What do landscapes reveal about law? Apparently a great deal, as Nicole Graham sets out to show in *Lawscape: Property, Environment, Law.* For example, the landscape in the cover photo—a salt lake in South Australia’s grasslands in which is planted a weathered fence-post, strung like an abandoned guitar with rusting strands of wire and sporting a crust of salt inches thick at its base—demonstrates the folly of massive tree-clearing, a practice imported from England in the settlement of Australia. It shows the damage caused by agricultural practices maladapted to the Australian environment, and a failure of environmental regulation measures that have perhaps come too little too late.

But Graham also argues that this landscape reflects the archetypal characteristics of Western property law, such as the discourse of improvement that required land to be cleared for agriculture (or grazing) in order to justify property rights. It reflects the dephysicalised concept of property in which the material limits of places have no bearing on the rights of owners to use them. More basically, it reflects the prior distinction between culture and nature that makes of environment and property two separate domains. The term “lawscape” encapsulates the point that law marks itself on the land. The oddness of the term comes from the juxtaposition of, as Graham puts it, “the abstractness of property law and the physical materiality of place.” It is this dichotomy that the book traces in chapters on Enlightenment philosophy; English nation-building and historical property reforms such as enclosure; empire and colonialism; modern property theory; and contemporary jurisprudence, property pedagogy and popular culture.

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2. *Ibid* at xiii.
The salt lake brings home Graham's message that we ignore the perils of the depophysicalisation of property at the risk of ecological catastrophe. Adopting Thomas Kuhn's theory of paradigm shifts in scientific theory, she argues that the current property paradigm, based on the separation of culture and nature, and the removal of nature from property, is in crisis. A revolution is in order, in Kuhnian terms, but not just because the placeless paradigm can no longer explain the facts of property ownership as an intellectual proposition. Rather it is because the paradigm "describes, prescribes and explains unsustainable people-place relations."4

I must disclose that I had already read parts of this book in an earlier life when it was the draft of Graham's doctoral dissertation. Since then I have moved to Canada from Australia, taught common law property and aboriginal rights at a Canadian law school, and learnt a little more about the civil law. My goal, therefore, in reviewing the book was to ask whether the book still makes sense to me in my new legal and physical landscape. I want to focus on the concept of nomadism because, first, although it is not one of Graham's key words, it is a useful foil to her argument about place and placelessness in property law. Second, it is a term that I have heard in at least two contexts in Canadian legal discourse: aboriginal title and legal education. My conclusion is that the argument against placelessness finds a larger home than in property law per se. Clearly, if the capacity to own property helps define legal personhood, as it does explicitly in the Quebec civil code but more generally in liberal culture, then rethinking the property paradigm has wide ramifications.

In the first Canadian context on which my enquiry focuses, the scene for a discussion of the placeless paradigm is the relationship of Aboriginal people to their traditional territories. In the Marshall and Bernard cases5 a question arose as to whether "nomadic or semi-nomadic peoples" in Canada would ever be able to claim aboriginal title under the test which required exclusive possession at the time British sovereignty was asserted. The Mi'kmaq of the 18th century, ancestors of the two defendants charged with taking timber in breach of provincial forestry regulation in the cases, were described as "moderately nomadic". In the result, Marshall and Bernard were unsuccessful in establishing that the Mi'kmaq held aboriginal title over the land on which the timber cutting had taken place. The Supreme Court majority upheld the trial judge's finding that they had not provided sufficient evidence of pre-sovereignty Mi'kmaq possession because they had not demonstrated "regular and exclusive use" of the specific logging sites. Chief Justice McLachlin, writing for the majority, leaves open the question of aboriginal title for nomadic peoples as an issue of fact, noting that in the common law what will count as sufficient acts of possession is dependent on context, the nature of the land and

3 Thomas Kuhn, The Structure of Scientific Revolutions, 3d ed (Chicago: University of Chicago Press, 1996). Kuhn argued that scientific discovery, instead of proceeding as a continual, linear, accretion of new information, undergoes periodic revolutions or "paradigm shifts". Scientists work within a particular knowledge paradigm dominant in their field, but when too many anomalous experimental results accumulate, the paradigm suffers a "crisis" and is eventually replaced by a new paradigm that better explains all the data.
4 Graham, supra note 1 at 5.
5 Art 2 CCQ: "Every person has a patrimony. The patrimony may be divided or appropriated to a purpose, but only to the extent provided by law."
the uses to which it is susceptible.\(^7\) (Graham will have something to say to this!) Justice LeBel, in separate reasons, is concerned that the above test is “incompatible with a nomadic or semi-nomadic lifestyle” and relies too heavily on common law concepts rather than incorporating “aboriginal conceptions of territoriality, land use and property.”\(^8\) He implies that the core of aboriginal title is a connection between First Nations peoples and the land rather than any particular mode of use.\(^9\)

The back-story to this discussion is well known. In the age of the European “voyages of discovery,” international law recognized claims by European colonial powers to sovereignty over new territories that were unoccupied or “desert and uncultivated” in William Blackstone’s phrase.\(^10\) For de Vattel, Locke and other apologists for colorization, the territory of “nomadic” tribes was an unproductive wasteland. In the common law, English colonial governments were obliged to respect the property rights of the inhabitants, but where the peoples were “so low in the scale of social organization” as to be incapable of having property rights “as we know them,”\(^11\) then the territory was treated as terra nullius or a land without owners. Justice LeBel may have feared that Chief Justice McLachlin’s approach bears an uncomfortable resemblance to this historical antecedent. What Graham does so well in her book is to place this “doctrine of terra nullius” in a much more comprehensive narrative in which it is actually the English who were becoming nomadic: less and less attached to specific places and more and more attached to property as an abstract right and as a universal system that could be exported throughout the British Empire. As we shall see, European assumptions about what constituted the best use of land make other uses not just inferior, but also invisible as property. From an indigenous perspective, however, the relationship between people and land that is recognized in the common law as title on the basis of regular and exclusive use is a weak and impoverished one. As in other Indigenous traditions, Mi’kmaq stories have it that the people came into being with the creation of the land, and were literally bonded into kinship relations with its manifestations.\(^12\) They may well wonder how this bond can be considered weaker than that of the strangers who arrived on their shores.

The germ of European nomadism in Graham’s account of the conceptual origins of dephysicalized property in Chapter 2 of the book is the division of the people-place relationship — that is, the way that people relate to land — into active property holding agents and passive objects of property. She writes that there was a transition at some point in the late Middle Ages in the principal meaning of “property” that illustrates well this division. Initially recalling the sense of being “proper to,” or an attribute of, a person — one that strongly links things to the identity of people — property comes to mean a person’s interest in having a thing.\(^13\) Alienability, and not identification or connection, is core to the current legal definition of property.

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\(^7\) *Ibid* at para 66.

\(^8\) *Ibid* at para 126-29.

\(^9\) *Ibid* at para 129.


\(^11\) *In re Southern Rhodesia*, (1919) AC 211 at 233-234, Lord Sumner.

\(^12\) See e.g. Stephen Augustine’s version recounted in *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 48-49.

\(^13\) Graham, *supra* note 1 at 23-27.
At the same time as the modern usage of the term “property” was emerging, the men of
the scientific revolution (such as Descartes and Bacon) were developing an epistemology based
around the distinction between nature and culture that Graham holds as the invidious core of
the dysfunctional property paradigm. Not only was man defined by his attainment of culture
through civilization (and nature defined by its lack of cultural qualities) but man’s relationship
to nature was one of external mastery: man was to subjugate and tame nature through the
methods of science. And indeed culture underwent its own change in definition: the tending
of natural growth and animal husbandry became a metaphor for the cultivation of human
minds and eventually a measure of human accomplishment. Through the notion of “improve-
ment” – applying human effort to render the land more profitable – agri-culture and human
culture became increasingly linked in a progress-oriented discourse.

These two conceptual shifts provided the impetus for some very concrete changes in the
“lawscape” of England associated with the enclosure of the commons that Graham details
in her third chapter, “Material Origins: Nation”. Enclosure, put into effect most intensively
between 1750 and 1820, entailed the basic physical and symbolic closing-off of lands previously
available to peasant communities for subsistence grazing and gathering through the erec-
tion of fences or hedges, and the legal dispossession of the latter, by act of Parliament, in favour
of private land owners. Landless peasants became labourers and migrated to cities, or to the
English colonies, with swelling populations and attendant development rapidly changing local
geography in both cases. For these people, the inherited knowledge of and attachment to the
lands of their forbears was also displaced. Graham describes this kind of knowledge – and
indeed the relationship – as one coming “from” a place, and based on an intimacy with the
land. Once dispossessed, new city dwellers and colonists could largely only have a relationship
to the land, have land or express their will over it.

Similarly, the new rural proprietors of enclosed estates also brought an altered relation-
ship to the land, the value of which was principally as an alienable good or an enterprise in an
emerging market economy. Where commons had been regulated by local customs determining
who could use which resources, in what way and when – a mix of property rights and envi-
ronmental management – enforceable in local manorial courts, the new private estates were
governed according to the uniform real property rules of the royal courts. Estate owners were
less likely to hold particularised ecological knowledge of their lands, which was in any case
being overtaken by the generalisable principles of agricultural science: land in this period was
“improved” and rendered more productive by clearing forests, draining fens, diverting streams,
constructing dams, and, in an earlier form of monoculture, planting crops with the greatest
market value. As Graham states, “[e]nclosure demonstrates the agency of law in transforming
the paradigm of nature/culture from theory to practice through the introduction of private
property relations.” The discourse of improvement, notably in John Locke’s theory of labour

14 Ibid at 27-37.
15 Graham notes at this point that the situation of indigenous peoples as the object of scientific study put
them in the category of nature rather than knowledgeable subjects, something which LeBel J in Marshall/
Bernard is implicitly counteracting.
16 Graham, supra note 1 at 51.
17 Ibid at 76.
18 Ibid at 55.
as the source of property rights,\textsuperscript{19} with its separation of nature and culture, and the shift from place as “proper” to place as “property,” justified and “naturalised” the privatization of the commons; enclosure in turn led to the literal and material separation of people and place.

Just as the dispossession of the English peasantry was the predicate of a land “improved” by physical changes and large-scale agricultural development, so too was the removal of indigenous peoples from their homeland in English colonies justified by, and necessary to, the transplant of private property, and an intensive agricultural economy, to the New World. The discourse of improvement may have been \textit{atopic} – placeless – but, Graham notes, the practices associated with it had nonetheless developed, and could only apply, “within the very particular geographic conditions of England including, importantly, fertile soils, the availability of plants and animals suitable ... for domestication and a temperate climate.”\textsuperscript{20} Colonial land laws did develop differently from the laws of England in socio-economic terms – witness squatter licenses, statutory pastoral leases in Australia with their minimum cattle stocking requirements, and registration systems to assist the marketability of land.\textsuperscript{21} The practices of colonists themselves also adapted, out of necessity and to some extent, to local conditions, accepting pastoralism and forestry rather than cultivation as alternative productive uses and, early on, making use of indigenous food sources that did not require land clearing, including game, corn and beans in North America.\textsuperscript{22} However, land laws maintained the core of English property in the idea of land as an alienable commodity, its purpose profit, its proprietorship individual and its vocation mastery. The imperatives of the colonial economy forced rapid “improvements” to the land to support productive use that, often in the space of one generation, led to devastating environmental degradation. As colonial laments for the disappearing lakes, rivers, forests, marshes, grasslands fish and fowl testify, the law and practice of property was a “terribly maladapted” one.\textsuperscript{23}

Given this background, it is ironic that the Mi’kmaq claim to Aboriginal title over more than small pockets of land in Nova Scotia, New Brunswick and Quebec is now in doubt, and yet the migrating French and then British Crowns gained sovereignty and underlying title to Mi’kmaq land, much of which they did not know and had not seen. The standards of regular and exclusive use to which Aboriginal title claims in Canada are held may not require the same kind of intensive modification of land or levels of productivity that colonial land regimes created and justified, but they are part of the same spectrum. In her book, Graham calls into question why this should be the measure of land title at all. At the hearing in the \textit{Bernard} case, council for the Crown in right of New Brunswick focused on the obligation to share the land with strangers, affirmed by witness Stephen Augustine, to undermine the idea that the Mi’kmaq traditionally had any concept of ownership of or property in the land: “[I]f it’s my family territory, Chief Augustine, but yet anybody can go in there who had no connection with my family, and to whom I’ve given no permission, what’s the point in it being called my

\textsuperscript{19} John Locke, \textit{Two Treatises of Government}, ed by Peter Laslett (Cambridge: Cambridge University Press, 2003), Treatise 2, Chapter 5.

\textsuperscript{20} Graham, \textit{supra} note 1 at 91.


\textsuperscript{22} Graham, \textit{supra} note 1 at 127, 131.

\textsuperscript{23} \textit{Ibid} at 132.
territory?"

The rest of the evidence, however, is redolent with the other kind of property—Aboriginal people considered themselves as belonging to the land, and their creation stories explain the ways in which specific peoples and specific places are connected, the way they are "proper to" each other.

While Aboriginal rights jurisprudence leaves some room for stories and the connections they detail as one of the means of proof and sources of title, McLachlin CJ's leading judgment in Marshall v Bernard renders them as handmaids to the question of common law-style possession. The lesson from Lawscape could be that taking on board both aboriginal and common law perspectives in the elaboration of rights is not just about parsing aboriginal claims, but about re-examining what is taken for granted in unarticulated non-Aboriginal claims. It is a move that Indigenous legal scholar John Borrows often makes in repeatedly turning questions asked of Aboriginal claimants back on the Crown: how did the Crown acquire title to the land at issue in Marshall v Bernard when it did not engage in regular and exclusive use either? Why does its right to take timber not have to be proven? Graham provides rich material to feed these reflections. Moreover, she gives a particularly compelling reason to respect traditional indigenous land use practices, and to understand their legal qualities: not because they are more ecologically sound or more "natural", but because these "practices have specifically adapted over a long period of time to specific places. This is how they are laws and why they are authoritative."

Since the bulk of Graham's historical analysis is directed towards showing that generations of laws have been maladapted to their locality, the central onward-looking thrust of Graham's message is that law—property law, environmental law and the discourses that inform and animate them—needs to become responsive to local knowledge whether it be about soil quality, rainfall, hydrolics, bio-species, weather, or climate. She argues for a paradigm shift towards "adaptation"—of human behaviour and human laws—which has a special power as an antidote to the problems of dephysicalised property because it "deconstructs the paradigm of nature/culture... it is both and neither natural and cultural." Unlike the prevailing paradigm—culture improving on nature—the adaptive paradigm embeds the agency of humans within the means of the location in which it acts. Two of Graham's examples in a concluding section that offers substance to the alternative paradigm are of Australian farmers who stopped "battling" the land with alien agricultural models that were killing it, and started "approaching" the land as its student, learning about what kinds of limits and demands are imposed by the land, rather than by the law. The strategies adopted put the farmers in breach of leasehold conditions and environmental regulations of noxious weeds, respectively. The farmers, on the

24 R v Bernard (15 September 1999), Fredericton, 12130113 (NB Prov Ct) (Trial transcript, Stephen Augustine cross-examination by Mr. McCormick at 121).


27 Graham, supra note 1 at 202.

28 Ibid at 19.

29 Ibid at 193.
other hand, felt that they had no alternative - the “real” laws of the land were the ultimate authority for their practices.

Adaptation is a central precept in a current of resource-based decision-making literature known as “adaptive management”. It denotes an iterative learning process that aims to optimize management strategies in light of feedback from the ecosystem in question. Graham (some-what surprisingly) does not engage with this literature. Environmentalist critiques of property are only briefly touched on as an alternative to anthropocentric models, but are largely side-lined by Graham as “qualified articulations of anthropocentrism” or, in their ecocentric modes, as a mere inversion of the categories of nature/culture. There is also little concession given in the book to the now extensive reach of environmentally-based restrictions on what can be done on the land. The major reason for this (apart from the entirely justifiable one that the target of the book is the history and practice of property law and theory) seems to be that regulations are generally conceived of as an imposition – and in the sights of many, an unjust one – on the otherwise unlimited rights of proprietors to the profits of the land. Environmental laws thus confirm rather than undermine the dominant paradigm and the priority of property. Graham supports this point with an analysis of regulatory takings cases that view restrictions on land use as the taking of “property,” measured by commercial viability, although in Canada this is by no means widely accepted as the basis for compensation. I would be curious as to what she would make of the adaptive management model. Perhaps it maintains too much of a scientific approach to disrupt the paradigm; or perhaps, given that understanding laws and policies as ecological experiments that we should learn from sounds like common sense, Graham’s account helps explain why it remains, like environmental regulation itself, marginalised by the more dominant understandings of property, restricted to populations of wild geese rather than the question of the scope of our laws. In any case, Graham seems to be arguing for the broad-est application of the adaptive paradigm: seeing ourselves and our law as engaged in a process of becoming local.

Law that is responsive to the particularity of places would necessarily not be uniform, or uniformly applicable across juro-political territories like states. There is thus a certain plural-istic bent to her argument, one that, in Canada, might find richest soil at the Faculty of Law at McGill, whose Centre for Human Rights and Legal Pluralism, and whose curriculum integrating the teaching of common law and civil law, dubbed “transystemic” legal education, lead Faculty and students to entertain multiple perspectives on the law and reject a “one size fits all” approach to legal issues. In writings on the McGill program, however, the relationship between law and place seems sometimes to epitomize the estranged or dephysicalised one that Graham eschews. Former Dean Nicholas Kasirer, for instance, expressed his vision for

31 Graham, supra note 1 at 18.
32 Ibid at 175.
33 See e.g. Mariner Real Estate Ltd v Nova Scotia (Attorney General) (1999), 177 DLR (4th) 696 (NSCA).
the mixed legal system as taught at McGill as one of “nomadic jurisprudence”. In seeking to break the imaginative hold that the formalism of state law holds on lawyers, in which law is organised in terms of political territories and thought of in terms of enforceability, he stresses instead law as an ideas-based phenomenon, one which “need not necessarily be anchored in space or even time.” This is my second Canadian scene for nomadism. The focus on breaking the necessary tie to territorial jurisdiction through nomadic jurisprudence, although important in shaping a critique of dominant modes of thinking about law as the prescriptive edicts of a central state power, and interesting to explain legal transplants, cross fertilization and hybrid legal traditions, risks committing the same errors as dephysicalised property if it is not done carefully. If we are concerned with the material constraints on the perpetuation of legal traditions, we cannot dispense entirely with the idea of a “fixed home” or “center” for a responsive law because it inevitably has to be given effect somewhere. A tradition, Graham tells us, can only survive as a successful practice of living on lands.

As the preamble or groundwork for a new manifesto for sustainable law, the diagnosis of a property paradigm in trouble in Lawscape is timely and powerful. It was my goal in this review to assess whether the largely English and Australian focus of the book translated well to other contexts. While most of the material focuses on Australian law and its English antecedents, and then on alternative paradigms drawn mainly from Australian Indigenous philosophies of place, Graham solicits sufficient colonial histories and contemporary practices from North America to build a case for a more generic phenomenon and make this book of wide relevance. The argument that inverts the colonial assumption, that agriculturalists rather than hunter/gatherers are nomadic because they are restless and lack deep attachments to place has been poignantly made in the Canadian context by Hugh Brody. Graham contributes greatly to Brody’s more ethnographic or mythological account by bringing law firmly into the conversation. From my Canadian vantage point, the soul searching in which Lawscape engages in relating the nomadic character of common law property provides additional food for thought in two quite distinctly Canadian jurisprudential endeavours: the reconciliation of perspectives in the recognition of Aboriginal rights and the transsystemic legal education project.


37 Kasrer, supra note 36 at 486.

38 Many of the arguments about law’s role in land degradation are particularly striking in this context.