This article aims to provoke interest in thinking about the spatial dimensions of property (particularly in land). This reflects the burgeoning interest in the geographies of law more generally. While there are many ways in which one can “think spatially”, it is important to begin by noting that “space” itself is capable of at least two meanings. An “absolute” view regards space as both a priori and asocial, and calculable and geometric. A relational view, conversely, regards space as meaningful only in relation to practices. Both these views of space, it is suggested, can be discerned when thinking about property. Indeed, they often collide in important ways.

INTRODUCTION

Katherine Hartley spent many hours under the elegant old maple tree that shaded her Toronto garden, practicing yoga and meditating. However, she came to worry that the tree was unsafe. On the assumption that the tree was on her land, she obtained a permit to remove it, as required by Toronto municipal law, and then advised her next-door neighbours, Hilary Cunningham and Stephen Scharper. They, however, were horrified at the prospect, regarding the tree as part of their backyard. Ms Cunningham placed a statue of St Francis of Assisi, protector of the environment, against the tree trunk, posting a notice that the ownership of the tree was in dispute. Obtaining an expert opinion that the tree was healthy, they offered to install cables to stabilise it. Ms Hartley, meanwhile, sued her neighbours to establish her right to cut down the tree, and enter onto the property to do so. Hartley lost at trial, although she reportedly plans to appeal.1

This is clearly a case about real property, being one of a particular genre of “neighbour law” disputes that turn on such seemingly trivial matters as sagging fences, party walls and blocked views. But it also alerts us to the role of the courts in interpreting space. The world we inhabit and shape is both temporal and spatial. If time is the dimension of succession, in which things happen before and after, space is the dimension of simultaneity, of co-presence and multiplicity. Entities are near or far, proximate or distant. Space has an undeniable materiality, but it is also symbolic and representational.2 As humans, we live our lives in and through innumerable spaces. These spaces include containers (such as neighbourhoods, states, and parcels of property), relations (proximity, distance, access, surveillance, ethical obligations, and so on), and scales (the local and the global). Geographers would argue that these spaces matter. They are constituted by and constitutive of social life, practice and experience, and shot through with power and possibility. But these spaces do not come to us ready-made. They are made meaningful through various forms of human practice, including that of legal actors.

The field of legal geography takes the interconnection and reciprocal constitution between law and space as its central point of enquiry.3 It begins with the argument that law – as a set of practices, discourses and forms of knowledge – frequently draws upon or helps to constitute spaces. A sidewalk, city, or a maple tree is thus a legal product. These legal spaces, it is argued, matter. At minimum, the ways in which space is imbued with legal meaning is very often significant, given the differentiated

1 PhD, Professor, Department of Geography, Simon Fraser University, Burnaby, Canada.

1 Hartley v Cunningham et al 2013 ONSC 2929.


ways in which law operates within the spaces that it partially produces. We are thus directed to a careful analysis of how law makes space, and with what effects.

Property scholars interested in space can begin, therefore, by paying particular attention to the ways in which property law and practice draw upon and help shape particular geographic forms, representations and enactments. We might think, for example, of the importance of spatial ordering, spatial memory, globalisation, nature, and landscape to property. Particular sites of property can also be subjected to a spatially informed analysis, such as public property, the urban commons, the school, and United States land grants.

Viewed thus, there are multiple spatial dimensions to the battle of the maple tree, some of which are made explicit, while others are bracketed out of the judicial setting for the dispute. The location of the dispute obviously matters in terms of the relevance of various municipal and provincial laws. A set of legally significant relations, such as proximity, sight lines, “neighbourliness”, and so on, are also clearly spatial. Multiple and intersecting geographic scales can also be noted. For some, this is a dispute between neighbours. Others “scale it up” to a question of ecosystem health and environmental ethics. Most immediately, however, the dispute between Katherine Hartley and her neighbours, entailing the attempt by the court to determine the relative location of the maple tree at dispute in terms of the property boundary that divides their respective lots, can be thought of as an attempt to produce a space of property. If the tree was owned by Ms Hartley, it was hers to cut down. If, however, the tree were co-owned, both parties would have to agree to its removal. The tree seems to have been planted long before, perhaps growing from a seed blown by the wind. Ms Hartley argued that the question of whether a tree crosses a boundary line must be directed at the issue of where the trunk emerges through the ground, insisting that the tree trunk was situated on her property. Professional arborists hired by Cunningham and Scharper, however, questioned measuring the trunk at ground level, arguing that this was not a good indicator of where the tree trunk transferred into the roots of the tree, which they identified as the true base of the tree. Justice Moore agreed with this interpretation, ruling that the tree was co-owned by both parties.

The case received some media attention, with commentators noting its wider significance. Phillip van Wassenaer, an arborist who examined the tree, was supportive of the ruling, noting that “it’s more in line with how trees grow and what nature gives us”. Environmentalists applauded the fact that the ruling would be more likely to ensure the protection of urban trees, as now tree removal would be a matter for conversation between neighbours. Ms Hartley’s lawyer, however, worried at the corrosive effects upon individual rights: “A tree can now become common property simply because it grows too large … At the same time, the rights of a landowner to cut the branches or roots of a neighbour’s tree are made explicit, while others are bracketed out of the judicial setting for the dispute. The location of the dispute obviously matters in terms of the relevance of various municipal and provincial laws. A set of legally significant relations, such as proximity, sight lines, “neighbourliness”, and so on, are also clearly spatial. Multiple and intersecting geographic scales can also be noted. For some, this is a dispute between neighbours. Others “scale it up” to a question of ecosystem health and environmental ethics. Most immediately, however, the dispute between Katherine Hartley and her neighbours, entailing the attempt by the court to determine the relative location of the maple tree at dispute in terms of the property boundary that divides their respective lots, can be thought of as an attempt to produce a space of property. If the tree was owned by Ms Hartley, it was hers to cut down. If, however, the tree were co-owned, both parties would have to agree to its removal. The tree seems to have been planted long before, perhaps growing from a seed blown by the wind. Ms Hartley argued that the question of whether a tree crosses a boundary line must be directed at the issue of where the trunk emerges through the ground, insisting that the tree trunk was situated on her property. Professional arborists hired by Cunningham and Scharper, however, questioned measuring the trunk at ground level, arguing that this was not a good indicator of where the tree trunk transferred into the roots of the tree, which they identified as the true base of the tree. Justice Moore agreed with this interpretation, ruling that the tree was co-owned by both parties.

The case received some media attention, with commentators noting its wider significance. Phillip van Wassenaer, an arborist who examined the tree, was supportive of the ruling, noting that “it’s more in line with how trees grow and what nature gives us”. Environmentalists applauded the fact that the ruling would be more likely to ensure the protection of urban trees, as now tree removal would be a matter for conversation between neighbours. Ms Hartley’s lawyer, however, worried at the corrosive effects upon individual rights: “A tree can now become common property simply because it grows too large … At the same time, the rights of a landowner to cut the branches or roots of a neighbour’s tree.

---

that cross over the boundary line face new restrictions”.16 He worried that “under this decision it makes no difference whether there’s a tiny part of trunk over the property. Does that mean both owners have totally equal rights in the tree?”.17

But the case also alerts us to some broader dimensions to the geographies of property. Property, put simply, is an empty formalism unless it is materialised in the world, in part through spatial arrangements. Modern, common law property, it seems, relies upon the construction of boundaries, delineating the owner, and object of property. Due to a contingent set of historical circumstances, the tendency has been to territorialise property, through the production of spatial boundaries that delineate the estate of one private property holder from another. But this requires a severing in the networks of relations that connect all objects, whether neighbours or maple trees, generating a complex and important tension between the “cuts” and “flows” of property relations.18 Such a tension is manifested at the boundary. Spatial boundaries, it has been noted, are particularly efficient and powerfully communicative devices when it comes to legal practice.19

Boundaries mean. They signify, they differentiate, they unify the insides of the spaces that they mark … And the form that this meaning often takes – the meaning that social actors confer on lines and spaces – is legal meaning. How they mean is through the authoritative inscription of legal categories … The trespasser and the undocumented alien, no less than the owner and the citizen, are figures who are located within circuits of legally defined power by reference to physical location vis-à-vis bounded spaces20

Boundaries, metaphorical and real, therefore, matter a great deal to property law. But if “boundaries mean”, the message of the boundary, as the maple tree case reveals, is far from straightforward. This is not only a function of the many challenges that courts face in fixing boundaries in a world where trees grow, fences fall, or rivers meander. It also reflects an important tension between profoundly different readings of the boundary as a space.

RELATIONAL AND ABSOLUTE SPACES OF PROPERTY

This divide has long preoccupied geographers. A long-standing view treats space as an “absolute” phenomenon. Newton famously viewed time and space as abstract entities that existed independently of their measurement. Space, on this view, is “out there”, available for human use and action through forms of representation predicated on visual and geometric technologies, such as surveying and cartography. Absolute space is understood through Euclidean geometry, and treated as objective and knowable. Space thus becomes the domain of the expert in fields such as cartography, and planning. Such a view has consequences. To the extent that absolute space is treated as asocial, for example, it can easily appear inert and apolitical. Space can appear as an essentially “technical” subject, of concern only to those such as the Toronto land surveyors who placed their boundary markers around the maple tree.

Secondly, however, we can also understand space in more relational, dynamic and social and political terms: as the product of interrelations. Departing from Newton, Leibniz argued that time and space were relational – that is, they were comprehensible only with reference to specific frames of interpretation. Distance made sense only relative to the objects situated in space. A relational view of space thus rejects the view of space as outside of the processes that define it, including the actors who

---


20 Delaney D, Blomley N and Ford R “Where is Law?” in Blomley N, Delaney D and Ford R (eds), The Legal Geographies Reader (Blackwell, New York, 2001) p xviii, original emphasis.
imburse it with meaning. Such processes do not occur in or on space, but actively generate space. As picked up and developed in contemporary human geography, the argument is that space is not to be treated as divorced from practice, but necessarily articulated through it. “The question ‘what is space?’ is therefore replaced by the question ‘How is it that different … practices create and make use of distinctive conceptualizations of space?’.”

In the divide between absolute and relative space, it is tempting to take sides. In so doing, we appeal to an essence of space as either relative or absolute. But this seems to be a fruitless argument. We live in spaces that are simultaneously Newtonian and Leibnizian. But on the principle that space matters, this can be said to be important. The “spatialisation” of property here, it should be noted, does important work.

By relying upon an absolute geography of property, with its pre-political circles, spheres and domains, property is constituted in an important way. Such a view invites us to treat property less in socially and ethically relational terms – as predicated on powers of exclusion and inclusion – than as a space itself, a territory, owned by an autonomous actor. We all know that property entails a set of relations between people. Yet the fact that it remains commonplace to refer to property as a bounded object – “my land” – surely speaks to a particular connection between absolute space and property. The nature of this connection is a complicated and important one that will not be elucidated here. Suffice it to say that absolute property and absolute space are, in many senses, coterminous and interlocking inventions, emerging at a particular historical juncture. The effect is to obscure and conceal power relations at work in property, which tends to appear to be concerned with impersonal spaces and things (like walls and fences), thus displacing attention from the controller and the controlled to the territory itself. Power relations appear impersonal and neutral. Thus it is that a multifaceted set of interactions between people over a tree is turned into a formal dispute between “owners” over a property line. Such a geography also underpins a particular notion of autonomy in which the self is imagined as “separative”: that is, necessarily detached from others. Ms Hartley, it seems, thought of the tree as her own, to do with as she saw fit. The space of her property thus becomes zero-sum.

A relational geography, however, takes us somewhere else. A boundary is not an edge, but a site of contact and connection. A lively body of scholarship has foregrounded the relational dimensions to property such that it comes freighted not only with entitlement but also obligation. These obligations are not absolute, but have crucial geographic dimensions (indeed, in many cases, they are meaningless absent such dimensions). “My” tree provides shade and aesthetic pleasure to my neighbours, who begin to regard it as their own (or it drops “my” leaves on their lawn, which they regard as my fault). Ms Cunningham noted her affection for the tree, which she considered as part of her backyard. Given space constraints, beliefs have been imputed to both parties. Their conceptions of space and property likely include both relational and separative logics (cf Cooper n 13).

21 Such actors may be humans or non-humans. See, eg Whatmore S, Hybrid Geographies: Nature Culture Space (Sage, London, 2002).
28 Cooper, n 13.
29 Given space constraints, beliefs have been imputed to both parties. Their conceptions of space and property likely include both relational and separative logics (cf Cooper n 13).
GENTRIFICATION STRUGGLES, PROPERTY AND SPACE

Cities across the world are embroiled in struggles over gentrification-induced displacement. As has been argued elsewhere, such struggles are simultaneously about property (whether formal or community-based) and space. But, again, space figures in several different and often opposed ways. Take, for example, struggles over development sites, such as the long conflict in the heart of Vancouver’s Downtown Eastside, a low-income community in which many residents are tenants in single-room residential hotels. One flashpoint was the plan to convert a former department store, Woodward’s, into market housing. This was clearly a conflict over property, pitting the rights of the owner of the site against low-income activists who, while not formal owners, articulated a collective property interest in the building, based both on histories of past use, and on the potential threat to the low-income housing stock, should the redevelopment occur. In that sense, it was also a struggle over space. But, again, space figured in quite different ways. From one perspective, no displacement was at issue, given that the site was currently vacant. This is a common claim in such struggles, and is, of course, correct, but only insofar as the relevant “space” of property is that of the development site, viewed as a detachable “parcel”, linked solely to the owner through a series of formalised protocols. Property, from this perspective, is a bounded space, and thus alienable and convertible. For the activists, however, a relational geography was at work. The space of Woodward’s was not detachable or free-floating. It came with baggage, whether by virtue of its indelible ties to the history of a particular place, or because of its power-laden connections to the stability of rental tenancies of low-income residents nearby. In so doing, the property claims of the developer were emplaced within a particular history, political economy, and bundle of property relations. This struggle and its related representations of the spaces of property continue throughout the Downtown Eastside. While an absolute reading appears to predominate, reliant upon sharp lines, a relational argument appears to have some purchase. Thus it was that Woodward’s was developed with a mixture of market and social housing.

Such struggles also reveal the value of thinking about temporal dimensions to property’s spaces. Any attempts to redirect this logic are seen as illegitimate or unwarranted interventions into the privatised rights of developers and owners. More strikingly, the space is regarded as essentially empty and poorly used, a modern day terra nullius, awaiting activation and productivity. Alternatively, such property logics are seen not as natural but as highly political, entailing social decisions concerning access, rights and allocation. The space of the neighbourhood is far from empty or inert, but dense with meaning, attachment, and affect, produced through decades of struggle and survival. These histories are inscribed into the very landscape of the neighbourhood, a resource that activists draw upon to mobilise resistance to the remaking of community.

COLONIAL PROPERTY AND ITS SPACES

A modern-day treaty process in British Columbia involving Indigenous communities and the state seeks to address the existence of un-extinguished Aboriginal title over the land now designated as British Columbia. It requires a participating First Nation to submit a Statement of Intent to the Crown that includes a 1:250,000 map demarcating the land it regards as its traditional territory. These maps conform to Western protocols of property by the use of a single and continuous solid line to mark the outermost extent of this territory. Property rights extend over an exclusive, bounded space, in other

31 Blomley, n 30.
words. Staking a claim according to this spatial format makes sense in the context of the treaty process. The assertion of an expansive and exclusive territory may prove empowering to a First Nation, particularly when combined with claims of nationhood and jurisdiction.\textsuperscript{35} Given that the treaty process is framed very much according to the expectations and norms of the dominant society, the use of familiar cartographic forms also meshes with a settler-society’s expectations concerning the absolute space of property. Such calculable spaces are said to produce certainty and legibility.

However, many Indigenous participants question such a spatialisation of property. Not only does it misrepresent Indigenous geographies of property, they fear, but it also threatens to actively reconstitute them. The Coast Salish, for example, traditionally frame ownership and space through a relational epistemology, predicated on relationships with ancestors and overlapping kinship networks.\textsuperscript{36} These are performed through reciprocity, sharing and respect for persons (human and non-human) associated with particular places. By virtue of one’s relationship to ancestors, and to related overlapping kin networks, an individual may have access to multiple sites (assuming appropriate relational protocols of respectful interaction are conformed to). From this perspective, the “traditional territory” to be mapped in the treaty process is less a zone bounded by sharp lines, than a network of relationships: “individuals experience their territories as ‘itineraries’ of places, engaging in reciprocal practices relating to their use, and respect, of the land within an ecosystem that they continually appropriate throughout their lives.”\textsuperscript{37} Many community members, therefore, see the bright spatial lines of absolute space and property as inimical to these dense relational geographies.

Moreover, the idea that each “nation” (itself, a colonial construct) must be assigned a unique territory inevitably runs into the reality of so-called “overlaps”, given both historical patterns of shared use and access, and the realpolitik of individual nations’ assertions of territorial dominance. Early on in the treaty process, a Vancouver newspaper compiled all the claims to traditional territories revealing, predictably, considerable overlap. The zero-sum spatiality of Western property was drawn upon to implicitly demonstrate the absurdity of Indigenous claims. They were, the newspaper noted, a “criss-crossing mess of coloured lines”, comprising 111\% of the landmass.\textsuperscript{38} To understand such collisions, however, we must recognise the clash not only of two conceptions of property, Indigenous and settler, but also of different geographies, one networked and relational, the other sharply territorialised and seemingly abstract. And it should be noted, again, that these geographies of property are not to be understood in either/or terms. First Nations have been adept at using cartographic techniques, reliant upon notions of absolute space, to advance claims to space and title. Settler society, in turn, has been forced to confront a messy “edge-politics” of relationality and co-presence, as it stumbles towards reconciliation.

CONCLUSIONS
The goal here has been modest: to introduce the interested reader to the importance and potential of thinking about property through a spatial lens. To do so is insightful and productive, particularly when we remember that space, along with time, is a basic vector by which we make sense of the world. At minimum, it requires the scholar to attend carefully to the spaces that property law relies upon, represents, and thus actively produces. In doing so, it helps to attend to the argument that such spaces are not simply outcomes of law, but are also a powerful precondition for property’s presence in the social world. Property’s spaces, moreover, make a difference to the work that property does. As suggested above, it is important for the scholar to note the particular ways in which such spaces are conceived (as absolute, or relational perhaps), as this shapes the way in which property itself is understood, both analytically and ethically. That said, there are challenges in thinking spatially about property. In part, this reflects the relatively undeveloped state of the literature. However, thinking

\textsuperscript{37} Thom n 36 at 186.

234 (2014) 3 Prop L Rev 229
carefully about the spatial dimensions of property is also hard to do, given the dominance of a view of space as inert, asocial and a priori. The recognition of the importance and liveliness of space, therefore, is a crucial first step.