

## **The Roman Catholic Foundations of Land Claims in Canada<sup>1</sup>**

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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 Canadian law. 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. As such, the Doctrine of Discovery is one of the oldest principles of international law. Although there were antecedents to the doctrine, it was Pope Alexander VI who applied it to the fifteenth-century Atlantic world 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 or engagement of any sort with the resident populations in these territories – the people to whom, by any sensible account, the land actually belonged.

The Doctrine of Discovery has been a critical component of historical relations between Europeans, their descendants, and Indigenous peoples; and it underlies their legal relationships to this day, having

smoothly and relatively uncritically transitioned from Roman Catholic to international law. Upon discovery of a territory, the doctrine held that Indigenous peoples could no longer claim ownership of their land, but only rights of occupation and use; moreover, no Indigenous nation could sell its land to any but the discovering state. In this way European colonial powers claimed preemptive rights while conceding only a restricted title to a territory's rightful owners.<sup>2</sup>

It has been argued that law regarding Aboriginal peoples is the "most uncertain and contentious body of law in Canada," and that this is a 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.<sup>3</sup> 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.

It is safe to say that Aboriginal Canadians do not generally regard their title to land as merely involving these kinds of rights of occupation and use. 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. As Leroy Little Bear noted: "[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?"<sup>4</sup> 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 that were transferred to the government of Canada.

### ***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."<sup>5</sup> The roots of the doctrine can be

traced back at least as far as the Crusades, though 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.<sup>6</sup> It was Pope Nicholas V who established the legal principle by which Europeans could lay claim to enemy territories. In two bulls,<sup>7</sup> Nicholas sanctioned the conquest of North Africa by the Portuguese king, Alfonso V, and ultimately provided the legal foundation for colonialism and the slave trade.<sup>8</sup>

Nicholas V's bulls effectively barred Spain from African exploration and, in response, Spain turned its attention westward with the voyages of Christopher Columbus. Upon his return to Spain, King Ferdinand and Queen Isabella immediately sought papal validation of their title to the discoveries Columbus had made in the Caribbean, and Pope Alexander VI subsequently issued three bulls legitimizing the claims, 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.<sup>9</sup>

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 the Pope's primary authority to grant sovereignty was not a debatable issue, and the assumption that Indigenous peoples lost underlying title to their land remained a point of international law.<sup>10</sup> 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*.<sup>11</sup>

By the turn of the sixteenth century, England and France had followed the Iberians in entering into the age of exploration, and the Crowns of both were guided by the Doctrine of Discovery. 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. 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.<sup>12</sup> Despite these refinements, 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. 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.<sup>13</sup>

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, one of Cabot's contemporaries wrote that he "placed on his new-found land a large cross, with one flag of England and another of St. Mark . . ." <sup>14</sup> 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. 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.<sup>15</sup> Prior to 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 Countey with Ensigne displaid, so far as thought needfulle, and now and then heaped up stones on high mountaines . . ." <sup>16</sup> 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 signified unto all men, that from this time forward, they should take the same land as a territories appertaining to the Queen of England . . . <sup>17</sup>

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

. . .<sup>18</sup>

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: first, the Royal Proclamation of 1763; and, second, the United States Supreme Court’s 1823 decision in *Johnson and Graham’s Lessee v McIntosh*.

### ***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 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 law the principle features of the discovery doctrine dealing with issues of sovereignty, title, and commerce. While ostensibly protecting First Nations from appropriation of their land, the document reserved to the Crown the prerogative to extinguish Aboriginal land rights and it established regulations for doing so.<sup>19</sup> 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 law that was based to a noticeable degree on the Royal Proclamation: "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."<sup>20</sup> 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 practice was that First Nations retained rights of occupation and use, but that Europeans automatically gained rights of preemption. Marshall's opinion established a legal precedent by which the loss of underlying Aboriginal title to land could be justified, a principle 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 . . . 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.<sup>21</sup>

Both the Royal Proclamation and Chief Justice Marshall's decision in *Johnson v. 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, in *St. Catherine's Milling and Lumber Company v The Queen* (1888), set the stage for this continuity. 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 referred directly to *Johnson v. McIntosh*, calling the holding in the case a "classic and definitive judgment;" and he concluded that First Nations' land rights amounted to "a personal and usufructuary right dependent on the good will of the

Sovereign.”<sup>22</sup>

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. *R v White and Bob* (1965) is a case in point. The trial involved the harvesting of deer in contravention of British Columbia gaming laws, and while the court held in favour of the defendants, in framing his opinion, Justice Norris referred repeatedly to the Royal Proclamation, *McIntosh*, and *St. Catherine’s Milling*. Marshall C. J.’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. The Proclamation, he wrote, “had the effect of a statute,” and it was “declaratory and confirmatory of . . . aboriginal rights.”<sup>23</sup> 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.<sup>24</sup>

The longstanding notion that Aboriginal title depended on the Crown and stemmed from the Royal Proclamation was discarded in the majority opinion in *Calder et al. v. Attorney-General of British Columbia, 1973*. In his opinion, Justice Judson claimed instead that it was based on pre-existing 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 . . .<sup>25</sup>

This was the first time that the court had acknowledged 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 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 in respect to Aboriginal land rights, even those justices who supported the Native

appellants upheld the tenets of Crown sovereignty and preemptive rights, 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.” As for *McIntosh*, Hall called the case “the locus classicus of the principles governing aboriginal title.” 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.”<sup>26</sup>

Aboriginal title was defined further in *Guerin v The Queen, 1984* as *sui generis* (characteristically unique) and based upon pre-contact occupation of a territory. Citing *McIntosh*, Justice Dickson stated that the Royal Proclamation recognized pre-existing forms of Aboriginal title. 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. Further, the preemptive rights established in the Royal Proclamation were also affirmed by Justice Dickson. Thus, although he 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.<sup>27</sup>

Still, the case was a catalyst for public discussions concerning Aboriginal rights that would ultimately contribute to the interpretation of these rights in Section 35(1) of the *Constitution Act, 1982* which reads, “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. Making it clear that the legitimacy of underlying title was not a debatable issue, Chief Justice Dickson and Justice La Forest wrote in the opinion that Aboriginal rights were not absolute, but could be subject to regulation by legislation. In underscoring this point, the justices cited the Royal Proclamation and Chief Justice Marshall.<sup>28</sup> *Sparrow* had broader implications in 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.” 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.”<sup>29</sup>

Two more cases bear consideration here, for the advancements they made in dealing with s.35(1) as well as for 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.”<sup>30</sup> Supporting the opinion in the case, the Chief Justice turned to both the Royal Proclamation and *McIntosh*.

Chief Justice Lamer reiterated many parts of the *Van der Peet* opinion in a year later in *Delgamuukw v British Columbia, 1997*, but the latter became a defining case when the court made the unprecedented decision to accept oral history as admissible evidence. In spite of this and other strides, Justice La Forest 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 extinguished, citing the Royal Proclamation as part of the opinion stating, “Indeed, the treatment of “aboriginal title” as a compensable right can be traced back to the Royal Proclamation, 1763.”<sup>31</sup>

### **Conclusion**

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 Canadian law. Sovereignty is presumed to reside with the Crown, and while Native peoples are regarded as having an Aboriginal claim on land, 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. These rights have a long legal history in Canada, tracing back to the Royal Proclamation. The integration of the Doctrine of Discovery into Canadian law 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 in respect to Aboriginal peoples – that Chief Justice Marshall’s ruling in *McIntosh* should no longer provide a template for assertions of territorial sovereignty.<sup>32</sup> While this may be a defensible position, the Constitution itself complicates matters since s.25(a) of the *Charter of Rights and Freedoms* legitimizes the foundation of Marshall’s opinion:

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 . . .

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, and are recognized in s.25(a).

When the Royal Commission on Aboriginal Peoples released its five-volume report in 1996,<sup>33</sup> 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 . . . 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 . . .<sup>34</sup>

It should not be surprising that among RCAP's key recommendations was the following:

To begin the process, the federal, provincial and territorial governments, on behalf of the people of Canada, and national Aboriginal organizations, on behalf of 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.<sup>35</sup> [my emphasis]

### **Endnotes**

1. My thanks to Kate Reid and Casey Koons for their assistance in the preparation of this essay.
2. Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny* (Westport, CT: Praeger, 2006), 4.
3. Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" *Alberta Law Review* 36, no. 1 (1997): 117.
4. L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm,'" in *Arduous Journey: Canadian Indians and Decolonization*, ed., J. R. Ponting (Toronto: McClelland and Stewart, 1986), 247; and Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiation," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 215-17.
5. Stewart Steinhauer, "Canadian Land Claims," *The Dominion*, 13 May 2006, [http://www.dominionpaper.ca/opinion/2006/05/13/canadian\\_1.html](http://www.dominionpaper.ca/opinion/2006/05/13/canadian_1.html) [accessed October 2008].
6. Wilcomb Washburn, *Red Man's Land, White Man's Law: The Past and Present Status of the American Indian*, 2<sup>nd</sup> ed. (Norman: University of Oklahoma Press, 1995), 4-5, cites Thomas Aquinas' *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 . . .”

7. *Dum diversas* (1452) and *Romanus Pontifex* (1455).
8. 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” (Pope Nicholas V, *Romanus Pontifex* [8 January 1455], <http://www.nativeweb.org/pages/legal/indig-romanus-pontifex.html> [accessed November 2008]); and Robert J. Miller, “Finders Keepers in the Arctic? The Doctrine of Discovery is Still Alive in the Modern World,” *Los Angeles Times*, 6 August 2007, <http://articles.latimes.com/2007/aug/06/news/oe-miller6> [accessed October 2008].
9. Pope Alexander VI, *Inter caetera* (4 May 1493), <http://www.catholic-forum.com/saints/pope0214a.htm> [accessed January 2009]. While the bulls defined the limits of Iberian discovery claims, Spain and Portugal mutually agreed to shift the boundary established by *Inter caetera* through the Treaty of Tordesillas in 1494. The pope responded with another bull, *Ea qua*, in 1506, which would allow Portugal limited access to the Atlantic world. As a result, it was able to claim discovery rights in Brazil (see L. C. Green, “Claims to Territory in Colonial America,” in *The Law of Nations and the New World*, by L.C. Green and Olive P. Dickason [Edmonton: University of Alberta Press, 1989], 178-79, 6-7).
10. 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 . . . [Moreover] 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.

11. See Washburn, *Red Man's Land*, 78.

12. Miller, *Native America*, 18.
13. Anglican Church of Canada and Evangelical Lutheran Church of Canada, "Doctrine of Discovery and Terra Nullius" (General Synod, 2001), at: <http://www2.anglican.ca/gs2001/tr/presentations/terranullius.html> [accessed October 2008].
14. Pasqualigo letter, 23 August 1497, cited in J. A. Williamson, *The Voyages of the Cabots* (London: Argonaut Press, 1929), 29.
15. Robert J. Miller, "The Doctrine of Discovery in American Indian Law," *Idaho Law Review* 42 (2005):16.
16. Richard Hakluyt, *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation*, vol. 3 (Glasgow: James MacLehose, 1903), 32; and Green, "Claims to Territory," 11-12.
17. Hakluyt, *The Principal Navigations*, 53-54; and Green, "Claims to Territory," 12.
18. H. P. Biggar, ed., *The Works of Samuel de Champlain*, vol. 2 (Toronto: Champlain Society Publications, 1925), 272, 297; and Green, "Claims to Territory," 9-10.
19. Miller, *Native America*, 31-32; Green, "Claims to Territory," 102-103; and John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, 159-60.
20. *Johnson v. McIntosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823), [http://www.utulsa.edu/law/classes/rice/ussct\\_cases/JOHNSON\\_V\\_MCINTOSH\\_1823.HTM](http://www.utulsa.edu/law/classes/rice/ussct_cases/JOHNSON_V_MCINTOSH_1823.HTM) [accessed January 2009].
21. *Johnson v. McIntosh*.
22. Privy Council (London), *St. Catherine's Milling and Lumber Company v The Queen* (1888), 14 A.C. 46, <http://library2.usask.ca/native/cnlc/vol02/541.html> [accessed November 2008]; McNeil (1997a), 142; and Catherine Bell and Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation," in *Aboriginal and Treaty Rights in Canada*, 47-48.
23. Supreme Court of Canada, *R. v White and Bob* (1964), 50 D.L.R. (2d) 613, <http://library2.usask.ca/native/cnlc/vol06/629.html> [accessed January 2009].
24. *R. v White and Bob*.

25. Supreme Court of Canada, *Calder et al. v. Attorney-General of British Columbia*, S.C.R. 313 (1973), <http://scc.lexum.umontreal.ca/en/1973/1973rcs0-313/1973rcs0-313.html> [accessed January 2009].
26. *Calder et al. v. Attorney-General of British Columbia*; Bell and Asch, "Challenging Assumptions," 48; Michael Asch, "Introduction," in *Aboriginal and Treaty Rights in Canada*, ix; Borrows, "Wampum at Niagara," 155; and Asch and Zlotkin, "Affirming Aboriginal Title," 210.
27. Supreme Court of Canada, *Guerin v The Queen*, 2 S.C.R. 335 (1984), <http://csc.lexum.umontreal.ca/en/1984/1984rcs2-335/1984rcs2-335.html> [accessed January 2009]; Bell and Asch, "Challenging Assumptions," 49; Joan G. Fairweather, *A Common Hunger: Land Rights in Canada and South Africa* (Calgary: University of Calgary Press, 2006), 99; and Borrows, "Wampum at Niagara," 161.
28. Supreme Court of Canada, *R. v Sparrow* 104 S.C.C. (1990), <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html> [accessed January 2009].
29. *R. v Sparrow*; Catherine Bell and William B. Henderson, "Aboriginal Rights: Canadian Law," *The Canadian Encyclopedia*, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1SEC815557> [accessed November 2008]; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination," in *Canadian Constitutional Law*, eds. P. Macklem, K. E. Swinton, R. C. B. Risk, C. J. Rogerson, L. E. Weinrib, and J. D. Whyte (Toronto: Emond Montgomery Publications, 1997), 527; and Kent McNeil, "The Meaning of Aboriginal Title," *Aboriginal and Treaty Rights in Canada*, 144-45.
30. Supreme Court of Canada, *R. v. Van der Peet*, 2 S.C.R. 507 (1996), <http://csc.lexum.umontreal.ca/en/1996/1996rcs2-507/1996rcs2-507.html> [accessed January 2009]; and McNeil, "The Meaning of Aboriginal Title," 123.
31. Supreme Court of Canada, *Delgamuukw v British Columbia*, 3 S.C.R. 1010 (1997), <http://csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.html> [accessed January 2009].
32. Macklem, "First Nations Self-Government," 528.
33. 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 5 volumes and made over 400 recommendations aimed at

improving the relationship between Aboriginal peoples and other Canadians. See The NationTalk Project, "Looking Back, Looking Forward: RCAP in Review" (2007), <http://www.nationtalk.ca/modules/news/article.php?storyid=1249> [accessed February 2009]; and Mary C. Hurley and Jill Wherrett, "The Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Library of Parliament, 2000), <http://www.parl.gc.ca/information/library/PRBpubs/prb9924-e.htm> [accessed February 2009].

34. Indian and Northern Affairs Canada, *The Report of the Royal Commission on Aboriginal Peoples*, volume 1, part 3, Appendix E (1996), <http://www.ainc-inac.gc.ca/ap/pubs/sg/sg-eng.asp> [accessed February 2009].
35. *The Report of the Royal Commission on Aboriginal Peoples*.

