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Felix Hoehn's *Reconciling Sovereignties* explores an idea that was once too radical to be taken seriously by the legal profession: settling Aboriginal rights claims requires an inquiry into how the Crown acquired sovereignty in what is now Canada and the consequent nature of that sovereignty. Where Bruce Clark unsuccessfully and infamously challenged the jurisdiction of Canadian courts to hear Aboriginal jurisdictional claims on the basis of unceded Aboriginal sovereignty,[1] Felix Hoehn now questions the legitimacy of Crown sovereignty in a less threatening manner. He succeeds in presenting a hopeful and convincing argument that suggests that the Aboriginal rights jurisprudence has matured to the point of tolerating — and in his view, requiring — this conversation.

Hoehn's thesis is that the 2004 decisions of the Supreme Court in *Haida Nation v British Columbia (Minister of Forests)*[2] and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*[3] mark the beginning of a shift in paradigm, one that moves away from a "discovery paradigm" to a "sovereignty paradigm" that recognizes the equality of peoples and the respective sovereignty claims of Aboriginal peoples and the Crown. Building on critiques of the doctrine of discovery as ethnocentric, racist, and immoral,[4]

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1 See e.g. *Delgamuukw v British Columbia* (12 September 1995), Ottawa, 23799 (SCC) (Transcript and Decision on a Motion to State a Constitutional Question), reprinted in "Appendix," Bruce Clark, *Justice in Paradise* (Montreal-Kingston: McGill-Queen's University Press, 1999) at 364-367 and available online: <http://sisis.nativeweb.org/clark/sep12scc.html#decision>. Clark argued that the jurisdictional argument was critical to the rule of law and he accused judges of being complicit with genocide for not addressing this point. Chief Justice Lamer roundly rejected this accusation, calling Bruce Clark a "disgrace to the bar" (*Justice in Paradise* at 366).

2 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

3 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

4 See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [*Borrows 2010*]; Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality

Hoehn argues that the Canadian Constitution and international law demand scrutiny of unilateral Crown claims of sovereignty and that such an approach is critical to the project of reconciliation between Aboriginal and non-Aboriginal peoples.[5]

He first outlines how the Canadian adoption of the discovery paradigm failed to recognize Aboriginal sovereignty, noting that an Aboriginal title doctrine built upon feudalism and racial hierarchy provides "a poor vehicle for taking Canada to the reconciliation promised by s. 35(1)."[6] Hoehn's review of the inadequacies of the discovery and Aboriginal title doctrines provides a succinct history of the development of these doctrines and gestures to the precarious status of Aboriginal title as a legal interest in the late-19th century.[7] His review of the historic Marshall decisions[8] from the United States is particularly interesting. He reaches beyond the oft-repeated quotations and principles to survey a larger range of American Supreme Court opinion and the later narrowing of this jurisprudence.[9] This approach effectively re-emphasizes the selective adoption of the Marshall jurisprudence and narrowed view of indigenous legal interests embedded within the Canadian Aboriginal title doctrine.

In Chapter Two, Hoehn argues that a sovereignty paradigm has begun to emerge. He bases this claim on a review of recent Supreme Court cases and academic commentary regarding a shift apparent in consultation cases.[10] Scholars such as Brian Slattery and Mark Walters have noted the significance of the shift in the structure of Aboriginal rights jurisprudence and language

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of Peoples" (1993) 45 Stan L Rev 1311; Robert J Miller, "American Indians, The Doctrine of Discovery, and Manifest Destiny" (2011) 11 Wyo L Rev 329; and "Conference Report from the International Seminar on the Doctrine of Discovery" (Kamloops: Shuswap Nation Tribal Council and Thompson Rivers University, 20-21 September 2012) online: <https://sites.google.com/site/dofdseminar/home>.

5 Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012) at 6-7 [Hoehn].

6 *Ibid* at 32.

7 *Ibid* at 22. The legality of the native title interest and status of Aboriginal polities in the 19th century has attracted debate in the last decade: see, *e.g.* Paul G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), Ch 3 especially, and Mark D Walters, "Histories of Colonialism, Legality and Aboriginality" (2007) 57 UTLJ 819.

8 *Johnson v M'Intosh,* 21 US 543 (1823), 5 L Ed 681; *Cherokee Nation v Georgia,* 30 US 1 (1831), 8 L Ed 25; and *Worcester v Georgia*, 31 US 515 (1832), 8 L Ed 483.

9 Hoehn, *supra* note 5 at 15-20.

10 *Supra* notes 2 and 3, as well as *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*], *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon/Carmacks*] and *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto Alcan*].

around sovereignty apparent in key duty to consult cases.[11] Many scholars have also emphasized the importance of recognizing Aboriginal sovereignty to the project of reconciliation.[12] Hoehn builds on these arguments by shifting the emphasis to Crown sovereignty and in particular, the conceptual space to consider its legitimacy within the present constitutional framework and cases. Instead of emphasizing the nature of Aboriginal sovereignties and their potential incompatibilities with Crown sovereignty, the cornerstone of Hoehn's argument is his careful exploration of the recognition of indigenous sovereignty implicit in the Supreme Court's description of Crown sovereignty as *de facto* until Aboriginal and Crown sovereignty are reconciled through a treaty.[13]

Hoehn's argument first establishes that recognizing indigenous sovereignty does not displace or threaten the sovereignty of the Canadian Crown. This argument rests on the difference between *de jure* and *de facto* sovereignty, which he asserts allows for questioning the legitimacy of Crown sovereignty. He further argues that section 35 of the *Constitution Act, 1982* demands such questioning. His approach involves a persuasive account of how the Act of State doctrine precludes supplanting the effectiveness of the Crown's *de facto* sovereignty, yet does not preclude arguments about the legitimacy (or *de jure* status) of Crown sovereignty in domestic courts. Hoehn accepts the long-established limitation on the ability of domestic courts to question the Crown's acquisition of territory but also argues that the doctrine "cannot be used to shield the Crown from claims that do not seek to dismantle Canada but rather unite it by furthering the reconciliation sought by section 35."[14] Particularly effective is Hoehn's use of the *Quebec Secession Reference*[15] and other constitutional cases stemming from disputes outside of the Crown-Aboriginal relationship to delineate the line between permissible, domestic constitutional questions and political or international legal questions that are beyond the competence of domestic courts.

11 Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 513-518 and Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433.

12 See e.g. Walters, *ibid*, Borrows 2010, *supra* note 4. For discussions of the different approaches to reconciliation in the jurisprudence, see Kent McNeil, "Reconciliation and the Supreme Court. The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous LJ 1 and Dwight G Newman, "Reconciliation. Legal Conception(s) and Faces of Justice" in John D Whyte, ed, *Moving Toward Justice. Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing Ltd & Saskatchewan Institute of Public Policy, 2008) 80.

13 *Haida Nation, supra* note 2 at para 32; *Taku River, supra* note 3 at para 42.

14 Hoehn, *supra* note 5 at 39.

15 [1998] 2 SCR 217, 161 DLR (4th) 385.

The next step in Hoehn's argument describes the scope and importance of the Crown's *de facto* authority. Drawing again on constitutional jurisprudence outside of Aboriginal law, and in particular the *Manitoba Language Rights Reference*,[16] Hoehn highlights how *de facto* authority supports the rule of law and convincingly demonstrates how, in a sovereignty paradigm, the *de facto* doctrine might be "enlarged" in connection with the doctrine of necessity to support the continuing governance authority of the Crown in the absence of reconciliation and *de jure* Crown authority.[17] This insightful analysis explains the duty to consult as a limitation of the Crown's *de facto* governance authority — potentially displacing the reliance on the honour of the Crown as the source of consultation obligations in the jurisprudence — and suggests potential avenues for expanded remedies and further limits on Crown authority prior to reconciliation.

In building his case for an emerging sovereignty paradigm, Hoehn also discusses recent Aboriginal rights cases, including *Marshall/Bernard,*[18] *Sappier/Gray*,[19] and *Lax Kw'alaams*,[20] as further evidence of the emerging sovereignty paradigm — a review that is, in my view, more hopeful than balanced in its assessment of those decisions. The review of the consultation decisions is similarly selective. His theorizing of the sovereignty paradigm is premised strongly on the existence of the duty to consult, with little attention to the structure of the duty expressed in the elements that define its trigger and scope. These elements, however, limit the impact of the duty and have led to critiques of the duty as engendering an assimilative dynamic, particularly in the jurisprudential emphasis on procedural over substantive remedies (accommodation) and the lack of a requirement for Aboriginal consent in most cases.[21] Hoehn addresses this latter point in the final chapter, in which he advocates for a consent-based consultation obligation and thus treats such critical concerns as evidence of the emerging and incomplete nature of the sovereignty paradigm. However, his inattention to the many ways the consultation and rights jurisprudence might be characterized as undermining rather than supporting a

16 [1985] 1 SCR 721, 19 DLR (4th) 1.

17 Hoehn, *supra* note 5 at 48-52.

18 *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall/Bernard*].

19 *R v Sappier; R v Gray,* 2006 SCC 54, [2006] 2 SCR 686 [*Sappier/Gray*].

20 *Lax Kw'alaams Indian Band v Canada (Attorney General),* 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*].

21 See *e.g.* Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139 [Christie]; E Ria Tzimas, "To What End the Dialogue?" (2011) 54 SCLR (2d) 493; and Veronica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17 J Envtl L & Prac 27.

sovereignty paradigm renders it more difficult to agree that this new paradigm has taken root.

In the penultimate chapter, Hoehn broadens the scope of his sovereignty paradigm, bravely (and briefly) imagining the implications of this paradigm for treaty contexts, third parties, fiduciary obligations, and other thorny aspects of present Aboriginal-Crown relationships. He aligns the application of the sovereignty paradigm in the historical treaty contexts with indigenous and scholarly arguments that historic treaties implemented a shared sovereignty rather than a surrender of Aboriginal sovereignty in favour of the Crown's authority.[22] This and other discussions in the chapter highlight Hoehn's view of the sovereignty paradigm as resulting in shared sovereignty, which requires recognizing Aboriginal jurisdictions and reconciling them with federal and provincial jurisdictions through negotiations. His approach also emphasizes the proper place of Aboriginal governments in Canadian federalism, echoing related observations of other scholars.[23] Consequently, a key consideration in this chapter is the ongoing place of freestanding rights in advancing the sovereignty model. Hoehn suggests that the transition to the sovereignty model could take time and calls for a consent-based consultation regime strictly limiting government while its authority remains *de facto* rather than *de jure*. He also suggests that during this transition the courts' role in determining freestanding rights should be decided in a manner that advances the sovereignty model. In making this argument, he draws on Brian Slattery's discussion of the courts' role as protecting historical rights from further erosion and providing a baseline for negotiation of modern rights and jurisdictions.[24] Finally, Hoehn envisions an evolution in the fiduciary relationship to a partnership of equals, more akin to a business relationship, than the past colonial hierarchies.[25]

There are, of course, gaps in Hoehn's discussion and ideas that deserve further exploration. For example, the emphasis on the *de facto* nature of the Crown's authority as the source of limitations in Crown-Aboriginal relationships departs from the Court's recent emphasis on the honour of the Crown

22 Hoehn, *supra* note 5 at 119-122.

23 See e.g. Dwight G Newman, "Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory" (2007) 37 SCLR (2d) 163; Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (West Vancouver: Centre for First Nations Governance, 2007), online: <http://fngovernance.org/pdg/Jurisdiction_of_Inherent_Rights.pdf>; and Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 Queen's LJ 521.

24 Hoehn, *supra* note 5 at 141-2, drawing on Brian Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85 Can Bar Rev 255.

25 Hoehn, *ibid* at 147.

— an interesting and potentially productive departure that deserves further attention. Since the publication of this work, the Supreme Court has continued to emphasize the honour of the Crown as a source of obligations and limitations on Crown authority specific to Aboriginal peoples, which the Court now identifies as originating in the Royal Proclamation.[26] By contrast, Hoehn emphasizes the limited nature of Crown authority in the absence of *de jure* sovereignty, a limitation that is not unique to Aboriginal contexts. While he acknowledges that the honour of the Crown also conditions limitations on the Crown's *de facto* authority,[27] he views the honour of the Crown as part of the fiduciary relationship that must evolve to be compatible with a relationship between equals.[28] A welcome addition to Hohen's work would be further exploration of this evolution, particularly the implications of these directions for the current role of the honour of the Crown in the jurisprudence and whether the relationship between the Crown and Aboriginal peoples would retain its distinctiveness.

Another point that deserves further attention is the argument around the scope for questioning the legitimacy of the Crown's sovereignty in a manner that is consistent with the Act of State doctrine. Hoehn's discussion raises questions of whether the sovereignty paradigm is sufficiently different from the diminished sovereignty recognized in the robust reading of the Marshall decisions to transcend the discovery paradigm and to satisfy indigenous parties. Relatedly, in Hoehn's discussion the concept of sovereignty must be taken as a given, with indigenous and Crown sovereignty being treated as conceptual equals. Although Hoehn's emphasis is on the nature of Crown sovereignty and this focus is productive, it remains important to consider the evolving nature of state sovereignty and indigenous conceptions of sovereignty (or governance) alongside such doctrinal discussions. For example, he briefly considers the jurisdiction to resolve issues of overlapping territories between Aboriginal nations and suggests that such issues would not be within the Canadian courts' or governments' authority but would rather be a matter for indigenous legal systems to resolve.[29] While this is a well-taken point, it also begs for further exploration. To illustrate, broadening the horizons of sovereignty and jurisdiction to include both personal and territorial authorities would add complexity around the notion of sovereignty within the western tradition.[30] This move in

26 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66.

27 Hoehn, *supra* note 5 at 116.

28 *Ibid* at 154.

29 Hoehn, *supra* note 5 at 113.

30 In the context of western concepts of sovereignty, see, *e.g.* Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 Queen's LJ 521 and, for a historical account, Lisa Ford, *Settler*

turn opens the door for a deeper consideration of indigenous law and notions of sovereignty and jurisdiction, in which geopolitical territorial boundaries may not be indicative of governance authority.[31] With this door opened, the potential constructions of the problem presented by "overlapping claims" are reconfigured, and in turn, the role of the Crown in creating, maintaining, or aggravating such claims may be reconsidered, raising questions about whether the Crown is so easily extracted from resolutions. Thus, in a discussion of reconciling sovereignties, the notion of sovereignty itself deserves critical attention.

Regardless of these gaps, it would be unfair to expect too much detail of this short and largely theoretical account of a sovereignty paradigm. Hoehn has made an important contribution by anticipating and suggesting the next steps in the discussion of reconciliation and the development of the section 35 jurisprudence. His work provides aspirational guidance in a manner that reflects the traditions of the Native Law Centre at the University of Saskatchewan College of Law[32] and helps takes that tradition into a new era in Aboriginal law.

Sovereignty. Jurisdiction and Indigenous People in American and Australia, 1788-1836 (Cambridge, Massachusetts: Harvard University Press, 2010).

31 See *e.g.* Brian Thom, "The Paradox of Boundaries in Coast Salish Territories" (2009) 16 Cultural Geographies 179 and Janna Promislow, "'It would only be just': A Study of Territoriality and Trading Posts along the Mackenzie River, 1800-27" in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (New York: Routledge, 2013) 35.

32 Directors of the Native Law Centre have included Brian Slattery, Kent McNeil, and James (Sákèj) Youngblood Henderson (present). Publications of the Centre include: Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: Native Law Centre, 1983); Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001); and James (Sákèj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights. Defining the Just Society* (Saskatoon: Native Law Centre, 2006). Paul McHugh has described the tradition that emerged from the Centre and the University of Saskatchewan College of Law more generally in the 1970s and 1980s as "exhortative" and focused on "good rights-design," which viewed the role of law in achieving justice for aboriginal peoples optimistically; see Paul G McHugh, *Aboriginal Title. The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011), especially 85-88 and 186-188, and Paul G McHugh, "A History of the Modern Jurisprudence of Aboriginal Rights — Some Observations on the Journey So Far" in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds, *A Simple Common Lawyer. Essays in Honour of Michael Taggart* (Oxford and Portland, Oregon: Hart Publishing, 2009) 209.