THE DOCTRINE OF DISCOVERY & TERRA NULLIUS

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TERRA NULLIUS & TERRA NULLUS

- Rooted in Natural and Roman law and European common law traditions. Initially, the right of discovery was valid when the lands discovered were unoccupied…a true "terra nullius."
- In the age of discovery, because most lands had inhabitants, and the traditional legal doctrine hindered expansion, the term "terra nullius" changed to mean lands that were uncultivated according to European standards
- Terra Nullus – lands inhabited by pagans, heathens, infidels and non-baptised persons, i.e., where the inhabitants had no fixed residences but roamed the territory like "wild beasts in a forest."

DOCTRINE OF DISCOVERY

- Doctrine of Discovery (DOD) is an international law principle developed primarily by Spain, Portugal, England, and the Church in the fifteenth and early sixteenth centuries to control and maximize European exploration and colonization in the New World and other lands of non-European, non-Christian people. The Doctrine had its genesis in medieval, feudal, ethnocentric, religious, and even racial theories.
- The Papal Bulls of Discovery were then, international law, holding that when European nations "discovered" non-European lands, they gained special rights over that land, such as sovereignty and title, regardless of fact other peoples lived on that land.

CHRISTIAN ORIGINS

- Pope Innocent IV concluded in 1240 that despite the fact that Indigenous "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.
- Property rights were at the core of Pope pronouncement 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.. Conquest and subjugation were thus permissible in the interest of spreading Christianity.

PAPAL BULLS

- The papal bull *Romanus Pontifex*, issued in 1455, serves as An example to understand the Doctrine of Discovery, specifically, the historic efforts by Christian monarchies and States of Europe in the fifteenth and later centuries to assume and exert rights of conquest and dominance over non-Christian indigenous peoples in order to take over and profit from their lands and territories.
- Centuries of destruction and ethnocide resulted from the application of the Doctrine of Discovery and framework of dominance to indigenous peoples and to their lands, territories and resources.

NON-CHRISTIANS, NO RIGHTS

- Pope Nicholas authorized Portugal King Alfonso to assume and take control over non-Christian lands and to "invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and 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, and to convert them to his and their use and profit …".

"DISCOVERY"

- The Doctrine of Discovery, as applied by England & later the United States to the American First Nations came to mean that when European, Christian nations first "discovered" new lands the discovering country automatically gained sovereign and property rights in the lands of the non-Christian, non-European nation even though, obviously, the natives already owned, occupied, and used these lands.
- In addition, the discoverer also gained sovereign governmental rights over the native peoples and their governments which restricted First Nations international political relationships and trade. This transfer of political, commercial, and property rights was accomplished without the knowledge nor the consent of the Indian people.

ELEMENTS OF DISCOVERY*

1. First Discovery – claiming a right of domination or conquest by 1st European/Christian government to show up
2. Actual Occupancy of land by that government
3. Pre-emption European Title – claimed sole right to acquire First Nation lands
4. Native title – limited rights once claimed by Christian governments
5. Sovereign & Commercial Rights – also limited

- * RJ Miller

ELEMENTS OF DISCOVERY 2

6. Contiguity – how much land was being claimed by Colonizer – boundaries of claimed land used river watersheds
7. Terra Nullius – Empty land; Terra Nullus – lands inhabited by pagans, heathens, infidels and non-baptised persons
8. Conquest – a "Just War" – used by Spanish as DOD legal principle, if IP violated Law of Nations (DOD)
9. Christianity – always used by Europeans to claim land because Indigenous people were non-Christian heathens – lesser beings
10. Civilization – lack of civilizations used to justify land theft

- *RJ Miller

INDIGENOUS POPULATIONS DECIMATED

- When Christopher Columbus arrived in 1492, it is estimated that the Americas were actually occupied by 100 million Indigenous Peoples - which is about one fifth of the human race at that time - who had been living their traditional lives on the land since time immemorial. But, because they were not Christians the land was deemed terra nullius.
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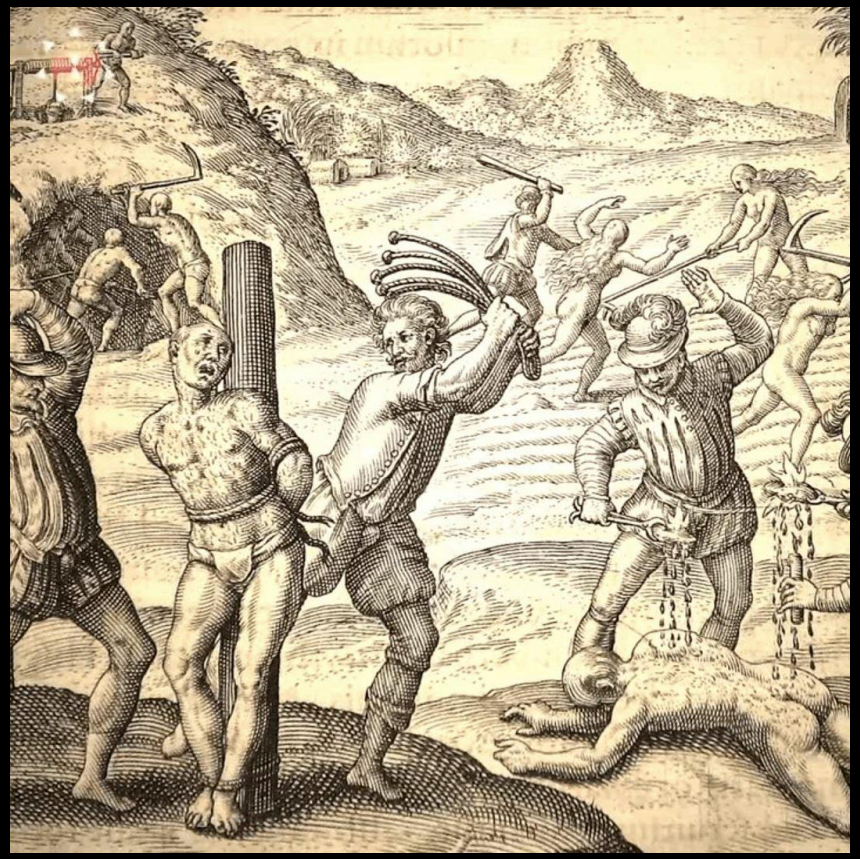

SETTLER NATIONS USED DOCTRINE

- There is No Doubt that the Indigenous nations in North America, Australia, and New Zealand were factually independent and sovereign prior to the arrival of Europeans. They occupied specific territories and had viable social, political, and legal systems that suited their needs and were adapted to the circumstances in which they lived.
- 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 the United States Supreme Court in Johnson v M'Intosh

APPLICATION TO THE UNITED STATES

- After the Americans fought and won their War of Independence, they had to deal with the rights to land and sovereignty of the pre-existing Indigenous First Nations already in the territory and with whom Treaties already existed. They resolved this in their own favour through their own Courts, where First Nations were not represented.
- In 1823, in Johnson v. M'Intosh, the United States Supreme Court held that the "Doctrine of Discovery" was an established legal principle of English and American colonial law that had also become the law of the American state and federal governments. However, the US Supreme Court found that "discovery" of a non-European land by representatives of a European monarch gave that monarch an exclusive right to buy lands from the Indigenous peoples of the area. And since the US government was the successor to the British Monarch who "discovered" this area, only the US government had the right to buy lands from First Nations.

JOHNSON V. M'INTOSH

- "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."

COURT REINFORCES DOCTRINE

- The US Supreme Court, though, did not see itself as coming up with this Discovery Doctrine by itself. Instead, it said that "The history of America from its discovery to the present day proves, we think, the universal recognition" of the Discovery Doctrine. By "universal recognition", the Court meant recognition by Europeans and their settlers. The Discovery Doctrine was a recognized principle of international law, which of course arose out of the relationships between European countries.

APPLICATION TO CANADA

- Granted by King Charles II of England, May 2nd, 1670, the Royal Charter gave an exclusive trading monopoly over the entire Hudson Bay drainage basin to "the Governor and Company of Adventurers of England trading into Hudson Bay."
- “And whereas the said undertakers for their further encouragement in the said designe have humbly besought us to Incorporate them and grant unto them and their successors the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the entrance of the Streightes commonly called Hudson’s Streightes together with all the Landes Countryes and Territoryes upon the Coastes and Confynes of the Seas Streightes Bayes Lakes Rivers Creekes and Soundes aforesaid which are not now actually possessed by any of our Subjectes or by the Subjectes of any other Christian Prince or State”

CANADIAN COURTS – ST. CATHERINES MILLING

- Leading cases in Canada, cases 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.

CANADIAN COURTS - SPARROW

- In Canada, the Doctrine is reflected by the 1990 Supreme Court of Canada decision of R v Sparrow. This was the first time the highest court in the Canadian legal system had a chance to deal directly with s.35(1) of the Constitution Act, 1982, which enshrined the protection of Aboriginal and Treaty Rights in the Constitution of Canada. "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." (Sparrow, p 1103)

CANADIAN COURTS – VAN DER PEET

- From this position, it was not a far leap for the Court to later say in the Van der Peet case that the law must help "the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown." But as the Court also said in Van der Peet, it is the existence of the Aboriginal societies, and their rights that need proving in the courts; the sovereignty of the Crown is just taken as a given.
- Unless an Indigenous community proves to a court's satisfaction that it has exclusive occupation or control of a territory, the default understanding of the Canadian legal system is that that territory is Crown land. Second, even if an Indigenous community can prove that they have an Aboriginal right, Aboriginal title, or a Treaty right, that right is always potentially subject to infringement by the Crown.

CANADIAN COURTS – TSILHQUOT'IN

- The Supreme Court of Canada decided in 2014 in Tsilhqot'in that in cases where Aboriginal title has never been extinguished, jurisdiction and title to the land remain with the relevant Indigenous nation.
- The UNDRIP, the gold standard for Indigenous rights at international law, unequivocally states that Indigenous peoples retain rights to unceded land and resources.
- Further, it requires settler states to provide redress for dispossessing Indigenous peoples of lands, territories and resources.

CANADIAN LAWS & POLICIES

- As in many countries worldwide, Canada's laws and policies constitute a continuing misinterpretation of international law relating to the doctrine of "discovery" – as well as a denial of the full and effective application of UNDRIP.
- Such actions by Canada and other States adversely affect Indigenous peoples globally. They are reneging on their international obligations to respect, protect and fulfil Indigenous peoples' human rights.

CALLS FOR REFORM

- RCAP (1996) Volume 2, Chapter 2 – Canada and the Aboriginal peoples of Canada, 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.
- Federal, provincial and territorial governments should 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; and (e) including a declaration to these ends in the new Royal Proclamation and its companion legislation."

INTERNATIONAL - UNDRIP - 2007

- UNDRIP Preamble "… all doctrines, policies and practices based on advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust"
- *Article 26*: Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- *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.

UNDRIP

- *Article 28*: Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

UNPFII - 2010

In the Report of the 9th Session, April 2010 of the UNPFII

- 128. The Permanent Forum decides that the special theme for its eleventh session, in 2012, will be "The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples)".
- **Recommendation:**
- That the UNPFII urge States to repeal laws, policies and processes based on the Doctrine of Discovery and jointly develop with Indigenous Peoples laws, policies and processes consistent with Articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples.

TRC - 2015

- ***Call to Action #48***, for example, calls upon the churches of Canada to adopt and comply with the **UN Declaration on the Rights of Indigenous Peoples.** UNDRIP establishes, among other things, a right of Indigenous peoples to their lands and a right not to have their lands taken from them without their free, prior, and informed consent (Arts. 10, 26, 32). Indigenous peoples also have a right to self-government (Arts. 4, 5, 18, 19, 20, 23, 33).
- ***Call to Action #45***, for example, explicitly calls on the Government of Canada, on behalf of all Canadians, to repudiate the Discovery Doctrine and implement UNDRIP.

ASSEMBLY OF FIRST NATIONS

The AFN recommends that Canada take the following steps:

- Acknowledge that this doctrine has had and continues to have devastating consequences for Indigenous peoples worldwide, including First Nations in Canada;
- Reject doctrines of superiority as illegal and immoral, and affirm that they can never be a justification for the exploitation and subjugation of Indigenous peoples and the violation of human rights;
- In full partnership with First Nations, examine how Canadian history, laws, practices and policies have relied on the doctrine of discovery;
- Repudiate all doctrines of superiority in a legislative framework for implementation of the *United Nations Declaration on the Right of Indigenous Peoples*, developed together with Indigenous peoples;

AFN POSITION

- Reinterpret Canadian law in a manner consistent with the *United Nations Declaration on the Right of Indigenous Peoples* and other contemporary international human rights standards;
- Ensure that the violation of First Nations' rights to lands, territories and resources that were taken without their free, prior, and informed consent are effectively redressed; and
- Ensure that the doctrine is not in any manner invoked in contemporary court cases or negotiations.

LASTING IMPACTS IN CANADA

- The *Doctrine of Discovery* still influences Canadian law and policy. The Doctrine has evolved from an explicitly racist legal/ moral instrument of domination, to subversive Canadian impacts, including ongoing reliance by Canadian Courts on the Doctrine.
- First Nations citizens continue to suffer from the ongoing impacts of the Doctrine, including loss of land & resources; loss of economies & poverty; abuse & legacy of residential schools; MMIWG; loss of self determination & jurisdiction (imposition of Indian Act); violation of Treaties; loss of control of First Nations citizenship; inadequate and unsafe housing; lack of safe water on reserves; survival of First Nations languages and cultures, to name a few.

THE WAY FORWARD

- We need a commitment & a process for Canadian governments to work with First Nation as equals to help repair the lasting impacts of the Doctrine, listed above. Not just reconciliation but Restitution, Restoration and Reclamation. This includes:
- recognition of First Nations Land rights and title & compensation for loss;
- recognition of First Nations rights of self determination/self governance & jurisdiction (replace the Indian Act),
- Nation to Nation Treaty recognition and implementation,
- First Nation jurisdiction over their citizenship, resources & jurisdictions for survival of First Nation languages/cultures

WAY FORWARD

- Resource revenues & wealth sharing,
- Justice,
- Withdrawal of the current attempt to impose the Recognition and Implementation of Indigenous Rights Framework, which is also built on the DOD.
- Work with First Nations (lead role) to implement all the previous recommendations from RCAP, UNDRIP, TRC & MMIWG.

QUESTIONS & DISCUSSION

- GROUP DISCUSSION & SHARING