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Questions of Title

The 15th century doctrine that upholds Indigenous land dispossession | Angelique EagleWoman

By **Angelique EagleWoman**

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(February 4, 2019, 2:36 PM EST) -- All Canadian and U.S. law schools teach basic property law and a brief history of the transfer of title from the original peoples to the present-day federal government. What is often glossed over in the property law introductory lesson is the Christian formed "doctrine of discovery" that continues in full force in both countries. The roots of the doctrine stretch back in time to the Crusades (1096-1291) and the rationale for just and holy wars sanctioned by the Catholic Pope.

During this time period and into the next several centuries, the church claimed global authority to dispossess pagans, infidels and non-Christians of their lands as a means to conversion to Christianity, regarded as a superior standard of civilization.

Papal bulls were issued to Portugal and Spain to discover lands not known to any Christian prince to subdue and assert every type of jurisdiction in the name of Christianity. The *Inter Caetera* bull issued by Pope Innocent IV in 1493 endorsed the actions of Christopher Columbus to take possession of all lands and non-Christian people as under the guardianship of Spain. This led to the *encomienda* system of enslavement of Indigenous peoples in what became Central and South America and was followed by the transatlantic slave trade of Africans after the decimation of the Indigenous populations.

In 1532, one of the early architects of international law, Franciscus de Victoria opined that American Indians possessed some natural rights to be free of enslavement and some form of property rights. However, the Spaniards could wage a just war if they were prevented from exploiting natural resources and/or proselytizing the Indigenous peoples to Christianity. He also supported Spanish guardianship over Indigenous peoples as in their best interests to civilize them from a state of "barbarism."

England and France in 1493 were Catholic countries and sought to assert their "discovery" rights to lands in the Western Hemisphere. In letters from King Henry VII to John Cabot he authorized the claiming of Indigenous peoples' lands in the name of England from "heathens and infidels in whatsoever part of the world placed which before this time were unknown to all Christians."

In June 1497, Cabot claimed what is now Newfoundland and all contiguous lands for England. Further, England and France without papal bulls developed the doctrine of *terra nullius* to proclaim lands vacant and therefore available to claim, regardless of the Indigenous peoples inhabiting their homelands.

As British colonies were established in North America, the Crown asserted "discovery" rights against all other European governments in the 1500s to the 1700s. In 1776, the United States was formed and claimed the rights of its predecessor, Great Britain. In the 1823 U.S. Supreme Court case, *Johnson v. McIntosh* 21 U.S. 843, the "doctrine of discovery" was formally acknowledged as the basis of U.S. title over Indigenous lands.

No Indigenous peoples were party or represented in the case between two land speculators, one claiming title directly from a transaction with the Piankeshaw Tribe and the other under a land

patent from the U.S. government. The case has been proved a sham as the title to the parcels did not overlap, however, the decision resonates to the present day in the dispossession of Indigenous lands around the world.

According to the decision, "[t]his principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession." 21 U.S. at 573.

Chief Justice John Marshall opined as to the rights of the Indigenous peoples of those same lands as follows. "While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy." 21 U.S. at 574. Further, the court set out "discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, and also gave a right to such degree of sovereignty as the circumstances would allow them to exercise." 21 U.S. at 587.

The chief justice did acknowledge the legal fiction relied upon: "[h]owever, extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it; it becomes the law of the land and cannot be questioned." 21 U.S. at 591.

Thus, the decision in *Johnson v. McIntosh* enshrined the "doctrine of discovery" as the legal basis for claiming superior title to Indigenous lands and was adopted by British counterparts in Australia, Canada and New Zealand.

In *St. Catherine's Milling and Lumber Co. v. the Queen* (1887) 13 SCR 577, the Supreme Court of Canada interpreted s. 91(24) of the *Constitution Act, 1867* authorizing federal authority over Indians and lands reserved to Indians. Chief Justice William Johnstone Ritchie stated, "I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase" and goes on to quote from U.S. Supreme Court Justice Joseph Story in the *Johnson v. McIntosh* decision.

In 2004, the Supreme Court of Canada in the *Haida Nation v. British Columbia* 2004 SCC 73 decision, returned to the principles of the doctrine of discovery and formally renounced that conquest had occurred in Canada. "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered" (para. 25). Thus, to perfect Aboriginal title in Canada, the government must engage in purchase of those lands.

Ten years later in *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44, the Supreme Court of Canada also rejected the doctrine of *terra nullius* as inapplicable to Canada. "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*" (para. 69).

In conclusion, the "doctrine of discovery" continues to operate in Canada through the assertion of superior title over all lands subject to the right of occupancy by Indigenous peoples. The Crown may extinguish Aboriginal title only through purchase, as the ground of conquest and the doctrine of *terra nullius* have both been refuted by the Supreme Court of Canada.

The question remains when the doctrine of discovery will be fully refuted and replaced with Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 26(2) of the UNDRIP expressly provides: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership, or other traditional occupation or use, as well as those which they have otherwise acquired."

From the first page of Volume 2 Restructuring the Relationship in the Report of the Royal Commission on Aboriginal Peoples, the following is stated. "A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not *terra nullius* at the time of contact

and that the newcomers did not 'discover' it in any meaningful sense. We know also that the peoples who lived here had their own systems of law and governance, their own customs, languages, and cultures."

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