



Canadian Friends
Service Committee
(QUAKERS)

Quaker Indigenous Rights Committee

FAQs on the Doctrine of Discovery & *Terra Nullius*

2015

What is the doctrine of discovery and *terra nullius*?

The doctrine of discovery was used as legal and moral justification for colonial dispossession of sovereign Indigenous Nations. Christian explorers claimed lands for their monarchs who could exploit the land, regardless of the original occupiers. This was invalidly based on the presumed racial superiority of European Christian peoples and was used to dehumanize, exploit and subjugate Indigenous Peoples and dispossess them of their most basic rights. Such ideology leads to practices that continue through modern day laws and policies.

Terra nullius means that no one owned the land prior to European assertion of sovereignty.

How has the doctrine of discovery been used in Canada?

Leading cases in Canada, such as *St. Catherines Milling and Lumber Company v. The Queen*, have relied upon early U.S. Supreme Court cases such as *Johnson v. McIntosh* that are based on the discovery doctrine. Yet, in these and other significant legal cases, the Indigenous Peoples affected were not included as direct parties. Such breaches of natural justice serve to further discredit these rulings and the doctrine on which they are based.

Discovery was used as a tool to attempt the “exclusive power to extinguish” Indigenous rights on an ongoing basis.ⁱ The pre-existing inherent sovereignty of Indigenous Peoples was not justly considered. Modern rulings, such as the BC Court of Appeal in 2012 have aided States not only by validating such destructive acts, but also by attempting to extinguish Indigenous rights through judicial rulings.ⁱⁱ

What does the recent Tsilhqot'in Supreme Court of Canada victory mean for the legal use of the doctrine of discovery in Canada?

In referring to the “pre-existing” land rights of Indigenous Peoples, the Supreme Court ruled in *Tsilhqot’in Nation*: “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation (1763)*”.ⁱⁱⁱ

This is because there are equitable principles^{iv} in the *Royal Proclamation* that have applied throughout Canada since its creation and such principles preclude any unjust, discriminatory doctrines.^v Just as the Supreme Court concluded that the *Proclamation* confirms that the doctrine of *terra nullius* never applied in Canada, the same must be true in regard to the doctrine of discovery.^{vi} Both these doctrines are also inconsistent with the constitutional principle to uphold the honour of the Crown.

What are other faith organizations saying about the doctrine of discovery?

Many faith-based groups are examining discovery and repudiating. The World Council of Churches has done so. The Truth and Reconciliation Commission (TRC) has called on all faith bodies to repudiate the concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of discovery and *terra nullius*, and the reformation of policies within their institutions that continue to rely on such concepts. CFSC will participate in a meeting with other faith communities further discussing this in November.

What does the CYM Minute on the doctrine of discovery say, and what does it mean for Friends in our social witness?

The doctrine of discovery originated in Papal Bulls that were never supported by the Religious Society of Friends. However, as it is a doctrine that historically originates in a religious context and has had ongoing legal/societal ramifications, it has been publically commented on and criticized by many faith bodies. The Canadian Yearly Meeting (CYM) minute on doctrine of discovery was achieved after a careful process of discernment through which Monthly Meetings and Worship Groups across Canada engaged and commented on a proposed draft statement that was well seasoned by the time it came to CYM and expresses Friends’ testimonies of equality and peace, recognizing that of God in everyone. We continue to look for opportunities to engage with other faith bodies and the government of Canada on the doctrine of discovery. As part of our witness, CFSC organized a panel on the doctrine of discovery at the closing events of the TRC. It can be viewed at:
<https://www.youtube.com/watch?v=1NrjoaFuXk4>

What impact would Canada formally renouncing the doctrine of discovery have on the reconciliation process?

While it does not change past injustices, it would acknowledge our collective moral responsibility and recognize the obligations Canada has in the present to Indigenous Peoples. It would be more than a merely symbolic gesture as it would show good faith and lay to rest an offensive legal justification for the subjugation of Indigenous Peoples based on racial superiority.

What would be the likely legal effect if the Government of Canada formally renounced the doctrine of discovery?

While the Supreme Court of Canada (SCC) did explicitly reject the doctrine of *terra nullius*, the SCC did not refer to the doctrine of discovery in the *Tsilhqot'in Nation* decision. The doctrine of discovery continues to be the unacknowledged “elephant in the room”. If Canada formally repudiated the doctrine of discovery it would not change the historic title to possession of lands held by settlers or mean that Canada automatically accepts Aboriginal title for all unceded territory of Indigenous Peoples. The necessity to resolve land rights claims will remain and these would still have to be negotiated or litigated. However, repudiating the doctrine of discovery and interpreting Canadian law in a manner consistent with the *United Nations Declaration of the Rights of Indigenous Peoples* and other contemporary international human rights standards will allow a fair and equitable settlement of outstanding issues of Indigenous lands, territories and resources. Rather than taking an adversarial position against Indigenous Peoples, Canada should uphold the honour of the Crown and engage in a resolution of land rights that does not try to minimize what Indigenous Peoples are entitled to. Indigenous Peoples should not have to engage in protracted, expensive litigation to have recognition of their lands and rights respected.

Can we envision a new paradigm to replace the doctrine of discovery?

A paradigm that is truthful about the history of past relations between Indigenous Peoples and settlers but allows for resolution of outstanding issues of land claims and self-determination is essential for advancing the reconciliation process between Indigenous Peoples and non-Aboriginal Canadians. Let us recognize that Indigenous Peoples in sovereign nations occupied the land before contact and we have an erratic history of making treaties and in honouring what treaties were made. Indigenous Peoples do not expect settlers to surrender occupation of lands they live on and return to their ancestral countries of origin. We are all here and must live together. Canada presently engages in an adversarial relationship with Indigenous Peoples. This is contradictory to reconciliation. If Indigenous Peoples are able to realize their full potential, individually and collectively, all of Canada benefits.

Examples abound of amicable relationships based on mutual cooperation established after the early contact between Indigenous Peoples and settlers. Early European settlement of the Americas would not have been possible without Indigenous Peoples sharing their traditional knowledge of the land, its flora and fauna, with settlers. The first European settlers were often ill prepared for the challenges of living in the new land. Those who survived and endured were helped by Indigenous Peoples, who shared with the new arrivals.

The *Royal Proclamation of 1763* was issued by George III after the defeat of the French in Québec with the crucial support of First Nations allies. A year later, at Fort Niagara, a gathering of representatives from a few dozen First Nations from Nova Scotia to the Great Plains and as far north as Hudson Bay met with Sir William Johnson, Superintendent of Indian Affairs, representing the Crown. At this gathering the Covenant Chain of Friendship, a multination relationship in which no member gave up their sovereignty, embodied in a two-

row wampum belt communicating the promises made, was affirmed. The *Proclamation* forms a basis for the land rights claims of Indigenous Peoples in Canada – First Nations, Inuit, and Métis and is therefore mentioned in section 25 of the *Canadian Charter of Rights and Freedoms*. Many leading Aboriginal law scholars assert the *Royal Proclamation of 1763* and the *Treaty of Niagara* together form a treaty between First Nations and the Crown that guaranteed Indigenous self-government.^{vii}

The TRC has called for Canada to jointly develop with Indigenous Peoples a *Royal Proclamation of Reconciliation* to be issued by the Crown. The proclamation would build on the *Royal Proclamation of 1763* and the *Treaty of Niagara* of 1764, and reaffirm the Nation to Nation relationship between Aboriginal peoples and the Crown. The proclamation would include a commitment to repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the doctrine of discovery and *terra nullius*.^{viii}

"The CYM minute on doctrine of discovery concludes with the exhortation: Friends are encouraged to explore further how we personally and corporately respond to how 'discovery' is ingrained in our culture and way of life. Canadian Yearly Meeting supports the process of building right relationship among peoples in Canada and we ask ourselves what the process of bringing reconciliation and healing means to us and to how we proceed."^{ix}

ⁱ Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

ⁱⁱ Tsilhqot'in Nation v. British Columbia, 2012 B.C.C.A. 285 (broad territorial claims to title are "antithetical to the goal of reconciliation"). CFSC intervened in this case at the appeal to the Supreme Court of Canada.

ⁱⁱⁱ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 69.

^{iv} See, e.g., *Rupert's Land and North-Western Territory Order* (U.K.), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9, Schedule A - Joint Address of the Senate and the House of Commons of Canada, December 1867: "...upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines." [emphasis added]

^v See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 200 (reasons of La Forest and L'Heureux-Dubé JJ. were delivered by La Forest): "In essence, the rights set out in the Proclamation ... were applied in principle to aboriginal peoples across the country". [emphasis added]

Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), para. 1: "The history of indigenous peoples' relationship with Europeans and Canada has positive aspects, such as ... policies of coexistence, the Royal Proclamation of 1763 and the related policy of the British Crown of seeking formal permission and treaty relationships with indigenous peoples before permitting settlement in their territories."

^{vi} Robert J. Miller, "The International Law of Colonialism: A Comparative Analysis", (2011) 15 Lewis & Clark L. Rev. 847 at 849: "... the Doctrine [of Discovery] provided that Europeans automatically acquired property rights in native lands and gained governmental, political, and commercial rights over the Indigenous inhabitants

without their knowledge or consent.³ This legal principle was created and justified by religious, racial, and ethnocentric ideas of European and Christian superiority over other peoples and religions.”

See also Tracey Lindberg, "Contemporary Canadian Resonance of an Imperial Doctrine" in Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of discovery in the English Colonies*, (Oxford/New York: Oxford University Press, 2012) 126 at 158: “Crown sovereignty could not replace Indigenous sovereignty just by virtue of non-Indigenous peoples settling in Indigenous territories and homelands.”

^{vii} Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. Vancouver: UBC Press, 1997.

^{viii} Recommendation 45

^{ix} See the full statement and approved minute at <http://quakerservice.ca/wp-content/uploads/2013/08/Doctrine-of-Discovery-minute-and-background-August-2013.pdf>