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ARTICLE

The Interaction between International and Domestic Law, *Aqua Nullius*, and Water-mediated Claims in Canada

L'interaction entre le droit international et le droit national, l'*aqua nullius* et les revendications fondées sur l'eau au Canada

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Abstract

Water-mediated claims in both international law and domestic law are often framed around, or adjudicated based on land-centred principles. In Canada, too, such claims tend to be judicially assessed through land-centric concepts. This approach has significant implications for Indigenous law and related claims to water-mediated spaces. It also has consequences for both international law and domestic law, particularly with respect to how *aqua nullius* and similar Eurocentric concepts are disguised and used in settler-colonial states like Canada. Accordingly, this article urges a critical engagement with Indigenous law and similar cosmologies on water in a manner that foregrounds the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) and in re-reading how the *UNDRIP* is incorporated and implemented in Canada.

Keywords: Aboriginal peoples; *aqua nullius*; doctrine of discovery; Indigenous law; international law; *terra nullius*; *UNDRIP*

Résumé

Les revendications fondées sur l'eau, tant en droit international qu'en droit national, sont souvent formulées ou jugées selon des principes axés sur la terre. Au Canada aussi, ces revendications ont tendance à être évaluées judiciairement à travers des concepts axés sur la

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terre. Cette approche a des implications importantes pour le droit autochtone et les revendications connexes portant sur l'eau. Elle a également des conséquences pour le droit international et le droit national, en particulier en ce qui concerne la manière dont le principe d'"*aqua nullius*" et d'autres concepts eurocentriques similaires sont déguisés et utilisés dans les États coloniaux comme le Canada. Par conséquent, cet article encourage un engagement critique envers le droit autochtone et les cosmologies similaires sur l'eau d'une manière qui met en avant la *Déclaration des Nations Unies sur les droits des peuples autochtones* (*DNUDPA*), et dans une relecture de la manière dont la *DNUDPA* est incorporée et mise en œuvre au Canada.

Mots-clés: Peuples autochtones; *aqua nullius*; doctrine de la découverte; droit autochtone; droit international; *terra nullius*; *DNUDPA*

1. Introduction

International law continues to impact domestic law in ways that are not so visible today. Whereas foundational international law principles, including the doctrine of discovery and its vestigial influences, continue to shape the course of domestic law, some dimensions of the doctrine remain under-explored even at this time. They have either been transmuted or subsumed under other aspects of law.[1] It is in this sense that claims to water-mediated spaces often take the form of, or are adjudicated using land-based claims and ideas.[2] In both international and domestic legal systems, including jurisdictions like Canada, legal claims to water-mediated spaces tend to be judicially assessed through standards that are founded on land-centred title claims.[3] In this article, I argue that these claims to water spaces are informed by, facilitated, and inhabited by land-centric concepts. The governing rationality of this land-water matrix is demonstrated through the violence of legal imperialism which pushes non-Western ontologies to the periphery. Notably, legal Eurocentrism negatively impacts Indigenous conceptions of law and associated relational cosmologies.[4]

[1]This article discusses international law, constitutional law theory, and Indigenous law. While all three prongs are implicated in the analysis in this article, my focus is decidedly on international law's interaction with domestic law.

[2]Lawrence L Herman, "Proof of Offshore Territorial Claims in Canada" (1982–83) 7:1 Dalhousie LJ 3; Clive Schofield, "Options for Overcoming Overlapping Maritime Claims: Developments in Maritime Boundary Dispute Resolution and Managing Disputed Waters" (2021) 8:2 J Territorial & Maritime Studies 21. I use water-mediated spaces (or water spaces) to describe the intersection of land and water that includes rivers, lakes, marine waters, and underground water sources. It also includes submerged lands, beaches, and the floors of these waters as well as the littoral areas bordering these waters. As a reminder, this is only a description and not a definition.

[3]*Delgamuukw v British Columbia*, [1997] SCR 1010 [*Delgamuukw*]; Paula Quig, "Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands — An Overview" (2004) 45:4 C de D 659 at 662; John Borrows, "Aboriginal Title and Private Property" (2015) 71 SCLR 91 at 107. In the primary sense, Borrows describes Aboriginal title as "the pre-existing rights to land held by Indigenous peoples under their own legal systems" (at 107). In the secondary sense, Borrows continues that Aboriginal title conversely refers to "the often-unsatisfactory way that these rights have been interpreted and affirmed by the courts by blending the common law and Indigenous legal traditions" (at 107).

[4]I use "Indigenous" in place of "Aboriginal" since it is more encompassing and more widely applied beyond Canada. However, I retain "Aboriginal" where applicable and in accordance with existing Canadian jurisprudence.

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It is in this sense that, when, ultimately, courts are called upon to adjudicate these matters, they have tended to obscure the distinct character of these water-based claims by turning to land-centred concepts that have continually proven to work injustice, especially against Indigenous peoples.

In this respect, this article proceeds along the lines of what the law relating to water-mediated spaces might look like if one started with water and not land? This question holds significance for both international law and domestic law. At both levels, a redirection away from the lesser-known *aqua nullius* doctrine and similar colonial concepts that emerged in international law is plainly needed. This development must proceed on the basis of de-centring Eurocentric law and mainstreaming Indigenous legal perspectives.[5] This de-centring process also calls for an inversion of the orthodox claims of settler-colonial sovereignty and its control over water-mediated mediums as necessary in understanding the differential extension of sovereignty over land and water.[6] Overall, this approach will impact the interaction across international and comparative law, Indigenous law and governance, and constitutional and property law concepts.

An inverted reading also foregrounds the emerging role of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) in domestic law.[7] This point is observed in the re-reading and interpretation of the relationship between international law and domestic law now that the *UNDRIP* has been incorporated into Canadian law.[8] For that reason, I argue, first, for a fundamental review beginning with reimagining water-mediated spaces as occupying a distinct place of juridical primacy, not subordinated by their land-centric counterpart. This analysis can only proceed if we query *aqua nullius* and its relationship with the doctrine of discovery. Second, I argue that the reliance on land-centred concepts and principles in the interpretation of Indigenous title claims to water-mediated spaces emerge from the vestiges of *aqua nullius* which began its normative life in international law but is now firmly anchored in domestic legal manifestations. This fluid movement of concepts between international law and domestic law allows for a subtle assimilation of these concepts with little focus on their origin. Thus, I urge a turn to Indigenous legal principles in exploring such concepts for a social and legal reconstruction of our relationship with water.

This article comprises six sections in addition to the introduction and conclusion. I begin with the idea of land and extraterritoriality beyond Europe. This idea was erected and supported by European doctrines that de-territorialized non-European lands. The article considers how such doctrines later reconstituted those lands, this time endowed with a new Eurocentric character. I extend the discussion in the earlier section; this time, focusing on water. The making of land recharacterized water as integrated into land by stripping water of its legal normativity through the operation of *aqua nullius*. Next, I focus on water as an analytical framework for exploring the

[5]Williamson BC Chang, "Indigenous Values and the Law of the Sea" in John M Van Dyke *et al*, eds, *Governing Ocean Resources: New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park* (Leiden: Brill, 2013) 427.

[6]Douglas C Harris, *Landing Native Fisheries Indian Reserves and Fishing Rights in British Columbia, 1849–1925* (Vancouver: UBC Press, 2008).

[7]*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (13 September 2007) [*UNDRIP*].

[8]*United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Act*, SC 2021, c 14 [*UNDRIP Act*].

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ways in which settler-colonial states organized and employed land-centric concepts to dominate water. I build on that analysis by examining *aqua nullius* in Canadian law through the lens of key judicial decisions that invoked significant aspects of Indigenous jurisprudence. The analysis here demonstrates the limitations of these cases in evolving legal responses to the peripheralization of water in the context of formulating Indigenous title claims. Then, I analyze recent Canadian case law that confronts the centrality of the water-mediated claims and their implications in both international law and domestic law. This analysis feeds into a discussion of new ways of thinking about these water-mediated claims by invoking the *UNDRIP*, Indigenous practices, and relevant constitutional provisions. The article concludes by rejecting land-based concepts that operate to limit the emancipatory potential of Indigenous law approaches, including the recognition of the uniqueness of water-mediated claims, and invites a turn to the *UNDRIP* and its transformative capacity to reorient water-mediated claims in Canada.

2. Land and territory beyond Europe

It is now more commonly known that European expansionism was predicated on a set of ideas and techniques that were intended to secure new territory for European states.[9] As territory was often equated to land, the legal doctrines that were contrived to aid this expansionist philosophy were equally designed around Eurocentric land-based considerations.[10] Equally, since territory was important to European social progress, it became the organizing ambition of Europe's engagement beyond its borders to acquire more lands, which then translated into an enlarged (European) territory.[11] This process ushered in several doctrines including the doctrine of discovery and its foremost feature known as *terra nullius*.[12]

During Europe's empire-building project, this doctrine of discovery was deployed as the justification for dispossessing and annexing lands from non-European peoples.[13] The European state found an ally in this imperial mission as the doctrine was also espoused by the church as a religious and legal technology for promoting Christianity beyond Europe. Notably, it was embraced by Portugal and Spain to advance their imperial and expansionist mission in places like Africa and the

[9]Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27:5 Third World Quarterly 739; Dieter Dörr, "The Background of the Theory of Discovery" (2013–14) 38:2 American Indian L Rev 477 at 480–81.

[10]Tayyab Mahmud, "Law of Geography and Geography of Law: A Post-Colonial Mapping" (2011) 3:1 Washington University Juris Rev 64 at 79.

[11]Luigi Nuzzo, "Territory, Sovereignty, and the Construction of the Colonial Space" in Martti Koskenniemi, Walter Rech & Manuel Jiménez Fonseca, eds, *International Law and Empire: Historical Explorations* (Oxford: Oxford University Press, 2017) 263.

[12]Douglas Lind, "Doctrines of Discovery" (2020) 13:1 Washington University Juris Rev 1. Douglas Lind's argument periodizes the doctrine of discovery. In his view, the idea of a singular version of the doctrine is a wrong approach, one that has been passed down in history, at least since the publication of Felix Cohen's *Handbook of Federal Indian Law* (Washington, DC: US Government Printing Office, 1941). At the tail of Lind's periodization of the doctrine of discovery was *terra nullius*. But, understood broadly, this doctrine of discovery and its variants unite to form a durable technology for governing non-European peoples, their land, and waters.

[13]Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Saskatchewan L Rev 1.

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Americas.[14] At its core, which was a blend of both legal and religious precepts, the doctrine of discovery posits that non-Europeans, who were also non-Christians, were inferior to their European counterparts.[15]

This religio-legal othering dispossessed non-European peoples of their lands based on this artificial distinction of superior (European) and inferior (non-European) peoples, including in present-day Canada.[16] It derived its strength from the religious and legal construction of European dominance over non-European polities as it was supported by papal edicts. Its overt manifestation was the exertion of Eurocentric control over territories, law, and cultures of non-European and non-Christian peoples and their societies.[17] These non-European peoples and their ways of life were considered open to discovery by Europe since these non-European peoples could hardly constitute human society in the European characterization.[18] Thus, they could only then derive their human essence from the pastoral care of God (through the pope) and Europe's Christians, who were God's earthly representatives.[19]

Importantly, the doctrine of discovery was not only applicable to land. It extended to water, water-mediated spaces, and related uses of water too. However, this aspect of the doctrine's control over water has been under-explored since water's essence was subsumed under land. In a recent review of the doctrine, the Australian legal scholar Erin O'Donnell confirms this point as she notes that "the 'fiction of first discovery' that dispossessed Indigenous Peoples of their lands also took their waters."[20] Similarly, historians like Ivana Elbl have also argued that the papal edicts that set this doctrine of discovery in motion "carefully spelled out the ecclesiastical prohibitions against any military, commercial, and *fishing* expeditions" that were unauthorized by the (Catholic) Church and its representatives.[21] Drawing on Elbl's point, the reference to "fishing" in this papal edict highlights European imperial ambitions as not only being restricted to land but also encompassing water domains.

Until recently, this water dimension of the doctrine of discovery had not received much attention at either international law or domestic law. Perhaps the extent of imperial sovereignty in water matters was casualized as though the doctrine of discovery, seen primarily through its *terra nullius* plank, was generally applicable to both land and water alike. In this respect, Europe's imperial (and colonial) interests tended to focus on land, and water — either as the sea, lakes, rivers, or streams — only served as a thoroughfare for ferrying Europeans to those new lands.[22] While this characterization of water, then, seems to be a logical consequence of these European

[14]Dörr, *supra* note 9 at 480–81.

[15]Robert J Miller *et al*, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) at 89.

[16]See generally Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019).

[17]Miller et al, *supra* note 15 at 89.

[18]Lauren Benton & Benjamin Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early European Modern Practice" (2010) 28:1 L & History Rev 1.

[19]Ivana Elbl, "The Bull Romanus Pontifex (1455) and the Early European Trading in Sub-Saharan Africa" (2009) 17:1 Portuguese Studies Rev 59 at 71.

[20]Erin O'Donnell, "Water Sovereignty for Indigenous Peoples: Pathways to Pluralist, Legitimate and Sustainable Water Laws in Settler Colonial States" (2023) 2:11 PLoS Water 144 at 144.

[21]Elbl, *supra* note 19 at 71 [emphasis added]. I have italicized "fishing" to emphasize the water dimensions of the doctrine as espoused in the papal bull.

[22]Andrea Carcano, *The Transformation of Occupied Territory in International Law* (Leiden: Brill, 2015).

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imperial ambitions, it is important to think about water as a distinct space that evokes its own unique spatiality and legality, especially in the way in which that interaction impacts Indigeneity.[23] Here, O'Donnell, once more points out that, "[l]ike land, water is central to Indigenous identity, with the relationship between people and place reflected in their laws."[24]

At this time, it is important to think about the significance of the doctrine of discovery in the making of both international and domestic law. Here, the papal bull *Romanus Pontifex* of 1454 endorsed this doctrine as it "allowed the European Catholic nations to expand their dominion over 'discovered' land. Possession of non-Christian lands would be justified along with the enslavement of native, non-Christian 'pagans' in Africa and the 'New' World."[25] However, it was another papal bull, the *Inter Caetera* of 1493, which spurred European expansionism.[26] The *Inter Caetera* practically divided the world into two, with Portugal and Spain exercising control over each half.[27] This process of dividing the world between these Iberian states provoked a response from other European states like England and The Netherlands since they too were equally interested in owning and colonizing non-European territories.[28] It was around this time that the earlier papal bull of 1454 assumed renewed significance. Its main feature was the endowment of European states with control over these new territories, which were to be aligned with Christo-centric pastoral care of non-European peoples.[29] The resulting effect was that this process of subjugation also carried with it the introduction of the domestic (public) law of Europe in these new jurisdictions.[30] In the ensuing imperial transformation, land and water were not spared from these violent legal intrusions as the doctrine of discovery had a profound influence at the intersection of the imperial encounter. It also began to carve a new space for the introduction of international law as it arose in the context of the ongoing European expansionist project into these non-European polities that had now been brought under European control.[31] With this introduction came the domestication of aspects of international law in the internal affairs of these new territories.

[23]Elizabeth Macpherson, "Beyond Recognition: Lessons from Chile for Allocating Indigenous Water Rights in Australia" (2017) 40:3 UNSWLJ 1130.

[24]O'Donnell, *supra* note 20 at 144–45.

[25]Mark Charles & Soong-Chan Rah, *Unsettling Truths: The Ongoing, Dehumanising Legacy of the Doctrine of Discovery* (Lisle, IL: InterVarsity Press, 2019) at 16.

[26]Robert J Miller & Olivia Stitz, "The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery" (2021) 32:1 Duke J Comp & Intl L 1.

[27]H Vander Linden, "Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493–1494" (1916) 22:1 American Historical Rev 1.

[28]Davor Vidas, "The Anthropocene and the International Law of the Sea" (2011) 369 Philosophical Transactions of the Royal Society A 909 at 913–14.

[29]Robert J Miller & Micheline D'Angelis, "Brazil, Indigenous Peoples and the International Law of Discovery" (2011) 37:1 Brooklyn J Intl L 1; Daniel Ricardo Quiroga-Villamarín, "*Vicarius Christi*: Extraterritoriality, Pastoral Power, and the Critique of Secular International Law" (2021) 34:3 Leiden J Intl L 629.

[30]Abdulqawi A Yusuf, *Pan-Africanism and International Law* (Leiden: Brill, 2014) at 55–63; George Barrie, "The Mabo-Decision and the 'Discovery' of Native Title in Australia and Beyond" in Bertus de Villiers et al, eds, *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts* (Leiden: Brill, 2021) 8 at 9–12.

[31]Miller & Stitz, *supra* note 26.

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It is in this broader context of imperial activities that *terra nullius* emerges as a derivative of the doctrine of discovery. Here, territory was declared *terra nullius* "either because no one has ever appropriated it — as in the case of newly found land — or because, though once appropriated, it has subsequently been abandoned."[32] This description of land (or a better description is "territory") had its roots in Roman law, and it had now passed in to common usage in the public law of Europe.[33] In this respect, *terra nullius* as a civilizing technology proceeded on the grounds that non-European lands could be conquered and brought under the dominion of European (Christian) states as if these lands never existed or were never previously settled by other peoples. The conquest of North America and the colonization of Australia, New Zealand, and Africa by European states, including England, Portugal, and Spain, were thus established on the basis of *terra nullius*.[34] For settler-colonial states like Canada, the lasting effect of *terra nullius* is that Indigenous societies were absorbed into the new creation of Canada with little chance to assert their independence or sovereign character without risking resistance from the Canadian state.[35]

While *terra nullius* has been challenged in both international and domestic law, its influence remains.[36] On the international scene, especially in the *Western Sahara* advisory opinion, the International Court of Justice (ICJ) rejected the view that Western Sahara was *terra nullius* at the time Spain occupied that territory.[37] Interestingly, the ICJ denied both Morocco and Mauritania the legal basis to lay claim to the contested territory, partly based on the nomadic character of the peoples living in Western Sahara in the contested territory. Admittedly, the incidence of nomadic movements suggests that people are not permanently fixed to a specific geography. However, the factual existence of nomadic organization in and of itself cannot negate claims of historical occupation or claims to a particular territory since occupation in fact does not mean every inch of a territory is occupied by people. Quite evidently, the reason both claims by both parties — Morocco and Mauritania — failed was because of a mooring of the ICJ's decision in territorial control relative to *terra nullius*.[38]

In the domestic context, the Supreme Court of Canada considered a similar situation in a case relating to the ability of Aboriginal peoples to fish commercially.[39] In this case, while the Supreme Court held that Aboriginal peoples could fish salmon as part of their historical rights, the court concluded that Aboriginal peoples did not possess historical Aboriginal rights to engage in the sale of salmon as a commercial activity. In a sense, this decision by the Supreme Court had a way of terminating or

[32]Marjorie Whiteman, *Digest of International Law* (Washington, DC: Government Printing Office, 1971) at 1030.

[33]Andrew Fitzmaurice, "The Genealogy of Terra Nullius" (2007) 38:129 Australian Historical Studies 1.

[34]Stuart Banner, "Why *Terra Nullius*? Anthropology and Property Law in Early Australia" (2005) 23:1 L & History Rev 95.

[35]Tim Schouls, *The Spaces in Between: Indigenous Sovereignty within the Canadian State* (Toronto: University of Toronto Press, 2024).

[36]Yogi Hale Hendlin, "From *Terra Nullius* to *Terra Communis*: Reconsidering Wild Land in an Era of Conservation and Indigenous Rights" (2014) 11:2 Environmental Philosophy 141.

[37]*Western Sahara*, [1975] ICJ Rep 12 [*Western Sahara*].

[38]*Ibid* at paras 161–62.

[39]*R v Van der Peet*, [1996] SCR 507 [*Van der Peet*].

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denying the existence of Aboriginal rights or stilling these rights in time as products of a past era that are incapable of evolution.[40] What is even more relevant here is the court's brief engagement with the question of nomadism. Chief Justice Antonio Lamer noted that, whether a people were nomadic or not, they still possessed "some kind of social and political structure" and had "a distinctive culture and their own practices, traditions and customs."[41] He also stated, in a rather tangential reference to international law principles, that the European settlement of Indigenous lands in present-day Canada could only be justified at international law through a variety of reasons, including the controversial principle of "acquisition of territory that was previously unoccupied or is not recognised as belonging to another political entity."[42] This statement by Lamer CJ could be likened to an invocation of *terra nullius* to justify the settlement of Indigenous lands even though that was not expressly noted in his statement. However, in her dissent, Justice Beverley McLachlin (as she then was) raised concerns over this implied reference to *terra nullius*. As she pointed out, "[t]he assertion of British sovereignty was thus expressly recognised as not depriving the [A]boriginal people of Canada of their pre-existing rights; [and that] the maxim of *terra nullius* was not to govern here."[43]

So, just as was decided in the *Western Sahara* advisory opinion, the implications of *terra nullius* as raised in the *Van der Peet* case go beyond the seemingly simple exercise of sovereign control over land. The doctrine had the potential to curtail ownership or legal title and extinguish any bundle of rights that were integral to that title. As Jennifer Reid rightly acknowledged, "[b]y this principle, land could be regarded as empty, and [the] underlying title could be claimed, if non-Europeans were failing to make use of it in accordance with European expectations or if they had migratory subsistence patterns."[44] What we learn from Reid's assertion is that the character of Indigenous usage then had to fit into Eurocentric classifications or else Indigenous peoples risked losing their lands, which was often the case.

The invocation of *terra nullius* as observed in *R. v Van der Peet* also demonstrates that the doctrine impacts more than just land.[45] It travels beyond its immediate land-centred manifestation as it touches on access to water and water resources, including fish, which are equally affected by this theory that frequently invalidates Indigenous title. Evidently, human interactions with water and related uses do not necessarily fit land-based modalities. However, by extending land-centric concepts, including *terra nullius*, to water, the encounter between international law and domestic law assumes a new form. Here, the doctrine of discovery, which has an international character, and its multi-tentacled expressions including *terra nullius*, quietly extended into the domestic terrain. Using the example of Australia once more, while *terra nullius* helped to extend British sovereignty over Australia, "the doctrine has a common law

[40]John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, the Trickster, and Originalism" (2017) 98:1 Can Historical Rev 114 at 115–16 [Borrows, "Challenging Historical Frameworks"].

[41]*Van der Peet*, *supra* note 39 at para 106. Prior to the *Van der Peet* case, the Supreme Court of Canada held in *Calder v Attorney-General of British Columbia*, [1973] SCR 313 [*Calder*] that Indigenous peoples held Aboriginal title at the time of settlement and that their title did not derive from colonial law.

[42]*Van der Peet*, *supra* note 39 at paras 108–09.

[43]*Ibid* at para 270.

[44]Jennifer Reid, "The Doctrine of Discovery and Canadian Law" (2010) 30:2 Can J Native Studies 335 at 340.

[45]*Van der Peet*, *supra* note 39.

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counterpart in the 'desert and uncultivated' doctrine."[46] This 'desert and uncultivated' doctrine, as a variant of the doctrine of discovery, allows the imposition of common law in non-English domains as if no law pre-existed the colonial encounter in these societies. It seems then that the transmission of Eurocentric ideas and legal precepts into new lands could simply turn those lands into European territory at will.

What we learn from this explanation is that the doctrine of discovery manifests an evolving character by seeking out places where it can lay claim to lands that are acquiescent to its philosophy. Viewed in this way, these multiple doctrines are not simply reminders of a time past. They are still present and very much alive and integral to contemporary notions of legal normativity, including international law as it pertains to Indigenous peoples and their relationship with settler-colonial states like Canada.[47] As Gordon Christie cautions, "[t]hat the Crown has control over international law must also be imagined, but only in the sense that the Crown is entirely at its leisure to decide what aspects of international law it might bring into the domestic scene, which reflects how the state and its courts overwhelmingly think of international law."[48] This point explains why settler-colonial states are hesitant to relinquish their hold over Indigenous law or are unwilling to acknowledge and permit Indigenous sovereignty to actively thrive by cherry-picking from the *UNDRIP* since those settler-colonial states are themselves products of these doctrines.[49]

In the end, the doctrine of discovery's international law pedigree quietly retreated, yet, at the same time, it took upon itself a broader and equally pervasive domestic character. It is in this respect that European imperial dominance masked as sovereignty extended from land to water, but with land subordinating water.[50] To illustrate in the context of the seaward extension of sovereignty, the popular maxim is "the land dominates the sea."[51] In this regard, David Wilson emphasizes that the "imposition of colonial territorial sovereignty was directly linked with the gradual ascendency of colonial jurisdiction over marine space and Indigenous bodies at sea."[52] Quite remarkably, when the doctrine of discovery is scrutinized as a cornerstone of the European imperial project, and *terra nullius* is cited as its foremost feature, there is relatively no corresponding commitment to querying the *aqua nullius* dimension of the doctrine with similar intensity. With time, *aqua nullius* also assumed a significant role in Indigenous-settler relations while avoiding the spotlight.

[46]Ulla Secher, "The High Court and Recognition of Native Title: Distinguishing between the Doctrines of *Terra Nullius* and 'Desert and Uncultivated'" (2007) 11:1 U Western Sydney L Rev 1 at 10.

[47]Robert J Miller, "The Doctrine of Discovery: The International Law of Colonialism" (2019) 5:1 Indigenous Peoples' J L, Culture & Resistance 35.

[48]Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in John Borrows et al, eds, *Braiding Legal Orders Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal and Kingston: McGill-Queen's University Press, 2023) 47 at 48.

[49]Kirsty Gover, "Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26:2 Eur J Intl L 345.

[50]Nicole Wilson, "'Seeing Water Like a State?': Indigenous Water Governance through Yukon First Nation Self-Governance Agreements" (2019) 104 Geoforum 101.

[51]Bing Bing Jia, "The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges" (2014) 57 German YB Intl L 63 at 66.

[52]David Wilson, "European Colonisation, Law, and Indigenous Marine Dispossession: Historical Perspectives on the Construction and Entrenchment of Unequal Marine Governance" (2020) 20 Maritime Studies 387 at 396.

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3. From *terra nullius* to *aqua nullius*

As was observed in the preceding section, *terra nullius* was summoned to dispossess Indigenous peoples of their lands, culture, and law. While *terra nullius* was central to the making of international law, it had far-reaching domestic implications too.[53] Here, we see that, even though courts in places like Canada (and other settler-colonial jurisdictions like Australia) have now, at least theoretically, renounced *terra nullius*, its repudiation could never be complete at both international and domestic law since, without its existence, colonization is strategically rendered indefensible.[54] This point explains why, in jurisdictions like Canada, *terra nullius* has only been repurposed to become more acceptable and nuanced in the context of Indigenous-settler relations. This point can also be seen in the way in which the Canadian state justifies its claim to sovereignty either as emanating from agreement — that is, through treaties made between the Crown and Indigenous peoples despite the evident power asymmetry between the two sides — or simply through the loss of Indigenous title occasioned by the exercise of Crown authority over unceded lands.[55] Either way, the superimposition of the authority of the Crown over such lands rested on a theoretical vacuum that is supported by *terra nullius*.

Yet, while *terra nullius* is standard knowledge, not very much is known about its *aqua nullius* counterpart. As a variant of the doctrine of discovery, *aqua nullius* also proceeds on the basis that water, as a special category of spatiality is equally open to the assertions of claims of no person's jurisdiction.[56] Like *terra nullius*, *aqua nullius* also has its roots firmly planted in international law.[57] Notably, as the Grotian doctrine of the free seas emerged in the sixteenth century and gained a foothold in European law and politics, the oceans were constructed as open space (or more like a highway) for access and use by European states for their imperial mission.[58] Here, the right to navigate the oceans was automatically invoked by European maritime powers and justified within the broader religious and legal authority of European states to discipline both the seas and the adjacent littoral non-European (Indigenous) societies in places like Africa, the Americas, Asia, and Australia.[59]

The construction of the oceans as thoroughfares turned it into "perpetual *res nullius*" or no one's property.[60] Significantly, following the imperial project and Europe's expansionism, water (especially the oceans) was seen only as a conduit for

[53]Linda Popic, "Sovereignty in Law: The Justiciability of Indigenous Sovereignty in Australia, the United States and Canada" (2005) 4 Indigenous LJ 117.

[54]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 at 264–66.

[55]Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17:2 Can JL & Soc'y 23; Kirk Cameron, "Resolving Conflict between Canada's Indigenous Peoples and the Crown through Modern Treaties: Yukon Case History" (2019) 31:1 New England J Public Policy 1 at 4.

[56]Nathan Rew, "Does Colonisation Think of Water? A History of *Aqua Nullius*" (2021) 6:1 Knowledge Makers 123 at 126–28.

[57]Apostolos Tsiouvalas, "*Mare Nullius* or *Mare Suum*? Using Ethnography to Debate Rights to Marine Resources in Coastal Sámi Communities of Troms" (2020) 11:1 YB Polar L 245.

[58]Henry Jones, "Lines in the Ocean: Thinking with the Sea about Territory and International Law" (2016) 4:2 London Rev Intl L 307.

[59]Renisa Mawani & Sebastian Prange, "Unruly Oceans: Law, Violence, and Sovereignty at Sea" (2021) 27 Third World Approaches to Intl L Rev: Reflections 1.

[60]Mikki Stelder, "Sinking Empire" (2023) 28:1 Angelaki: J Theoretical Humanities 53 at 57.

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transporting Europeans to these new lands. Where European states met with opposition from Indigenous peoples, the European imperialists maintained a political, religious, and even legal obligation to resist these Indigenous peoples. To these imperialists, like the land, the ocean was "nobody's water," and Indigenous peoples could not prevent Europeans from exercising their God-given authority over the oceans that ferried them (as colonizers) to these new lands.[61] As Endalew Lijalem Enyew remarks in his critique of *aqua nullius*, "the freedom of the sea was functionally equivalent to the doctrine of *terra nullius* that enabled European [s]tates to freely occupy lands inhabited by non-European Indigenous peoples."[62]

Aqua nullius and its implementation in the domestic setting thus gave rise to new modalities for the exercise of legal authority. First, *terra nullius* and *aqua nullius* united within the context of the doctrine of discovery to break up the sea-land continuity in Indigenous cosmologies which conceptualized land and water as complementary realms.[63] These non-European societies had "wide-ranging practical, spiritual, environmental, cultural, and economic interests in, relationships with, obligations towards, and dependencies on water resources," which were disrupted by these doctrines.[64] However, in the second instance, *aqua nullius* galvanized "water colonialism" in settler-colonial states and ruptured this land-water continuum by creating separate categories of control for both domains.[65] In this way, *aqua nullius* rushed through European authority in colonial societies and, along with that process, pushed through devastating consequences for water's legal normativity.

In this respect, the imperial and colonial interruption in Indigenous social and legal ontologies treated both land and water as functionally empty spaces for the introduction of European law. Most notably, *aqua nullius* and its corollary of water colonialism transformed Indigenous water-informed legal relationships from relationality to unfettered resource access and unrestricted use. By turning water into an empty space without its own governing rationality, European colonizers imported and further extended land-based concepts into water-mediated spaces. These changes fundamentally obliterated prevailing pre-colonial Indigenous world views

[61]Monica Mulrennan & Colin Scott, "*Mare Nullius*: Indigenous Rights in Saltwater Environments" (2002) 31:3 Development & Change 681.

[62]Endalew Lijalem Enyew, "Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea" (2022) 21:3 Chinese J Intl L 439 at 458.

[63]Elizabeth Macpherson, *Indigenous Water Rights in Law and Regulation Lessons from Comparative Experience* (Cambridge: Cambridge University Press, 2019) at 51–98. Elizabeth Macpherson provides a detailed analysis of the Aboriginal and Torres Strait Islander peoples and the work they are doing to bridge understandings of the sea-land interface through Indigenous world views.

[64]Elizabeth Macpherson, "Indigenous Water Rights in Comparative Law" (2020) 9:3 Transnational Environmental L 393 at 393–94.

[65]Lana D Hartwig et al, "Water Colonialism and Indigenous Water Justice in South-Eastern Australia" (2022) 38:1 Intl J Water Resources Development 30 at 34; Jason Robison et al, "Indigenous Water Justice" (2018) 22:3 Lewis & Clark L Rev 841 at 845. Jason Robison and colleagues used the term "water colonialism" to "synthesise commonalities among the indigenous water-justice struggles that are characteristic of historical and ongoing colonial processes" (at 845). They do this by drawing on both historical and contemporary experiences of Indigenous peoples in settler-colonial states, including Canada, to showcase how water, whether in the context of rivers, lakes, or the oceans, were sites of disciplining Indigenous peoples by colonial settlers. This concept of water colonialism is important to the way in which we think about how water could be summoned in law as a civilizing technology.

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on water.[66] In the end, *aqua nullius* radically modified Indigenous relations with water, disrupting Indigenous peoples-water interactions while introducing new and unfamiliar legal relations with water, including property rights erected upon this legal vacuum.[67] By draining water of its legal normativity, beginning with the claims that it was owned by no person, *aqua nullius* as an international law principle rendered water normatively empty and in need of a civilizer and, along with this process, introduced a new (Eurocentric) law to fill that vacuum.

4. Water as method

If water was never absent of its governing logic, which was rooted in a complex relationship with Indigenous peoples, how can Indigenous peoples and their laws reclaim this connection and restore water and its agency? The pivot of the ensuing analysis is that water can found a renewed framework for mediating Aboriginal title claims. This transformed framework has useful theoretical and practical application in how we understand water as uniquely positioned to provide both context and content for analyzing these claims.

On this subject, I draw on Renisa Mawani's pioneering work *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire*, where she advances the methodological value of water (using the example of the oceans) in rewriting historical narratives, including colonial repression in the context of ocean-mediated migration.[68] In her oceans-as-method framework, Mawani makes two central arguments that, "[f]irst, by drawing attention to the peripatetic movements of vessels, laws, and people, oceans offer novel techniques for writing colonial legal history. Second, as sites of ongoing and ceaseless change, the sea emphasises motion as central to imperial and colonial politics."[69]

Mawani problematizes the oceans to assume a more determinate role in the movement of peoples from one place to the other and gives the reasons for such migration as facilitating ocean travel or the forces that oppose such translocation of peoples across jurisdictions. Viewed in this way, the ocean (or water generally) in Mawani's analysis is not simply treated as a thoroughfare but also as an actor shaping the ensuing history and its impacts.[70] This explanation is relevant in particularizing European settler-colonial history with law and water as sites of contestation. This process of elaboration must engage with this methodological value of water. Drawing on this wider application of Mawani's construct, the description of water in the context of *aqua nullius* thus operates not only as a legal metaphor but also as a legal technology for displacing Indigenous presence and control in much the same way as was demonstrated through *terra nullius.*

[66]Rachel J Wilson & Jody Inskter, "Respecting Water: Indigenous Water Governance, Ontologies, and the Politics of Kinship on the Ground" (2018) 1:4 Environment & Planning: Environment, Nature & Space 516.

[67]Gabriel Eckstein et al, "Conferring Legal Personality on the World's Rivers: A Brief Intellectual Assessment" (2019) 44:6–7 Water Intl 804 at 807–08.

[68]Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham, NC: Duke University Press, 2018).

[69]*Ibid* at 8.

[70]Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)" in Borrows et al, *supra* note 48, 101 at 104–06.

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The oceans-as-method framework brings into focus an analytical posture that showcases an alternative construction of the normative place of water. It highlights the ocean as a site of anti-colonial struggle, one that will be important to the recovery and revitalization of Indigenous law.[71] In this respect, if *aqua nullius* is to be confronted and uprooted, it must be done within a wider effort that is aimed at de-emphasizing and de-centring Eurocentric law. This expansive framing of "water as method" (based on Mawani's "oceans as method") and as a site of anti-colonial struggle is important to this process for a variety of reasons. For example, the anti-resistance framework is necessary as settler-colonial states could potentially wave away generations of Indigenous ontologies, laws, and relations in regard to water-mediated spaces as simply vacant based on *aqua nullius.* As other legal scholars have cautioned in their studies on Norway, *aqua nullius* was deployed in a manner that allowed the Norwegian state to dispossess the Sápmi Indigenous peoples of control over what is now known as the Norwegian fjords by ignoring "the pre-existing populations in these areas and their legal traditions."[72] Thus, these renewed views on water cosmologies provide a fluid process for reimagining the place and role of water in mediating Indigenous-settler relations.

In this respect, the success of efforts aimed at dislodging *aqua nullius* must be built around resisting prevailing Eurocentric themes. By thinking of water as a site of struggle, liberation, and law-making, ongoing efforts by Indigenous peoples will continue to receive much-needed impetus to challenge and de-centre Western legal precepts that have long served as technologies of dispossession. Reassuringly, this water-as-method approach has seen new scholarly and practical uptake. For instance, recent scholarship notes that the water-as-method approach allows the flourishing of new ways of engaging with ocean histories.

In practical terms, the engagement with Indigenous peoples and their water cosmologies is important for rethinking water relations.[73] This interest is observed in how Western canons of law that were formulated on the basis of *aqua nullius* are now being resisted due to their Eurocentric pedigree.[74] Here again, it is important to turn to Mawani's insightful reflection which is that, "[r]ather than drawing a fixed line in the soil as the basis of a modern European legal order, *oceans as method* emphasises the sea as a polycentric, polyphonous, and variegated space marked by continual movements, circulating legalities, and by competing jurisdictional claims."[75] This description of water emphasizes its legal pluralities and the multiple relationships that it has with Indigenous peoples.[76] Drawing on this prodigious analytical framework, my use of water as method is wider and extends beyond its initial oceans use in Mawani's work to include the marine foreshore, lakes, rivers, streams, and even sources of underground water. Therefore, water (broadly replacing

[71]Isabel Hofmeyr, "Complicating the Sea: The Indian Ocean as Method" (2012) 32:3 Comparative Studies of South Asia, Africa & the Middle East 584.

[72]Tsiouvalas, *supra* note 57 at 254–55.

[73]Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 732.

[74]See generally Dilip M Menon *et al*, *Ocean as Method: Thinking with the Maritime* (London: Routledge, 2022).

[75]Mawani, *supra* note 68 at 236.

[76]Deborah Curran, "Indigenous Processes of Consent: Repoliticising Water Governance through Legal Pluralism" (2019) 11:3 Water 571.

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Mawani's reference to oceans) provides a more comprehensive canvas for Indigenous peoples to revive their cosmologies and advance new legal claims in water-mediated spaces.

Water as method also presents a valuable opportunity for an antithesis to the colonial domination that led to the dispossession of Indigenous peoples of their water. It also helps in how water, understood in the secondary sense as legal method, challenges the colonial infrastructure of law, including *aqua nullius*. For example, as Surabhi Ranganathan argues, while the ocean has been studied in international law more generally, its history is not frequently offered as a counterpoint to the prevailing colonial legality of foundational international and domestic law doctrines.[77] This effort in challenging *aqua nullius*, then, involves a re-imagination of water-mediated spaces as sites of history, contestation, and law-making. For Indigenous peoples, this process requires a transformation in the juridical characterization of access and use of water-mediated spaces that recognize the significance of "cultural imagination" in endowing water with its own agency and legal normativity.[78]

Admittedly, this re-imagining process engages with a legal consciousness that highlights the role of cultural invigoration and renewed understandings of the social reconstruction of water.[79] Here, Indigenous ontologies are understood as respecting water as having its own agency yet being integral to human society. For instance, certain Anishinaabe world views on water treat it as a life giver and that both humans and water owe to each other a sacred relationship of reciprocity and responsibility of care.[80] They also demonstrate the historical connections between society and water that are marked by spiritual and ancestral practices that represent legal relations between society and water. Nonetheless, these are not merely historical considerations. They are ongoing practices that give rise to legal duties that still have contemporary relevance. Thus, the restoration of water ontologies and traditions must be embraced and harnessed to displace Eurocentric understandings of water as simply a resource to be exploited since Indigenous practices and customs must be viewed as "dynamic legal orders, rooted in those traditions, while adapting to contemporary circumstances to be governed and used in accordance with law."[81]

This concept of water as method envisioned through the idea of social reconstruction challenges Western norms on how we engage with water on its own terms and as its own normative phenomenon. It also challenges human relations with water as a medium and a site of knowledge and law-making. Andrew Ambers uses the powerful example of the laws of the 'Namgis, Heiltsuk, and W̱SÁNEĆ peoples to explain this point and prove how relational understandings between water and Indigenous peoples can clarify the project of legal personhood in a manner that

[77]Surabhi Ranganathan, "Decolonisation and International Law: Putting the Ocean on the Map" (2021) 23:1 J History Intl L 161 at 168.

[78]E Gray, "A Sequel to Mabo: Is *Mare Nullius* also a Fiction for Indonesian Fishermen in Australian Waters?" (1997) 93 Maritime Studies 1 at 3.

[79]Lauren E Eckert et al, "Linking Marine Conservation and Indigenous Cultural Revitalisation: First Nations Free Themselves from Externally Imposed Social-Ecological Traps" (2018) 23:4 Ecology & Society 23.

[80]Aimée Craft & Lucas King, "Building the Treaty No 3 Nibi Declaration Using an Anishinaabe Methodology of Ceremony, Language and Engagement" (2021) 13:4 Water 532.

[81]Wilson & Inskter, *supra* note 66 at 526.

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assures the vitality of Indigenous legal orders in Canadian society.[82] In this respect, Corey McKibbin also argues that, in Indigenous world views, water is much more than just a fluid medium for transport, consumption or other human uses, but that it holds a "spiritual" or even "medicinal" value for Indigenous peoples.[83]

Accordingly, it is the defective understanding of the interconnectedness between water and Indigenous peoples and their world views that leads courts to undermine, poorly interpret, and eventually fail to uphold or enforce the Indigenous legal values that underpin the "reciprocal relatedness of water peoples and water places."[84] This relationship between water and Indigenous peoples then is misrepresented or misunderstood as having no place, or, in some cases, occupying a much diminished role, in Eurocentric law.[85] This issue demonstrates itself in the manner in which Indigenous peoples contest development projects that affect water-mediated spaces based on "the spirituality of water."[86] But as Natasha Bakht and Lynda Collins have noted, legal suits involving Indigenous claims that "have relied primarily or solely on spiritual rights" have seldom succeeded in Canadian courts.[87] This is not an isolated point but a long-standing observation as other legal scholars in Canada have also discussed how Indigenous peoples have struggled to demonstrate their spiritual connections to land and water in the context of environmental reviews in Canada, often without success.[88]

However, a deeper analysis of this point demonstrates how courts tend to obstruct relational understandings and interpretations of Indigenous cosmologies, particularly through a narrow construction of Indigenous rights and related claims.[89] John Borrows points us in that direction by arguing that Canadian courts must not look at Indigenous rights as calcified and stilled in time since "working with Indigenous legal traditions on their own terms involves traditional, modern, and postmodern sensibilities."[90] In the water context, legal scholars like Aimée Craft advances this evolving agenda through her research with Anishinaabe peoples and their relationships with water and how that interaction continues to be relevant to law, even today.[91]

[82]Andrew Ambers, "The River's Legal Personhood: A Branch Growing on Canada's Multi-Juridical Living Tree" (2022) 13:1 Arbutus Rev 1 at 7–17.

[83]Corey McKibbin, "Decolonising Canadian Water Governance: Lessons from Indigenous Case Studies" (2023) 5:6 U College London Open: Environment 1 at 2–4.

[84]Elizabeth Macpherson, "Can Western Water Law Become More 'Relational'? A Survey of Comparative Laws Affecting Water across Australasia and the Americas" (2023) 53:3 J Royal Society New Zealand 395 at 396.

[85]Sarah Hunt, "Ontologies of Indigeneity: The Politics of Embodying a Concept" (2014) 21:1 Cultural Geography 27 at 29; John Studley, *Indigenous Sacred Natural Sites and Spiritual Governance: The Legal Case for Juristic Personhood* (London: Routledge, 2019).

[86]Michael Blackstock, "Water: A First Nations' Spiritual and Ecological Perspective" (2001) 1:1 BC J Ecosystems & Management 1 at 5.

[87]Natasha Bakht & Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777 at 795.

[88]Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred" (2014) 64:1 UTLJ 64 at 98.

[89]Borrows, "Challenging Historical Frameworks," *supra* note 40 at 114.

[90]John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 816 [Borrows, "Heroes, Tricksters, Monsters"].

[91]Craft, *supra* note 70 at 101. Aimee Craft's professional academic career has been largely devoted to uncovering and recovering Indigenous laws and applying those laws to contemporary issues in Canadian society. Much of that work has systematically addressed the multiple dimensions of Indigenous world views, including physical and spiritual relationships and relationality with water and how they unite as law. Her scholarship is evidence of this water-as-method proposal.

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The effective interpretation and application of Indigenous cosmologies then must be adapted to fit the contemporary issues that invite their consideration. Thus, it is no surprise that Bakht and Collins note that "[t]his lack of understanding has too often led the legislative, administrative, and judicial branches of the Canadian state to fail to protect Indigenous spiritual rights."[92]

This view invites us to think more critically by drawing upon international law in the context of the *UNDRIP* to enrich the current jurisprudence that has failed significantly to advance Indigenous world views. It is in this context that the idea of water as method becomes ever important as it requires a fundamental judicial awareness that the modes of vindicating Indigenous claims require a new take on existing jurisprudence. This idea also challenges the unsupportable foundations of colonial sovereignty over water that as yet have hardly seen any successful resistance.[93] For claims that derive their basis from a water-society nexus, land-based prescriptions might then be wholly incapable of accommodating or vindicating such claims.[94] Therefore, as a matter of necessity, the legal foundations of jurisdiction and sovereign claims over water-mediated spaces as seen through colonial legal instrumentality must be reformed to redeem the suppressed Indigenous character of these claims.[95]

One way in which this juridical reorganization is possible will be through the lens of water as method, which confronts this strain of injustice. This approach invites a reappraisal of some of the canons of law that have held legal imagination captive for so long, including *aqua nullius.* As a complement to *terra nullius*, *aqua nullius* has played a significant role in changing the character and history of water across colonized jurisdictions. Whether it was in Africa, the Americas, and places like Australia and New Zealand, even the names of rivers and lakes were changed to assume the character of the colonizing power. This naming process was integral to the imposition of a Eurocentric vision of law and a corollary revision of the histories of these water-mediated spaces.[96] In this respect, water as method advances the process and project to re-name Indigenous landmarks and watermarks not only as a necessary correction of the historical revisionism that was inspired by international law developments traced to Europe's imperial project but also as an effort to re-claim the legal essence of Indigenous lands and water.[97]

Beyond this process of re-naming and re-characterization of water wrought by *aqua nullius*, these profound changes also took a foothold in the legal regulation of water-mediated spaces. As the Canadian legal scholar Douglas Harris has argued, as with sovereign control over land, the imperial inroads into water, including through

[92]Bakht & Collins, *supra* note 87 at 780.

[93]Nicole J Wilson, "Querying Water Co-Governance: Yukon First Nations and Water Governance in the Context of Modern Land Claim Agreements" (2020) 13:1 Water Alternatives 93. So far, the idea of co-water governance has not delivered reconciliation in water spaces since that process is undertaken with a Eurocentric outlook.

[94]Endalew Lijalem Enyew, Margherita Paola Poto & Apostolos Tsiouvalas, "Beyond Borders and States: Modelling Ocean Connectivity According to Indigenous Cosmovisions" (2021) 12 Arctic Rev L & Politics 207 at 208.

[95]Wilson, *supra* note 52 at 392.

[96]Alice Baumgarter, "The Rivers of America: Colonialism and the History of Naming" (2023) 13:1 J Early American History 3 at 18–26.

[97]Clifford Atleo & Jonathan Boron, "Land Is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada" (2022) 11:5 Land 609 at 615.

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fishing regulation, only cemented the extension of extraterritoriality and the accumulation of natural resources that were central to the logic of Western doctrines of property law.[98] Fishing was one such means and method of understanding the complex infrastructure of the colonial and imperial posturing of law relative to water. It is the reason in settler-colonial states like Canada, that, while fishing was recognized as being integral to the lives of Indigenous peoples, the Canadian state labelled subsistence fishing as "an activity of the mean and destitute" and consequently succeeded in elevating commercial fishing — largely reserved for European settlers — as a worthy enterprise and much superior to subsistence fishing undertaken by Indigenous peoples.[99] Even when, much later, the Supreme Court of Canada held in cases like *R. v Marshall* that the Mi'kmaq people were not confined to bare subsistence but could fish for "moderate livelihood," this judicial pronouncement did not significantly reorient the Canadian state's exercise of sovereignty over these water-mediated spaces, as we see in the later case of *Van der Peet*.[100]

On this subject, it is important to re-examine how *aqua nullius* effectively passed from international law into domestic law. In this respect, it is important to note that, due to its impact on Indigenous peoples, interests, and claims to water, *aqua nullius* is now receiving renewed critical interests from legal scholars and lawyers alike. For example, in Australia, *aqua nullius* is the subject of extensive legal inquiry as parallels are being drawn between its effects and the influences of the adjacent equivalent — *terra nullius* — in reconstituting relations between Indigenous peoples and water.[101] In the decision of the High Court of Australia in *Mabo v State of Queensland (No. 2)*, it was held that the doctrine of *terra nullius* did not operate to exclude Indigenous title to land.[102] Thus, this Australian interest in querying *aqua nullius* is inspired by the *Mabo* decision and how it can be applied to water.

Today, Indigenous claims to water are now becoming part of the legal corpus in jurisdictions like Australia. New arguments have emerged that it is about time similar reforms observed in the case of *terra nullius* are undertaken in the realm of water-mediated claims. The argument is that this process begins with the express rejection of *aqua nullius* just as *terra nullius* was repudiated in the *Mabo* case.[103] As another Australian Indigenous law scholar argues, "the concept of *aqua nullius*, that is, 'water that belongs to no other', raises important questions that align equally with discourse on Indigenous land rights and are generally ignored in the broader discussion on property rights in water."[104] As other commentators too have put it, while the

[98]Douglas C Harris, "Historian and Courts: *R. v. Marshall* and Mi'kmaq Treaties on Trial" (2003) 18:2 CJLS 123.

[99]Harris, *supra* note 6 at 7.

[100]*R v Marshall*, [1999] 3 SCR 456. While the Supreme Court of Canada recognized the Aboriginal right to commercial fishing, it nonetheless limited that right by stating that such an activity cannot result in "the accumulation of wealth" (at para 7).

[101]Virginia Marshall, "Deconstructing *Aqua Nullius*: Reclaiming Aboriginal Water Rights and Communal Identity in Australia" (2016) 26:8 Indigenous L Bulletin 9.

[102]*Mabo v State of Queensland (No. 2)*, [1992] NCA 23.

[103]Julie H Tsatsaros et al, "Indigenous Water Governance in Australia: Comparisons with the United States and Canada" (2018) 10:11 Water 1639.

[104]Virginia Marshall, "Overturning *Aqua Nullius*: Pathways to National Law Reform" in Ron Levy *et al*, eds, *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Canberra: Australia National University Press, 2017) 221.

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Australian courts have struck down *terra nullius*, "*aqua nullius* remains."[105] So, just like Australia and other settler-colonial jurisdictions, including Canada, where the state and its law dominate the legal sphere, the water-as-method framework becomes even more relevant in remedying this long-standing injustice for peoples and water.

5. Canada between *terra nullius* and *aqua nullius*

At this point, it is impossible to envisage settler colonialism without *aqua nullius.* This point accounts for Canada's own history with *aqua nullius.*[106] But before turning my focus to how Canada has failed to advance water-mediated concerns, I examine the treatment of land-based claims and how they impact water. To begin, the Supreme Court of Canada has had the opportunity to pronounce on land-based claims in some groundbreaking cases. For example, it held in *Delgamuukw v British Columbia* that the province of British Columbia could not extinguish the Aboriginal title of the Gitxsan and Wet'suwet'en peoples over the land in dispute.[107] This decision validated Indigenous claims as predating the colonial encounter in Canada. Quite importantly, the court noted in *Delgamuukw* that proof of Aboriginal title includes the right to exclusive use and occupation of land, and, where proof is required to establish pre-colonial occupation, "an [A]boriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to Aboriginal title."[108] The court further noted that it is "pre-contact practices, customs and traditions of [A]boriginal peoples which are recognised and affirmed as [A]boriginal rights by s. 35(1)" of the *Constitution Act, 1982.*[109] Thus, this case built upon the earlier decision in *Calder* by fundamentally constraining the status and domestic applicability of the international law doctrine of discovery through its recognition of pre-existing Aboriginal title.[110]

Delgamuukw confirmed the protections afforded to Aboriginal rights under section 35(1) of the *Constitution Act, 1982.*[111] Importantly, it highlights the pre-existence of Indigenous claims to land long before the colonization of present-day Canada. This statement was affirmed in a later case, *Tsilhqot'in Nation v British Columbia*, where the

[105]Kat Taylor, Anne Poelina & Quentin Grafton, "The Lie of *Aqua Nullius*, 'Nobody's Water', Prevails in Australia. Indigenous Water Reserves Are Not Enough to Deliver Justice," *The Conversation* (22 December 2022), online: https://theconversation.com/the-lie-of-aqua-nullius-nobodys-water-prevails-in-australia-indigenous-water-reserves-are-not-enough-to-deliver-justice-195557.

[106]Corey McKibbin, "(Re-)Envisioning Natural Resource Management Involving First Nations: Toward an Effective Co-Management Policy" (2023) 15 Water 3144.

[107]*Delgamuukw*, *supra* note 3 at paras 172–82. This case was brought on behalf of the Gitksan and Wet'suwet'en peoples. The First Nations in this case were claiming ownership and jurisdiction over large tracts of land in British Columbia following a failed negotiation process with the province. In the suit before the BC Supreme Court, the court held that the Aboriginal title held by these nations may have been extinguished at Confederation. Following an unsuccessful appeal to the BC Court of Appeal, the Gitksan and Wet'suwet'en peoples appealed to the Supreme Court of Canada. This case and a host of others focus on the interpretation of section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[108]*Delgamuukw*, *supra* note 3 at para 152.

[109]*Ibid* at 152; *Constitution Act, 1982*, *supra* note 107.

[110]Reid, *supra* note 44; *Calder*, *supra* note 41.

[111]This section reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

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Supreme Court of Canada held that *terra nullius* was inapplicable in Canadian jurisprudence.[112] Despite this seeming affirmation of *Delgamuukw*, the Supreme Court's decision in *Tsilhqot'in Nation* appears contradictory as it also confirmed the Crown's "underlying title" to Aboriginal lands by re-establishing such title claims on the privilege of a "legal vacuum," which claims its heritage through the international law doctrine of discovery.[113] Nonetheless, the effect of the combined reading of *Delgamuukw* and *Tsilhqot'in Nation* not only protects Indigenous land claims as predating Crown sovereignty but also supports those claims as founded on Indigenous world views and legal principles derived from Indigenous laws, customs, and practices.

But while these land-mediated claims have helped to establish and even confirm Indigenous jurisdiction over land, the same cannot be said about water-mediated claims. In settler-colonial jurisdictions like Canada, Indigenous water-mediated claims are judicially assessed based on land-centric legal standards.[114] The challenge with this approach has been that the resolution of such claims are often restricted to the application of land-based principles that do not necessarily align with the issues at stake in water-related matters, neither do they reflect relevant Indigenous cosmologies. This issue arises from the separation of water and land and a conflation of applicable legal norms. While water was conceptually excised from land, the paradoxical juridical embodiment of water as an extension of land in international law or much later in domestic law then becomes a product of the Eurocentric ideologies of water being declared as legally vacant. Water, which was conceptualized as separate yet still attached to the land it abuts or was contained in, meant that it was not to be treated juridically as a medium with its unique legal normativity other than what was derived from its land-centric character.

This conceptual separation of land and water with land dominating water was a legal technology deployed at both international and domestic law to galvanize Europe's imperial ambitions. The outcome was that the ruptured effects of the separation displaced Indigenous relationships with water.[115] To reiterate, the test as laid down in *Delgamuukw* was that,

> [i]n order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[116]

Regrettably, these elements, including the test of continuous occupation are simply not aligned with Indigenous ways of living and knowing water.[117] On this subject,

[112] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

[113] John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v. British Columbia*" (2015) 48:3 UBC L Rev 701 at 703 [Borrows, "Durability of *Terra Nullius*"].

[114] *Chippewas of Saugeen First Nation et al v Attorney General of Canada et al*, 2021 ONSC 4181 at paras 565–87 [*Chippewas of Saugeen*].

[115] Wilson, *supra* note 52.

[116] *Delgamuukw*, *supra* note 3 at para 143.

[117] Lindsay Day et al, "'The Legacy Will Be the Change': Reconciling How We Live with and Relate to Water" (2020) 11:3 Intl Indigenous Policy J 1.

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Paula Quig notes that the Aboriginal title test formulated in *Delgamuukw* was not specifically designed to deal with water-mediated spaces.[118] Quig's apt observation is still relevant today since the *Delgamuukw* test was designed for Indigenous dry land title ascertainment and not for water-mediated claims. It is thus no surprise that, even today, Canadian courts have tended to apply this land-centred framework to water-mediated claims.

There are both practical and legal questions posed by the superimposition of a dry land approach in water-mediated spaces. First, it is difficult to establish exclusive occupation over water in the same way that we do for land. Very few Indigenous communities permanently build their homes on, and live on water. However, there is some guidance here since evidence of occupation may be demonstrated through the construction of dwelling homes, cultivation, and enclosure of fields in the foreshore and regular fishing and hunting grounds in and around these water spaces. The ascertainment of these signs of occupation may satisfy the requirement of "traditional laws" and "traditional customs" of Indigenous peoples as affirmed in *Van der Peet* as being integral to "pre-existing culture and customs of [A]boriginal peoples."[119] Nonetheless, this suggestion that evidence of exclusive occupation is tied to pre-existing culture is inconsistent with the constant evolving character of Indigenous engagements with either land or water.

This position is supported through the observation of a particular Indigenous people's size, culture, and material resources. However, another challenge is that, in *Delgamuukw*, Lamer CJ also contemplated that proof of Aboriginal title in Canada may require reconciling both Aboriginal and common law positions.[120] The point advanced by Lamer CJ suggests the need to draw upon ideas from both Indigenous law, which is the Aboriginal perspective, and the common law perspective. This proposition poses further problems since the courts could potentially deny the existence of Indigenous occupation prior to European colonization arising out of this undertaking to reconcile the two positions that Lamer CJ raised in his analysis. Where such a situation arises, the court's decision could lead to a modification or suppression of Indigenous claims to fit within the expectations of the settler-colonial state.

There are also issues with proof of continuity, a requirement of the Aboriginal title test in *Delgamuukw*. First, the precise role of continuity is less clear when there is no reliance on present occupation of the contested place. This is obviously a much bigger problem for water-mediated spaces than land. Borrows reflected on this question of continuity of occupation in *Tsilhqot'in Nation* and notes that the title claim in that case was upheld on grounds that "Tsilhqot'in law and social organisation was in existence when the Crown asserted sovereignty and that there has been 'continuity' in this organisation down to the present day."[121] Evidently, Borrows's argument follows his persistent call that Aboriginal rights are not preserved in the past as "Indigenous legal traditions exist to address current and future needs."[122]

Second, while proof of continuity of land-based claims may be easily ascertainable because of the geographical or physical contiguity of land, continuity of occupation in

[118]Quig, *supra* note 3 at 675.
[119]*Van der Peet*, *supra* note 39 at para 40.
[120]*Delgamuukw*, *supra* note 3 at paras 148–49.
[121]Borrows, "Durability of *Terra Nullius*," *supra* note 113 at 719.
[122]Borrows, "Heroes, Tricksters, Monsters," *supra* note 90 at 816.

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water-mediated spaces require a differently formulated test that draws upon Indigenous law conceptions in regard to water.[123] An attempt to formulate this test must consider the influence of Western law on Indigenous practices and customs. This difference in outlook between Western and Indigenous perspectives on water has been raised in other contexts in Canada, and this distinction is underlined by a spiritual and ancestral connection between Indigenous peoples and water.[124] Again, the ascertainment of these water-informed Indigenous conceptions requires a turning to water-based ontologies that confirm this unique notion of continuity.[125]

Third, a difficulty also arises in dealing with common law public rights and rights of states at international law, including the right of innocent passage.[126] For example, where an Indigenous title claim to the foreshore (be it lake or the ocean) is upheld as pre-existing Crown sovereignty, such a claim can potentially impact Canada's international territorial jurisdiction and related rights. Here, any approach taken by the Canadian courts to interpret such claims will involve, as a matter of necessity, a construction of section 35(1) of the *Constitution Act, 1982*, with a view to balancing Indigenous claims to sovereignty and the sovereignty of the Canadian settler-colonial state to secure its national frontiers while respecting international law.[127] An analysis in this respect will equally invoke the political and legal requirements of reconciliation. A water-mediated claim here will involve a turning away from the strict language of land-based claims to a more expansive view of section 35(1) of the *Constitution Act, 1982*, as encompassing more than land-based concerns.[128] The intended result from this balancing act contemplates a vindication of Indigenous claims and the upholding of the Crown's international obligations to maintain its national frontiers. This tension is not so manifest in a land-centric test as much as it is

[123]Aimée Craft, "Giving and Receiving Life from Anishinaabe nibi inaakonigewin (Our Water Law) Research" in Jocelyn Thorpe, Stephanie Rutherford & L Anders Sandberg, eds, *Methodological Challenges in Nature-Culture and Environmental History Research* (London: Routledge, 2016) 105 at 107. Craft's views here confirm my concerns about the role of the rights of nature in revitalizing Indigenous legality. As she points out here, "Anishinaabe water law is focused primarily on responsibility, rather than rights" (at 107). If these observations are true that Anishinaabe water law is not principally concerned with rights, then it is important to think more critically about this burgeoning interest in rights as a descriptor of the relationship between Indigenous peoples and water, which invites even more scrutiny. This observation and similar examples will be important as more progress is made on the legal personhood of non-human entities. It is equally important to think about this subject even more as the *UNDRIP* assumes a larger role in interpreting Indigenous claims in Canada and internationally.

[124]Blackstock, *supra* note 86 at 3–5; Obadiah Awume, Robert Patrick & Warrick Baijius, "Indigenous Perspectives on Water Security in Saskatchewan, Canada" (2020) 12:3 Water 810; Rachel Arsenault et al, "Shifting the Framework of Canadian Water Governance through Indigenous Research Methods: Acknowledging the Past with an Eye on the Future" (2018) 10:1 Water 49.

[125]Nicole Latulippe & Deborah McGregor, "Zaagtoonaa Nibi (We Love the Water): Anishinaabe Community-Led Community-Led Research on Water Governance and Protection" (2022) 13:1 Intl Indigenous Policy J 1 at 5–6. The spiritual quality of water highlights its agency and continuous existence. As seen in this Anishinaabe water law study, the spiritual value of water highlights its continuity.

[126]Quig, *supra* note 3 at 685–86.

[127]Diana Ginn, "Aboriginal Title and Oceans Policy in Canada" in Donald R Rothwell & David L VanderZwaag, eds, *Towards Principled Oceans Governance* (London: Routledge, 2006) 283.

[128]Michael Byers & Suzanne Lalonde, "Who Controls the Northwest Passage?" (2009) 42 Vanderbilt J Intl L 1135. This situation potentially raises other issues about whether sea ice could be treated as land. The reason is that sea ice is, in practical terms, frozen ocean water. So if the sea is treated as land it will amount to a denial of its original aqueous constitution.

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within a fluid water-mediated space since the *Delmaguukw* test was not designed for water-mediated claims.[129]

The analysis of *Delgamuukw* and *Tsilhqot'in Nation* as well as similar decisions highlight the hurdles Indigenous peoples would have to navigate to prove water-based claims. To be more precise, these cases do not exactly offer a clear course of action for how Indigenous peoples could prove title claims in Canada in water-mediated spaces, which includes proof of the extent of the sufficiency of their occupation, continuity of occupation, and exclusivity of occupation. The challenge that this situation presents is the extension of what started as colonial (state) sovereignty to water-mediated spaces in Canada through *aqua nullius*. Still, even in the post-colonial experience, state sovereignty operates to exclude Indigenous peoples from exercising control over their seas, lakes, rivers, and marine foreshores and, along with that, an inability to apply Indigenous legal cosmologies to support claims to these water-mediated spaces.[130]

6. Navigating jurisdictional claims over water

Nearly two decades after Quig's foundational text that explored this subject, Canadian courts are beginning to explore the opportunity to pronounce on water-mediated claims. A number of recent cases are shining legal light on this less-explored foundation for Indigenous water claims. But then these cases only go so far. For instance, in the recent case of *Chippewas of Saugeen First Nation et al. v Attorney General of Canada et al*, an Ontario court simply held that proof of Aboriginal title to submerged lands is the same as the test in *Tsilhqot'in Nation*.[131] Even though the court concluded that the plaintiffs had failed to prove their claim to Aboriginal title to this water-mediated space, the trial judge noted that "[m]y conclusion relates to the specific area claimed by SON [Saugeen Ojibway Nation — that is, the plaintiffs], in the Great Lakes. The outcome could be different for other submerged land, such as inland lakes, rivers, and streams."[132] This statement by the court highlights the importance of thinking about how to approach water spaces differently.

While not readily obvious, the *Chippewas of Saugeen* case raises some international law questions. Notably, if the arguments of the plaintiffs were upheld and Aboriginal title declared in their favour, the decision could impact Canada's international boundary with the United States and, along with that, "activities normally permitted by the public right of navigation" in the Great Lakes region.[133] However, in this case, the actual claims of the plaintiffs seemed not to disturb the Canadian-United States international boundary passing through the Great Lakes region. Nonetheless, this dimension to the case revives Quig's two decades-old concern

[129]William Y Kim, "Global Warming Heats up the American-Canadian Relationship: Resolving the Status of the Northwest Passage under Resolving the Status of the Northwest Passage under International Law International Law" (2013) 38:1 Can-USLJ 167.

[130]Lara Domínguez & Colin Luoma, "Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment" (2020) 9 Land 65 at 68.

[131]*Chippewas of Saugeen*, *supra* note 114 at 565–87.

[132]*Ibid* at para 97.

[133]*Ibid* at paras 136–37.

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about the implications of Aboriginal title claims to water-mediated spaces and how that might impact the international right of innocent passage to which the court alluded.[134] With the potential threat to balancing Indigenous sovereignty against assertions of (colonial) state sovereignty and its wider international law implications, this case highlights the potential of the courts to discipline Indigenous world views and force them to fit the Eurocentric expectations of international relations disguised as the exercise of Canada's state sovereignty.

If the Aboriginal title claims had succeeded, the outcome of the *Chippewas of Saugeen* case could also have carried with it further international law implications for the Canadian state.[135] The court gestures at this possibility when the trial judge noted that where such claims involve "an international boundary, that also brings a geographic factor into the analysis."[136] In addressing this issue, the court confirmed the Supreme Court of Canada's jurisprudence that, in situations where "Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights," those interests and laws survived only to the extent that they did not violate Crown sovereignty.[137] In addition, were the claims to be upheld at trial, they could have had the potential of affecting Canada's international boundary with the United States as they could potentially exclude "recreational use" and "commercial uses" as well as affect "national defence."[138] It is thus unsurprising why the court concluded that the "historical practices" and customs that the Chippewas of Saugeen peoples relied upon had consequences for Canada's international boundaries.[139]

One can also observe that the court attempted to restrict Indigenous title in the Great Lakes region and its effect on Canadian-US relations in *Chippewas of Saugeen.*[140] This point raises a number of contradictions in Canada's own state practice. Notably, Canada relies on Aboriginal histories to ground its claims in its ongoing dispute with the United States concerning the Northwest Passage in the Arctic archipelagic region. Canada's argument typically revolves around the concept of historical internal waters use by its Inuit people, which challenges and resists the American characterization of the Northwest Passage as international waters.[141] A similar analogy drawn in comparison with the *Western Sahara* advisory opinion has also been advanced in support of Canada's claim when the ICJ held that the territory

[134]Quig, *supra* note 3 at 685–87. The right of innocent passage under international law refers to the inherent permission granted to a foreign ship to pass through the territorial waters of a coastal state to the extent that the foreign ship does nothing to disturb the peace and security of the coastal state.

[135]*Chippewas of Saugeen*, *supra* note 114 at para 118.

[136]*Ibid* at para 111.

[137]*Ibid* at para 115.

[138]*Ibid* at para 136.

[139]*Ibid* at paras 146–47.

[140]*Ibid* at para 151. As the court noted in its decision, "the international boundary forms the western border of the Aboriginal Title Claim Area. That international boundary did not exist in the 18th century and is not based on SON [Saugeen Ojibway Nation] traditional practices as of 1763. The SON submits that as a practical matter, there was no point in going beyond that boundary since the court could not grant any relief beyond it. That position would be more consequential if SON's traditional use of the area extended at least as far as that boundary, but it does not." The court's conclusion hints at the possible complexity of the claim if it had gone beyond Canada's territorial limits.

[141]Gillian MacNeil, "The Northwest Passage: Sovereign Seaway or International Strait? A Reassessment of the Legal Status" (2006) 15:1 Dal J Leg Stud 204 at 225–27.

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in question in *Western Sahara* was not *terra nullius* and that Indigenous nomads could still claim title to the territory based on occupation and long use.[142] In this respect, if Canada could repurpose the *Western Sahara* decision to advance its claims to the Northwest Passage based on the "occupation of sea ice" by the Inuit people in response to its ongoing dispute with the United States in these contested areas, there should be no difficulty in applying this analogy internally to water-mediated claims by Indigenous peoples within Canada through an expanded construction of "occupation and use" to encompass water.[143]

The plaintiffs appealed the trial court's decision in *Chippewas of Saugeen.* This appeal — *Chippewas of Nawash Unceded First Nation v Canada (Attorney General)* — was partly successful as the case was remitted to the trial judge to decide "whether Aboriginal title can be established to a more limited and defined area, in accordance with the Tsilhqot'in test."[144] A possible reconsideration of this case on its merits is a positive step for Indigenous peoples and law. However, the limits placed on them by the court of appeal's remittance that the proof of title claim must follow the dry land test in *Tsilhqot'in Nation* means that the Chippewas nation might have to find resolution within the constraints of a land-centric framework. Here, the prospects of success are quite slim if proof of such water-mediated spaces does not align with *Tsilhqot'in Nation.*[145] Once again, we observe how the courts might adopt and apply a test that is unlikely to succeed or produce an outcome that does not address the questions at issue.

The order for retrial equally raises some international law considerations. Perhaps the international boundary implications of the title claim by the Chippewas people might have motivated the attempt by the court of appeal to limit the scope or coverage of the claim should the plaintiffs' claim succeed at retrial. As the Ontario Court of Appeal had noted, "[t]he trial judge also expressed concern that the Title claim area extended to the international boundary with the United States, and that SON [that is, the plaintiffs] sought the right to control that area for all purposes, including with respect to national defence."[146] This concern expressed by the trial judge was premised on "whether recognising Aboriginal title to submerged land that extends to the international boundary is compatible with Canadian sovereignty."[147] Demonstrably, the trial court's insistence on a strict dry land-based framework seems motivated by an intention to constrain the potential complications that a judicial decision might present in this respect, and its extra-jurisdictional implications for Canada. As a result, if one fails to avert their mind to the imperial and colonial subtexts of these cases and their related doctrines like *terra nullius* and *aqua nullius*, it is difficult to detect how the courts reinterpret and reinforce the legal emptiness of these doctrines as applicable to contested water-mediated spaces in a bid to contain

[142]Kim, *supra* note 129 at 190–92.

[143]*Ibid* at 192. What is evident here is that the language of *terra nullius* or *aqua nullius* can be repurposed depending on one's view on the character of sea ice as either land or water.

[144]*Chippewas of Nawash Unceded First Nation v Canada (Attorney General*, 2023 ONCA 565 at para 299 [*Chippewas of Nawash* 2023].

[145]*Chippewas of Nawash Unceded First Nation, et al v Attorney General of Canada et al*, Case No 40978 (25 April 2024). The Supreme Court of Canada recently dismissed the leave to appeal of the Ontario Court of Appeal's decision to the Supreme Court.

[146]*Chippewas of Nawash* 2023, *supra* note 144 at para 86.

[147]*Ibid* at para 327.

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and suppress Indigenous claims that have potentially complex implications on the Canadian state's sovereignty at home and abroad.

A residual challenge that a possible retrial presents is that the plaintiffs are likely to face a second round of rejection from the court. Here, it is important to note that the spiritual connections of the Chippewas people to the disputed area were earlier rejected by the trial court, which held that the plaintiffs had failed to establish historical use and occupation. At the trial, the judge downplayed the reliability of the oral evidence provided to back these claims. In her opinion and reaction to this issue, the judge stated that "formality is not required, but it enhances reliability."[148] Regrettably, this formalist approach to the reception of oral histories is not new as it has been frequently deployed in judicial decision-making processes as a technique to discipline Indigenous law.[149] So, it is important to reiterate that a casualization of Indigenous world views underpinning title claims as merely stories that can hardly be offered in support of evidence is inconsonant with the teleology of section 35(1) of the *Constitution Act, 1982*.

Therefore, it seems that this round of new cases only reinforces the apprehension that some Indigenous law scholars have that "the purpose of section 35 was to facilitate the reconciliation of the prior presence of Aboriginal peoples to the sovereignty of the Crown."[150] In this sense, formalism operates as a barrier to effective reconciliation. It threatens the objectives of reconciliation as confirmed in even dry land-based cases where it was asserted that "the *Delgamuukw* case affirmed Aboriginal title, but also affirmed Crown title and the settler governments' right to infringe on Aboriginal rights and title."[151] Viewed this way, insofar as Aboriginal rights or claims threaten to erode Crown sovereignty, the process of reconciliation is then purposely undertaken in a manner that aligns with the Crown's interest and not the interest of Indigenous peoples. A deeper review of this concern exposes the silent international law dimension of domestic legal developments like reconciliation since the original purpose of European expansionism, including legal imperialism, remains protected till date, albeit through a less visible strategy.

In this respect, this new line of judicial pronouncements is reminiscent of a seemingly past era of international law that created and upheld *aqua nullius*. These decisions do so by quietly rejecting Indigenous cosmologies in favour of European claims of sovereignty and title through the instrumentality of Western law. For instance, the express reference to the *Tsilhqot'in Nation* test suggests that the Ontario Court of Appeal, just as its trial court counterpart did, failed to consider the more-than-land context of the areas being claimed in this dispute. Whereas *Tsilhqot'in Nation* was a dispute over dry land, which tends to have well-defined limits and is more amenable to the incidence of physical occupation, water-mediated spaces do not possess similar attributes. To this end, a pure dry-land analysis is simply incompatible with Indigenous views on the land-water interface. As the analysis shows, however, the courts appear to be cautious of the far-reaching implications of these water-mediated claims in and outside Canada, not that the claims are without

[148]*Ibid* at para 58.

[149]Jimmy Peterson, "Judicial Treatment of Aboriginal Peoples' Oral History Evidence: More Room for Reconciliation" (2019) 42:2 Dalhousie LJ 484 at 486–87.

[150]Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 83.

[151]Atleo and Boron, *supra* note 97 at 615. Atleo and Boron note that, through *Delgamuukw*, "the SCC paved the way for business as usual and ongoing conflict with Indigenous land defenders" (at 616).

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merit or incapable of being proved in accordance with Indigenous ways of knowing and living.[152] Either way, a resolution of *Chippewas of Saugeen* and similar ones cannot be based on the limited scope of the tests in either *Delgamuukw* or *Tsilhqot'in Nation*.

There is yet another case beyond *Chippewas of Saugeen* and *Chippewas of Nawash*. The Dzawada'enuxw First Nation has also brought an action seeking to extend its Aboriginal title over the oceans.[153] This is an action demanding the removal of salmon fish farms from a section of the coast of British Columbia. While this case has still a long way to go, it is indicative of the growing interest to challenge Indigenous dispossession and the restoration of Indigenous control over water-mediated spaces. The resolution of *Dzawada'enuxw First Nation v Minister of Fisheries and Oceans et al* will have implications for Indigenous access to fishery resources and fishing grounds as a matter of asserting Aboriginal title.[154] Thus, this line of cases are charting the path for a new phase of Indigenous-settler relations.

7. Dismantling the residuality of the *aqua nullius* doctrine

As demonstrated in the foregoing analysis, the standard legal test for Indigenous title in regard to title claims over rivers, lakes, or ocean spaces under the law of the Canadian state is inadequate.[155] To address this challenge, Canada needs a broader approach in interpreting and enforcing relevant constitutional provisions on Indigenous issues and its obligations under international law. If the framework envisaged under section 35(1) of the *Constitution Act, 1982*, is to effectuate the objectives of reconciliation, then Canadian courts must be willing to move away from the narrow interpretive framework of the tests formulated in *Delgamuukw* or *Tsilhqot'in Nation* and embrace an expanded agenda that is capable of vindicating Indigenous title claims to water.

On this subject, Canada's incorporation of the *UNDRIP* is a significant first step to improving settler-Indigenous relations.[156] Here, the passage of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (*UNDRIP Act*) by the Canadian Parliament marked a defining moment for Indigenous jurisprudence.[157] This Act affirms the *UNDRIP* as applicable within Canadian law and further calls for an *UNDRIP*-driven implementation plan in Canada.[158] In this respect, the *UNDRIP Act* is capable of giving effect to several *UNDRIP* provisions as they are relevant to the realization of the objectives of the declaration as an international law objective and

[152]Ardith Walkem, *Water Is the Lifeblood of the Land: Importance of Water to Indigenous Peoples*, Report submitted on behalf of the Union of British Columbia Indian Chiefs (2016).

[153]*Dzawada'enuxw First Nation v Minister of Fisheries and Oceans, Canada, CERMAQ Canada Ltd and MOWI Canada West Inc*, Docket No T-1076-20 (28 January 2021).

[154]Melanie G Wiber & Allain Barnett, "(Re)Assembling Marine Space: Lobster Fishing Areas under Conditions of Technological and Legal Change in Atlantic Canada" (2023) 48:3 Science, Technology & Human Values 500.

[155]Magena Warrior, Lucia Fanning & Anna Metaxas, "Indigenous Peoples and Marine Protected Area Governance: A Mi'kmaq and Atlantic Canada Case Study: (2022) 7 Facets Journal 1298.

[156]*UNDRIP*, *supra* note 7, art 25.

[157]*UNDRIP Act*, *supra* note 8.

[158]*Ibid*, s 4.

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reconciliation as a domestic imperative. For instance, with respect to Indigenous peoples, the *UNDRIP* affirms "their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources."[159] The itemization of dry lands and water-mediated spaces in Article 25 of the *UNDRIP* and their distinguishing corresponding cosmologies invite a more intentional effort to give effect to their domestic legal significance and international solidarity aspirations.

It is for this reason that the incorporation of the *UNDRIP* into Canadian law heralds the prospects of re-engaging with section 35(1) of the *Constitution Act, 1982*, for a more vigorous commitment to the interpretive framework of Aboriginal rights and claims.[160] The *UNDRIP* proposes a new frontier of engagement with Indigenous relations, one that endorses a helpful turning to international instruments for significant illumination and legal guidance. On this subject, Aboriginal jurisprudence must reflexively engage with the *UNDRIP* as the declaration highlights international legal principles that must assume a central role in domestic law. This point was recently confirmed in the case of *Thomas and Saik'uz First Nation v Rio Tinto Alcan*, which dealt partly with a similar Aboriginal title claim to a riverbed, where the British Columbia Supreme Court held that the *UNDRIP* "supports a robust interpretation of Aboriginal rights."[161] In this respect, underexplored subjects like water colonialism as a variant of the international law on colonialism must begin to feature robustly in this expanded interpretive paradigm.[162] Thus, water injustice, based on the enduring character of *aqua nullius*, must be rejected as having no place in Canada.

A renewed interpretive outlook must engage with Indigenous perspectives under principal legislation, including water laws and policies.[163] This *UNDRIP*-inspired approach can play a very useful role in how Canadian courts engage with Indigenous title claims to water-mediated spaces. As Diana Ginn has argued for this position, "[t]he possible application of [A]boriginal title to an area of seabed, when taken in conjunction with the collaboration already required by the *Oceans Act*, makes it clear that the participation of First Nations will be an important element of the implementation of an oceans strategy."[164] This argument can be extended to other water-mediated spaces beyond the oceans. In this respect, the remittance in *Chippewas of Nawash* for a re-determination of the Aboriginal title claim to part of the Great Lakes region might benefit from this extended approach. This point is relevant since Article 25 of the *UNDRIP* underscores the rights of Indigenous peoples at international law to maintain their traditional relationships with both

[159] *UNDRIP*, *supra* note 7, art 25.

[160] The province of British Columbia first domesticated the *UNDRIP* in 2019 (*Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*BC UNDRIP Act*]). This provincial law was passed two years before the federal Parliament incorporated the *UNDRIP* in a federal law.

[161] *Thomas and Saik'uz First Nation v Rio Tinto Alcan*, 2022 BCSC 15 at para 212 [*Rio Tinto*]. Regrettably, the court did not apply this "robust" interpretive framework under the *UNDRIP* to the case at bar, choosing rather to defer to the Supreme Court of Canada to pronounce on the implications of the incorporation of the *UNDRIP* into Canadian law.

[162] Robison et al, *supra* note 65 at 841; Robert J Miller & Harry Hobbs, "Unraveling the International Law of Colonialism: Lessons from Australia and the United States" (2023) 28:2 Mich J Race & L 271.

[163] The laws include the *Canada Water Act*, RSC 1985, c C-11; *Oceans Act*, SC 1996, c 31.

[164] Ginn, *supra* note 127 at 283–84.

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land and water, a relationship that underscores the spiritual, cultural, and relational connections with both land and water.[165]

Additionally, the incorporation of the *UNDRIP* in Canadian law puts into perspective other challenges confronting Indigenous peoples and their customary rights over water-based resources. From access to fishing in traditional marine waters to Indigenous conservation practices, the *UNDRIP* offers an opportunity to foreground foundational change in existing colonial inroads into water-mediated spaces. For instance, recent disputes between the Mi'kmaq First Nation of Nova Scotia and commercial fishers over lobster fishing further highlights the inadequacy of Canada's *Oceans Act* since the administrative and legislative action in the aftermath of the Supreme Court of Canada's decision in the *Marshall* case has not effectuated the constitutional imperative of section 35(1) of the *Constitution Act, 1982*.[166] The resulting effect is that an *UNDRIP*-inspired process can successfully challenge and reorient the governing authority of the Department of Fisheries and Oceans, the implementing agency of the *Oceans Act*, by demanding a rematriation of ocean spaces to Indigenous peoples and the finalization of co-sharing and co-management arrangements.[167]

It is in this sense that this lobster dispute in Nova Scotia is described as "the unfinished business" of the *Marshall* case based on its failure to address the rights of Indigenous peoples to marine spaces and resources.[168] The lobster fishery dispute must therefore be understood and re-interpreted as part of the vestigial remnants of *aqua nullius*, which effectively supplanted Indigenous hydro-sociality with Western epistemologies and laws that fundamentally dislodged unique Indigenous relationships with water.[169] Quite evidently, the resolution of *Dzawada'enuxw First Nation* on the licensing of salmon (aquaculture) farms off the coast of British Columbia presents another opportunity for the Canadian courts to address the unfinished business that was left in the aftermath of the *Marshall* case.

The entry of the *UNDRIP* into the Canadian law thus raises concerns over the domestic applicability of international law. Here, the language in Article 25 of the *UNDRIP* provides specifically for "lands, territories, waters and coastal seas and other resources" and opens the door to the assertion of water-mediated claims under the rubric of "waters and coastal seas and resources."[170] Further, the *UNDRIP Act* "affirms" the *UNDRIP* as "a framework for the Government of Canada's

[165]*UNDRIP*, *supra* note 7, art 25; Juliana Illuminata Wilczynski, "Beyond the Nation-State Paradigm: Inuit Self-Determination and International Law in the Northwest Passage" (2021) Arctic YB 1 at 8. The challenges raised in this article have occurred in both domestic law and international law. As Juliana Wilczynski has noted, "[a]lthough Art. 25 and 26 UNDRIP specify traditional 'waters and coastal seas', human rights bodies have not adequately applied this norm to marine spaces" (at 8).

[166]*Oceans Act*, *supra* note 163; Wiber and Barnett, *supra* note 154; Leah Sarson, "Shifting Authority: Indigenous Law-Making and State Governance" (2022) 50:3 Millennium: J Intl Studies 601 at 619.

[167]Natalie C Ban, Emma Wilson & Doug Neasloss, "Historical and Contemporary Indigenous Marine Conservation Strategies in the North Pacific" (2019) 34:1 Conservation Practice & Policy 5 at 9.

[168]JJP Smith, "The Unfinished Colonial Business of Canada's Indigenous Fisheries" (2021) 6 Asia-Pac L & Pol'y J 117 at 120–21.

[169]Shaun A Stevenson, "Decolonising Hydrosocial Relations: The River as a Site of Ethical Encounter in Alan Michelson's *TwoRow II*" (2018) 6:2 Decolonisation: Indigeneity, Education & Society 94; Kelsey Leonard et al, "Water Back: A Review Centring Rematriation and Indigenous Water Research Sovereignty" (2023) 16:2 Water Alternatives 374 at 390.

[170]*UNDRIP*, *supra* note 7, art 25.

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implementation of the [d]eclaration."[171] Craft confirms this point in a recent review where she argued that Article 25 of the *UNDRIP* provides a rich starting point for Canada to re-engage with Indigenous law and the complex spiritual relationships between water, law, and peoples.[172]

Nonetheless, the incorporation of the *UNDRIP* in Canadian law does not demonstrate an immediate guarantee with respect to its domestic applicability.[173] This is evident in the similar framing of section 6 of the *UNDRIP Act* as it proposes an action plan to "achieve the objectives of the [d]eclaration."[174] This open-ended approach to implementing the *UNDRIP*, even after its domestication, exposes Indigenous peoples to further complications in their quest to vindicate their rights under the *UNDRIP*.[175] This point is confirmed in a recent case where the British Columbia Supreme Court, in considering the provincial *UNDRIP*-implementing legislation, held that the *UNDRIP* is an "interpretive aid" that does not confer enforceable rights.[176] This decision proceeded on the grounds that the *UNDRIP* itself is not a treaty under international law. Nonetheless, a different take on the *UNDRIP* as soft (international) law might shift thinking that "soft law cannot be simply dismissed as non-law."[177] Thus, this decision clearly tells us, once again, that an over-reliance on formalism by the courts is a problem that will continue to impede the progress that must be made in turning to Indigenous law.

This complicated situation between Canadian law and the *UNDRIP* has consequences for ongoing and future water-mediated claims. The attitude of the courts in *Rio Tinto* and *Gitxaala* demonstrates that the reception, interpretation, and enforcement of the *UNDRIP* as a significant normative framework for reworking Indigenous-settler relations in Canada faces an uphill task.[178] Indigenous law scholars like Christie have also highlighted this problem as he registers his "full awareness of the unlikely nature of the premise that the Crown might think seriously about engaging in braiding laws in line with principles informing [the] *UNDRIP* and in light of the fact of strong legal pluralism."[179] Based on this grim outlook, if these new claims are going to be successful, Canada must move the *UNDRIP* forward very quickly beyond mere interpretive analysis so that it

[171] *UNDRIP Act*, *supra* note 8, s 4.

[172] Craft, *supra* note 70 at 102–04.

[173] However, in the recent case of *R v Montour*, 2023 QCCS 5154, the court suggested that the *UNDRIP* could be construed as a binding instrument in Canada despite its non-binding procedural form. In principle, the proposition in *Montour* is quite controversial and could be declared wrong if it came up for judicial review. Such arguments flow from a positivist take on international law. Here, if the *UNDRIP* were a treaty, it could only be implemented in Canadian law by statute, and the federal statute falls short of direct implementation (domestic incorporation). Be that as it may, the limited scope of the *UNDRIP Act*, applying to federal matters, also suggests non-application to non-federal issues, thus possibly leaving room for provincial non-action.

[174] *UNDRIP Act*, *supra* note 8, s 6(1).

[175] Thomas Isaac & Arend Hoekstra, "Identity and Federalism: Understanding the Implications of *Daniels v. Canada*" (2017) 81 SCLR 27.

[176] *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 [*Gitxaala*]. The court's analysis focused on the *BC UNDRIP Act*, *supra* note 160.

[177] Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58:4 ICLQ 957 at 959.

[178] *Rio Tinto*, *supra* note 161; *Gitxaala*, *supra* note 176.

[179] Christie, *supra* note 48 at 53.

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advances the substantive implementation of a renewed vision of Indigenous law as envisaged under the *UNDRIP*.

8. Conclusion

The influence of international law on domestic law demands constant investigation. In this respect, this article has argued that, whether it is *terra nullius* or *aqua nullius*, the domestic manifestations of these doctrines derive their source from imperial and colonial constructs that have their origin in international law. One manifestation of this problem — from international law to domestic law — is that these Eurocentric doctrines have been the subject of judicial inquiry in land-centred claims in settler-colonial states, including Canada. Indigenous peoples have had to repeatedly call into action their cosmologies to challenge these doctrines or support their claims in and out of courtrooms. The recognition of Indigenous cosmologies and their vindication in *Delgamuukw* and *Tsilhqot'in Nation* and how these cosmologies came to ground Aboriginal title to land as pre-existing the Crown's claim is plainly needed for water-mediated claims as well. Thus, the response to the central question in this article goes beyond the assertion of certain rights attached to ownership in the context of water-mediated claims.[180] It goes to the root — that is, the character of title claims and their proof.

These water matters demand deeper considerations of relationality that cannot be subsumed under an unworkable dry land analysis.[181] Here, the call to action is that the land-centred focus of both *Delgamuukw* and *Tsilhqot'in Nation* as well as similar cases cannot continue to be used as the interpretive guide in Aboriginal title claims to water-mediated spaces. Of course, this article does not under-estimate the significant milestones advanced by these land-centric cases. Rather, the article advocates intentionality and attentiveness to water and its unique significance as a site of contestation and reorientation at the intersection of international law and domestic law. Effectively, water-based jurisprudence must complement its land-centred counterpart. This point is confirmed by other Canadian legal scholars. For example, Robert YELKATŦE Clifford reflects on what the Canadian state can learn from W̱SÁNEĆ law and argues that the current jurisprudence from even the Supreme Court of Canada is unable to effectively address previous challenges relating to the vindication of Indigenous claims.[182] This point invites a critical turn especially as the *UNDRIP* assumes a more prominent role in Indigenous jurisprudence in Canada and elsewhere.[183]

An important aspect of this difficult, but nonetheless important, process will be the humility of the Canadian state to accept that it has still a long way to go in learning the many Indigenous ways of knowing and living and the proof of the existence of Indigenous phenomena. The jurisprudence on section 35(1) of the *Constitution Act, 1982* will require a significant overhaul to address its colonial vestiges and bring it in

[180]*Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40.

[181]Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817.

[182]Robert YELKATŦE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)" (2016) 61:4 McGill LJ 755 at 785.

[183]Kevin Gray, "Change by Drips and Drabs or No Change at All: The Coming *UNDRIP* Battles in Canadian Courts" (2023) 11:2 American Indian LJ 1.

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line with the international law aspirations under the *UNDRIP*.[184] It also involves the willingness to embrace Indigenous knowledge and ideas in a manner that promotes reconciliation, responsibility, and reciprocity between Indigenous world views and contemporary understandings of water within domestic and international law.[185] With newer cases emerging over water-mediated spaces, *aqua nullius* and similar concepts cannot be left to continue their unjustifiable stance on sovereignty and Indigenous dispossession. Ultimately, the resolution of this new line of cases on water-mediated spaces must contend with the enduring effects of international law doctrines, like *aqua nullius*, as present within domestic law.

[184]Brenda L Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law" in Borrows et al, *supra* note 48, 135 at 141–44.

[185]MaryJane Proulx et al, "Indigenous Traditional Ecological Knowledge and Ocean Observing: A Review of Successful Partnerships" (2021) 8 Frontiers in Marine Science 1; Susan Chiblow, "Reconciling Our Relationships with the Great Lakes" (2023) 49 J Great Lakes Research 587 at 589–91.

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