The ties that blind: making fee simple in the British Columbia treaty process

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Property is a crucial means by which space is made, and remade. This is powerfully evident in settler societies, such as British Columbia, Canada. To understand the work that property does requires us to attend to the manner in which it is entangled in and constitutive of a multitude of relations (ethical, practical, historical, semantic and so on). Yet for property to function, some of these relationships must be bracketed. That which is designated as inside a boundary must be partly disentangled from that identified as outside. Property practice and theory helps organise these exclusions. Yet this is not disinterested: Property’s frames, therefore, can become political battle lines.

Drawing from a modern-day treaty process involving indigenous communities and the federal and provincial governments in British Columbia, Canada, I trace the ways in which the state has sought to disentangle property from its recently re-emergent colonial entanglements. One of the ways in which it has tried to do this is to insist that First Nations hold their treaty settlement lands as a form of fee simple, this being bracketed as a clear and certain entitlement, replacing a messier ‘Aboriginal title’. First Nations negotiators, however, have pushed back, re-entangling fee simple in culture, politics and place. I explore the performative use of categorisation on the part of the Crown in their attempt at re-framing fee simple as ‘simple’. Apart from documenting this understudied postcolonial moment, I also encourage geographers to recognise the important work that property does in making space. To do so, I theorise property as an effect, performed through multiple technical and categorical enactments.

Key words property; indigenous treaties; British Columbia; law and geography; bracketing; categorisation

The spaces of property

When we assume that our clefts and bunches represent fixed separations and collections in rerum natura, we obstruct rather than aid our transactions with things. (Dewey 1922, 92)

As geographers, we need to take property, as a set of relations between people in regards to valued resources, seriously. It is an important means by which we inhabit, produce and are shaped by the spaces we occupy (Blomley 2011). In Western liberal societies, it comes laden with powerful spatialised ideologies and aesthetic dispositions, such as notions of ‘improve ment’ or ‘privacy’. It authorises or compels certain forms of spatial habit, from suburban lawn mowing to gentrification. It enables powerful ethico-spatial distinctions, constituting the homeless native person outside my home as a threat to, rather than a product of property (Blomley 2009). Property is more than one of the many prosthetics that we lean on in the making of space: by virtue of state-sanction and ideological clout, it comes with teeth. Property may enforce particular geographies, and encode them in the landscape as facts on the ground. To contest property, therefore, is to contest the spaces we inhabit and produce (Crabtree 2013).

In thinking about the work that property does, this paper makes three broad points. First, I hope to challenge the idea that property exists outside its performances and enactments. Most readers, I imagine, would assume that property is a ‘social construction’, or something similar, yet there still seems a surprising tendency to attribute to property a solidity and presence such that it begins to appear to exist in the world independent of human action. Rather than presuming an objective coherence to property, and then coming up with strong descriptions of it, I prefer to explore how our descriptions of property help to perform it into being as an ‘effect’ (Blomley 2013; Mitchell 1991). Property should not be treated as an actual structure, ‘but as the powerful, metaphysical effect of practices that make such structures appear to exist’ (Mitchell 1991, 94). But this is not to say that property is somehow illusory. Particular performances of property, if successful, are enacted within the world with powerful results. How, then, is property performed? There are many dimensions to this (Blomley 2013) but here - my second point - I wish to underscore the centrality of
legal practice in the performance of property. As Annalise Riles notes, legal practice is not a flourish or a detour; it is a very serious thing. The legal techniques at work in doing state work are real. They are consequential. (2011, 89)

As we shall see, particular legal forms – notably fee simple – are indeed consequential. But they are not given, but depend on complex and often surprisingly slippery enactments. Third, in thinking of these performances, I develop the concept of legal bracketing, understood as the attempt to stabilise law’s fluid meanings through the creation of sharp boundaries.

My more immediate goal is to explore the potential of such a performative treatment of law’s technical bracketing in making sense of the largely undocumented ‘status of lands’ question, central to a modern-day treaty process in British Columbia, begun in 1993, involving many First Nations and the provincial and federal state (as legal actors, these are referred to as the federal and provincial Crowns1), with negotiations occurring at multiple negotiation tables. The treaty process is a crucial moment in a long postcolonial struggle over socio-spatial justice. The purpose of modern-day treaties, as far as the state is concerned, is to reconcile Crown sovereignty and title with un-extinguished Aboriginal title (McKee 2000; Pennikett 2006). Property, it seems, is the central catalyst for the treaty process. But it is also an outcome that returns us to legal technicalities. A First Nation treaty signatory will receive a much-reduced central catalyst for the treaty process. But it is also an

2000–2013 I interviewed 18 key informants either directly involved in treaty negotiations or serving as advisors and analysts for individual First Nations, or the federal or provincial Crown. My focus has been squarely on these elite nomospheric technicians (Delaney 2010) on both sides, rather than individual members of First Nations communities. While this number may seem relatively modest, it should be noted that there are relatively few key actors on either side. By way of verification, I have presented sections of it to diverse audiences, both locally and further afield, and have reworked the ideas accordingly. Many of my respondents have read a draft of this paper, and provided commentary on it (some critical, it should be noted, but this is to be expected given the stakes concerned).

Bracketing

To understand the way in which the actors constitute and contest the property at issue in this exchange, I propose to consider a prevalent and inescapable tendency to attempt to stabilise and fix property's meanings according to certain brackets (treated at more length in Blomley forthcoming b).3 To establish a bracket is to construct ‘a boundary within which interactions – the significance and content of which are self-evident to the protagonists – take place more or less independently of their surrounding context’ (Callon 1988b, 249). Bracketing, in this broad sense, is a ubiquitous and seemingly inescapable dimension of experience and perception. It entails complex and subtle calculations that govern what is, and what is not, to be included within a particular semantic setting (Goffman 1974).

Bracketing, put thus, seems to have several inter-related dimensions. Most immediately, it entails the drawing of a boundary that marks an inside, that is detached or disentangled from that now identified as outside. A relative independence from the outside must be secured for the bracket to succeed. Property as a bundle of relations is inherently productive of, and produced by, dense networks of power, membership, identity, connection, information and so on (Singer 2000). Yet for property to work, cuts in these networks must be made. Sharp lines have to be drawn around the subject and object of property, in order to ensure predictability. Now stabilised as ‘secure’, or ‘clear’ ownership, the result is an internalisation of the risks and benefits of ownership, ensuring calculable interactions: ‘buyer and seller must be produced as fairly stable and autonomous agencies. The object to be traded must be constructed as reasonably stable and thinglike’ (Holm 2007, 324; see also Callon 1998a).

However, while a bracket ‘puts the outside world in brackets . . . it does not actually abolish all links with it’
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(Callon 1998b, 249). The performance of a play entails a careful framing, for example, but it would not succeed were it not for a whole set of prior expectations about what it is to watch a play. While a bracket in a sentence temporarily cuts the flow, it still relies on the text as a whole for its meaning. Similarly, the exchange of property may require a legal contract that carves out a sanitised space for the exchange of certain goods and services. Yet this frame presupposes and relies on a legal regime of courts, cultural expectations about property, and so on, outside the bracket.

It is tempting to characterise bracketing as a form of ‘simplification’ or ‘reduction’. But this would be misleading for several reasons. Most immediately, as noted, the relationship between the inside and outside of a bracket is a complex one. As individuated units, the subjects and objects of property are not free floating. Indeed, they are meaningless unless inserted into dense external networks of record keeping, registration and commerce, as well as circuits of ideology, practice, materials and so on. Second, simplification implies that bracketing is easy. But it is far from guaranteed. To draw and to maintain any boundary, whether metaphoric or real, requires considerable investments of energy and time (Blomley 2008 2011; Prudham 2008). Framing is never a given, but is always a conditional and often hard-won achievement. Third, it is tempting to assume that bracketing entails an attempt to carve out a virtual reality from the real world. But to frame is not to engage in a Polanyian disembedding, a separation of law or market from culture, but a strategic reformatting. Society is not the (real) context, from which the (virtual) frame has been extracted. Rather, the bracket seeks to arrange a set of relations, foregrounding some and bracketing others. It should be assessed not by its ‘truth’, but by its success in sustaining its framing. Dominant framings of property can work very well within particular settings, despite their exclusion of certain relationships. This is particularly so, when we note their performative role in making a world in which they can become successful (Blomley 2013 2014; Mitchell 1988 2002).

Bracketing is often relatively routine and bureaucratic, and thus can appear as a rather apolitical business. But as property is relational, to frame or re-entangle property is to cut, foreground or efface some of its networks. Frames may thus become political battle lines (Slater 2002). Foundational conflicts, such as the present case, concerning indigenous title, offer an invaluable window into this ontological conflict, and the spaces that are performed and fought over there (cf. Sawyer 2004).

Bracketing is a generalised human practice, but we can anticipate that it will work in distinctive ways in law. One particularly important (and rarely reflected on) technology for legal bracketing is categorisation. The category provides legal technicians with a tool for the apprehension of reality, the identification of problems and their resolution, and an instrument through which to think, such that ‘the primacy of categorization in legal reasoning would be hard to overestimate’ (Hamilton 2002, 116). Just as the territory does more than delineate an already existent set of distinctions, but helps make those distinctions stable and real, so categories help constitute and stabilise the world (Abbott 1995; Lakoff 1987). Sameness, put another way ‘is not a quantity which can be recognized in things themselves – it is conferred upon elements within a coherent scheme’ (Douglas 1986, 59). Categories in general (and legal categories in particular, given their performative force) are thus far from disinterested. The prevalence of certain categorical containers (‘contract’, ‘public/private’, ‘no trespassers’) and the unavailability of others (‘commons’, etc.) does powerful political work. Put bluntly, not everyone has the power to categorise and have such categories taken up in the world. The effect is to create and sustain gradients of power (Bowker and Star 1999).

Common law property is highly categorical. It can be held as various types of estate, broadly divided into freehold and leasehold. Fee simple is a form of fee simple (distinquished from the fee tail, abolished by statute in Canada, and the life estate). The category of fee simple has a reassuring solidity to it within the common law world, connoting certainty, security and fixity. It is the highest and purest form of property, it seems, central to the reassuring story that we tell ourselves, whereby certainty of title begets security, which ushers in improvement and investment. Yet this solidity should be thought of, I suggest, not as a function of the stable essence of ‘fee simple’ itself, but as a contingent effect, produced through a pre-emptive disambiguation. As we shall see, it risks sticky entanglements with culture, history and practice. Indeed, rather than a coherent system, many scholars characterise English land law as the haphazard product of hundreds of individual decisions resolving particular conflicts over rights and obligations in a particular plot of land (Henderson et al. 2000). Fee simple, for some, is ambiguous and uncertain (Gray 1991; Hohfeld 1917), or historically fluid (Vandevelde 1980). That fee simple appears simple, I suggest, must be thought of as a conditional achievement, dependent on a hard-won and conditional bracketing of many of the messy relations that entangle it.

Bracketing property in British Columbia

The nature and import of this hopefully becomes clearer through an example. I may imagine myself as a property ‘owner’ but, technically speaking, I am a tenant seized of an estate in fee simple. Resident in
a common law jurisdiction, as a Canadian I hold land ‘of’ the Crown, which retains the underlying title, allocating me an ‘estate’ (that is, an interest over time). ‘Fee’ describes the status of the estate as freehold, and capable of being inherited. The word ‘simple’ denotes that there is no restriction as to whom the estate may be passed on to. The doctrines of tenure and estate that govern ‘my’ property are of the greatest antiquity, deriving from early feudal English law, and variously taken up in the common law world. As such, fee simple is a form of mobile indigenous law: through British colonialism, it has become a global localism. Its apparent universality is perhaps ‘more symptomatic of the widespread imposition of western forms of land title that accompanied colonization, than any inherent “quality” to such landholding arrangements’ (Godden and Tehen 2010, 8).

The performance of fee simple is hard to see for most of us, given its routinised form. The legal fiction of Crown title might offend a republican, but seems little more than a dusty vestige. Encoded in surveys, confirmed in land registries, transferred through land markets and materialised in everyday landscapes of urban subdivisions, fee simple takes on a quiet, habitual quality. The integrity of the ‘cadastral fabric’, as one British Columbia Land Surveyor puts it, ensures a geography of property that is ‘simple, secure, transparent, [and] guaranteed’, ensuring that ‘BC property owners sleep soundly at night’ (Beddoes 2008, 22, 26).

But fee simple and its sleep-inducing certainties are only possible in a settler society to the extent that a set of prior entitlements and geographies were, and continue to be, erased and ignored. The establishment of new forms of property was, and is, prosecuted through ‘lawfare: the effort to conquer and control indigenous peoples by the coercive use of legal means’ (Comaroff 2001, 306; original emphasis). In remarkably short order, the land that became British Columbia was emptied, to be refilled with white legal fictions and magic (Allen 2008). Most importantly, the land was taken up by the Crown, which can then make it available to liberal subjects such as myself, mostly through forms such as fee simple. To do so entails the remaking of human geographies, through the interlocking spatial forms of the land survey, and the native reserve, all of them sustained by the mobilisation of state violence, actual or implied (Blomley 2003; Harris 2002). For First Nations, the spatial grid that materialised property’s forms and violations becomes the ‘most pervasive disciplinary technology of all’ (Harris 2004, 178). Yet this is not just a story of ‘property’, in general, but of English common law legal forms, as Harris (2004) notes, imbued with particular cultural inflections and expectations. While, as he argues, some of this relates to a Blackstonian celebration of the conjunction of liberty and individual property, I would also wish to underscore the spectre of the Crown, which underpins a colonial fee simple.

Dispossession, like settlement, is never complete, but remains dependent on continued enactments. Similarly, for over a century, the provincial government in British Columbia bracketed property through the claim that at contact the land was effectively un-owned and, as such, treaties with aboriginal peoples were not required. Since settlement, indigenous communities have resisted such claims, through challenges to reserve allocations, a refusal to allow access to land surveyors, and the assertion of indigenous rights to land and self-government (Tennant 1990). Such claims were long rebutted by the Province: Premier William Smithe, meeting with chiefs of the Nisga’a and the Tsimshian in 1887, insisted that ‘the land all belongs to the Queen’ (quoted in McKee 2000, 24).

The full story of the ‘land question’, as it became known, rather modestly, is one that I cannot do justice to here. Suffice it to say that the 1970s and 1980s saw an intensification of resistance, with the assertion of indigenous legal geographies on the ground (Blomley 1994) and in the courtroom (Sparke 1998). Initiated by Calder (1973), the judiciary began slowly to recognise some form of un-ceded indigenous interest to the land that is now British Columbia, known as ‘Aboriginal title’. This is not, it should be made clear, a recognition of autonomous indigenous property, akin to that of the Crown. While it is predicated on the recognition of pre-existent indigenous communities, with some form of land title, an assumption of Crown sovereignty means that this has been modified into a form of domestic title. As such, Aboriginal title is viewed as coexisting with the radical or underlying title of the Crown. However, because Aboriginal title carries with it a right of use and possession, it constitutes a legal ‘burden’ on the title of the Crown (Slattery 2006). As such, the certainty of Crown title is muddied, as long as the burden of Aboriginal title remains.

The emergence of Aboriginal title, however hedged in, clearly complicates a settler society’s bracketing of property (Walters 2009), raising the possibility of novel entanglements (or rather, reasserting messy, hot entanglements that were previously severed). Assessing the nature and extent of these entanglements remains unclear, particularly as case law continues to evolve (the geographic scope of Aboriginal title, for example, remains unresolved in Canadian law). Aboriginal title itself appears hard to situate within common law categories (Slattery 2006). Most immediately, the allocation of interests to public land for private resource companies becomes a stickier question, as these ‘public’ lands are now burdened with other interests. Formally, this is as far as the stickiness proceeds. Private property is frequently (but not always) identified as immune from
such entanglements. However, lingering uncertainties remain, creating a colonial ‘edge politics’, cross cut by ‘ambivalence, uncertainty, change, overlap, and interaction’ (Howitt 2001, 237).

This edge politics continues to unfold at multiple sites across the province, including court rooms and logging roads (Blomley 1996). The treaty process is one crucial site. For the Crown, treaties offer the chance to re-bracket settler property in the face of these deepening and ambiguous postcolonial entanglements and produce what it terms ‘certainty’ (Blackburn 2005). Certainty, simply put, is a bracketing that turns Aboriginal title from overflow and entanglement into something appropriately contained, via the treaty process. An ambiguous (and ‘uncertain’) form of property is to be remade, and brought into the Canadian common law. As the province’s mandate paper puts it:

Treaty negotiations will exchange … relatively undefined aboriginal rights with clearly-defined rights to land and resources in a manner that fits with contemporary realities of economics, law and property rights in British Columbia. (British Columbia 1996, no page, my emphasis)

For the Crown, that contemporary reality is a fee simple. The Crown insists that a First Nation will hold its land in fee simple as a collective, and is then free to allocate interests in land to Nation members within. This is, as far as the Crown is concerned, fee simple on the outside, and collectivity and culture on the inside. Apart from being the most comprehensive, fee simple is also said to be knowable and legible. It is an apopolitical and technical tool, the clarity of which fosters economic exchange. Rather than entanglement, fee simple promises clarity and certainty. For one provincial representative, fee simple has an obviousness to it: ‘it’s the easiest, the system understands it, it’s commercially understood, why not? Why would you not want it?’

Indigenous entanglements

Some First Nations appear willing to accept fee simple, although, it should be noted, there are profound nuances here, which I treat elsewhere (Blomley forthcoming a). For them and for the many other First Nations negotiators who resist it, fee simple is not, as the Crown suggests, ‘easy’. Rather, it comes entangled with culture, colonialism, history, politics and geography. At worst, it threatens to annihilate the indigenous relation to land and place.

This has proven a major obstacle for several First Nations. Along with several other concerns, the effect has been to derail the treaty process. With only a few treaties signed and approved, most treaty tables have been locked in the penultimate stage of negotiations for years, with little sign of progress. There are a variety of other obstacles, but the ‘status of lands’ question has proven a significant roadblock. For Sophie Pierre, Chief Commissioner of the BC Treaty Commission:

the way [a First Nation] want to hold their lands for their people into the future is very, very important to them. But we don’t see how we’re going to be able to get over this incredible wall that [the provincial and federal Crowns] have built. 7

One brick in the fee simple wall is a political one. Does a treaty deactivate Aboriginal title, or does it continue, albeit in a new form? An earlier blunt treaty language of ‘extinguishment’ (in which the Crown required signatories to ‘cede, release and surrender’ their aboriginal rights and title) has been replaced by a lexicon of ‘modification’ and ‘release’ (whereby signatories agree to the continuation of Aboriginal title ‘as modified’ into fee simple by the treaty, and release the Crown from future claims, shutting off (it is hoped) future entanglements. Both Aboriginal title and Crown title, therefore, are re-bracketed. Yet for many First Nations, the logic of ‘certainty’ is seen as working a powerful containment of indigenous property:

From Canada’s perspective, our Aboriginal Title has to be changed, altered, and defined in a treaty so that it fits with Canadian laws and ideas about Land … [The effect is] to capture and tame Aboriginal title and rights, and then place them in a cage constructed of words and legal provisions. (Union of British Columbia Indian Chiefs no date, no page, my emphasis)

As noted, for the Crown, fee simple is an expression of ‘contemporary realities’. Yet it is far from ‘contemporary’, being a ‘genuine relic of the feudal system’ (Clarke and Kohler 2005, 309), governed by the doctrines of tenure and estates. As such, it entrains quite particular vestiges of culture, economics, history and politics. The spaces of indigenous property are felt by many First Nations to be ill-suited to, or positively threatened by, a fee simple property form. In effect, fee simple remakes indigenous legal geographies:

So, fee simple is very much an English land law system. It would be … a complete gutting of any kind of Aboriginal interest based on your customs, practice, traditions, long connection with the land. You would sever that, and replace it with this English land law model of a fee simple…

And here another entanglement of fee simple complicates its self-styled simplicity. As noted, Canadian landholding is tenurial, all lands in private hands being held ‘of’ the Crown. Contemporary landholding, although notionally free of the trappings of fealty and obligation, retains the legal fiction of Crown title. As such, fear many First Nations, fee simple treaty settlement lands imply a beneficent grant from the Crown, rather than an aboriginal relationship to land, thus extinguishing aboriginal identity and space.
For the Crown, fee simple is a technical device that allows for a First Nation to interact with a larger world. However, fee simple could be said to do more than this. It has become, as Latour would put it (1987), an immutable mobile that allows for comparison and calculation. As a representational device, it can be detached from a particular site, and put into circulation in a wider capitalist network. These commercial entanglements, of course, are an essential dimension to the dominant framing of fee simple. However, for some First Nations the effect is to individualise the irreducibly collective, and to turn place into space (Woolford 2011):

the collective, inalienable property relation to these places is REPLACED by the individual. In this simple categorization, we complete the social transformation of the collective to the individual – we complete the assimilation project itself, obliterating older collective forms of relating to each other (vis-à-vis land in this case) and sprouting individualism and the central mode of social relations. This is the western colonial project in its full form.9

Re-bracketing fee simple

So fee ‘simple’ is anything but, insist many First Nations negotiators. As such, they engage in a form of categorical politics, resisting and denaturalising fee simple, and opening up and attempting to stabilise alternative frames. This is a sociotechnical politics, fought within and around property’s categories and ordering frames. Yet it also has a powerful destabilising potential, opening up and remaking the space of reconciliation, and resisting the ‘epistemic injustices’ (Fricker 2007) of dominant categorical forms. My focus here is on the ways in which, in response to these re-entanglements, the Crown seeks to re-bracket fee simple as ‘simple’. In sum, the first move is to establish a category into which indigenous property must be located. In effect, as we shall see, the Crown builds a categorical bracket with sharp, restrictive boundaries. As a result, alternatives become hard or simply unavailable for thought. But the Crown also seeks to bracket that which is inside the fee simple category, the effect of which is a form of black-boxing. But fee simple in treaty is of a distinct form, as we shall see. As such, the Crown has to bend the bracket, even to the point of breaking. Fee simple has to be stabilised and made true. This requires hooking up treaty fee simple to a larger network, in particular that of land registration.

Building fee simple

The legal impulse, as noted, is highly taxonomic. Settler societies have long felt compelled to fit indigenous property interests into more familiar categorical forms, either to reject them as radically unlike, or to analyse them as unsettlingly similar (Patton 2000). But this is not an open-ended process for the Crown, particularly in treaty-making. The performance of ‘certainty’, it seems, requires the stabilisation of indigenous interests into a fixed, familiar form, with a discernable inside and outside.

The treaty process attempts to bracket the very origin of Aboriginal title, with the Crown beginning from the assumption that a First Nation has some legitimate interest in its traditional territory, and that title need not be proven. However, some form of legible property relationship to its treaty lands must be crafted. This requires that the First Nation enter the space of the common law. To do so is to abandon the world of ambiguity, and enter the domain of legibility and clarity, predicated (of course) on ‘certainty’ (Blackburn 2005; Woolford 2005).

Part of negotiations is to create certainty for both First Nations and for governments, and part of that is through the negotiations leading to fee simple title . . . First Nations can . . . leave their undefined Aboriginal rights and title in the vagaries of the Courts . . . and all of the uncertainty that that occurs. Or they can, through the Treaty Process, obtain certainty as to where their lands are, what they can do with these lands, how they can make laws on them.10

Ambiguous aboriginal interests are to be translated into a certain, knowable frame.

A sharp line is thus drawn around the common law. Placed outside the common law, alternative forms of property are hard to discern: ‘other forms of land ownership are just a lot of uncertainty’, unlike the ‘reality’ of fee simple.11 Even to discuss them at the treaty table is said to be unhelpful. For the former federal Minister of Aboriginal Affairs ‘speculative, theoretical debates over the exact definition and extent of existing Aboriginal rights at the negotiating table would not be a fruitful exercise’ (Strahl 2009, my emphasis). The effect is to rebuff calls for a categorically prototypical property regime that is ‘neither English nor Aboriginal in origin, but rather a new form of intersocietal law’ (Henderson et al. 2000, 8; Walters 2009), entailing ‘a uniquely Canadian amalgam’ (Borrows 2002, 5) of indigenous and common law.

To the extent that Treaty Settlement Lands are held as fee simple estates, then, they can be inserted ‘into’ the common law, as opposed to being housed in some problematic ‘external’ form of title. A sui generis, community specific form of indigenous title under treaty would create what one Crown representative termed a metaphorical and material ‘carving out’12:

if the point of the process is to put [Aboriginal people] back to where they were before the Crown declaration of sovereignty and all of these other people came along as settler colonists . . . best of luck. If we are trying to reconcile within the sovereignty of the Crown, then we’re kind of stuck with our legal framework, because these people are going to
be expected to participate in some way in the greater society that is going on around these treaty settlement lands.13

Opening (and then closing) fee simple
That which is outside, then, is to be brought inside. The only categories available into which to place indigenous property holdings are those to be found within Canadian common law. Why can we not step outside the common law? To do so, it is argued, would be to remake a fundamental categorical framing: First Nations and their property interests are to be understood as subject to Canadian sovereignty and the common law, not placed outside it. This, of course, reflects prevailing case law produced by a domestic court that can say nothing else. The powerfully performative legal bracket that constitutes the reality it describes has, not surprisingly, been subject to considerable criticism (Borrows 2002; Henderson et al. 2000). Yet it remains a non-negotiable ground for the treaty process.

But even if First Nations are obliged to find a category within the common law, surely there are multiple options available other than fee simple? After all, the common law is capable of embracing a rich variety of complex forms of landholding. Highly adaptive, it has proven itself remarkably flexible and capable of handling a considerable diversity of forms of tenure, both collective and individual. Even ‘private’ property is a good deal more diverse and variegated than it appears.

However, the Crown only makes one categorical box available:

The problem is, our structure, the common law structure, has limited forms of title available… We know what leasehold is, we know what fee simple is. We don’t really have a form of title within our system that’s other than that.14

A categorical cleansing seems to have been effected. At work here, perhaps, is a version of a particularly powerful jurispathic categorical tool, the 

umerus clausus 

principle (literally, ‘the number is closed’), which asserts that ‘the common law will enforce as property only those interests that conform to a limited number of standard forms’ (Merrill and Smith 2000, 3). While Merrill and Smith (2000) see economic merit in this principle, others express reservation. For Bright ‘[[it is about time that the door was opened and new rights admitted on a more principled basis’. However, we have ‘bolt[ed] the door’ (1998, 546). The lush ecosystem that is common law property has been limned and constrained.

Making a strong fee simple
How, then, to build the fee simple bracket? Put another way, how clearly defined is it to be? Categories can be framed more or less sharply (Lakoff 1987). A defini-

tional model of categorisation proceeds by listing the necessary and sufficient conditions for a category. As with a material container, an object can only be inside or outside. A prototypical theory of categorisation, however, proceeds on a different basis, based on some ideal form (such as the robin, for the category ‘bird’), and degrees of similarity to the ideal form.

While it is tempting to assume that law exclusively adopts a definitional model, it seems perfectly capable of embracing prototypical categories (Winter 1989). However, the Crown constructs fee simple as a sharply bounded object in treaty negotiations. As noted, for the Crown, this is simply a translation, not a remaking. Yet some First Nations negotiators see this as effecting a zero-sum logic of the excluded middle (whereby there is no possibility other than falling entirely in or out of a given category). This is despite creative attempts on the part of First Nations negotiators to find labels that fall between fee simple and some form of indigenous title (Blomley forthcoming a). For one First Nations negotiator, ‘fee simple’ inscribes an overly bright categorical line: ‘Where is the space to be able to work with the indigenous peoples?’ he asks15

In so doing, he invokes a form of prototypical categorisation based less on absolute boundaries and unitary identity than on degrees of membership:

So what’s the starting point for this treaty process? Is it the starting point to say, okay, from a Canadian government’s perspective, we recognize that First Nations people had an interest in territory, and had an interest in land. And, now we want to sit down with you and be able to, in a treaty, give that life under our current legal system … Rather than saying, … you have to absolutely adopt all of the trappings of the fee simple?’16

Black-boxing fee simple
In the treaty process, fee simple is made available through the elimination of alternative categorical possibilities. But this technical category is also stabilised through an appeal to the technical itself. In so doing, it is black-boxed, such that fee simple is treated as a device in which ‘only the input and output count’ (Latour 1987, 3). Black-boxing entails a quite particular framing: rather than excluding the world outside, and foregrounding that which is within the frame, it brackets the content of the frame, and directs our attention to its effects. For the then Minister of Indian Affairs, fee simple treaty settlement lands ‘facilitates harmonization with established property management systems, enhances their economic potential, and facilitates economic development opportunities’ (Strahl 2009, 12; my emphasis).

First Nations shouldn’t get hung up on what’s inside the fee simple box, suggests the Crown. Whatever fee simple is need not worry us; rather we should note what
it does. Most immediately, fee simple is seen as desirable for a First Nation because it is said to create a visible and calculable form:

it’s quite clear that if you’re going to use your lands as a means to develop your local economy, the lands are going to have to be understood and recognized by banking institutions. It’s really as simple as that.17

Fee simple, then, is mobile, transferable and universal.

Aboriginal forms of landholding are also seen as localised, and incapable of being scaled up without fee simple. As such, fee simple generates a reproducible form that fosters harmonised approaches. Without it, spatial chaos reigns. If First Nations came up with their own form of tenure, worried one senior provincial negotiator, ‘What in the world happens to British Columbia? Who manages what? Who’s responsible? . . . How would you ever function as a province’?19 This relies on the characterisation of treaty settlement lands as reproducible and recordable units, rather than discrete places.

The ability to black box, it should be noted, is not granted to everyone, but must be understood as an effect of power (Callon and Latour 1981). Blackboxing, if successful, makes fee simple into an unmarked category: it becomes an essentially useful machine that generates predictable outputs, such as economic growth, harmonised governance and constitutional certainty. Fee simple is not full of history, place, culture and politics, but is a technical device that fosters certain calculation.

Bending fee simple
But things (again) are not so easy. For when we pry open the black box, we don’t quite find a conventional ‘fee simple’. Responding to First Nations resistance, the Crown offers what has become known as ‘fee simple plus’. The ‘plus’ component refers to the fact that, unlike a ‘regular’ fee simple, many of the Crown’s powers are excised. Fee simple plus lands are not subject to state expropriation except under particular terms, and do not fall within the Crown’s reversionary interest, for example.

Crown lawyers insist that the ‘plus’ merely adds to a stable fee simple: nothing has really changed. Fee simple plus is still fee simple. But others question whether the ‘plus’ is simply additive: does it not produce a new creature? For senior Canadian property scholar Kent McNeil,

fee simple plus is confusing and doesn’t really describe what is being talked about. . . . I understand what the fee simple part is, I don’t understand the plus part.20

Something strange happens here: ‘fee simple plus’ seems to escape its own category. For some, the slippage opens political possibilities. As some First Nations observers note, if we’ve moved to something that is ‘a slightly different animal’,20 then why insist on the fee simple designation at all? Why can we not go further? But for the Crown, unwittingly channelling pragmatic debates about what fee simple plus actually is are irrelevant. It’s still fee simple. Or, more pragmatically, we shouldn’t spend time worrying about the essence of fee simple, but rather focus on its performative effects. As a framing, it works to the extent that it can arrange relations and networks to generate the effect of certainty and clarity (Mitchell 2007). Fee simple, in other words, should not be judged by its verity, but by its success. As such, for a First Nation negotiator, while fee simple plus ‘is not your typical fee simple grant in lands’, it nevertheless ‘looks like a duck, walks like a duck and talks like a duck’.21

Making fee simple true
But how is it possible for a duck that is maybe a chicken to walk like a duck? As with any legal bracket, fee simple does not walk alone. While it appears to bracket the collective, it depends on it. It is successful, whatever its ‘essence’, to the extent that it can plug itself into networks outside the frame. The Land Titles Office is one such ally.

As Bowker and Star (1999) note, large-scale bureaucracies are very good at making objects, ideas and people hold together, by stabilising and authorising particular categorical arrangements. Similarly, land registration does more than record fee simple; it confirms it. Under the Torrens system operative in British Columbia, current property interests as they pertain to a parcel of land are recorded in the Land Titles Register. Once title has been registered, it becomes indefeasible, and a curtain is drawn down on the past. Indigenous interests in land, other than those formalised in reserves or treaties, have a hard time inserting themselves into the registration system. Aboriginal title has been determined to have ‘no place in the Torrens system’.22 What, then, of the property holding of a First Nation under the treaty process? Interestingly, the Land Titles Act (Schedule 1, 2.1) specifies that the treaty lands registered under the Act will be granted an indefeasible fee simple title. Thus, registration would seem to produce fee simple, whatever it is elsewhere.23

Closing comments
The treaty process was never a conversation between equals, clearly, but was always a grudging and asymmetric exercise conducted on the terms set by a powerful settler society. The state is motivated not by a desire to right historic wrongs, or engage in inter-legal cultural conversations, but by a pragmatic wish to
resolve an unresolved title question in order to advance investment certainty in an economy based on resource extraction. If we want to explain the treaty process, it might be argued, or other property struggles, we need only point to the workings of ‘power’. As a Senior Provincial Negotiator bluntly noted: ‘we’re into a power game here. We are the Government that has the laws, and that makes the decisions, and how much of that are we willing to give up, right?’

Indeed, First Nation negotiators continue to worry that the power game remakes property in non-integrative and worrisome ways. Perhaps we must follow Coulthard’s claim that colonial powers will only acknowledge those Aboriginal rights that ‘do not throw into question the background legal, political and economic framework of the colonial relationship itself’ (2007, 451). But to characterise the Crown’s imposition of fee simple as simply a manifestation of power is to truncate our analysis. I prefer to take a slightly different angle. I aim to think more carefully about the ways in which abstractions such as ‘power’, ‘space’ and ‘property’ are put together and made into social facts (Callon and Latour 1981). Put another way, the treaty process is not about power in general, but power of a particular form, working through legal categorical frames to sever, connect and rearrange property relations. In so doing, particular spaces are challenged or sustained.

To get at this requires an attention to legal techniques. While it may be agreeable to inveigh against abstractions such as ‘colonialism’, the danger is that we then miss the detailed and often messy practices and forms of knowledge at work here. The treaty process, it must be understood, is a legal one, conducted largely by lawyers (on both sides), with negotiations centring on legal concepts, conducted through a legal language, seeking a legal document. Property’s geographies are performed here, it seems, in essentially technical terms. The treaty process, broadly put, entails a battle over the technical meaning of property and its metaphorical and material spaces, at stake being

the inextricably theoretical and practical struggle for the power to conserve or transform the social world by conserving or transforming the categories through which it is perceived. (Bourdieu 1985, 729)

In the treaty process, legal categorisation works through a logic of bracketing, I wish to suggest, predicated on the construction and contestation of the frame surrounding property in general, and fee simple in particular. But as with any frame, such moves are open to entanglements, whether intended or not. Fee simple, in particular, is a messy and slippery category, particularly when turned into ‘fee simple plus’. Producing fee simple as simple requires sustained technical and categorical policing. The frame cannot be taken as given. I have tried, in this paper, to document some of this technical labour.

Yet, to date, the Crown’s moves appear to have proven successful, in that fee simple remains the default, against which alternatives struggle. Bowker and Star, in their discussion of classification, offer a useful methodological mantra here: ‘In general, the trick is to question every apparently neutral easiness in the world around us, and look for the work involved in making it easy’ (1999, 39). Property law seems full of such easiness. Bourdieu (1987, 838) characterises law’s performative power, whereby utterances ‘succeed because they have the power to make themselves universally recognised’, as a form of social ‘magic’ (Allen 2008). Borrows (1999) notes the law’s alchemical powers, whereby juridical assertions conjure up settler sovereignty. But legal magic, like law’s easiness, requires careful explanation. It doesn’t happen on its own. The important task, then, becomes one of understanding how fee simple’s easiness is made possible: how it is able to walk like a duck, in other words, against the odds. This is not lost on First Nations’ negotiators, who know only too well the performative work that legal technicalities can achieve. For them, of course, fee simple is far from an ‘easy’ category. In arguing within and around the technicality, reframing it and re-entangling it with culture, history and politics, they try to make fee simple less simple. In so doing they ask: Can fee simple, itself an instrument of dispossession, accommodate alternative indigenous legal geographies? But to do so is to work against a dominant framing, for fee simple is largely unavailable for criticism. Unlike indigenous title, which must be defended through dense and often politicised networks of argumentation, case law and overt and embodied practice, fee simple too often ‘goes without saying because it comes without saying’ (Bourdieu 1977, 169).

But it does not come without brackets. Tracing the framing of fee simple thus begins to allow us to open it up to scrutiny. In revealing the work involved in simplifying fee simple, perhaps, we begin to push back against its institutional easiness. In much the way that the radical dramatist, who breaks the conventional frames of drama, opens the play up to new and creative possibilities (Kershaw 1992), so perhaps by identifying property’s brackets, we can begin to reveal and thus politicise its performance, and the role of the actors within it. In so doing, we can maybe begin to make space for alternative frames.

Such questions are of significance not only in British Columbia, but also in settler societies worldwide. Indeed, they open up questions relating to the work of property in other contexts as well. Property matters, I argue, enforcing particular geographies in the world.

To contest space is thus to confront property. But
property is not an essence, but an effect. It is sustained and stabilised through complex enactments that include technical and categorical forms. Property law produces certain socio-spatial relations, while also seeking to arrange and sever them through forms of bracketing. Opening these sociotechnical processes up to scrutiny is thus a task of the first importance.

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Notes

1 On the curious legal actor that is the Crown in Canadian law see Valverde (2012). While there are historic differences between the provincial and federal positions, there is now considerable commonality between them on the fee simple question.

2 The treaty group comprises six Coast Salish First Nations on the eastern coast of Vancouver Island (http://www.hululuminum.bc.ca). They have been particularly opposed to the fee simple status of treaty settlement lands, and have played a leadership role in working with many other First Nations treaty groups. I am very grateful for their generosity in sharing this crucial material. As well as providing important data, this archive has proven invaluable in providing the context for this under-documented contest.

3 I borrow from Michel Callon’s (1998a 1998b) account (which draws on Irving Goffman), and its uptake within performative analyses of economics (e.g. Mitchell 2007). While Callon refers to ‘framing’, I have chosen to use ‘bracketing’. This is to avoid confusion with its use in media studies, where it is used to signal the conscious adoption of a particular narrative or theme to make sense of an event or phenomenon. Bracketing also echoes the textuality and particularities of lawyerly practice.


5 Business Council of BC – submission to BC Select Standing Committee on Aboriginal Affairs, 4 December 1996 http://www.leg.bc.ca/CMT/36thParl/CMT01/1997/hansard/ab1204.htm

6 Provincial representative, interview with author, 2 November 2010, my emphasis.

7 Interview with author, 30 November 2010. The BC Treaty Commission is the ‘keeper of the process’, working at arms-length to facilitate negotiations.


10 Tom Molloy, Chief Federal Negotiator (speaking on his own account), interview with author, 22 January 2010, my emphasis.

11 Ibid.

12 Provincial representative, interview with author, 2 November 2010. One counter to this is to argue that the success or failure of such a model is also a function of the larger society, rather than just the other way around. The success of fee simple lies in the support that a social network provides for it (Wallace 2010, 44).

13 Provincial representative, interview with author, 2 November 2010, my emphasis.

14 Ibid.

15 Robert Morales, Chief Negotiator, Hul’qumi’num Treaty Group, interview with author, 9 August 2010, my emphasis.

16 Ibid.

17 Former Chief Provincial Negotiator, interview with author and Brian Egan, 16 July 2010, my emphasis.

18 Ibid.

19 Kent McNeil, interview with author 8 November 2010. McNeil is a distinguished law professor at Osgoode Hall Law School, York University, with a particular expertise in the rights of indigenous peoples.


21 Mark Stevenson, Chief Treaty Negotiator, K’omoks First Nation.

22 Skeetchestn et al v Registrar of Land Titles Act 2000 BCSC 0118 p. 11 (online record).

23 However Torrens’ land registration may prove hostile to an Aboriginal title that is ‘continued, as modified’ in a treaty, given its original assumption that registration involves a surrender of a title to the state and then a re-grant of the interest by the state (Law on the Edge Conference 3 July 2013 ‘Is there legal space for Aboriginal title in land titles registries?’ Jonette Watson Hamilton et al. and pers. comm.).

24 Former Chief Provincial Negotiator, interview with author and Brian Egan, 16 July 2010.
The ties that blind

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