

2022 Race and the Law Essay Contest  
Keira Lewis

## **The Role of the Doctrine of Discovery and *Terra Nullius* in Environmental Racism in Indigenous Communities**

### ***Abstract***

This paper explores the concepts of the Doctrine of Discovery and *terra nullius* as one element underlying the environmental racism seen in Indigenous communities within Canada. It argues that environmental racism in Indigenous communities cannot be fully addressed while environmental decision-making is rooted in these doctrines. It proposes amending Canada's *Impact Assessment Act* to reject these doctrines and to adopt in their place a Two-Eyed Seeing approach to decision-making.

### **1. The Doctrine of Discovery and *Terra Nullius***

The Doctrine of Discovery (“DoD”) allowed European colonizing states to claim sovereignty over empty lands by ‘discovering’ them through a number of symbolic acts.<sup>1</sup> Discovery was supported by the doctrine of *terra nullius* (“TN”), which allowed land to be regarded as empty if the inhabitants did not live and use the land in the same way as Europeans.<sup>2</sup> Since the Indigenous peoples living in what is now Canada did not share the culture or worldview of the colonizing state, it was considered lawful to claim sovereignty over them and their lands. As will be discussed, this assumption of sovereignty, and the racist perspectives supporting it, continue to inform Canadian law respecting Indigenous peoples.

### **2. The Doctrine of Discovery, *Terra Nullius*, and Environmental Racism in Indigenous Communities**

#### **a. Environmental Racism**

---

<sup>1</sup> Jennifer Reid, “The Doctrine of Discovery and Canadian Law” (2010) XXX:2 *The Canadian Journal of Native Studies* 335 at 339.

<sup>2</sup> Canada, Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 origins to 1939*, vol 1 (Canada: McGill-Queen's University Press, 2015) at 14, 17-19 [*TRC History*].

Environmental racism describes the disproportionate siting of environmentally hazardous projects near racialized communities, as well as the laws that enable this inequitable exposure to pollutants.<sup>3</sup> It also includes the historical and contemporary exclusion of racialized communities from decision-making processes that impact their communities. Finally, it refers to the structural inequalities faced by these communities, which compound the negative impacts of environmental harms and contribute to a lack of power to resist these harms.<sup>4</sup>

Environmental racism in Indigenous communities can be traced back to the DoD and *TN* in two main ways.

a. The Doctrines Established an Inherently Racist Legal Relationship with Indigenous Peoples

Firstly, they established the legal relationship between Indigenous peoples and the Canadian state upon a racist and discriminatory view of Indigenous peoples. These doctrines were the initial means by which the colonial state justified the injustices to which it subjected Indigenous peoples. Since Indigenous peoples and their cultures were seen as inferior, extermination and assimilation efforts were seen as legitimate, and sometimes even as the responsibility of the colonizing state.<sup>5</sup> This view led to the imposition of profoundly damaging policies such as the criminalization of ceremonies, the elimination of traditional landholding and livelihood practices, and the residential school system.<sup>6</sup> The significance this has had for environmental racism is two-fold.

i. *Canadian decision-making is founded on inherent racism*

---

<sup>3</sup> Ingrid Waldron, *Environmental Racism in Canada* (Ottawa: Canadian Commission for UNESCO's IdeaLab, 2020) at 1 [Waldron, *Environmental Racism in Canada*]; Ingrid Waldron, "Troubled Waters: The Health and Mental Health Impacts of Environmental Racism" (Health Law Seminar Series delivered remotely at the Schulich School of Law at Dalhousie University, 29 October 2021) [Waldron, "Troubled Waters"].

<sup>4</sup> *Ibid.*

<sup>5</sup> *TRC History*, supra note 2.

<sup>6</sup> *Ibid* at 14-15.

A key contributor to environmental racism is overall societal racism.<sup>7</sup> The disproportionate placement of environmental hazards near Indigenous communities today demonstrates the ongoing view of Indigenous peoples as “disposable and lacking in humanity.”<sup>8</sup> These are the perceptions upon which the entire legal relationship between Indigenous peoples and the Canadian state are founded. The racism inherent in the relationship between Indigenous peoples and the Canadian state means that disproportionately citing environmental hazards near Indigenous communities may be implicitly justified in the minds of Canadian decision-makers.

ii. *Negative impacts on the structural determinants of health in Indigenous communities*

The main determinants of health in a community are structural factors such as employment, education, public infrastructure, food systems, healthcare, exposure to violence, racial and cultural devaluing, and social exclusion.<sup>9</sup> Inequalities in these structural factors interact with the disproportionate exposure of Indigenous communities to pollutants. This compounds the damage of each problem to the wellbeing of individuals in those communities and contributes to their greater vulnerability to environmental health risks.<sup>10</sup>

The DoD and *TN* legitimized the process of colonization.<sup>11</sup> Colonization, in turn, has contributed significantly to the profound inequalities relating to the structural determinants of health in Indigenous communities. There are many examples of this issue. The policies imposed through colonization have led to incidents of violence in communities stemming from intergenerational trauma.<sup>12</sup> The reserve system, imposed to free up land for settlers, sequestered

---

<sup>7</sup> Kaitlyn Mitchell & Zachary D’Onofrio, “Environmental Injustice and Racism in Canada: The First Step is Admitting We Have a Problem” (2016) 29:227 J Env’tl L & Prac 305 at 309.

<sup>8</sup> Ingrid Waldron, *There’s Something in the Water: Environmental Racism in Indigenous and Black Communities* (Halifax: Fernwood Publishing, 2018) at 89 [Waldron, *Something in the Water*].

<sup>9</sup> Waldron, *Environmental Racism in Canada*, *supra* note 3 at 3.

<sup>10</sup> Waldron, *Something in the Water*, *supra* note 8 at 92.

<sup>11</sup> *TRC History*, *supra* note 2.

<sup>12</sup> Canada, Truth and Reconciliation Commission of Canada, *A Knock on the Door: The Essential History of Residential Schools from the Truth and Reconciliation Commission of Canada* (Winnipeg: University of Manitoba Press, 2015).

Indigenous communities in remote areas where it is difficult to acquire health infrastructure and services, and where there are issues of poverty and lack of access to essential resources.<sup>13</sup>

Finally, the displacement of Indigenous peoples and the policies attacking their cultures and practices disrupted the relationship many communities have with their traditional lands.<sup>14</sup> This has caused a lack of access to land-based resources integral to health, such as an inability to hunt, access medicines, find clean water, and engage in spiritual practices.<sup>15</sup>

b. Power Imbalances in Decision-Making Processes

Bullard points to the “lack of political power...communities have for resisting the placement of industrial polluters in their communities”<sup>16</sup> as one of the main features of environmental racism. A major source of this lack of power in Indigenous communities stems from the DoD and *TN*. The legal system built upon these doctrines constitutes an extreme power imbalance between Indigenous peoples and the Canadian state. Based on these doctrines, it was assumed that Indigenous peoples lost underlying title to their lands and faced restraints on their sovereignty upon discovery, while the colonizing state acquired underlying title to land and ultimate sovereignty over them and their inhabitants.<sup>17</sup>

This assumption legitimizes laws which allow the Canadian government to unilaterally decide to proceed with projects that create environmental hazards for Indigenous communities. For instance, the Crown has a duty to consult and where appropriate accommodate Indigenous groups when it has knowledge, real or constructive, about the potential existence of Aboriginal

---

<sup>13</sup> Kory Wilson, *Pulling Together: Foundations Guide* (Victoria: BCcampus, 2018) at 53-54.

<sup>14</sup> Waldron, *Something in the Water*, *supra* note 8 at 97-99.

<sup>15</sup> Waldron, *Something in the Water*, *supra* note 8 at 99; Brenda Gunn, “Protecting Indigenous Peoples’ Rights through Indigenous Peoples’ Participation in Decision-Making: A Climate Change Example” (2020) 17:1 JSDLP 3 at 43.

<sup>16</sup> Waldron, “Troubled Waters”, *supra* note 3

<sup>17</sup> Reid, *supra* note 1 at 339.

or treaty rights that may be adversely impacted by its decision.<sup>18</sup> However, the Supreme Court of Canada has emphasized that consultation does give Indigenous groups the power to veto a decision, and there are situations where the Crown can proceed with the project even if the group protests the decision.<sup>19</sup> As such, Indigenous communities and their environmental health are subject to the ultimate power of the Canadian state. These communities thus lack the power needed to ensure decisions reflect their interests, which contributes to the disproportionate number of decisions which adversely impact Indigenous communities.

### **3. The Continued Acceptance of these Doctrines in Canadian Law Perpetuates Environmental Racism in Indigenous Communities**

#### **a. The Decision-Making Process under the IAA**

The *Impact Assessment Act* (“IAA”) is the dominant legal instrument for making decisions about major environmental projects.<sup>20</sup> Projects are subject to the *IAA* if they are either described in the Physical Activities Regulations or the Minister of Environment and Climate Change (“the Minister”) chooses to designate a proposed project.<sup>21</sup> A number of steps must be taken if the *IAA* applies. Before the actual impact assessment (“IA”) occurs, a planning phase must be carried out in which the Impact Assessment Agency of Canada decides whether an IA of the project is required.<sup>22</sup> If an IA is conducted, a number of factors must be applied during the assessment.<sup>23</sup> Consultation with Indigenous groups is also usually carried out during the IA.<sup>24</sup>

---

<sup>18</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 (*Haida*); *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>19</sup> See e.g. *Haida* at para 48; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources)*, 2017 SCC 54 at paras 83, 149, 154.

<sup>20</sup> *Impact Assessment Act*, SC 2019, c 28 s 1 [*IAA*].

<sup>21</sup> *Physical Activities Regulations*, SOR/2019-285; *IAA*, *supra* note 20, s 9.

<sup>22</sup> *IAA*, *supra* note 20 s 16.

<sup>23</sup> *Ibid*, s 22.

<sup>24</sup> Canada, Impact Agency of Canada, *Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples*, (Ottawa: Impact Agency of Canada: 2020).

The Minister then uses the findings of the IA, along with the public interest factors listed in section 63 of the *IAA*, to make a determination as to whether the project will be approved.<sup>25</sup>

b. The Decision-Making Process under the *IAA* Perpetuates Environmental Racism in Indigenous Communities

Canadian law “rooted in doctrines such as the Doctrine of Discovery are unable to produce anything but racist legal principles.”<sup>26</sup> The *IAA* is one such law. Like all Canadian law, the *IAA* is founded on the assumption of ultimate Crown sovereignty. The *IAA* assumes that the government of Canada is entitled approve a project even if the assessment has shown that it may adversely impact Indigenous groups, if the Minister considers it to be in the “public interest” to proceed.<sup>27</sup> The power imbalance created by the DoD is perpetuated as the Canadian state retains the power to make decisions impacting the lands and lives of Indigenous groups even if they protest it.<sup>28</sup> This perpetuates the exclusion of Indigenous peoples from decisions and their lack of power to resist the placement of environmental hazards in their communities.

Further, the Canadian legal system is founded on a “fundamental assumption of...superiority of Europeans over Indigenous peoples”<sup>29</sup> flowing from the DoD and *TN*. The *IAA* reinforces this issue. Impacts on Indigenous peoples and their insights into a project are considered during the assessment and decision-making processes, but these considerations are merely complementary to the dominant assessment of the project from a non-Indigenous Canadian perspective. There is a risk that the practice of undervaluing Indigenous peoples and cultures in comparison to those of the Canadian state will continue to justify the exclusion of

---

<sup>25</sup> *IAA*, *supra* note 20, s 63.

<sup>26</sup> Gunn, *supra* note 15 at 37.

<sup>27</sup> *IAA*, *supra* note 20, s 63.

<sup>28</sup> Reid, *supra* note 1; Gunn, *supra* note 15 at 32.

<sup>29</sup> James Sákéj Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous Law Journal* 1 at 4-5.

Indigenous perspectives from decision-making and the resulting imposition of injustices on Indigenous peoples.

Finally, the *IAA* enables the Canadian government to make its decision by weighing the extent to which the project is in the “public interest.”<sup>30</sup> However, there is evidence that Indigenous communities continue to be undervalued and considered secondary to the interests of mainstream Canadian society.<sup>31</sup> There is as such a risk that during this weighing process negative impacts on the environmental health of Indigenous communities may be implicitly deemed justifiable if the project will be beneficial for non-Indigenous actors.

#### **4. Recommendation: A Two-Eyed Seeing Approach**

##### **a. A Two-Eyed Seeing Approach to Impact Assessment under the *IAA***

The concept of Two-Eyed Seeing encourages decision-makers to learn to “see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges.”<sup>32</sup> Two-Eyed Seeing uses valuable elements of both knowledge systems and the information they contribute to form an inclusive understanding of and engagement with the world.<sup>33</sup>

##### **b. This Approach could Effectively Combat Environmental Racism in Decision-Making**

Establishing a Two-Eyed Seeing assessment process could move away from an *IAA* scheme founded on the DoD and *TN* and help address environmental racism in Indigenous communities. Although the *IAA* currently offers multiple opportunities for “Indigenous knowledge” to be

---

<sup>30</sup> Canada, Impact Assessment Agency of Canada, *Policy Context: Public Interest Determination under the Impact Assessment Act*, (Ottawa: Impact Assessment Agency of Canada, 2020).

<sup>31</sup> Waldron, *Something in the Water*, *supra* note 8 at 89.

<sup>32</sup> Shelley Denny & Jennifer Sylliboy, “Review of the Draft Canadian Environmental Assessment Report and Potential Conditions for the Central Ride Exploration Drilling Project” (6 November 2020), Online (pdf): *Unama’ki Institute of Natural Resources*, <<https://www.cnlopb.ca/wp-content/uploads/equinorcr/kmkno.pdf>> at 3 [“Review of Draft EA”].

<sup>33</sup> *Ibid.*

considered in the assessment process, the use of this knowledge is ultimately discretionary.<sup>34</sup> In contrast, this paper proposes that the *IAA* be amended to establish an assessment and decision-making process that fully uses a Two-Eyed Seeing approach when Indigenous communities may be adversely impacted by the proposed project.

Firstly, this could help establish a system in which Indigenous and Canadian parties have equal power over assessing the risks associated with a project and equal influence over environmental decisions that may impact the health of Indigenous communities. This would help move away from the current decision-making paradigm in which Indigenous peoples are subordinate to the ultimate power of the Canadian state. Doing so would address the power imbalances that are a key part of environmental racism and enable decision-making which truly reflects the interests of communities rather than imposing harmful decisions upon them.

Second, it would also acknowledge the equal value of Indigenous cultures and worldviews by incorporating Indigenous knowledge as an integral part of the IA process. This would help address the devaluing of Indigenous cultures which has legitimized the disproportionate exposure of Indigenous communities to environmental harms.<sup>35</sup>

Finally, it could produce more robust assessments and environmentally sound decisions. Worldviews vary among Indigenous peoples, and it is important not to homogenize Indigenous cultures. However, a common element of worldview reportedly seen among Indigenous peoples in Canada is a holistic understanding of the environment.<sup>36</sup> This includes the interrelations between all human and non-human beings, as well as corresponding responsibilities to promote a balanced and sustainable environment.<sup>37</sup> In contrast, non-Indigenous Canadian understandings of

---

<sup>34</sup> See e.g. *IAA*, *supra* note 20, ss 6(1)(j), 22(1)(g), 28(3.1), 33(2.1), 97(2), 102(2), 119.

<sup>35</sup> Waldron, *Something in the Water*, *supra* note 8 at 89.

<sup>36</sup> See e.g. Wiebe, *supra* note 9; Gunn, *supra* note 15; Waldron, *Something in Water*, *supra* note 8; “Review of Draft EA”, *supra* note 32 at 4-5.

<sup>37</sup> *Ibid.*

the environment tend to be technical, objective, and obtained through the scientific method.<sup>38</sup> A Two-Eyed Seeing approach to environmental assessment would use the strengths of each knowledge system to help establish a vigorous assessment process. Decisions made based on this process could incorporate a technical understanding of the impacts of a project, as well as the overall impact of the project on the balance of the environment and its implications for upholding humankind's responsibilities. This could lead to more responsible decisions regarding environmentally significant projects, which could benefit the non-human environment, Indigenous communities, and humankind more generally.

c. Outstanding Problems with this Recommendation

There are several practical issues with this proposal, such as the feasibility of implementation and the logistics of how such a system would function. However, it is beyond the scope of this paper to analyze these logistical details. This section will instead focus on two key theoretical concerns this recommendation raises.

One key issue is the limited scope of this recommendation. It only deals with future decisions, and only those decisions impacting Indigenous communities. In contrast, there are many examples of ongoing environmental racism to be addressed.<sup>39</sup> There are also issues of environmental racism in Black and other racialized communities that this recommendation would not address.<sup>40</sup> However, although these issues are incredibly pressing and important, they are ultimately each founded in a unique legal relationship between the group and the Canadian government, and as such require independent analyses into their causes and potential solutions in

---

<sup>38</sup> "Review of Draft EA", *supra* note 32 at 4.

<sup>39</sup> See e.g. Sarah Marie Wiebe, "Guardians of the environment in Canada's Chemical Valley" (2016) 20:1 Citizenship Studies 18.

<sup>40</sup> Waldron, "Troubled Waters", *supra* note 3.

order to be effective. It should be left to further analyses to address other facets of the issue of environmental racism.

Further, this suggestion is based in a Canadian statute. This is undoubtedly a concern, since the imposition of Canadian law on Indigenous peoples and requiring communities to participate in the legal processes of the colonizing state have been significant issues arising from the DoD and *TN*. However, the *IAA* could be amended in a way that leaves Indigenous groups full sovereignty in their decisions and establishes a nation-to-nation relationship in which the Canadian government and the Indigenous group are full partners in decision-making. In this way, although the process is rooted in a Canadian statute, it would nonetheless avoid the pitfalls of a legal process founded on the DoD and *TN*. Further, amendments to the *IAA* should not be the final step in repudiating the DoD and *TN*. These doctrines must be entirely expunged from Canadian law, and approaches to decision-making that do not rely on Canadian statutes may be developed as this happens.

## **5. Conclusion**

Environmental racism is a key issue in the contemporary pursuit of both environmental protection and racial equity. One key action which must be taken is the repudiation of the DoD and *TN* in the legal processes used to make decisions that impact the environmental health of Indigenous communities. Basing decision-making under the *IAA* on a Two-Eyed Seeing approach rather than on these doctrines has the potential to begin addressing the injustices of colonization and moving towards a more positive relationship between Indigenous peoples and the Canadian state.

## Bibliography

### LEGISLATION

*Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

*Impact Assessment Act*, SC 2019, c 28 s 1.

*Physical Activities Regulations*, SOR/2019-285.

### JURISPRUDENCE

*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources)*, 2017 SCC 54.

### GOVERNMENT DOCUMENTS

Canada, Canadian Environmental Assessment Agency, *Overview of the Impact Assessment Act: Level 1 Training*, (Ottawa: Canadian Environmental Assessment Agency: 2019).

Canada, Impact Agency of Canada, *Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples*, (Ottawa: Impact Agency of Canada: 2020).

Canada, Impact Assessment Agency of Canada, *Policy Context: Public Interest Determination under the Impact Assessment Act*, (Ottawa: Impact Assessment Agency of Canada, 2020).

Canada, Truth and Reconciliation Commission of Canada, *A Knock on the Door: The Essential History of Residential Schools from the Truth and Reconciliation Commission of Canada* (Winnipeg: University of Manitoba Press, 2015).

Canada, Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 origins to 1939*, vol 1 (Canada: McGill-Queen's University Press, 2015).

### SEMINAR

Ingrid Waldron, "Troubled Waters: The Health and Mental Health Impacts of Environmental Racism" (Health Law Seminar Series delivered remotely at the Schulich School of Law at Dalhousie University, 29 October 2021).

### SECONDARY SOURCES

Brenda Gunn, "Protecting Indigenous Peoples' Rights through Indigenous Peoples' Participation in Decision-Making: A Climate Change Example" (2020) 17:1 JSDLP 3.

Ingrid Waldron, *Environmental Racism in Canada* (Ottawa: Canadian Commission for UNESCO's IdeaLab, 2020).

Ingrid Waldron, *There's Something in the Water: Environmental Racism in Indigenous and Black Communities* (Halifax: Fernwood Publishing, 2018).

James Sákéj Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous Law Journal* 1.

Jennifer Reid, "The Doctrine of Discovery and Canadian Law" (2010) XXX:2 *The Canadian Journal of Native Studies* 335.

Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step is Admitting We Have a Problem" (2016) 29:227 *J Envtl L & Prac* 305.

Kory Wilson, *Pulling Together: Foundations Guide* (Victoria: BCcampus, 2018).

Sarah Marie Wiebe, "Guardians of the environment in Canada's Chemical Valley" (2016) 20:1 *Citizenship Studies* 18.

Shelley Denny & Jennifer Sylliboy, "Review of the Draft Canadian Environmental Assessment Report and Potential Conditions for the Central Ride Exploration Drilling Project" (6 November 2020), Online (pdf): *Unama'ki Institute of Natural Resources*, <<https://www.cnlopb.ca/wp-content/uploads/equinorcr/kmkno.pdf>>.