross, with one flag of England and another of St. Mark, by reason of his being a Venetian, so that our banner has floated very far afield" (Williamson 1929: 29). England's discovery claims were challenged by France for over two centuries, the latter basing its claims for sovereign rights on the discoveries of Jacques Cartier which began in 1534. Cartier was the first European explorer to travel the St. Lawrence River, and the first to refer to the northern region of the continent as Canada. The two countries would eventually come to war over their conflicting claims to sovereignty in the New World, with France conceding most of its territories in 1763 (Miller 2005: 16). Until that time, however, explorers continued to claim territory through discovery. Martin Frobisher, for instance, wrote that at Hudson Bay in 1577, he had "marched through the Countrey with Ensigne displaied, so far as thought needfulle, and now and then heaped up stones on high mountaines, and other places, in token of possession, as likewise to signifie unto such as hereafter may chance to arrive there, that possession is taken in behalfe of some Prince, by those who first found out the countrey..." (Hakluyt 1903: 32, Green 1989: 11-12). Upon landing in Newfoundland in 1583, Humphrey Gilbert had "openly read and interpreted his commission; by vertue thereof he tooke possession in the same harbour of St. John, and 200 leagues every way, invested the Queenes Majestie with the title and dignities thereof.... And signified unto all men,

that from this time forward, they should take the same land as a territories appertaining to the Queen of England, and himself authorized under her Majestie to possesse and enjoy it" (Hakluyt 1903: 53-54, Green 1989: 12). A half century later, Samuel de Champlain would stake his claim to New France through the planting of symbols: "Of this wood I made a Cross which I set up at one end of the island, on a high and prominent point, with the arms of France, as I had done in the other places where I had stopped. I named this place Saint-Croix island.... Before I left, I built a Cross, bearing the arms of France, which I set up in a prominent place on the shore of the lake, and begged the Indians to be kind enough to preserve it, as well as those they would find along the trails by which we had come" (Biggar 1925: 272, 297, Green 1989: 9-10).

We might note that such symbolic acts of possession continued to be employed well into the nineteeth and twentieth centuries. When William McDougall was sent by the Canadian government to Rupert's Land in 1869 to assume his post as lieutenant governor of the soon to be acquired territory, he was prevented from entering the colony at Red River by a group of armed Métis who did not recognize Ottawa's sovereignty in the region. He was forced to retreat across the US border where he remained for a month before he decided to re-enter the territory one night after dark to read an official statement asserting Canadian sovereignty despite the fact that there was no one there to hear it.

More disturbing, however, was the Canadian government's 1953 and 1954 relocation of northern Quebec Inuit to Resolute Bay and Grise Fiord in the High Arctic. The ostensible reason for the move was to foster selfsufficiency on the part of the Inuit by providing them with a better supply of game. The families involved in the relocation were from communities in which government relief payments were considered by the government to be too high. The unofficial reason for the relocation, however, was to signify, through occupancy, Canada's sovereignty in the high North. In 1946, the government learned that the Americans were planning to build a series of weather stations in the High Arctic as part of their defense system, and had no intention of consulting with Canada about the scheme. External Affairs was understandably concerned that Canada's sovereignty in the region might be compromised. Worries continued among government officials, and in 1953 the Prime Minister, Louis St. Laurent, announced in Parliament that "we must leave no doubt about our active occupation and exercise of our sovereignty in these northern lands right up to the Pole." Canadian security, he said, was threatened "by the fact that this northland of ours is between these two great world powers [the United States and the Soviet Union]." Effective occupation remained a concern of the federal government throughout the decade,

as the Minister of Northern Affairs, Alvin Hamilton, explained to the House in 1958: "you can hold a territory by right of discovery or by claiming it under some sector theory but where you have great powers holding different points of view the only way to hold that territory, with all its great potential wealth, is by effective occupation" (Marcus 1995: 49, 53, 57-59).

By 1960, it had become clear that the Inuit relocation had not resulted in an improvement in economic conditions for the Inuit; but a confidential report prepared for Northern Affairs in 1958 noted that "this community also serves a distinctly useful purpose in confirming, in a tangible manner, Canada's sovereignty over this vast region of the Arctic." The Inuit were, as many have since described them, "human flagpoles." Their initial move was accompanied by promises that they would be assisted in returning to northern Quebec, if they chose to do so, after two years; but the promise was not kept. While some were provided with support to move back to their original communities in the 1970s, most had to wait until the late 1980s (Marcus 1995: 59, 77-78, Tester and Kulchyski 1994: 114).

Fifteenth-century papal bulls were the legal foundation upon which North America was colonized. The basic principle of the doctrine they set down—that Indigenous peoples had no sovereign rights in relation to their own land—remained unaltered through centuries of international jurisprudence. The Doctrine of Discovery is not simply a relic of colonial history; it is the legal force that defines the limits of all land claims issues to this day, and it was integrated into North American law from an early period. There are, in particular, two documents that have been principally responsible for keeping the doctrine alive in Canadian law: (i) the Royal Proclamation of 1763 and (ii) the US Supreme Court's 1823 holding in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

The Doctrine of Discovery in Canadian Law

Disputed claims over sovereignty in the New World led Britain and France into the Seven Years War, which ended in 1763 when France surrendered to England its discovery rights over Canada and the territory east of the Mississippi River. The Royal Proclamation, issued the same year, was a document that reflected the English crown's understanding of its rights stemming from the Doctrine of Discovery. Lands occupied by Native peoples were defined in the Proclamation as "our dominions," despite the fact that no Indigenous nation had relinquished its title. Furthermore, the Crown promised to protect Native rights of occupancy and land use, thus subsuming Native title within the territorial sovereignty of the Crown. Finally, the document reiterated the trade

and preemptive rights long recognized as integral to the principle of discovery: only licensed agents could trade with Native people, and Natives were not permitted to sell their land to any party but the British Crown. The Royal Proclamation thus established as a principle of English colonial law key features of the discovery doctrine dealing with issues of sovereignty, title, and commerce. It was intended as a legal instrument for mediating tensions between First Nations and expanding colonial settlements; but while it defined the limits of settler encroachment on Native land, its clear assertion that the territories in question were ultimately Crown "dominions" effectively removed the issue of sovereignty from the conversation about land rights and Aboriginal title. While ostensibly protecting First Nations from appropriation of their land, the Royal Proclamation also allowed for the dissolution of such protection since it not only reserved to the Crown the prerogative to extinguish Aboriginal land rights but established regulations for doing so. Essentially, neither individuals nor colonial governments were permitted to acquire Native land. This privilege was reserved to the Crown. The proclamation asserted that "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions or territories as, not having been ceded to or purchased by Us, are reserved to them;" and it forbade any administrator or private citizen from "making any Purchases...or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purchase first obtained." Thus the document ensured that "if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name" (Royal Proclamation, 1763, Miller 2006: 31-32, Green 1989: 102-103, Borrows 1997: 159-160).

Not only did this document dismiss the question of First Nations sovereignty by reserving preemptive rights to the Crown, but its promise not to impose the British legal system on Native peoples (which, in itself, might be considered to be an indication of sovereignty) was undermined by a proviso permitting colonial officials to enter into Native territories without consultation with the community in order to apprehend non-Native criminals who might be hiding there: "And we do further expressly conjoin and require all officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisons of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take refuge in the said Territory,

and to send them under a proper guard to the Colony where the crime was committed, and of which they stand accused, in order to take their Trial for the same" (*Royal Proclamation, 1763*). The Royal Proclamation was steeped in the Doctrine of Discovery. In this document, the British Crown asserted sovereignty over former French territories by virtue of France's cession of its own discovery rights and despite the fact that no First Nation had ever ceded its land to either France or Britain. On the basis of the doctrine, France's authority to transfer sovereignty to England needed no justification.

Turning to the second document, the judgment in Johnson v. McIntosh, we find an affirmation of the Doctrine of Discovery in American common law that was based to a noticeable degree on the Royal Proclamation: "This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians.... The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs. By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, 'all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest,' and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands" (Johnson v. McIntosh, 21 U.S. [8 Wheat.] 543, 593 [1823]). Despite the fact that Native peoples were the obvious owners of the lands in North America at the time of initial European incursions, Chief Justice Marshall asserted that European states acquired sovereign title to these lands upon discovery. What this meant in Anglo-European practice was that First Nations retained rights of occupation and use, but that Europeans automatically gained rights of preemption; that is, the sole right to purchase these lands from Native peoples. Marshall's opinion established a legal precedent by which the loss of underlying Aboriginal title to land could be justified, and the principle was based wholly on the Doctrine of Discovery: "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, 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" (Id. at 574).

Both the Royal Proclamation and the Court's opinion and holding in McIntosh would be used by subsequent Canadian courts to support the principles of Crown sovereignty and Aboriginal title. An early ruling of the Privy Council set the stage for this continuity. St. Catherine's Milling and Lumber Company v. The Queen (1888) has been interpreted as having established the principle in Canadian common law that Aboriginals did not hold a fee simple interest in their property (the kind of interest that non-Aboriginals typically have when they purchase property). On the basis of the Royal Proclamation, the Court determined that Aboriginals possessed rights of occupation and use, but the Crown maintained underlying title. In his opinion, Lord Watson stated that Royal Proclamation guaranteed that Native peoples would be protected in their occupation of the land. He also referred directly to Johnson v. McIntosh, calling the holding in the case a "classic and definitive judgment." He thus concluded that First Nations' land rights amounted to "a personal and usufructuary right dependent on the good will" of the Crown: "Documentary evidence was referred to, to shew the nature and character of the Indian title. It was contended that the effect of it was to shew that from the earliest times the Indians had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation. British and Canadian legislation was referred to, to shew that such complete title had been uniformly recognized...to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right.... The proclamation in 1763 was uniformly acted on and recognized by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act...but it was held by the Supreme Court of the United States to be still in force in 1823: see Johnson v. McIntosh." (St. Catherine's Milling & Lumber Co. v. The Queen, [1889] L.R. 14 App. Cas. 46, 48 [P.C. 1915] [appeal taken from the Supreme Court of Canada], see generally McNeil 1997a: 142, Bell and Asch 1997: 47-48).

For the better part of a century, *St. Catherine's Milling* would join the Royal Proclamation and *McIntosh* as rationale in support of limitations on Aboriginal title. In point of fact, recourse to *St. Catherine's Milling* often went further than would have been acceptable to even Lord Watson, who concluded his remarks with, "There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit" (*St. Catherine's Milling*, 14 App. Cas. at 60). *R v. White*

and Bob (1964), a case decided by the British Columbia Court of Appeal, and later affirmed by the Supreme Court of Canada, is a case in point (R. v. White and Bob, [1964] 50 D.L.R. (2d) 613) (affirmed by the Supreme Court of Canada at R. v. White, [1965] 52 D.L.R. (2d) 481n). The trial involved the harvesting of deer in contravention of British Columbia gaming laws, and while the Court of Appeal held in favor of the defendants' (both Nanaimo) usufructurary rights, in framing his opinion, Justice Norris referred repeatedly to both the Royal Proclamation and McIntosh. Chief Justice Marshall's opinion in the 1823 case was, according to Justice Norris, "entirely consistent with the opinion of the Privy Council in St. Catherine's, and both were consonant with the principles of the Royal Proclamation" (Id. at 631). The Proclamation, he wrote, "had the effect of a statute," and it was "declaratory and confirmatory of... aboriginal rights" (Id. at 653). He stated, further, that "the principles there laid down [in the Royal Proclamation] continued to be the charter of Indian rights through the succeeding years to the present time - recognized in the various Treaties with the United States in which Indian rights were involved and in the successive land Treaties made between the Crown and the Hudson's Bay Co. with the Indians" (Id.at 653).

Finally, Justice Norris confirmed the principle of limited Aboriginal title stemming from discovery that was set down in the Royal Proclamation: "The Proclamation was made on the basis of a claim to dominion and its protective provisions became applicable in fact to Indians as their lands (the Indian Territory) came under the de facto dominion of representatives of the British Crown" (R. v. White and Bob) (Id. at 661). The long-standing notion that Aboriginal title depended on the Crown and stemmed from the Royal Proclamation was discarded in the majority opinion in Calder v. Attorney-General of British Columbia (1973). In his opinion, Justice Judson claimed instead that it was based on preexisting occupation and social organization: "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means..." (Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313 ¶ 26). This was the first time that the court had approached some kind of acknowledgment of the fact that Native peoples lived in legitimate societies and had rights of self-determination that were not extinguished at the time that Canada claimed sovereignty over their land. This opinion had a substantial impact, and is considered to have directly influenced the decision to include the recognition of Aboriginal and treaty rights in the Constitution Act, 1982. While the case initiated major strides with

respect to Aboriginal land rights, the dissenting justices (who in this instance supported the Native appellants in their claim that their title to land in northwestern British Columbia had never been legally extinguished) upheld the tenets of Crown sovereignty and preemptive rights; and they did so on the basis of the Doctrine of Discovery as articulated in the Royal Proclamation and by Justice Marshall in McIntosh. The Royal Proclamation, according to Justice Hall, was a "fundamental document upon which any determination of fundamental rights rests;" and citing White and Bob, he called it a "charter of Indian rights" (Id. at ¶ 138, Hall J., dissenting). As for Johnson v. McIntosh, Justice Hall called the case "the locus classicus of the principles governing aboriginal title" (Id. at ¶ 121). Thus, notwithstanding his assertion that Aboriginal title was a "legal right," it could nonetheless be extinguished "by surrender to the Crown or by competent legislative authority" (Id. at ¶ 118, see also Bell and Asch 1997: 48, Asch 1997: ix, Borrows 1997: 155, Asch and Zlotkin 1997: 210).

Aboriginal title was defined further in Guerin v. R (1984) as sui generis (characteristically unique) and based upon pre-contact occupation of a territory (Guerin v. R., [1984] 2 S.C.R. 335). In the majority opinion, Justice Dickson stated that Aboriginal title predates the Royal Proclamation which merely recognized it; and he cited Marshall's opinion in McIntosh to support this claim: "In Johnson v. M'Intosh Chief Justice Marshall, although he acknowledged the Royal Proclamation of 1763 as one basis for recognition of Indian title, was none the less of the opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent" (Id. at ¶ 84). Dickson went on to write, however, that presumptive and underlying rights were different in kind, and that ultimate title belonged to Europeans by rights of discovery: "The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect, at least, the Indians' rights in land were obviously diminished; but their rights of occupancy and possession remained unaffected.... Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown" (Id. at ¶ 93). Further, the preemptive rights established in the Royal Proclamation were also affirmed by Justice Dickson: "An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763" (Id. at ¶ 83). Thus, although

Justice Dickson clearly rejected the tradition of regarding the Royal Proclamation as the source of Aboriginal title, his description of Aboriginal title as *sui generis* did not fundamentally define the scope of interest in land beyond the principle articulated in the Proclamation (Bell and Asch 1997: 49, Fairweather 2006: 99, Borrows 1997: 161).

Still, the case was a catalyst for public discussions concerning Aboriginal rights that would ultimately contribute to the interpretation of these rights as they are articulated in section 35(1) of the *Constitution Act*, 1982:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35(1) is not at all self-explanatory, and its meaning has been the central issue in numerous Supreme Court cases since. The first time the court had to consider the scope of constitutional protection of Aboriginal rights was in R. v. Sparrow (1990), a case that concerned Aboriginal fishing rights. The majority opinion in the case maintained that s.35(1) protects only those rights that had not been extinguished before 1982 (R. v. Sparrow, [1990] 1 S.C.R. 1075). Additionally, the majority noted that Aboriginal rights were not absolute, but could be subject to regulation by legislation (Id.). This latter point made it clear that the legitimacy of underlying title, claimed on the basis of the Doctrine of Discovery, is not considered to be a debatable issue. In underscoring this point, the justices cited the Royal Proclamation and Chief Justice Marshall: "It is worth recalling that while British policy towards 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; see Johnson v. M'Intosh (1823)..." (Id. at ¶ 49). Sparrow had broader implications with respect to the issue of Aboriginal title. Although the majority opinion concerning the salmon fishery in British Columbia was not intended to speak to the general question of the scope and nature of Aboriginal rights, Chief Justice Dickson and Justice La Forest linked the issue of title to "traditional activities recognized by the aboriginal society as integral to its distinctive culture" (Id. at ¶ 40). Thus, since Sparrow, courts have generally required that in making a claim, Aboriginal appellants demonstrate that their ancestors exclusively occupied given territories that were loci for activities deemed "integral" (Id., see Bell and Henderson; Macklem 1997: 527, McNeil 1997: 144-145).

Two more cases bear consideration here, for both the advancements they made in dealing with s.35(1) as well as the continued limits they

placed on Aboriginal title. In R. v. Van der Peet, (1996), Chief Justice Lamer wrote at length on the issue of Aboriginal title, concluding that, "what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown" (R. v. Van der Peet, [1996] 2 S.C.R. 507, ¶ 31). The supporting opinion in the case referred repeatedly to McIntosh, and in her dissent, Justice McLachlin turned to both the Royal Proclamation and McIntosh. The Royal Proclamation, she wrote, "set out the rules by which the British proposed to govern the territories of much of what is now Canada. The Proclamation, while not the sole source of aboriginal rights, recognized the presence of Aboriginals as existing occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the aboriginal people of Canada of their pre-existing rights; the maxim of terra nullius was not to govern here" (Id. at 270). This direct reference to the concept of terra nullius is unusual, and would appear to raise the problem of the Doctrine of Discovery. However, the fact that the presumption of British sovereignty, as an obvious assault on precolonial rights, could be justified in the manner suggested in the opinion ultimately diminishes the cogency of this claim. Assumptions concerning sovereignty or underlying title that undergird this statement have pervaded all disputes over Aboriginal title in Canada, a fact that accounts for the courts' continued recourse to McIntosh. Thus, again in Van der Peet, we find extensive references such as this to the case: "In Johnson v. M'Intosh...the first of the Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. Government, not by the Indians themselves. In the course of his decision (written for the court), Marshall C. J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection" (Id. at ¶ 36). And again, Justice Lamer wrote: "I agree with Professor Slattery both when he describes the Marshall decisions as providing 'structure and coherence to an untidy and diffuse body of customary law based on official practice' and when he asserts that these decisions are 'as relevant to Canada as they are to the United States. . . ' I would add to Professor Slattery's comments only the observation that

the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings" (*Id.* at 35).

In Van der Peet, the issue of prior occupation was critical, as it was in R. v. Adams (1996), and in the context of dealing with the issue, Chief Justice Lamer underscored the injustice inherent in the Doctrine of Discovery as it continues to play itself out in law. Although the Chief Justice admitted to being unsure about how "permanent" prior occupation would have to have been, he nonetheless felt that it was a question that needed to be considered in Adams: "Aboriginal rights cannot be inexorably linked to aboriginal title given that some aboriginal peoples were nomadic.... Moreover, some Aboriginal peoples varied the location of their settlements both before and after contact. The Mohawks are one such people.... That this is the case may (although I take no position on this point) preclude the establishment of Aboriginal title to the lands on which they settled..." (R. v. Adams, [1996] 3 S.C.R. 101, ¶ 27). The absurdity of suggesting such a gauge in determining title is hard to disregard. European colonials were patently more nomadic than Aboriginal North Americans, having shifted their settlement a span of nearly 5,000 kilometers at the time they asserted sovereignty in the North America, yet the underlying title of their descendants is not disputed. It appears that because of the Doctrine of Discovery, First Nations are expected to demonstrate a pattern of occupancy to which the Crown has never been under any obligation to conform.

Chief Justice Lamer reiterated many parts of the Van der Peet opinion a year later in Delgamuukw v. British Columbia (1997), but the latter case made some important steps forward in terms of Aboriginal rights. In fact, with respect to rights of title, Delgamuukw has been a defining case. The court's opinion stated that a claim to title should be upheld if the claimants could demonstrate that their society occupied a given territory exclusively prior to the Crown's assumption of sovereignty. To make this possible, the justices made the unprecedented decision to accept oral history as admissible evidence of exclusive occupation. Additionally, Chief Justice Lamer further refined the notion of Aboriginal title as sui generis, suggesting that it might potentially encompass not only occupation and use, but resource rights (Bell and Henderson, Fairweather 2006: 104). In spite of these strides, Justice La Forest (in a concurrence) remained faithful to other long-standing principles of limited title. For instance, while more forceful in his statement concerning discussion and the payment of compensation, he upheld the prevailing view that Aboriginal rights can be unilaterally extinguished, citing the

Royal Proclamation as part of the opinion: "More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples.... Indeed, the treatment of 'aboriginal title' as a compensable right can be traced back to the Royal Proclamation, 1763.... Clearly, the Proclamation contemplated that aboriginal peoples would be compensated for the surrender of their lands..." (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 203, La Forest, J. dissenting/concurring).

Conclusion

According to international law as it was established by European colonial states, sovereignty in the New World was possessed by whatever European state claimed discovery and settlement. Later claims to the same territory could be made by other states through the negotiation of treaties or through successful military bids. It has never been necessary for any state to settle an entire territory in order to maintain its title; rather, it need only prevent all other states from challenging claims to sovereignty. The land rights of Indigenous peoples have never been recognized by the European-based system of international law as having priority over the rights of colonizing states; and although international law has undergone dramatic shifts in terms of recognizing human rights, there has never been an attempt to revisit the injustice inherent in the notion of sovereignty based on the Doctrine of Discovery. Consequently, Indigenous peoples have been forced to deal with judicial systems that are wedded to an archaic and racist principle of papal law. In the Canadian context, recourse to Johnson v. McIntosh and the Royal Proclamation have ensured that rights of sovereignty based on the Doctrine of Discovery have remained definitive in common law. Sovereignty is presumed to reside in the Crown, and thus the Crown has the right to own Native land. Native peoples are regarded as having an Aboriginal claim on land, but this claim is not equivalent to ownership. Aboriginal title relates to rights of occupation and use, not underlying title. Thus, all Aboriginal land rights are limited in Canada. Any land right can be contravened if the government deems such a move necessary for economic or other reasons. Regardless of the negotiations and payment of compensation that are now by convention considered to be necessary components of the process of extinguishing Aboriginal rights, the fact that extinguishment is possible, and that limits on alienability continue to be imposed on Native peoples, underscore the Crown's preemptive rights that are founded in the Doctrine of Discovery. These rights have a long legal history in Canada, tracing back to the Royal Proclamation, which was regarded as the source of Aboriginal title until the Supreme Court

ruled in *Sparrow*, *Van der Peet*, and *Delgamuukw* that it was merely formal recognition of existing rights (Green 1989: 125-126, Asch 1997: 47, Miller 2006: 9, Thom).

The Royal Proclamation and *Johnson v. McIntosh* have had an indelible impact on Canadian common law as it applies to Aboriginal rights. The Doctrine of Discovery has provided a foundation on which all deliberations concerning Aboriginal title have proceeded. It has been suggested that s.35(1) recognizes the aspiration for Aboriginal self-government and thus requires that the courts revisit the legitimacy of Canadian sovereignty claims with respect to Aboriginal peoples – that Chief Justice Marshall's ruling in *McIntosh* should no longer provide a template for assertions of territorial sovereignty (Macklem 1997: 528). While this may be a defensible position, the Constitution itself complicates matters since s.25a of the *Charter of Rights and Freedoms* legitimizes the foundation of Marshall's opinion – the principle of limited Aboriginal title as expressed in the Royal Proclamation:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763....

As we have noted throughout this essay, the rights recognized by the Royal Proclamation are double-edged: the protections it provides in respect to use and occupation of land are countervailed by limits on alienability and the Crown's assertion of preemptive right. Title to land is, according to the Proclamation, an Aboriginal right that is inherently limited. It appears that the Doctrine of Discovery is not only well-established in common law, but has been entrenched in the Constitution as well. And while the Royal Proclamation may not be the source of Aboriginal rights in Canada, it has unmistakably served to define the outermost parameters of these rights – parameters that were established by Pope Alexander VI in 1493.

Although non-Aboriginals are largely unaware of the theological basis of Canadian sovereignty, it has been a significant issue among Aboriginal peoples. When the Royal Commission on Aboriginal Peoples released its five-volume report in 1996 (The NationTalk Project 2007, Hurley and Wherrett 2000),⁴ and recommended that Canadian governments commit themselves to dramatically recreating their relationship with Aboriginal peoples, it specifically targeted the Doctrine of Discovery:

The Commission recommends that

To begin the process the federal, provincial and territorial governments...commit themselves to building a renewed relationship based on the principles of mutual recognition, mutual respect, sharing and mutual responsibility....

Federal, provincial and territorial governments further the process of renewal by

- (a) acknowledging that concepts such as terra nullius and the doctrine of discovery are factually, legally and morally wrong;
- (b) declaring that such concepts no longer form part of law making or policy development by Canadian governments;
- (c) declaring that such concepts will not be the basis of arguments presented to the courts;
- (d) committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation....

(Indian and Northern Affairs Canada 1996)

It should not be surprising that among RCAP's key recommendations was also the following: "To begin the process, the federal, provincial and territorial governments,...and national Aboriginal organizations,... commit themselves to building a renewed relationship based on the principles of mutual recognition, mutual respect, sharing and mutual responsibility; these principles to form the ethical basis of relations between Aboriginal and non-Aboriginal societies in the future and to be enshrined in a *new Royal Proclamation* and its companion legislation" (Indian and Northern Affairs Canada 1996, my stress).

Postscript

The Canadian Charter of Rights and Freedoms opens with the following statement: "...Canada is founded upon principles that recognize the supremacy of God and the rule of law...."

Most constitutional law experts have agreed that the reference to God in the *Preamble* is purely symbolic, and that it does not conflict with the later clause protecting religious freedom (Barnett 2006). The *Preamble*, however, might have a more literal meaning than we conventionally assume. The inclusion of the Royal Proclamation in s.25 of the *Charter* constitutionally entrenches a principle of international law that was created by the Roman Catholic Church to limit the property rights

of Indigenous peoples. Furthermore, this principle impacts on the definition, and compromises the scope, of "inherent rights" referred to in s.35(1). The *Preamble*'s melding of secular and religious law might well be less that purely symbolic in the context of constitutional treatment of Aboriginal rights.

Notes

- Washburn cites the Summa Theologica, Part II, Question 40.1, where Augustine defends "just war" in situations where "a nation or state has to be punished for refusing to make amends for the wrongs inflicted by its subjects...."
- Nicholas authorized Portugal to "...invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed,...to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods...."
- 3. While the Catholic Church attempted on occasion to speak officially on behalf of the rights of Indigenous peoples, no pope addressed the fundamental issue of territorial sovereignty which was integral to European claims throughout the colonial period. Thus Paul II, in his bull, Sublimis dues sic dilexit (1537), declared that Native Americans should not be treated like "dumb brutes created for our service ...[but] as true men...capable of understanding the Catholic faith... [Moreoever] the said Indians and other peoples who may be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they may be outside the faith of Jesus Christ...nor should they be in any way enslaved." Similarly, Urban VIII declared that anyone who denied Indigenous peoples the right to freely occupy their land would face excommunication.
- 4. The Commission was created under Prime Minister Brian Mulroney, and announced by Chief Justice Brian Dickson, in 1991. The Prime Minister's hope was that it would help to resolve all outstanding land claims by the year 2000. The Commission's report was submitted to the government late in 1996. It encompassed five volumes and made over 400 recommendations aimed at improving the relationship between Aboriginal peoples and other Canadians.

References

Pope Alexander VI

1493 Inter caetera. May 4. At: http://www.catholic-forum.com/saints/pope0214a.htm. Accessed January 2009.

Anglican Church of Canada and Evangelical Lutheran Church of Canada.

2001 "Doctrine of Discovery and Terra Nullius." General Synod.

At: http://www2.anglican.ca/gs2001/rr/presentations/terranullius.html. Accessed October 2008.

Asch, Michael (ed.)

1997 Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference. Vancouver: University of British Columbia Press.

Asch, Michael & Norman Zlotkin

1997 "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations." In Michael Asch, ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference. Vancouver: University of

British Columbia Press: 208-229.

Assembly of First Nations

2005 "First Nations-Federal Crown Political Accord and Cabi-

net Retreat Signal Steps Towards Self-Determination and Self-Government for First Nations." June 1. At: http://www.afn.ca/article.asp?id=1218 [accessed November

2008]

Barnett, Laura

2006 "Freedom of Religion and Religious Symbols in the Public

Sphere." Canada: Library of Parliament, Parliamentary Information and Research Service: Law and Government Division, 2006. At: http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.htm. Accessed January 2009.

Bell, Catherine & William B. Henderson

n/d "Aboriginal Rights: Canadian Law." The Canadian En-

cyclopedia. At: http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1SEC815557.

Accessed November 2008.

Bell, Catherine & Michael Asch

1997 "Challenging Assumptions: The Impact of Precedent in

Aboriginal Rights Litigation." In Michael Asch, ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference. Vancouver: Univer-

sity of British Columbia Press, 1997: 38-74.

Biggar, H. P. (ed.)

1911 The Precursors of Jacques Cartier 1497-1534: A Collec-

tion of Documents Relating to the Early History of the Dominion of Canada. Ottawa: Government Printing Bu-

reau.

1925 The Works of Samuel de Champlain. Vol. 2. Toronto:

Champlain Society Publications.

Borrows, John

1997 "Wampum at Niagara: The Royal Proclamation, Cana-

dian Legal History, and Self-Government." In Michael Asch, ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference. Vancouver: University of British Columbia Press, 1997:

155-172.

Department of Justice Canada

n /d Canadian Charter of Rights and Freedoms, Constitution

Act, 1982. At: http://laws.justice.gc.ca/en/charter/. Ac-

cessed January 2009.

Fairweather, Joan G.

2006 A Common Hunger: Land Rights in Canada and South

Africa. Calgary: University of Calgary Press.

Green, L. C.

1989 "Claims to Territory in Colonial America." In L. C. Green

and Olive P. Dickason. *The Law of Nations and the New World.* Edmonton, AB: University of Alberta Press: 1-140.

Green, L. C. & Olive P. Dickason

1989 The Law of Nations and the New World. Edmonton, AB:

University of Alberta Press.

Hakluyt, Richard

1903 The Principal Navigations, Voyages, Traffiques and Dis-

coveries of the English Nation. Vol. 3. Glasgow: James

MacLehose.

Hurley, Mary C. & Jill Wherrett

2000 "The Report of the Royal Commission on Aboriginal

Peoples." Canada, Library of Parliament, 2000. At: http://www.parl.gc.ca/information/library/PRBpubs/prb9924-

e.htm. Accessed January 2009.

Indian and Northern Affairs Canada

1996

Report of the Royal Commission on Aboriginal Peoples. Volume 1, part 3, Appendix E. At: http://www.ainc-inac.gc.ca/ap/pubs/sg/sg-eng.asp. Accessed January 2009. Johnson v. M'Intosh, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823).

Little Bear, Leroy

1986

"Aboriginal Rights and the Canadian 'Grundnorm." In J. R. Ponting, ed. *Arduous Journey: Canadian Indians and Decolonization*. Toronto: McClelland and Stewart.

Macklem, Patrick, K. E. Swinton, R.C.B. Risk, C.J. Rogerson,

L.E. Weinrib, & J.D. Whyte (eds.)

n/d

Canadian Constitutional Law. Toronto: Emond Montgomery Publications.

Macklem, Patrick

1997

"First Nations Self-Government and the Borders of the Canadian Legal Imagination." In P. Macklem, K. E. Swinton, R. C. B. Risk, C. J. Rogerson, L. E. Weinrib, and J. D. Whyte, eds., *Canadian Constitutional Law*. Toronto: Emond Montgomery Publications: 526-529.

Marcus, Alan Rudolph

1995

Relocating Eden: The Image and Politics of Inuit Exile in the Canadian Arctic. Hanover: University Press of New England.

McNeil, Kent

1997a

"Aboriginal Title and Aboriginal Rights: What's the Connection?" *Alberta Law Review*, 36, 1: 117-148.

1997b

"The Meaning of Aboriginal Title." In Michael Asch, ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and respect for Difference. Vancouver: University of British Columbia Press: 135-154.

Miller, Robert J.

2005

"The Doctrine of Discovery in American Indian Law." *Idaho Law Review*, 42: 1-122.

2006

Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny. Westport, CT: Praeger.

2007

"Finders Keepers in the Arctic? The Doctrine of Discovery is Still Alive in the Modern World." *Los Angeles Times*, August 6, 2007. At: http://artciles.latimes.com/2007/aug/06/news/oe-miller6. Accessed October 2008.

The NationTalk Project

2007 "Looking Back, Looking Forward: RCAP In Review."

2007. At: http://www.nationtalk.ca/modules/news/article.php?storyid=1249. Accessed January 2009.

Pope Nicholas V

1455 Romanus Pontifex. January 8. At: http://www.nativeweb.

org/pages/legal/indig-romanus-pontifex.html. Accessed

November 2008.

Ponting, J. R. (ed.)

1986 Arduous Journey: Canadian Indians and Decolonization.

Toronto: McClelland and Stewart.

Privy Council

1888 St. Catherine's Milling and Lumber Company v. The

Queen (1888), 14 A.C. 46.

Royal Proclamation, 1763

1763 At: http://www.bloorstreet.com/200block/rpl1763.htm#2.

Accessed November 2008.

Steinhauer, Stewart

2006 "Canadian Land Claims." *The Dominion*, May 13. At:

http://www.dominionpaper.ca/opinion/2006/05/13/

canadian I.html. Accessed October 2008.

Supreme Court of Canada

1996 R. v. Adams, 3 S.C.R. 101.

1997 Delgamuukw v. British Columbia. 3 S.C.R. 1010.

1973 Calder et al. v. Attorney-General of British Columbia,

S.C.R. 313.

1984 Guerin v. The Queen, 2 S.C.R. 335.

1990 R. v. Sparrow, 104 S.C.C.

1996 R. v. Van der Peet, 2 S.C.R. 507.

1964 R. v. White and Bob, 50 D.L.R. (2d) 613.

Supreme Court of the United States

1823 Johnson and Graham's Lessee v. McIntosh, 21 U.S. 543,

5 L.Ed. 681, 8 Wheat. 543.

Thom, Brian

n/d "Aboriginal Rights and Title in Canada After

Delgamuukw." At: http://home.istar.ca/~bthom/

rights.htm. Accessed November 2008.

Tester, Frank James & Peter Kulchyski

1994 Tammarniit (Mistakes): Inuit Relocation in the Eastern

Arctic, 1939-63. Vancouver: University of British Colum-

bia Press.

Washburn, Wilcomb

1995 Red Man's Land, White Man's Law: The Past and Present

Status of the American Indian. 2nd Ed. Norman: Univer-

sity of Oklahoma Press.

J. H. Williamson

1929 The Voyages of the Cabots. London.

Acknowledgments

I wish to thank Kate Reid for her assistance in the preparation of this article.