Canada's vision of reconciliation with Indigenous Peoples is crap. It's nice to see a book that shares this view. Read it and learn.
—Tim Fontaine, *Walking Eagle News*

STANDOFF

Why Reconciliation Fails Indigenous People and How to Fix It

Bruce McIvor

Essays by leading Canadian Indigenous Rights lawyer Bruce McIvor

Dismantling Canada's colonial legal system and the mindset that sustains the continued denial of the rights of Indigenous peoples requires sustained work by skilled advocates. At every turn, Indigenous peoples must confront, challenge and overturn these oppressive Canadian laws and policies, in direct action and through court processes. Bruce McIvor has been at the forefront of this work for decades as a masterful scholar, advocate and Indigenous thought leader. In all of this work, Bruce embraces cultural humility and defers to the voices of his clients, bringing wisdom and collaboration in each step of this arduous journey.

—Mary Ellen Turpel-Lafond (Aki-Kwe)

Faced with a constant stream of news reports of standoffs and confrontations, Canada's "reconciliation project" has gone off the rails. In this series of concise and thoughtful essays, lawyer and historian Bruce McIvor explains why reconciliation with Indigenous peoples is failing and what needs to be done to fix it.

Widely known as a passionate advocate for Indigenous rights, McIvor reports from the front lines of legal and political disputes that have gripped the nation. From Wet'suwet'en opposition to a pipeline in northern British Columbia, to Mi'kmaw exercising their fishing rights in Nova Scotia, McIvor has been involved in advising First Nation clients, witnessing industry and non-Indigenous opposition to true reconciliation, and explaining to government officials why their policies are failing.

In clear, plain language he explains the historical and social forces that underpin the development of Aboriginal law, criticizes the current legal shortcomings and charts a practical, principled way forward.

$21.95 • Non-Fiction • Printed in Canada

ISBN 978-0-88971-420-5

52195

9 780889 714205

NIGHTWOOD EDITIONS

www.nightwoodeditions.com

STANDOFF

Why Reconciliation Fails Indigenous People and How to Fix It

Bruce McIvor

NIGHTWOOD EDITIONS

2021

1 2 3 4 5 — 25 24 23 22 21

Nightwood Editions
P.O. Box 1779
Gibsons, BC V0N 1V0
Canada
www.nightwoodeditions.com

COVER DESIGN: TopShelf Creative
TYPOGRAPHY: Carleton Wilson

Nightwood Editions acknowledges the support of the Canada Council for the Arts, the Government of Canada, and the Province of British Columbia through the BC Arts Council.

This book has been produced on 100% post-consumer recycled, ancient-forest-free paper, processed chlorine-free and printed with vegetable-based dyes.

Printed and bound in Canada.

LIBRARY AND ARCHIVES CANADA CATALOGUING IN PUBLICATION

Title: Standoff : why reconciliation fails Indigenous people and how to fix it / Bruce McIvor.
Names: McIvor, Bruce, author.
Description: Includes bibliographical references and index.
Identifiers: Canadiana (print) 20210271701 | Canadiana (ebook) 20210273763 | ISBN 9780889714205 (softcover) | ISBN 9780889714212 (HTML)
Subjects: LCSH: Indigenous peoples—Canada—Social conditions. | LCSH: Indigenous peoples—Canada—Government relations. | LCSH: Indigenous peoples—Legal status, laws, etc.—Canada. | LCSH: Indigenous peoples—Canada—Public opinion.| LCSH: Canada—Race relations. | LCSH: Canada—Ethnic relations. | LCSH: Reconciliation.
Classification: LCC E78.C2 M35 2021 | DDC 305.897/071—dc23

This book is dedicated to Emilie whose strength, support and clarity of vision have inspired me to imagine a better world and to play my small part in making it a reality, one step at a time.

Table of Contents

Preface

Not long after I became a lawyer, I found myself one sunny day in a standoff on the edge of the Thompson River in Nlaka'pamux territory in the interior of British Columbia. Two clients and I were toe to toe with three government officials. No one spoke. The only sounds were the rushing water of the river in freshet and a woodpecker's hammering on a nearby tree.

While the anger and frustration engulfing our small group was palpable, stronger still was my clients' resolve. It was their land. It was their responsibility to care for the river, the fish, the birds and the plants. Regardless of what happened in that moment, they would not concede, they would not back down.

Writing the essays in this book has been my attempt to use the development of the law around Indigenous rights in Canada over the last ten years to capture that moment in time, to help explain the legal and historical forces that created it and, hopefully, to suggest a way forward based on honesty and respect. Although all the essays are grounded in my knowledge of Canadian constitutional law and Canadian history, they are written for non-lawyers. Most began as opinion pieces and case comments I shared with clients, colleagues and a wider audience across Canada and around the world.

When I set out to put together this collection, I considered rewriting many of these essays with the benefit of hindsight. But I quickly realized this would deprive them of their value. By respecting their historical embeddedness and adding short addendums where helpful, I hope these essays capture how the development of Canadian Aboriginal law over the last ten years has simultaneously supported and thwarted the recognition of Indigenous rights and legal orders.

I have always believed there is much more to being an Indigenous rights lawyer than arguing cases in court. Being part of the national dialogue is just as important. This collection is my contribution to that dialogue. I hope all readers, Indigenous and non-Indigenous, find in it a moment that resonates with their personal history, with their values and aspirations, with their conscience and responsibilities. The possibility of resolving the standoff is born in that moment.

Acknowledgements

Professionally, I am nothing without my clients. Whatever value there is in this book is primarily due to their visions, teachings and patience. The entire team at First Peoples Law has been instrumental in bringing this work to publication. I am especially indebted to my colleagues Kate Gunn and Cody O'Neil. Cody's comments and editing skills improved many of these essays. He has an outstanding future in the law ahead of him. Kate helped me develop many of the essays, added valuable insights and corrected my mistakes. Kate is a top-notch lawyer, trusted colleague and dedicated advocate for Indigenous Peoples.

Residential Schools and Reconciliation: A Canada Day Proposal

News of 215 Indigenous children buried on the grounds of the Kamloops Indian Residential School has shocked Canada and the world. Canadians are calling for real change in the country's relationship with Indigenous Peoples. Apologies are not enough. The federal government must take a meaningful step toward dismantling the existing structures of systemic racism that led to the death of the 215 children and hundreds of other Indigenous children across the country. One such step would be for the federal government to repudiate the Doctrine of Discovery.

The Doctrine of Discovery

The Doctrine of Discovery is the Western legal principle that European countries extinguished Indigenous sovereignty and acquired the underlying title to Indigenous Peoples' lands upon "discovering" them. The principle derives from an 1820s decision of the US Supreme Court. An early champion of the principle was US President Andrew Jackson, infamous for signing into law the Indian Removal Act of 1830.

The Doctrine of Discovery entered Canadian law in the 1880s through the *St. Catherine's Milling* decision, the first

major court decision to address the nature of Indigenous land rights in Canada. When the Supreme Court of Canada began its modern consideration of Indigenous rights in the late twentieth century, it relied on the doctrine to explain how colonizing European countries gained the underlying title to Indigenous lands.

Despite the appeals of intervenors in the 2014 *Tsilhqot'in* decision, the Supreme Court refused to abandon the Doctrine of Discovery. Instead, the court perpetuated and reinforced the racist, dehumanizing and indefensible principle that with a sleight of hand the British Crown acquired the underlying title to Indigenous lands through a simple assertion of sovereignty. The Truth and Reconciliation Commission denounced the Doctrine of Discovery. Four of the commission's calls to action (45, 46, 47 and 49) urge governments and religious denominations to publicly disavow it—Canadian governments have responded with silence.

A Long Shadow

The doctrine is not simply a historical or legal curiosity—it informs every aspect of federal and provincial governments' relationships with Indigenous Peoples.

The Supreme Court of Canada has repeatedly stated that at its heart reconciliation is about reconciling the pre-existing rights of Indigenous Peoples with the assertion of Crown sovereignty. The phrase "assertion of Crown sovereignty" is a Canadian euphemism for the Doctrine of Discovery. Every time Canadians read in the news about "reconciliation" they are entering a national conversation based on the racist and

dehumanizing Doctrine of Discovery.

When Canadian governments consider making a decision with the potential to affect Indigenous rights protected under section 35 of the constitution they must consult and accommodate Indigenous Peoples. The duty to consult is based on Canadian governments' claim to the underlying title to Indigenous lands. Every time governments across the country engage in consultation with First Nations they invoke the Doctrine of Discovery.

Even when Indigenous Peoples succeed in establishing Aboriginal title to their lands, they cannot escape the Doctrine of Discovery. In Canadian law, Indigenous rights protected under section 35 of the constitution, including Aboriginal title, are not absolute. Where justified, provincial and federal governments can infringe Aboriginal title in the name of reconciliation.

The Supreme Court has suggested that Aboriginal title might be infringed for a wide range of purposes including the development of agriculture, forestry, mining and hydroelectric power, as well as the building of infrastructure and the settlement of foreign populations. The Doctrine of Discovery is the back door through which Canadian governments can override Aboriginal title.

The long, insidious reach of the Doctrine of Discovery extends beyond the courts and government interactions with Indigenous people. Canadian private property rights are based on the Doctrine of Discovery. Every time Canadians sell a house and rub their hands with glee at the wealth their property has generated, they are complicit in perpetuating the Doctrine of Discovery.

Repudiate the Doctrine of Discovery

Much has been made of the federal government's proposed legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). I have my doubts about its likely impact (see "A Cold Rain Falls" on page 174). Even if the legislation is passed into law, it will not change Canadian law's reliance on the Doctrine of Discovery.

It has become clear that Canadians cannot expect Canadian courts to rectify this injustice. Rather than denounce the Doctrine of Discovery, the Supreme Court of Canada has relied on it to build the framework for its interpretation of Indigenous rights protected under the constitution. It has done so because acknowledging the legal and moral illegitimacy of the Doctrine of Discovery would raise questions about the court's authority over Indigenous people and Indigenous lands.

There is a direct correlation between the death of the 215 Indigenous children at the Kamloops Indian Residential School and the Doctrine of Discovery. The residential school system was founded on denial—the denial of Indigenous Peoples' human rights, the denial of Indigenous sovereignty, the denial of Indigenous land rights. Even in death, the 215 children could not escape the Doctrine of Discovery—the Canadian state took their lives and claimed the very land they were buried in.

Reconciliation has become a four-letter word for many Indigenous people not simply because of a continuous stream of empty and broken promises. Reconciliation fails Indigenous people, and all of Canada, because it rests on a legal house

of cards—the morally reprehensible Doctrine of Discovery. By finally and officially rejecting the doctrine, Canada will be able to enter a relationship of respect and coexistence with Indigenous Peoples—respect for Indigenous Peoples' inherent rights and right to protect their land and their children.

With the Supreme Court of Canada unwilling to act, the responsibility rests on the Canadian Parliament. To honour the 215 children and to set the country on a path to true reconciliation, on Canada Day, July 1, 2021, the Prime Minister should have announced that his government would introduce legislation to repudiate the Doctrine of Discovery.

The Age of Recognition: The Significance of the *Tsilhqot'in* Decision

The release of the *Tsilhqot'in* decision on June 26, 2014 marked the beginning of the post-denial period of Indigenous rights. Like any new day, promise and hope abounded. What the future will bring in response is up to all Canadians. And we can start by taking stock of what *Tsilhqot'in* means.

The dots-on-a-map theory of Aboriginal title is dead.

The Supreme Court confirmed that Aboriginal title can include territorial claims and that the occupation requirement for proof is not limited to intensive, regular use of small geographical sites (e.g., fishing spots and buffalo jumps). Rather, regular use of large swaths of land for traditional practices and activities (e.g., hunting, trapping and fishing) when coupled with exclusivity may be sufficient to ground a claim for Aboriginal title.

The implications are profound. Government's long-time myopic focus on dots on a map indicating specific sites of occupation is now indefensible. Indigenous Peoples are now able to seek recognition of their wider territorial claims. For those who are ultimately successful like the Tsilhqot'in, the change will be dramatic. Subject to "justifiable infringements," Indigenous Peoples have the legal rights to exclusively use and occupy their title lands, to benefit from their

lands and to decide on how their lands will be managed. In other words, in large part they will enjoy the rights and privileges of their ancestors. Over a century of denial will be put to rest.

Tsilhqot'in is about more than how to prove Aboriginal title and what happens if you succeed. For Indigenous people across Canada, it is also about the here and now. Nowhere is this more obvious than in the context of the duty to consult, which obligates governments to consult about, and possibly accommodate, Aboriginal title before it is recognized or proven in court. The possibility of territorial claims for Aboriginal title based on traditional activities will shift the duty-to-consult equation in favour of Indigenous people. Government and industry will have to step up and acknowledge the new reality. The court in *Tsilhqot'in* confirmed that a failure to meaningfully consult and accommodate Indigenous Peoples could result in development projects being cancelled and government and industry being liable for damages.

As the court specifically stated, there is a simple and effective way for government and industry to avoid the uncertainty and risk they now clearly face—obtain the consent of Indigenous Peoples before you mess with their lands and resources.

The provinces have assumed a heavy burden.

By authorizing provincial laws to apply to Aboriginal title lands in *Tsilhqot'in*, the court made new law and saddled the provinces with hefty legal obligations. The court clarified that when Indigenous Peoples succeed in confirming their Aboriginal title, a province will not be able to simply apply provincial laws through box-ticking consultation; the

province will be subject to the much more onerous burden of obtaining consent or justifying infringements.

The court's test for justifying infringements of section 35 rights has largely fallen by the wayside since its 2005 decision in *Mikisew* in favour of less onerous—and often unsatisfactory—consultation obligations. When the provinces awaken to the reality of what it really takes to meet the test of justifying an infringement, they may well regret the new responsibilities they have won based on *Tsilhqot'in*.

The implications extend beyond Aboriginal title. Based on the reasoning in *Tsilhqot'in*, in July 2014 the Supreme Court in *Grassy Narrows* opened the door to provinces regulating treaty rights if they can justify infringements through the same test. The days of shuffling treaty rights to the side through cookie-cutter duty-to-consult processes is hopefully at an end. Similar standards should also apply to uncontested Aboriginal rights.

Treaties—The Jig Is Up

Tsilhqot'in significantly affects treaty peoples in other ways, too. For Indigenous Peoples with pre-Confederation treaties (e.g., the Douglas Treaties on Vancouver Island and the Peace and Friendship Treaties in the Maritimes), the implications are obvious: their claims to Aboriginal title can now be pursued with renewed confidence, and their demands that government obtain their consent before exploiting their lands have new credibility.

Tsilhqot'in is also vitally important for Indigenous Peoples with one of the numbered treaties negotiated in Ontario, the

Prairies, British Columbia and the North since Confederation. Successive provincial and federal governments have proceeded for generations on the assumption that through these treaties, Indigenous Peoples ceded, released and surrendered their Aboriginal title to so-called Crown lands. Even as treaty people have widely and consistently maintained that their ancestors did nothing of the kind. For them, the numbered treaties have been about establishing respectful, mutually beneficial relationships. The court's endorsement in *Tsilhqot'in* of a liberal test for Aboriginal title encompassing territorial claims based on traditional Indigenous practices will embolden treaty peoples to refuse the language of "cede, release and surrender" while they assert Aboriginal title over their ancestral lands.

Tsilhqot'in also affirms that new government mandates for the British Columbia treaty process are necessary. It is hard to imagine why Indigenous people would join or continue to participate in the current process with its predetermined, non-negotiable government limitations when the reality and promise of Aboriginal title has been confirmed.

Now is the time to honour, thank and recommit.

We must honour those, both Indigenous and non-Indigenous, who did so much in the long struggle to have Aboriginal title recognized and confirmed but did not live to see their dreams realized. Thanks are also owed to the current generation who inherited the weight of their ancestors' efforts yet did not shrink from the responsibility. And a recommitment is owed to future generations to ensure that this remarkable success is not undermined by complacency. The Supreme Court has handed all Indigenous people a

mighty victory—now is the time to see that the promise is realized.

Seven years later, *Tsilhqot'in* is still the only court case in Canada that has resulted in a declaration of Aboriginal title. Several new claims have been filed in different parts of Canada since 2014, including one by my Mi'kmaw clients for roughly one-third of New Brunswick. There have also been several claims filed by Indigenous Peoples for smaller parts of their territories as a way to counter resource extraction proposals that are being pushed through without their consent. In British Columbia, the most active, ongoing Aboriginal title claims are being pursued by Cowichan Tribes, the Haida Nation and Kwikwetlem First Nation.

One of the issues at play in many of these Aboriginal title claims, which was left unanswered in *Tsilhqot'in*, is the question of whether Indigenous Peoples can make an Aboriginal title claim for so-called private land. Another issue of particular interest is whether and how Aboriginal title applies to the foreshore and the seabed.

Reconciliation as a Massive Failure

Anishinaabe comedian Ryan McMahon is one of Canada's most perceptive social commentators. Season five of McMahon's *Red Man Laughing* podcast is devoted to reconciliation. In his view, the brand of reconciliation peddled by Canada's mainstream politicians is a massive failure. For many lawyers, McMahon's critique likely grates on their ears. For those willing to be nudged out of their comfort zone, McMahon's criticism rings true.

Reconciliation continues to fail because it rests on a foundation of systemic racism. It is predicated on the denial of Indigenous Peoples' inherent rights and the willingness of the Canadian state to use violence to suppress Indigenous rights.

Reconciliation continues to fail because it attempts the impossible—the reconciliation of a right with a lie. The right is the pre-existing interest Indigenous Peoples had and continue to have in their land and the right to make decisions about their land before and after the colonizers' arrival. This includes the right to benefit from their land and decide how their lands should be used or not used.

The lie is that through simply showing up and planting a flag, European nations could acquire an interest in Indigenous land and displace Indigenous laws.

Around the world, this racist legal principle is recognized as the Doctrine of Discovery. It was developed by the United States Supreme Court in the 1830s. In the Supreme Court of Canada's 1990 *Sparrow* decision, where the court articulated for the first time the fundamental principles for interpreting section 35 of the constitution, it was welcomed as an essential principle of Canadian law.

While the Doctrine of Discovery was codified as part of Canadian law in the 1990s, its rationale was nothing new for Indigenous Peoples—by then it had become all too familiar to them. For decades and generations they had been faced with the denial of their laws, of their title to the land, of the true spirit and intent of treaties, of their very humanity.

Denial is the handmaiden of violence. When grainy images hover on TVs and computer screens of Indigenous Peoples assaulted by agents of the Canadian state, the legacy and modern reality of denial upsets smug complacency. In that discomfort the opportunity for real reconciliation is born.

Confronted with the reality that rote, feel-good land acknowledgements are part of the problem, not the solution, Canadians will hopefully start to demand deliverables. What are the courts and mainstream politicians doing to undo hundreds of years of violence and denial? What is being done to ensure that Indigenous laws are respected, that Indigenous Peoples benefit from their lands and are actively involved in deciding how their lands are used?

As hard as it might be for Canadians to hear McMahon's condemnation of reconciliation as it is currently practised, his criticism is also an invitation. It is an invitation to Canadians

to take the first step on what will undoubtedly be a long and difficult road.

The first step is acceptance. Acceptance that Canada is fundamentally a racist state. That it has been built on the denial of Indigenous Peoples' rights and humanity. That this denial is a shameful fact that runs through and binds together Canadian law.

With acceptance comes opportunity.

Colonialism's Disciples: How Government Undermines Indigenous People

There are a lot of well-intentioned civil servants. They respect Indigenous people and do their best, within the confines of their positions, to bend government policy to achieve just outcomes. Their work is recognized, appreciated and honoured. This essay is not about them.

This is about government employees, federal and provincial, who spend their workdays undermining Indigenous Peoples.

Case in point. On a winter's day I drove the Trans-Canada highway from Winnipeg to Kenora. It's a car journey loaded with memories, contradictions and hope.

As an undergraduate I spent a summer camped on a small island in Shoal Lake while soil sampling for a junior mining company. Now I represent Shoal Lake 40 First Nation. Close to the Ontario border I pass the Freedom Road sign, Shoal Lake 40's statement of defiance and optimism for the future.

Having managed to keep the car on the road for two plus hours despite not being able to get a rental with winter tires at the Winnipeg airport, I check in at the Lakeside Inn close to midnight.

Dawn finds me giving thanks for the view of Lake of the Woods from the hotel's ninth-floor restaurant. Boats,

cornered by the ice, sit motionless, patiently waiting for the sun to regain its strength and set them free.

While I drink coffee and prepare for a meeting with Treaty 3 clients and government officials, a group of four or five settle around the table behind me. There are few people in the restaurant and I can't help but overhear their conversation.

I realize they work for one of those government departments which, despite regular name changes, always has an acronym that sticks in your throat. They are the government employees my clients and I will meet after breakfast.

They too are preparing for the meeting. My first thought is to turn and introduce myself. But then their words settle in my consciousness. They are rehearsing the various ways they intend to say no to my clients.

They are also laughing. Laughing at their own well-worn obstructionist tactics. Laughing at my clients' positions and expectations. Laughing at the ultimate meaninglessness of the consultation process they have invited my clients to join.

My hand drifts across the notepad and I find myself scribbling in the margin:

The beetles gathered, stuffing their ears with indifference,
stabbing their eyes, filling their mouths with silence.

My experience at the Lakeside Inn was extreme but not exceptional. It wasn't the first time I've overheard government employees laughing about how they plan to stonewall Indigenous people.

I also believe it is not representative of the majority of civil servants who honestly want to make a positive difference. But it is significant nonetheless, especially when governments pledge a renewed partnership with Indigenous Peoples.

The Supreme Court of Canada has penned inspiring descriptions of the purpose and importance of the Crown's obligations under section 35 of the constitution. With varying degrees of sincerity, governments have echoed the court's pronouncements.

Cynicism grinds legal principles and government mandates to dust.

However small a group they might be, government employees who walk in colonialism's shadow do a disservice to us all.

They undermine the legal and historical relationship between Canada and Indigenous Peoples. They thwart government policy. They make a mockery of the law.

Most importantly, they crush the good faith and optimism of Indigenous people who enter into consultation processes with the hope that government is finally serious about a partnership based on respect.

Legal principles, government promises and cabinet appointments are important. But until Indigenous people are confident that the bureaucrats they meet on a daily basis sincerely believe that their responsibility is to work with, not against, Indigenous people, none of us will be free of Canada's colonial past.