THE CANADIAN LEGAL GENEALOGY OF *TERRA NULLIUS*

SUB NOM.: IS IT TOO LATE TO SEND *TERRA NULLIUS* BACK TO AUSTRALIA (AND WOULD THEY EVEN TAKE IT)?

PART I

By Sarah Pike*

The Myth of *Terra Nullius*

... When Europeans arrived in the South Pacific in the land that is now Australia and New Zealand,[1] they regarded it as *terra nullius* or "nobody's land." They simply ignored the fact that Indigenous Peoples had been living in these lands for thousands of years, with their own cultures and civilizations. For the newcomers, the land was theirs to colonize; this narrative was also applied in Canada.

Law Society of British Columbia, Indigenous Intercultural Course, announced January 26, 2022, Module 3.1.[2]

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The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 at para. 69, per Chief Justice McLachlin.

Which of these seemingly opposite statements is true? Both? Neither?

In 2007, Australian historian Andrew Fitzmaurice published "The Genealogy of *Terra Nullius*" as part of his contribution to the Australian "history wars", debates concerning the historiography of British colonization of

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Australia and its effect on Indigenous peoples.[3] The present article, published in two parts, adapts and extends Fitzmaurice's framework to the Canadian legal context showing, I hope, that neither the Law Society's nor the Chief Justice's statement is entirely correct.

In Part I of this article, I examine the international and Australian use of the term *terra nullius* in legal and non-legal contexts. In Part II, which will be published in a later issue of the *Advocate*, I will trace the Canadian jurisprudential adoption of the term. To the date of writing, Canadian judges have referenced *terra nullius* in only 17 decisions; the treatment has been substantive in only seven. Tellingly, the first mention of the term was in May 1993, a year after the High Court of Australia's lengthy discussion of *terra nullius* in its groundbreaking Aboriginal title decision, *Mabo v. Queensland (No. 2)*.[4] I will conclude Part II by briefly examining the interface and friction between Indigenous and settler legal systems in 19th-century British Columbia, suggesting that this is where we should focus our attention if we are to properly understand our legal pasts and present and to craft a legal future.

WHAT IS *TERRA NULLIUS*?

The "Genealogy" of *Terra Nullius*

In the last 30 years, *terra nullius*—meaning, literally, "land belonging to no one"[5] or "land without owners"[6]—has come into wide usage in reference to British colonization.[7] However, as Fitzmaurice and others have shown, *terra nullius* is valid only as a shorthand; it is not an accurate description of a legal or political doctrine employed in the justification of the British empire.[8] One scholar terms it a "neologistic loan expression" whose "fascination is in being so widely misunderstood, a casualty of the conjunction of legal, political, and historical attitudes toward the past".[9]

Terra nullius emerged as an international law concept only toward the end of the 19th century.[10] Although similar to the Roman law terms *res nullius* and *territorium nullius*, *terra nullius* has a distinct meaning and genesis.[11] By applying *terra nullius* anachronistically, we obscure two complex histories: (1) the comparatively recent history of *terra nullius* as it was used to discuss European expansion; and (2) the older history of how ideas of occupation were used to justify empire.[12]

Following the term's sporadic appearances, Britain and Venezuela applied *terra nullius* in an 1899 arbitration concerning a long-simmering conflict over three former Dutch colonies in Guiana.[13] Then, early in the 20th century, *terra nullius* secured a place in the international law lexicon.[14] In 1909, French foreign affairs official Camille Piccioni used it in an article

about sovereignty over Spitzbergen, an island within the Arctic circle over which no sovereignty had been established.[15] He used the term to refer not to a place that was uninhabited—he knew it was inhabited—but to territory that states had agreed would remain in common.[16]

Over successive decades, *terra nullius* continued to be used in discussions concerning the polar regions.[17] Its prominence in these debates brought it to the attention of the Columbia University Joint Seminar in International Law (the "Columbia Seminar"), established by law professor Philip Jessup and others in the 1930s and concerned primarily with the doctrine of occupation.[18] Among other questions, the scholars considered whether the International Court of Justice's reference to *terra nullius* in a 1933 decision concerning a dispute between Norway and Denmark over East Greenland[19]—the court had used the term to refer to a land that was unpeopled—could be extended beyond the polar context. They wondered whether *terra nullius* could explain previous centuries' colonial expansionism.[20]

The students in the Columbia Seminar began to publish works arguing that *terra nullius* could indeed be used to understand the justifications of empire in the previous 400 years.[21] In one book, the students took the meaning of *terra nullius* that had emerged from the polar regions debate—that is, "land not under any sovereignty"[22]—and extended it, determining that they would retain the term even to describe lands inhabited by Indigenous peoples:

> The presence of a savage population, of aborigines, or of nomadic tribes engaged in hunting and fishing, was generally disregarded by Europeans. For the purposes of this volume, therefore, insofar as any status of sovereignty is concerned, the existence of such a population will not exclude these lands from our definition of *terra nullius*.[23]

It was the Columbia Seminar that delivered *terra nullius* to Australia. In addition to publishing, Columbia Seminar members wrote to scholars in settler societies asking them whether the assertion of sovereignty over *terra nullius*—according to the seminar's definition—could explain the colonial settlement of their countries.[24] As part of this project, Philip Jessup wrote to eminent Australian historian Sir Ernest Scott in 1939, asking if Australia had been *terra nullius*—again, according to their definition—at the time of British occupation. Scott quite easily concluded that it had, which he reported in two papers, including "Taking Possession of Australia – The Doctrine of 'Terra Nullius' (No-Man's Land)".[25] In the paper, Scott wrote:

> I was induced to write this paper by receiving some inquiries from Professor Philip C. Jessup, of the Department of International Law, University of Columbia. He informed me that he had been working with a seminar of advanced students on the subject of "*Terra Nullius*," *which has been defined as land not under any sovereignty*. It is, therefore, *land of which a sovereign state may consider itself at liberty to take possession*. We may put

> the point more simply if we say that "Terra Nullius" is No-man's-land. In the sixteenth, seventeenth and eighteenth centuries, Portugal, Spain, Holland, England and France took possession of such territory in Asia, Africa, America and Australasia, by performing certain symbolic acts, which I shall describe presently.
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> ....
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> *Little regard was paid to the rights of original inhabitants by any of the colonizing peoples.* Generally, they considered that they were acting righteously in introducing the Christian religion to lands previously heathen.[26]

Having gained a foothold in Australia in the 1930s, *terra nullius* largely lay dormant there for nearly another half-century. Finally, in 1977, it arose again in a court case in which an Indigenous man, Paul Coe, argued that Aboriginal people continued to hold sovereignty in Australia.[27] Coe sought to leverage a recent International Court of Justice decision concerning the Western Sahara and amend his statement of claim to assert that "[t]he proclamations by Captain James Cook, Captain Arthur Phillip and others and the settlement which followed the said proclamations and each of them wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign aboriginal nation as set out in paragraphs 5A, 6A and 7A hereof".[28]

Australia's highest court, however, dismissed Coe's appeal, refusing him permission to file the amended pleading. The majority concluded that if there were serious legal questions to be decided about "what rights the aboriginal people of this country have, or ought to have, in the lands of Australia[,] ... the resolution of such questions by the courts will not be assisted by imprecise, emotional or intemperate claims".[29] Thus, no court ever dealt with Coe's claim on its merits.

Mabo (No. 2)

Just three years later, Eddie Mabo and others filed a claim on behalf of the Meriam people of the Murray Islands in the Torres Strait, part of the Australian state of Queensland, arguing that they still held "native title" to their lands. The *Mabo* plaintiffs did not use *terra nullius* to attack British sovereignty over Australia, as Coe had proposed to do. Instead, they ultimately successfully argued that "the doctrine of *terra nullius*" had prevented Australian common law from recognizing Aboriginal title.

Justice Brennan, whose judgment can be considered the majority judgment, referred repeatedly to "the enlarged notion of *terra nullius*"—which, he explained, was an international law principle that justified "the acquisition of inhabited territory by occupation on behalf of the acquiring sovereign".[30] The previous international law principle, according to Justice

Brennan, had allowed such acquisition only where the land was truly "desert" and "uninhabited".[31] In refusing to enforce the contemporary results of this allegedly historical doctrine—the "enlarged notion of *terra nullius*"—Justice Brennan was explicit that his court could modify the common law to account for the inequities history had left in Australian society:

> Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. … [T]he law of this country is entirely free of Imperial control. The law which governs Australia is Australian law. … Increasingly since 1968 … the common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation. … The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights … [N]o [previous] case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.[32]

In this manner, Justice Brennan overruled historical precedent in a way not often seen in the common law world. He refused to follow older judgments that had been based on "the enlarged notion of *terra nullius*": "the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not. … The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country".[33]

In the result, six out of seven members of the High Court agreed that Australian common law should reject "the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein".[34] The court thus took the British Crown's sovereignty as a given—indeed, it concluded that the acquisition of sovereignty by a country could not be challenged in municipal (i.e., national) courts, as it is a matter of international law[35]—but accepted that "the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty" and now constitute "a burden on the radical title of the Crown".[36]

After the High Court's decision, it became "repeated wisdom that in *Mabo*, the High Court 'rejected' or 'reversed' the 'doctrine of *terra nullius*',

which had held that in 1788 Australia was 'nobody's land'".[37] But how had the High Court come to take the *terra nullius* hook?

Henry Reynolds, *The Law of the Land*

The *Mabo* court referred several times to Australian historian Henry Reynolds's book *The Law of the Land* as a source of historical fact and an explanation of the doctrine of *terra nullius*. Justice Toohey's judgment referred explicitly to Reynolds's "attack" on *terra nullius*.[38] In the book, published five years before the High Court's decision, Reynolds had set out to "challenge[] the legal and moral assumptions underlying the European occupation of Aboriginal Australia".[39] In fact, he had written the book "'as an argument that lawyers could follow' and with a judicial audience in mind".[40]

In the first chapter, "Who Was in Possession?", Reynolds wrote that "[t]he doctrine underlying the traditional view of settlement was that before 1788 Australia was *terra nullius*, a land belonging to no-one".[41] In his last chapter, Reynolds determined that *terra nullius* lay—and lies—at the heart of the Indigenous land issue in Australia. He distinguished British sovereignty from "[t]he claim to all the property", concluding that "[p]ractice in other parts of the world suggested that negotiations should have been conducted prior to the purchase of land". He laid the failure to do so at the doorstep of *terra nullius*:

> The situation in Australia may have arisen from the mistaken belief that the country was largely uninhabited and therefore literally a *terra nullius*. The idea was soon discredited. The law, however, continued to work on that assumption in face of everything that happened after 1788. *Terra nullius* is still at the heart of the Australian legal system. While it remains there the gap will yawn between jurisprudence and historical reality. There will never be a real accommodation between black and white. Australia will continue to be an imperial nation where the indigenous people are ruled by a legal system which enfolds old injustice.[42]

Critique of *Mabo* and *The Law of the Land*

Upon the release of *Mabo* and for many years afterward, Australian historians and lawyers criticized the *Mabo* court's anachronistic reference to *terra nullius* and its related reliance on Reynolds's book.[43] Today, commentators almost universally acknowledge that *terra nullius* was not used in the 18th and 19th centuries to justify the dispossession of Australian Indigenous peoples.[44]

Nonetheless, they also acknowledge that the *Mabo* court's and Reynolds's use of the term was shorthand for something real:

> [W]hile the term *terra nullius* was not used to justify dispossession in Australia, it was produced by the legal tradition that dominated questions of the justice of 'occupation' at the time that Australia was colonised. *Terra nullius* is a product of the history of dispossession and the larger history of European expansion.[45]

Australian historian Bain Attwood concluded that Reynolds "undoubtedly" had used the term *terra nullius* metaphorically "to register the racism that Aborigines and their supporters saw as integral to the British colonization of the continent and the dispossession and destruction of its indigenous peoples".[46] Similarly, Australian lawyer David Ritter noted that the term "emotively connoted the historical reality of how Aboriginal people had been treated".[47] Recently, Australian legal academic Shane Chalmers acknowledged that *terra nullius* was not used in the 19th century in reference to Australian colonization, but that he nonetheless continued "to use the term here anachronistically, not as a legal-doctrinal concept, nor as an historical concept, but as a discursive concept that expresses the denial of Indigenous land rights in Australia and that has been used in the struggle by Aboriginals and Torres Strait Islanders against the ongoing colonisation of their country".[48]

The Common Law Status of Colonies

But there was even more to it than this.[49] In fact, there had been a domestic common law corollary to the (later) international law concept of *terra nullius*: land acquired by settlement that was "desert and uncultivated".[50] According to the common law, this kind of colonized land attracted English laws of real property ownership, since it was assumed that no land law or tenure existed in the colony at the time of its annexation by the Crown.[51] Britain *had* applied this categorization to the Australian colonies.

Reading Justice Brennan's judgment, one can see his conflation of *terra nullius* and the status of land and law in a settled colony.[52] By the "enlarged notion of *terra nullius*", Justice Brennan appears to have intended to describe the imperial treatment of inhabited lands as uninhabited lands, for the purposes of law, in a colony established by settlement. For the majority in *Mabo*, this "enlargement" had been improperly based on assumptions that the Indigenous inhabitants were too "low in the scale of social organization" to have legal systems and interests in land that ought to be recognized by British common law.[53]

Australian judges had routinely applied the English common law rule relating to settled colonies. In *Milirrpum* in 1970, in an action claiming Aboriginal title under the common law, a judge of the Supreme Court of the Northern Territory rejected the government's argument that the Indigenous plaintiffs could not have had "law". Of the government's position, the judge said, "I do not find myself much impressed by this line of argument",[54] and concluded:

> I am very clearly of opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the

> other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.
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> ....
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> I hold that I must recognize the system revealed by the evidence as a system of law.[55]

Despite this, Blackburn J. made other evidentiary findings against the plaintiffs' laws, including that the plaintiffs' claims were "not in the nature of proprietary interests", because their laws did not comprehend property in the same way as his.[56] He also felt bound by his understanding of English common law, finding that it did not include a rule requiring the recognition of "communal native title"; rather, "[a]ll titles, rights, and interests whatever in land which existed ... [after the foundation of a settled colony] in subjects of the Crown were the direct consequence of some grant from the Crown".[57]

This reasoning equates sovereignty over a territory with property rights within a territory, a conflation—and, some would argue, an error—that surfaces in some of the Australian and Canadian jurisprudence. In *Mabo*, however, the High Court distinguished between sovereignty and property rights, leaving British sovereignty untouched, but reordering property rights within the common law. The *Mabo* court refused to follow "formidable" previous case law,[58] and Justice Brennan made space for Aboriginal title "above" the Crown's radical title (yet still recognized that ultimate title as a result of Crown sovereignty):

> ... it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a *terra nullius*, the Crown would take an absolute beneficial title (an allodial title) to the land ... : there would be no other proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant.
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> ....
>
> Once it is accepted that indigenous inhabitants in occupation of a territory when sovereignty is acquired by the Crown are capable of enjoying - whether in community, as a group or as individuals - proprietary inter-

> ests in land, the rights and interests in the land which they had theretofore enjoyed under the customs of their community are seen to be a burden on the radical title which the Crown acquires.[59]

Thus, the *Mabo* judges not only purported to reject "the doctrine of *terra nullius*", but they also rejected what they saw as a straight line of legal reasoning from the designation of the colony as "settled", to the application of English law to the colony, to the inability or refusal of English common law to recognize Aboriginal title.[60]

So, what does all this Australian analysis and debate have to do with Canada? In Part II of this article, I tackle this question. I will begin by showing that the first mention of *terra nullius* in a Canadian judgment came a year after the High Court of Australia's decision in *Mabo*. It is clear, I suggest, that Canada imported *terra nullius* from Australia. Yet it is equally clear, in my view, that our jurisprudential treatment of the term and the concept is distinct from Australia's. But my ultimate point, which I make by brief reference to historical facts in British Columbia, is that as lawyers, we would be best served by considering the history of the role of law in our province, rather than continuing to engage with the shorthand *terra nullius*.

ENDNOTES

1. New Zealand's inclusion in this paragraph could be the subject of a separate article. See e.g. the 1840 Treaty of Waitangi | Te Tiriti o Waitangi.
2. For similar statements regarding *terra nullius*, see *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, preamble (providing, as a recital, that "all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and *terra nullius*, are racist, scientifically false, legally invalid, morally condemnable and socially unjust"); British Columbia, "Directives on Civil Litigation Involving Indigenous Peoples" (21 April 2022), Directive #14, online: <news.gov.bc.ca/files/CivilLitigationDirectives.pdf> ("the Province is committed to negotiating treaties, agreements and other constructive arrangements outside of the litigation process, guided by, among other things, the repudiation of concepts such as the doctrine of discovery and *terra nullius* … ").
3. Andrew Fitzmaurice, "The Genealogy of *Terra Nullius*" (2007) 38:129 Austl Historical Studies 1 [Fitzmaurice, "Genealogy"].
4. *Mabo v Queensland (No 2)*, [1992] HCA 23 [*Mabo*]. Unless stated otherwise, all references are to Justice Brennan's reasons.
5. Noel Castree, Rob Kitchin & Alisdair Rogers, eds, *A Dictionary of Human Geography* (Oxford: Oxford University Press, 2013).
6. Laura Benton & Benjamin Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice" (2010) 28:1 L & Hist Rev 1 at 1.
7. What follows is an abbreviated synopsis of an exceedingly complicated history.
8. Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014) at 302 [Fitzmaurice, *Sovereignty*]; Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015) at 138; Douglas Howland, "Sovereign Claims and Possessions – The Beginnings of the Territorial State" (2019) 7:6 Intl J Social Science Studies 71 at 72–73.
9. Conal Condren, *Political Vocabularies: Word Change and the Nature of Politics* (Rochester: University of Rochester Press, 2017) at 85.
10. Fitzmaurice, *Sovereignty*, *supra* note 8 at 304–10; Howland, *supra* note 8 at 74–76.
11. Fitzmaurice, *Sovereignty*, *supra* note 8 at 303. See also Fitzmaurice, "Genealogy", *supra* note 3 at 6; Benton & Straumann, *supra* note 6 at 3, 6.
12. Fitzmaurice, *Sovereignty*, *supra* note 8 at 303–04.
13. *Ibid* at 306–10.
14. *Ibid* at 310.
15. Fitzmaurice, "Genealogy", *supra* note 3 at 4. See also *ibid* at 311. Fitzmaurice refers to Piccioni as Italian, but my research discloses that he was French, born in Corsica, and worked for the French government.
16. Fitzmaurice, *Sovereignty*, *supra* note 8 at 312.
17. Fitzmaurice, "Genealogy", *supra* note 3 at 15.
18. Fitzmaurice, *Sovereignty*, *supra* note 8 at 319–20.
19. *Ibid* at 316.

20. *Ibid* at 320.
21. *Ibid*.
22. As quoted in *ibid* at 321.
23. As quoted in *ibid*.
24. *Ibid* at 322.
25. Western Sahara, Advisory Opinion, ICJ Reports, 1975, at 39, as cited in Fitzmaurice, *Sovereignty*, *supra* note 8 at 322. See especially references to Scott's two papers at footnote 65 in Fitzmaurice, "Genealogy", *supra* note 3.
26. Sir Ernest Scott, "Taking Possession of Australia - The Doctrine of 'Terra Nullius' (No-Man's Land)" (1940) XXVI: Part 1 Royal Austl Historical Society, J & Proc 1 at 1, 3–4 [emphasis added].
27. *Coe v Commonwealth*, [1979] HCA 68. All paragraph numbers references are to the AustLII version of the decision, online: <www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/68.html>. Each judge's decision restarts at paragraph 1 in AustLII, so I have also referred to the judge's name.
28. *Ibid* at para 1 (Gibbs J)
29. *Ibid* at para 21 (Gibbs J).
30. *Mabo*, *supra* note 4 at para 34.
31. *Ibid* at paras 33–36.
32. *Ibid* at para 29.
33. *Ibid* at paras 39, 42.
34. *Ibid* at para 62.
35. *Ibid* at paras 30–32 (Brennan J), 6 (Dawson J).
36. *Ibid* at para 62.
37. *Mabo*, *supra* note 4; David Ritter, "The 'Rejection of Terra Nullius' in *Mabo*: A Critical Analysis" (1996) 18 Sydney L Rev 5 at 5 [Ritter, "Rejection"].
38. *Mabo*, *supra* note 4 at para 18 (Toohey J).
39. Henry Reynolds, *The Law of the Land* (Ringwood, Victoria: Penguin, 1987).
40. David Ritter, "Tilting at Doctrine in a Changing World: The Three Editions of Henry Reynolds' *The Law of the Land*" (2008) 32:3 J Austl Studies 393 at 394 [Ritter, "Tilting"]. Ritter makes this statement, quoting from Reynolds's own book, *Why Weren't We Told?: A Personal Search for the Truth About Our History* (Viking: Melbourne, 1999) at 191.
41. Reynolds, *supra* note 39 at 12.
42. *Ibid* at 173–74.
43. See e.g. Ritter, "Rejection", *supra* note 37; Ritter, "Tilting", *supra* note 40; Bain Attwood, "*The Law of the Land* or the Law of the Land?: History, Law and Narrative in a Settler Society" (2004) 2 History Compass 1; Andrew Fitzmaurice, "The Great Australian History Wars" (15 March 2006), online: The University of Sydney <sydney.edu.au/news/84.html?newsstoryid=948>.
44. Fitzmaurice, "Genealogy", *supra* note 3 at 1. See also the sources Fitzmaurice cites in "Genealogy" at footnote 2; Benton & Straumann, *supra* note 6; Pagden, *supra* note 8 at 138; Ritter, "Rejection", *supra* note 37; Attwood, *supra* note 43; Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Sydney: Macleay Press, 2005); Edward Cavanagh, "Possession and Dispossession in Corporate New France, 1600-1663: Debunking a 'Juridical History' and Revisiting *Terra Nullius*" (2014) 32:1 L & Hist Rev 97; Shane Chalmers, "*Terra Nullius*? Temporal Legal Pluralism in an Australian Colony" (2020) 29:4 Soc & Leg Stud 463 at 483, n 1.
45. Fitzmaurice, "Genealogy", *supra* note 3 at 1. See also Fitzmaurice, *Sovereignty*, *supra* note 8 at 330 (concluding that, in *Mabo*, "[t]erra nullius was thus used as shorthand for occupation, and sometimes even for conquest").
46. Attwood, *supra* note 43 at 9.
47. Ritter, "Rejection", *supra* note 37 at 6.
48. Chalmers, *supra* note 44 at 483, n 1.
49. Again, there is a vast scholarship on this topic. Readers should consider this section as only an introduction.
50. Ritter, "Rejection", *supra* note 37 at 8. In *Mabo*, the judges make extensive reference to Blackstone's use of the term "desert uninhabited" land. However, Ritter is correct that Blackstone, as well, made reference to "desert and uncultivated" land. See Blackstone, *Commentaries on the Laws of England*, 18th ed (1823), Book 2, Ch 1, at 7 and Introduction, Section 4, at 107.
51. Ritter, "Rejection", *supra* note 37 at 8–9, citing from *Cooper v Stuart* (1889), 14 App Cas 286 at 292.
52. *Mabo*, *supra* note 4 at paras 33–34.
53. *Ibid* at paras 36–39. For a discussion of this "backward peoples" justification, see Daniel Lavery, "No Decorous Veil: The Continuing Reliance on an Enlarged *Terra Nullius* Notion in *Mabo* [No 2]" (2019) 43:1 Melbourne UL Rev 233.
54. *Milirrpum v Nabalco Pty Ltd* (1970), 17 FLR 141 at 266.
55. *Ibid* at 267–68.
56. *Ibid* at 273.
57. *Ibid* at 245.
58. *Mabo*, *supra* note 4 at para 26.
59. *Ibid* at paras 51, 54 [emphasis added].
60. Since *Mabo*, however, legal academics have suggested that the "settled" colony designation did not necessarily dictate the colonial recognition or disregard of Indigenous land rights: Ritter, "Rejection", *supra* note 37 at 9; Paul G McHugh, "Aboriginal Title Within and Across Disciplinary Boundaries—Anthropologists, Historians, and Political Philosophers" in Paul G McHugh, ed, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) 241 at 286. See also Paul G McHugh, "The Common-Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past" (1998) 61 Sask L Rev 393 at 402–03 (arguing that "the distinction [in types of colonies] was never regarded as having any bearing on the status or rights of the Indigenous peoples of the colony (whatever those might be) but was a response to the situation of the Crown's non-native subjects").

THE CANADIAN LEGAL GENEALOGY OF *TERRA NULLIUS* *SUB NOM.*: IS IT TOO LATE TO SEND *TERRA NULLIUS* BACK TO AUSTRALIA (AND WOULD THEY EVEN TAKE IT)?

PART II

By Sarah Pike*

THE CANADIAN LEGAL GENEALOGY OF *TERRA NULLIUS*

As set out in Part I of this article, published in the September 2022 issue of the *Advocate*, in June 1992 the High Court of Australia issued judgment in its pivotal Aboriginal title decision, *Mabo v. Queensland (No. 2)*, in which Justice Brennan engaged extensively with what he called "the enlarged notion of *terra nullius*".[1] As of that date, no Canadian judgment had ever referred to *terra nullius*.[2] The first one to do so—from the Quebec Court of Appeal in *R. v. Côté* in May 1993—referred to *Mabo* once in passing. However, the second Canadian judgment to refer to *terra nullius*—the B.C. Court of Appeal's in *Delgamuukw* in June 1993—referred to *Mabo* 46 times. Between 1996 and 2014, the Supreme Court of Canada referred to *terra nullius* in four decisions (even though the term appears in only one of the eight lower court judgments).[3] Just this year, in January 2022, the B.C. Supreme Court issued a judgment with the longest analysis of *terra nullius* in Canada to date.

In total, 17 Canadian decisions have referred to *terra nullius*. Many do so because they quote an oft-cited paragraph from *Tsilhqot'in* or documents containing the term.[4] Ultimately, as discussed below, there are only 17 substantive references to *terra nullius* in all of the reported Canadian jurisprudence.[5] While *terra nullius* came in to Canadian jurisprudence from Australia, I contend that our jurisprudential treatment of the term has not been the same and, indeed, is now on a different trajectory—one that, I suggest, is largely unhelpful to our collective understanding of our legal past.

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Jurisprudence

Côté (QCCA and SCC)

The Quebec Court of Appeal and the Supreme Court of Canada both referred to *terra nullius* in judgments in *R. v. Côté*, in which the Supreme Court ultimately upheld the appellants' Aboriginal right to fish.[6]

In May 1993, the majority of the Court of Appeal referred once to *terra nullius*, in the title of a 1938 article by James Simsarian, "The Acquisition of Legal Title to *Terra Nullius*", cited as support for the proposition that "modern authors quite clearly dismiss the principle of the right of discovery as a means of acquiring territory".[7] In the article, published when Simsarian was a student with the Columbia Joint Seminar in International Law (a seminar discussed in Part I of this article), Simsarian had reviewed all empires from the 15th century to the 20th century. He assumed that all territories acquired by the empires had, in fact, been *terra nullius* and asked how the empires had justified taking possession. He concluded that discovery and symbolic acts had been sufficient to establish title prior to 1700.[8]

At the Supreme Court of Canada in 1996, Chief Justice Lamer, for the majority, dealt with the term *terra nullius* differently, using the term in a more literal way to describe an area devoid of Indigenous occupation: "In one of the mysteries of the history of New France, the Iroquois people who occupied the region at the date of Jacques Cartier's visit in 1534 had simply disappeared by 1603. The French colonists thus claimed and occupied this particular area as *terra nullius*."[9]

Delgamuukw (BCCA)

In June 1993, one B.C. Court of Appeal judge treated *terra nullius* in almost the same way as the judges in *Mabo* treated the concept. Although the Court of Appeal's decision in *Delgamuukw* would be eclipsed by the Supreme Court of Canada's several years later in the same case—in which no judge referred to *terra nullius*[10]—Justice Lambert (dissenting and writing only for himself on a five-judge bench) effectively incorporated the *Mabo* analysis into his own.[11] He concluded that *terra nullius* had been used in British Columbia to justify a failure to recognize Aboriginal rights (and had resulted from the type of colony England had established):

> In my opinion the decision of the High Court of Australia in *Mabo v. Queensland* decides this point in the same way as I have decided it and in the way first referred to by Professor Slattery as the Doctrine of Continuity. In my opinion the area in central British Columbia claimed in this case was no more "*terra nullius*" when the first colonizers arrived in that part of British Columbia than the Murray Islands were when the first colonizers arrived there.[12]

Justice Lambert accepted Crown sovereignty, as had the *Mabo* court. His "point" was that if the Crown asserted sovereignty and "adopted the common law as the law of the territory over which Sovereignty was claimed",

> then the common law itself recognized, adopted and affirmed the rights and titles of the indigenous people in relation to land and in relation to their own customs and practices for control of land and for control of their other rights, except to the extent that their rights were inconsistent with the concept of Sovereignty itself, or inconsistent with laws clearly made applicable to the whole territory and all of its inhabitants, or with the principles of fundamental justice.[13]

Thus, British sovereignty was a given, the doctrine of *terra nullius* ought not to have applied and the common law ought to have recognized Aboriginal title, with the qualifications Justice Lambert set out.

Van der Peet (SCC)

The Supreme Court of Canada first referred to *terra nullius* on August 21, 1996, in an appeal by an Indigenous woman found guilty under B.C. fishing regulations for selling fish caught under an Indigenous food fish licence, contrary to the licence terms. (The court released its decision in *Côté* some six weeks later.) Ms. Van der Peet sought an acquittal on the basis that the regulatory section infringed her constitutional rights under s. 35 of the *Constitution Act, 1982*. In upholding the conviction, Chief Justice Lamer, for the majority, analyzed the *Mabo* judgment without referring to *terra nullius*. The two dissenting judges, however, referred to *terra nullius* a total of three times.

Justice L'Heureux-Dubé did so while setting out the historical background of the case, referring to Indigenous peoples' finding a "*terra nullius*" when they first arrived in North America, some 12,000 years before.[14] Justice McLachlin, as she then was, quoted from Justice Brennan's judgment in *Mabo*, summarizing that "[o]nce the 'fictions' of *terra nullius* are stripped away", then, according to Justice Brennan, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the Indigenous people.[15] She then turned to the Canadian context, declaring that the Royal Proclamation—which "expressly recognized" that British sovereignty did not deprive Indigenous peoples in Canada of their "pre-existing rights"—was evidence that "the maxim of *terra nullius* was not to govern here".[16] She would reiterate this 18 years later, writing for a unanimous court in *Tsilhqot'in*.

Marshall; Bernard (SCC)

The Supreme Court of Canada next mentioned *terra nullius* once, only incidentally, in a 2005 case from Nova Scotia involving Aboriginal title.[17] In

Marshall; Bernard, two concurring judges again tried to come to terms with the basis on which British sovereignty had been extended and its implications for Indigenous peoples. Their only reference to *terra nullius* was in a quote from an article by Australian law professor Samantha Hepburn, in which Hepburn had referred to the rejection in *Mabo* of the enlarged notion of *terra nullius*.[18]

Tsilhqot'in (SCC)

In 2014, the Supreme Court of Canada made its most recent and most contentious reference to *terra nullius*—mentioning the term only once—in *Tsilhqot'in*, a unanimous decision written by Chief Justice McLachlin, in which she effectively repeated what she had said in *Van der Peet* in dissent:

> *A. The Legal Characterization of Aboriginal Title*
>
> The starting point in characterizing the legal nature of Aboriginal title is Dickson J.'s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. *The doctrine of* terra nullius *(that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763*. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.[19]

Thomas (BCSC)

Only one judgment since *Tsilhqot'in* has analyzed *terra nullius* in any detail. In January 2022, B.C. Supreme Court Justice Kent, in *Thomas v. Rio Tinto Alcan Inc.*, set out the longest discussion of *terra nullius* in the history of Canadian jurisprudence.[20] He granted the First Nation plaintiffs partial relief, declaring a constitutionally recognized Aboriginal right to fish that had been significantly impaired by the regulation of the Nechako River for the purposes of hydroelectricity.[21]

In a section entitled "Background to Aboriginal Rights Jurisprudence in Canada" and a subsection entitled "Legitimacy of Crown Assertion of Sovereignty", Justice Kent reviewed the Supreme Court of Canada's 1973 *Calder* judgments' analyses of the Royal Proclamation and the doctrine of discovery as articulated in two 19th-century U.S. Supreme Court decisions.[22] He then inserted *terra nullius* into the analysis: "The doctrine of 'discovery' combines with the related concept of '*terra nullius*' to bestow upon European settlers title to and sovereignty over the 'empty lands' which they 'discovered'."[23] Perhaps unintentionally, Justice Kent did two things other Canadian and Australian judges have done: he introduced *terra nullius* into

a history in which it did not play a role, and he conflated sovereignty over a territory with title to or within a territory.[24]

In this *obiter dicta*, Justice Kent prodded the "rationale for Crown sovereignty over land formerly owned and occupied by Indigenous peoples", which, he noted, "has in recent decades come under scathing academic, political, and legal criticism".[25] He laid out the case that the legal justification for European sovereignty over Indigenous peoples and lands is highly problematic:[26]

> Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada: see Borrows 2015, above at para. 182, and John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall Law Journal 537.[27]

But the First Nation plaintiffs in *Thomas* did not challenge Crown sovereignty "*per se*"; rather, they challenged "the efficacy of legislation, licences, and contracts issued or made by the Crown in a tort lawsuit against a non-government entity", asserting that these were "'constitutionally inapplicable' as any defence to their claim".[28] Of this line of argument, Justice Kent concluded that two "harsh realities" barred the plaintiffs' way:

> First and foremost is the fact that the system of law and government imported by settlers into British Columbia and superimposed upon Indigenous peoples has become firmly and intractably entrenched. It is the foundation for Canadian society as it exists today. The laws relating to ownership of land are the basis for this country's wealth and the very foundation for its economy. It is these same laws which provide legitimacy to this Court.
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> ....
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> The second harsh reality, closely related to the first, is that this Court is bound by the doctrine of precedent, which requires it to apply the law enunciated by the Supreme Court of Canada. If that construct or analytical framework attracts academic or political criticism, no matter how justified, this Court is nevertheless bound to apply it, subject only to incremental changes not prohibited by precedent or legislative change ... [29]

Justice Kent ultimately concluded that "when Crown sovereignty was asserted in British Columbia in 1846, the lands bordering the Nechako River, the Stellako River, and Fraser Lake were not *terra nullius*", because they were "owned, occupied and used" by the Dakelh.[30]

Commissions

Two important Canadian commissions of inquiry have referred to *terra nullius*, asserting that it underpinned the establishment of Canada and persists in Canadian law and society today.

Royal Commission on Aboriginal Peoples (1996)

In 1996, the Royal Commission on Aboriginal Peoples ("RCAP") issued its final report, comprising some 4,000 pages and 440 recommendations intended to enact sweeping changes to the relationship between Indigenous and non-Indigenous people and governments in Canada. The report referred several times to *terra nullius* as a doctrine on which Canada was settled and the basis on which Britain extended sovereignty over Canada. One definition of *terra nullius* that RCAP gave was a "concept … used by Europeans to suggest that they came to empty, uninhabited lands or at least to lands that were not in the possession of 'civilized' peoples, that were not being put to 'civilized' use".[31]

Ultimately, RCAP made these recommendations:

> The Commission recommends that
>
> 1.16.2
>
> Federal, provincial and territorial governments further the process of renewal by
>
> (a) *acknowledging that concepts such as* terra nullius *and the doctrine of discovery are factually, legally and morally wrong*;
>
> (b) declaring that such concepts no longer form part of law making or policy development by Canadian governments;
>
> (c) declaring that such concepts will not be the basis of arguments presented to the courts;
>
> (d) committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation; and
>
> (e) including a declaration to these ends in the new Royal Proclamation and its companion legislation.[32]

Truth and Reconciliation Commission (2015)

Canada's Truth and Reconciliation Commission made similar recommendations in its final report in 2015, referring explicitly to *terra nullius* in four of its final Calls to Action (Nos. 45–48), including these:

> 45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:
>
> i. *Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and* terra nullius.
>
> ….

> 47. We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.[33]

Academic Analysis

In January 2022, Justice Kent felt compelled to take British sovereignty over Canada as a given, something that, as he recognized, Canadian legal academics have been challenging for decades. Some 30 years ago, Professor Hamar Foster, K.C., described the problematic foundation for this sovereignty in this way: "How the act of discovery or mere words on paper can be transformed into rights and jurisdiction over Aboriginal nations remains a mystery".[34]

Canadian lawyers, judges and legal academics now employ *terra nullius* almost exclusively as part of efforts to expose what Justice Kent called sovereignty's "legal fiction".[35] Many scholars shine the spotlight on Chief Justice McLachlin's statements in *Tsilhqot'in* that, on the one hand, *terra nullius* did not apply in Canada; but that, on the other, "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province".[36] After the Supreme Court of Canada's decision in *Delgamuukw*—which did not refer to *terra nullius*—Professor John Borrows called this "sovereignty's alchemy".[37] After the *Tsilhqot'in* decision, he framed what he and many others[38] saw as an apparent contradiction in this way:

> [i]f that land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in the same land by merely asserting sovereignty, without a version of *terra nullius* being deployed. The Crown's claim to underlying title on this basis "does not make sense." Some kind of legal vacuum must be imagined in order to create the Crown's radical title. The emptiness at the heart of the Court's decision is disturbing.[39]

Professor Gordon Christie also challenged the Supreme Court's "fictional legal history", asserting that the court's statement concerning *terra nullius* was "disingenuous on several levels", including because "*[t]erra nullius* – in its most insidious form – functioned to discount the very possibility that an Indigenous community could have anything like a separate, legitimate system of authoritative rule generation, one that should bind all (including the colonizers who came to it)".[40]

Borrows and Christie (and others) make important points deserving of more attention. But, as Professor Douglas Sanderson recently acknowledged while continuing to challenge that sovereignty "mystery at the heart

of Canadian law", *terra nullius*, "although widely used by historians in reference to legal claims made in the early modern period, did not, in fact, appear in legal documents linked to the settlement of the Americas before the nineteenth century".[41]

CONCLUSION

During the colonial period (prior to 1871) and after British Columbia joined Confederation, this province's history discloses marked examples of both Crown acknowledgement and Crown disregard of Indigenous laws and interests in land. This history does not reflect the application of *terra nullius*. But it is a legal history that ought to compel all B.C. lawyers (at the very least) to learn more, investigate further and reflect deeply.

In January 1873, the newly appointed, sole federal representative for Indigenous matters in British Columbia, Israel W. Powell, wrote his first lengthy report to Ottawa, describing the past 15 years of British colonial policy toward Indigenous peoples in this way: "[B]eyond giving Indians the protection of the law, and reserving certain lands for them in the settled part of the Province … no efforts have been put forth with a view to civilizing them, it having been considered that the best mode of treatment was to 'let them alone'".[42]

At the end of that year, after visiting with a Vancouver Island nation, Powell reported that they had asked "that a Treaty may be made with them and compensation allowed [for their lands]", and he asked for instructions to do so.[43] Two months later, Canada appointed Powell to a three-man Board for British Columbia tasked with arranging "under the directions of the Superintendent General all negotiations and Treaties with the Indian Tribes".[44] But Powell never received the instructions he sought.

Instead, just a few months afterward, Canada passed an order-in-council asserting that it was now "assumed that the Government does not contemplate giving the Indians of British Columbia any compensation for their lands, as has been done with the Indians of the North West".[45] A month later, Powell's Ottawa boss, the Minister of the Interior, telegrammed to say that "no treaties or special negotiations [are] now necessary" to be made with Indigenous peoples in British Columbia.[46]

Are you curious? Do you have questions? I hope so.

Yet, even with this decision not to pursue treaties in British Columbia, five years later, in 1879, Powell still acknowledged and recognized Indigenous laws, particularly in relation to land. In the context of trying to determine when Indian reserves for coastal Indigenous peoples should be allotted, he cautioned:

> the expense of substituting *our own regulations in lieu of theirs*, would be greater than the necessities of the country require – at least for the present. Indian tribes all over the coast claim hereditary rights to certain places, perhaps a hundred miles or more from where they reside.
>
> To adjust all of these at once... before there are different and superior arrangements to enforce other than *native regulations*, would pretty certainly give rise to trouble.
>
> ....
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> [I]t would be a large and needless expense, and one of doubtful utility to proceed at once to define and allot all their reserves, especially in the wilds of the country ... , with no existing machinery of the Government to supersede *their own time-honored customs and regulations as to the division of territory*.[47]

The following year, Powell reiterated his position, asserting that the federal and provincial governments did not have enough resources "to substitute their authority and provide for peace among distant or remote Indian tribes, as yet, left mostly in the enjoyment of their own laws and customs. ... The different bands of Indians ... on the Coast have the whole country marked out and divided, and do not allow encroachments within their boundaries by other tribes without compensation".[48]

Today, a significant scholarship investigates the role that law played in empire, including by examining colonized territories for signs of "strong" and "weak" legal pluralism.[49] Such examinations, among other things, allow the identification of "transformative moments": "[s]ubtle but important shifts in the definition of colonial state law and its relation to other law [that] ... occurred at various moments in the long nineteenth century, in patterns replicated across a wide array of colonial and postcolonial settings".[50] For Yale professor Lauren Benton, this identification is not only of historical interest; it also may help us, today, "to make space for other frameworks that would allow for greater legitimacy for alternative political authorities without threatening the rule of law".[51]

British Columbia's history is both shared and unique. Our colonial and provincial beginnings share commonalities with other British colonies and Canadian provinces. Yet, of course, our precise path is our own. Might it not be that by engaging in the kind of examination Benton suggests, we could identify our province's own "transformative moments", particularly the ones we now regret?[52]

My point is not that we have collectively failed to discover a utopian, legally plural society in 19th-century British Columbia. We have not. Yet should not we at least look at that society, its legal systems (both Indigenous and settler) and its use and misuse of law? Ultimately, we may discover details far worse than those in a picture painted with the broad brush of

terra nullius. But to achieve the monumental reconciliatory task at hand and account for the legal and historical injustices the state has perpetrated on Indigenous peoples in this country and province, the first step, as the Truth and Reconciliation Commission said, is to acquire an "awareness of the past".[53] This awareness—and, especially for lawyers, this *legal* awareness—just might allow us to imagine and construct contemporary alternatives that free us from our legal and political pasts.

ENDNOTES

1. *Mabo v Queensland (No 2)*, [1992] HCA 23 [*Mabo*].
2. To the best of my research skills.
3. See *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *R v Côté*, [1996] 3 SCR 139 [*Côté* (SCC)]; *R v Marshall; R v Bernard*, 2005 SCC 43 [*Marshall; Bernard*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].
4. See e.g. *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at paras 65–66, leave to appeal ref'd 2015 CanLII 66255 (SCC). See also *Ross River Dena Council v Canada (Attorney General)*, 2015 YKSC 33 at para 31; *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc (Iron Ore Company of Canada)*, 2016 QCCS 1958 at para 66; *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 56; *West Moberly First Nations v British Columbia*, 2020 BCCA 138 at para 162; *Procureur général du Québec c Aumont*, 2021 QCCS 4081 at para 30. One court has quoted portions of the Truth and Reconciliation Commission's 2015 Calls to Action, several of which refer to *terra nullius*: *R v Sayers*, 2017 ONCJ 77 at para 51. Courts have also quoted pleadings or argument in which references to *terra nullius* are made: *Giesbrecht v British Columbia*, 2018 BCSC 822 at para 3; *Law Society of Ontario v Bogue*, 2019 ONLSTH 53 at para 34.
5. I have also omitted from this analysis the Provincial Court of Saskatchewan's reference to *terra nullius* in *Canada (Minister of National Revenue - MNR) v Ochapowace Ski Resort Inc*, 2002 SKPC 84, a matter concerning a company's failure to file tax returns.
6. *R v Côté*, 1993 CanLII 3913 (Que CA) [*Côté* (QCCA)]; *Côté* (SCC), *supra* note 3.
7. *Côté* (QCCA), *supra* note 6 at 110.
8. Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014) at 320–21.
9. *Côté* (SCC), *supra* note 3 at para 47.
10. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
11. *Delgamuukw v British Columbia* (1993), 104 DLR (4th) 470 (BCCA).
12. *Ibid* at para 661.
13. *Ibid* at para 655.
14. *Van der Peet*, *supra* note 3 at para 106.
15. *Ibid* at para 265.
16. *Ibid* at para 270.
17. *Marshall; Bernard*, *supra* note 3 at para 134.
18. Samantha Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction" (2005) 27 Sydney L Rev 49 at 78.
19. *Tsilhqot'in*, *supra* note 3 at para 69 [emphasis added].
20. *Thomas v Rio Tinto Alcan Inc*, 2022 BCSC 15 at paras 187–200 [*Thomas*].
21. *Ibid* at para 16. The plaintiffs filed a notice of appeal on February 3, 2022. At the date of the writing of this article, the appeal has not been heard.
22. *Ibid* at para 187.
23. *Ibid*.
24. On this point, see Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases" (1991–1992) 21 Man LJ 343 at 363–64 (discussing Felix Cohen's analysis of the United States's sovereignty over Louisiana but not its title to the lands, which it then had to purchase from Indigenous owners).
25. *Thomas*, *supra* note 20 at para 189.
26. *Ibid* at paras 194–98.
27. *Ibid* at para 198.
28. *Ibid* at para 199.
29. *Ibid* at paras 201–02, 204.
30. *Ibid* at para 335.
31. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa, 1996) [RCAP Report], vol 1 at 661. See also references in vol 1 at 7, 47, 239, 584 and in vol 2 at 1, 83, 545.
32. *Ibid*, vol 1 at 662 [emphasis added].
33. Truth and Reconciliation Commission of Canada [TRC], "Calls to Action" (Montreal: McGill-Queen's University Press, 2015) [emphasis added]. See also the many references to *terra nullius* in the TRC's other reports.
34. Foster, *supra* note 24 at 385. See also Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29:4 Osgoode Hall LJ 681. Even in Australia, where the "doctrine of *terra nullius*" has been denounced, concerns still exist over the justification for British sovereignty: see e.g. Daniel Lavery, "No Decorous Veil: The Continuing Reliance on an Enlarged *Terra Nullius* Notion in *Mabo [No 2]*" (2019) 43:1 Melbourne UL Rev 233.

35. *Thomas*, *supra* note 20 at para 198.
36. Senwung Luk, in his 2014 article discussing *Tsilhqot'in*, used *terra nullius* in much the same way that the *Mabo* court had: Senwung Luk, "The Law of the Land: New Jurisprudence on Aboriginal Title" (2014) 67 SCLR (2d) 289. Contrary to Chief Justice McLachlin's statement, Luk described how, "[i]n effect, as a matter of policy, the Crown decided to deal with the lands of most of British Columbia as if they were *terrae nullius*" (at 297). He seemed to go further than this when he concluded: "[t]he denial of Indigenous land rights through the legal fiction of *terra nullius* is the exceptional case, most notably being the fiction under which the settler state operated in British Columbia. … The decision in *Tsilhqot'in Nation* decisively charts a course away from the fiction of *terra nullius*" (at 306).
37. John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537 at 558.
38. See e.g. Felix Hoehn, "Back to the Future: Reconciliation and Indigenous Sovereignty after *Tsilhqot'in*" (2016) 67 UNBLJ 109; Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17:2 CJLS 23; Bradford Morse, "Aboriginal and Treaty Rights in Canada" (2013) 62 SCLR (2d) 569; Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729; Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1.
39. John Borrows, "The Durability of *Terra Nullius: Tsilhqot'in Nation v. British Columbia*" (2015) 48 UBC L Rev 701 at 703.
40. Gordon Christie, "Who Makes Decisions Over Aboriginal Title Lands?" (2015) 48 UBC L Rev 743 at 769–70.
41. Douglas Sanderson, "The Residue of *Imperium*: Property and Sovereignty on Indigenous Lands" (2018) 68:3 UTLJ 319 at 319, 322, paraphrasing Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015) at 138.
42. IW Powell to Deputy Superintendent General of Indian Affairs W Spragge, 13 January 1873, printed in "Report of the Superintendent of Indian Affairs for British Columbia for 1872 and 1873", Sessional Papers, vol 5, 2nd Parl, 1st Sess, 1873 (36 Victoria, Sessional Papers (No 23) A 1873).
43. IW Powell to Minister of the Interior, 10 December 1873; RG 10, vol 3583, f 1062.
44. PC 1873-14 (16 June 1873) and PC 1873-1625 (9 February 1874).
45. PC 1874-582 (19 May 1874).
46. As quoted in *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185 at 357 (BCSC).
47. IW Powell to Superintendent General of Indian Affairs, 26 August 1879 [emphasis added]; Paper No 49 in Annual Report of the Deputy Superintendent-General of Indian Affairs for 1879 at 131.
48. IW Powell to Superintendent General of Indian Affairs, 23 April 1880; RG 10, vol 3700, f 16,692, pt 2.
49. Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2004) at 11. See also Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge: Harvard University Press, 2011); Lauren Benton & Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge: Harvard University Press, 2016). In Canada, see e.g. Hamar Foster, "International Homicide in Early British Columbia" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Essays in the History of Canadian Law*, vol V: Crime and Criminal Justice (Toronto: University of Toronto Press, 1994) 41; Sidney Harring, "Indians and the Law in British Columbia" in *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) 186; Tina Loo, "Bute Inlet Stories: Crime, Law, and Colonial Identity" in *Making Law, Order and Authority in British Columbia*, 1821-1871 (Toronto: University of Toronto Press, 1994) 134.
50. Benton, *supra* note 49 at 9.
51. *Ibid* at 29–30, 264–65.
52. Professor Philip Gerard did this recently in "The Contrasting Fates of French Canadian and Indigenous Constitutionalism: British North America, 1760-1867" (2020) 7:1 L & Hist Rev 1 at 5 (concluding that "Lauren Benton's distinction between 'strong' and 'weak' legal pluralism assists in explaining the differing constitutional outcomes for French Canadians and Indigenous peoples" after the fall of New France).
53. TRC, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 7–8. Andrew Fitzmaurice, as well, provided this reason for conducting his "genealogy": Andrew Fitzmaurice, "The Genealogy of *Terra Nullius*" (2007) 38:129 Austl Historical Studies 1 at 2.