

What is Sovereignty?

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In reading Canadian Aboriginal rights jurisprudence, the central role that judicial acceptance that the British Crown was, and is, sovereign plays in Canadian law and politics becomes crystal clear. For example, in *R v Sparrow*, Chief Justice Brian Dickson stated that “while British policy towards the native population was based on respect for their right to occupy their traditional lands, ... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”¹ Before one can make such an assertion, however, one has to address the fundamental question that lies behind the assertion — what is sovereignty? Is there a principled definition of what “sovereignty” is that allows sovereignty to exist in a society governed by the rule of law? Or is sovereignty merely a legal fiction, created to provide an *ex post facto* legal justification for what is, in truth, merely an exercise of raw power? And if it is a concept that can exist in conjunction with the rule of law, how is sovereignty legally acquired and secured?

Black’s Law Dictionary defines “sovereignty” as, among other things, “supreme political authority.” It has also been defined as supreme authority and control, or the “last word,” over a given territory and population.² As one begins to read modern scholarly literature in the areas of political science, political philosophy, and law, however, Chief Justice Dickson’s confident statement in *Sparrow* that there was never any doubt that the British Crown held sovereignty over what we now know as Canada seems more and more questionable, as the very idea that

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1 *R v Sparrow*, [1990] 1 SCR 1075 at 1103.

2 *Black’s Law Dictionary*, 5th ed (St. Paul, MN: West Publishing, 1979) at 1252; see also Conseil d’Etat, (Annual Study 2024: Sovereignty” (25 September 2024), online: <<https://www.conseil-etat.fr/en/reports-and-studies/annual-study-2024-sovereignty>> [<https://perma.cc/AE8C-6J5M>] at 1.

“sovereignty” itself can exist in societies governed by the rule of law has increasingly come to be doubted.

Brian M Mazer explains that the concept of sovereignty can be traced to the writings of political theorists in the 16th century, as a reference to the authority of the king, who has no greater authority than himself. Mazer notes that “[s]ince the sovereign was the ultimate source of power, it was he who had the law-making power. It followed, then, that the law-maker could not be bound by the law because law was his own creation.”³ He also notes that the requisites of sovereignty are a territory, a population, and a government, and that “[a] state must be free to act with effective control over certain events and a state must be able to pursue its national interest unhindered by the imposition of demands from others — either state, participant, or organized community decisions.”⁴ If these two situations are the requisites of sovereignty, sovereignty is, in reality, much rarer than commonly assumed.

Mazer, however, noted that “[s]overeignty is a much used but vaguely defined concept ... [that] has almost as many meanings as there are people who use the term.”⁵ Mazer’s comment, in his 1977 article, remains at least as true today, nearly 50 years later, as it was then. Berg and Kuusk note that conceptualizations of sovereignty that are prevalent today are still quite vague, usually grounded in legalistic provisions but more often than not lacking empirical, measurable indicators to allow observers to know when sovereignty exists.⁶ Peter Oliver comments that the basic idea of sovereignty is the ability to determine the law and to have those determinations obeyed; he observes, however, that not only does this term simply provide a cover for a wide range of difficult questions, but the very relevance of the concept is frequently challenged today.⁷ He also observes that “it is not surprising that the ongoing relevance of sovereignty is often placed in doubt these days” and that “[a] question familiar to sovereignty study — ‘who is in charge here?’ — admits of no clear answer.”⁸

Challenges to sovereignty have gone so far as to question whether sovereignty is fundamentally inconsistent with the rule of law. Pavlos Eleftheriadis may have put it most strongly; he comments that, “contemporary political philosophers start from the fundamental assumption that persons share equal rights and responsibilities so that those appointed to offices of power are bound by legal and moral duties,” thereby leaving “no room for absolute power in modern political and legal philosophy.” This leads Eleftheriadis to question how constitutional government can coexist with sovereignty at all, as sovereignty is the affirmation of absolutism.⁹ He then argues that:

It [i.e. sovereignty] signifies, as all the classical authors of sovereignty knew, the unlimited power to be free of any legal restriction, contrary to any doctrine of constitutional government or indeed the rule of

3 Brian M Mazer, “Sovereignty and Canada: An Examination of Canadian Sovereignty from a Legal Perspective” (1977) 42:1 Sask L Rev 1 at 2.

4 *Ibid* at 4.

5 *Ibid* at 1.

6 Eiki Berg & Ene Kuusk, “What Makes Sovereignty a Relative Concept? Empirical Approaches to International Society” (2010) 29 Political Geography 40 at 42.

7 Peter C Oliver, “Sovereignty in the Twenty-First Century” (2003) 14:2 King’s College Law Journal 137 at 137.

8 *Ibid* at 142, 159.

9 Pavlos Eleftheriadis, “Law and Sovereignty” (2010) 29 Law & Phil 535 at 536, 538.

law. ... [T]he survival of sovereignty is [therefore] what it appears to be, just a mistake. It is the result of some kind of absent-mindedness on the part of some constitutional lawyers and political thinkers. ... [But] it is not a harmless error. When taken seriously, sovereignty cannot be successfully adjusted and refined to fit our times. Philosophically speaking, sovereignty is and has always been incompatible with the rule of law and with constitutional law itself. Sovereignty and constitutional government law are mutually exclusive.¹⁰

Eleftheriadis goes on to comment that, “in a modern legal system that operates under a constitutional framework there can be no constitutional sovereign.”¹¹ Thus, the existence of the very concept of sovereignty must be impossible in a political community governed by the fundamental principle of constitutionalism and the rule of law. Eleftheriadis reinforces this conclusion when he states that:

The very point of constitutional government is the creation of offices (and the separation of powers) that ensure the continuity between different office holders. In that sense there is no sovereign and no single founder of the constitution or agent of legislation. ... The ultimate power that is associated with sovereignty ... is the dominion of the commonwealth or political society, through legal and political institutions that merge into the practices of law. This is not a theory of sovereignty. It is a theory of political society because it tells us that what is pre-eminent and legally and politically ultimate is just the set of rules and procedures that organise our society into a civil condition.¹²

He then concludes that, “[l]aw in this sense is not a command by anyone, a mandate or a threat, but a public system of reasoning that is capable of guiding our actions and fixing our expectations about the actions of others. ... If this is generally held to be true, then it should also be so held that sovereignty and law are finally incompatible and mutually exclusive.”¹³ John Hoffman reinforces this when he comments that the very idea of state sovereignty is “absurd,” while Paul Kahn observes that the possession of sovereignty is the result of force threatened and applied, and that states, and the concept of sovereignty, are the results of wars fought and won, rather than of some sort of natural truth about the community.¹⁴

If, however, we wish to see if there could be some conception of sovereignty that could be consistent with the rule of law, rather than simply abandon it as a mere legal fiction created to provide an *ex post facto* justification for a political order that is, in truth, grounded purely in power relations, we must address the second question of how sovereignty is acquired and secured in complex democratic societies governed by the rule of law. It is clear from the definitions of sovereignty proffered above that sovereignty is an observable state of existence, not merely a feeling, belief, or perception. To be sovereign, a governing entity must be able to demonstrate authority and control over a given population and a given territory. The clearest evidence of sovereignty would seem to be that the rules of social behaviour defined by the governing entity are generally recognized and accepted by those within the territory that the sovereign claims to be theirs and, where these rules are opposed by dissenters, it is recognized and accepted by the society that the institutions of the governing entity may enforce those

10 *Ibid* at 538–9.

11 *Ibid* at 553.

12 *Ibid* at 563–4.

13 *Ibid* at 569.

14 John Hoffman, “Can We Define Sovereignty?” (1997) 17:1 *Politics* 53 at 58; Paul W Kahn, “The Question of Sovereignty” (2004) 40:2 *Stan J Int’l L* 259 at 263.

rules through the use of force. In these circumstances, which are the basis of liberal democracy, “sovereignty” rests on a foundation of legitimacy and consent.

Consent of the governed does, indeed, seem to be a requirement if sovereignty is to be secured in rule of law societies. Berg and Kuusk describe sovereignty as, “above all a ‘bordered power container’ ... constituted by contractual relationships and premised on the will and the freedom of its constituents.”¹⁵ They also observe that Locke sees the sovereign as a body constituted by the people who, at any time, may choose to revoke the authority or jurisdiction of their creation.¹⁶ Eleftheriadis notes that Hamilton wrote that: “The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.”¹⁷ He goes on to comment that, “[i]n a society of equals, the constitution is not a pact between the ruler and the subjects, but is a bond between the citizens themselves through which they affirm their equal standing and their mutual respect. ... this is the social contract argument to which the idea of sovereignty is so drastically opposed.”¹⁸

Peter Oliver provides an extensive analysis of how sovereignty arises through the consent of the governed. He comments that:

Finally, important questions emerge as to how or why sovereign determinations (or commands, as we used to say) come to be obeyed ... while the administrators, police and army have a wide array of means to encourage obedience and discourage law breaking, we tend nowadays to assume that legal determinations are not obeyed simply because of threats and force. ... What is it, then, that explains why the laws are obeyed where the threat of sanctions is not the sole or even dominant factor? This is, in part, a question of authority and authoritativeness. It is also a question of legitimacy ... [and t]oday, we prefer to focus on democratic and rational sources of legitimacy: citizens obey the law because they are allowed to vote on it, or, even in the absence of democratic input, because they believe that the law makes sense.¹⁹

Canadian Aboriginal rights jurisprudence, however, tends to suggest that sovereignty need merely be asserted, not recognized and accepted as fact by those governed by “the sovereign” for it to exist. For example, in *R v Van der Peet*, Chief Justice Antonio Lamer declared that it is “the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada with the assertion of British sovereignty over that territory to which the recognition and affirmation of aboriginal rights in s. 35(1) [of the *Constitution Act, 1982*] is directed.”²⁰ Similarly, in *Delgamuukw v British Columbia*, Chief Justice Lamer again stated, referring back to *Van der Peet*, that Aboriginal rights “are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory.”²¹

In these statements, mere assertion of sovereignty by the Crown seems to be sufficient for the Court to accept that Crown sovereignty exists and to relegate Indigenous sovereignty

15 Berg & Kuusk, *supra* note 6 at 40.

16 *Ibid* at 41.

17 Eleftheriadis, *supra* note 9 at 538.

18 *Ibid* at 566–7.

19 Oliver, *supra* note 7 at 141.

20 *R v Van der Peet*, [1996] 2 SCR 507 at para 36,

21 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 81.

merely to a set of “rights” within the Canadian settler-state legal system. The Crown’s assertion of sovereignty does not, itself, make its sovereignty a demonstrable fact, though, any more than my assertion that the moon is made of green cheese (if I were to make such an assertion) makes the moon of green cheese. If Indigenous societies in what we now call Canada were sovereign in their territories prior to European settlement, as is generally recognized, how can the non-consensual displacement of Indigenous sovereignty by merely asserted Crown sovereignty be an honourable reconciliation of two sovereign societies? Should those Indigenous societies whose territories were occupied by British colonizers not be required to consent to the assertion of British Crown sovereignty for the British Crown to truly be sovereign? If “sovereignty” was built, rather, purely on the exercise of dominant power, how can it be accepted as a legal fact? We must, again, question how “sovereignty” can be recognized in a society governed by constitutionalism and the rule of law.

One must also ask if sovereignty must be a singular and absolute authority, as it was conceived in earlier centuries, or whether it can be partial and shared among different communities? The sharing of “sovereignty” through treaties, or, for that matter, through multi-level governance structures such as federalism, suggests that sovereignty, especially in a multinational, liberal-democratic federation such as Canada, is not singular and absolute, but is a nuanced legal concept, as international law also makes clear. Multi-level governance, whether in federal states or in the international community, suggests that there may be no such thing as sovereignty, if sovereignty is supreme authority held by a single source of power. Rather, in federal states and quasi-federal international organizations, the power, or sovereignty, held by any one partner is partial, and the whole “basket” of sovereignty is shared among the partners. As Mazer observes, “[t]he problem created by federalism is that there exists no one seat where the ultimate power of law-making and law-enforcing lies.”²² Oliver further comments that “[c]ontrary to what was thought centuries ago, sovereignty can be limited and divided, as we see in popularly approved national constitutions with Bills of Rights and federal elements, and in international law too.”²³ If sovereignty required a singular, absolute, and supreme holder of political power, no federal state would ever be sovereign. Berg and Kuusk note that situations of shared sovereignty and the rise of supranational organizations suggest how widespread exceptions to the rule of absolute, indivisible sovereignty are.²⁴ This should not be surprising, as the structuring of human political relationships is always more complex and nuanced than the simple idea of sovereignty as an absolute, supreme authority could ever reflect.

In the same way, the history of the Peace and Friendship Treaties between the British and the nations of the Wabanaki Confederacy in Atlantic Canada and of the Covenant Chain Treaties in Central Canada is evidence that the British recognized the sovereignty of Indigenous nations. The British sought to peaceably acquire Indigenous consent to settle Indigenous territories, as a necessary element of their colonial project in British North America, by recognizing that those nations retained their sovereignty and negotiating alliances with those nations, as separate, independent, and sovereign communities, in the face of military conflict with the French. Repeatedly over several decades, however, the treaty promises were breached, which led to conflict between the Indigenous nations and the British, with the British then renego-

22 Mazer, *supra* note 3 at 8.

23 Oliver, *supra* note 7 at 143.

24 Berg & Kuusk, *supra* note 6 at 41.

tiating treaties so that they could again be confident that the Indigenous treaty parties would continue to be allies of the British, rather than the French. That the British repeatedly renegotiated these treaties as a strategy to maintain a peaceful alliance with Indigenous peoples in the face of conflict with the French (and later the Americans) strongly suggests that the British recognized the Indigenous nations as sovereign nations with whom they had to negotiate an alliance, rather than subjects of the British sovereign, even after British settlement was a *fait accompli*; a sovereign does not make treaties with their subjects.

The legal pluralism that accompanied British colonial settlement around the world also suggests that the British recognized their sovereignty to be limited, partial, and dependent on the consent of the Indigenous societies of the colonized territories, rather than singular and absolute. Legal pluralism in territories that the British colonized was such a standard component of the English common law as applied to those colonies that Russell Barsh has gone so far as to describe it as a core principle of the imperial legal system.²⁵ For centuries, the English common law, in its “imperial” aspect, has recognized the local laws of colonized territories as applicable law within those territories. Indeed, Tully describes the convention of the continuity of a people’s customary ways and forms of government as they are woven into new forms of constitutional associations with others as the oldest convention in Western jurisprudence.²⁶ In inhabited territories colonized by the British, until the British altered local laws, those laws, customs, and institutions continued and local law became incorporated into the imperial law as the “municipal common law” of the locality, through a rule of recognition.²⁷ This certainly suggests that British sovereignty in colonized territories was only partial and limited, with British imperial hegemony in colonized territories often depending on the acceptance of this legal and political reality by colonial officials.

Having analyzed the limitations that actually exist on the sovereign’s authority, or sovereignty, one inevitably must return to the question: if sovereignty is supreme authority, how can sovereignty be consistent with the rule of law, which declares the law, not any person, to be supreme? Equally, how can it be consistent with the principle of liberal democracy, which is designed to limit authority and impose on the exercise of authority the ultimate constraint of legitimacy, by dispersing power to grant or withhold legitimacy among the entirety of the governed population? If one looks to England, one can see this story of replacing absolute, sovereign authority with legal and legitimacy constraints on the exercise of power playing out fairly consistently (with the exception of the Stuarts’ efforts to reinstate absolute monarchy in the 17th century) since the *Magna Carta* of 1215.

The principles of liberal democracy, the rule of law, and federalism all suggest that sovereignty is a highly constrained and nuanced concept that, ultimately, rests on consent, whether the consent of the *polis* or the consent of semi-sovereign sub-state societies. These forms of consent provide the governing entity with the legitimacy necessary for its decisions and rules to be accepted by the population it governs as binding on them or, in other words, for the gov-

25 Russel Lawrence Barsh, “Indigenous Rights and the Lex Loci of British Imperial Law” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) at 92.

26 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 125.

27 Mark Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and under the *Constitution Act, 1982*” (1999) 44 McGill LJ 711 at 715–716.

erning entity to be sovereign. If “sovereignty” rests on consent, the true sovereigns are those who have the power to grant or withhold their consent. If, somehow, sovereignty does not ultimately rest on consent, the only alternative that readily comes to mind is that sovereignty, as a legal concept, is just a legal fiction, designed to establish an *ex post facto* justification for what is actually nothing more than rule by force. This cannot be considered acceptable and legally sound if ours is truly a liberal-democratic country governed by the fundamental principle of constitutionalism and the rule of law, not to mention the principles of federalism, democracy, and the protection of minorities.

The closest that the Supreme Court of Canada has ever come in Aboriginal rights jurisprudence to recognizing this and questioning the legal credibility of Crown sovereignty is in *Haida Nation v British Columbia (Minister of Forests)*. There, Chief Justice McLachlin, for the Court, repeatedly contrasts the status of Indigenous sovereignty and Crown sovereignty and sees the task of reconciliation as being to reconcile the two competing sovereignties. For example, she states, early in her opinion, that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with *assumed* Crown sovereignty.”²⁸ In this decision, then, the Court recognizes that Crown sovereignty requires the consent of the pre-existing sovereign Indigenous nations of Canada, through treaties, and the credibility and extent of Crown sovereignty must be determined by the terms of the agreement between the British Crown and the Indigenous nations that is documented in the treaties; in other words, through Indigenous consent.

Because Indigenous nations existed and exercised sovereignty over their territory before European settlement and because they were never conquered, the only way for the British Crown to secure some degree of sovereignty in Canadian territory was and is through the negotiation of the terms of Indigenous recognition and consent to the British assertion of sovereignty. If Indigenous sovereignty over their territory was never ceded through treaty-making, but merely attenuated in the name of peacefully sharing the land with the British settler-state, the mere Crown assertion of sovereignty cannot ground a legitimate, principled, legal recognition of Crown sovereignty. Furthermore, where there are no treaties, there is no actual Crown sovereignty, as a legal concept, only *de facto* control and dominance through the successful exercise of power. The *Haida Nation* decision is the one decision, above all others, that gives us a jurisprudential roadmap to an honourable way forward in reconciliation between Indigenous societies and the Crown; it is therefore *Haida Nation* that must always be our jurisprudential touchstone in Canadian Aboriginal law.

28 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20 [emphasis added].

