Making Space for Property

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A modern-day treaty process in British Columbia, Canada, involving First Nations and the federal and provincial governments, entails a struggle to carve out both metaphoric and material space for indigenous land and title. Despite considerable opposition, the state has insisted that First Nations will hold their treaty lands as a form of “fee simple,” this being the way most private property owners hold property, granting broad rights to access, use, and alienation. This is said to generate what the state terms certainty, a concept predicated on the idea of property as a priori, singular, and definite. I explore the resultant contest through a performative lens that treats property not as essence, but as effect. Tracing the complicated ways in which fee simple is performed in the treaty process reveals that fee simple is anything but. Multiple, competing, and overlapping fee simples are in circulation. The identification of this multiplicity offers valuable lessons for our understanding of the contemporary space of postcolonial reconciliation. Key Words: common law, critical legal geography, performativity, property, reconciliation.

I know from painful experience that when you upset white people’s categories you’d better watch out.

—Mandaway Yunupingu, Yolngu member (quoted in Black 2011, 75)

On 15 October 2007, Kim Baird, Chief of Tsawwassen First Nation, rose to address the British Columbia Provincial Legislature. Her speech celebrated Tsawwassen’s “long and proud history,” centered on the use and occupation of a large territory, rich in resources. Colonialism shat-
Tsawwassen, British Columbia, and Canada, designed to reconcile Tsawwassen Aboriginal title with state title and sovereignty.

Although her speech was called “Making History,” the treaty can also be said to be an attempt at making geography, in both a material and metaphoric sense. Property in land is a means by which we make space and, in so doing, make power. When we deploy property, we draw on, rearrange, or sever relationships—to the collective, to individuals, to things, to ancestors, to the divine, to the past, and to the future (Blomley 2011). Tsawwassen were denied the power to make space through property, as others “mapped” over their territories. They now sought to remake property and its relations and thus reorder space on their own terms. As such, the treaty sought to redefine the relationship between Tsawwassen and its traditional territory. Although only a fraction of this territory was recovered, it was now to be held by Tsawwassen, severing the former arrangement whereby the federal state held reserve land in trust for the First Nation.

Property forms matter a great deal to how we can make space. A property holding serves as a crucial mediating device between a legal subject and the space within which it exercises its property interest. What, then, is the precise nature of the landholding that Tsawwassen has in its land? How does it own? As we shall see, this spatio-technical question is also a fully political one. Western settler law, reliant on notions of clarity, legibility, and predictability, polices and purifies property’s forms and meanings. Settler property is not open-ended but is only available in a finite set of legal forms and practices. Tsawwassen was required to hold the land through the very “tools of land title” that had originally served as instruments of dispossession. Although the treaty provided, as Chief Baird (2007) put it, the metaphorical opportunity “to take back our rightful place, equal to others,” reconciliation required the insertion of Tsawwassen identity, law, and title into the conceptual space of a settler legal system. It is this charged combination of the material and metaphoric geographies of property that I term the space of reconciliation.

The Space of Reconciliation in British Columbia

As Chief Baird noted, colonial resettlement in British Columbia entailed the massive remaking of legal space, with the destruction and denial of other ways of relating to land (Harris 2002, 2004). White law was (and is) an instrument of dispossession, reworking Aboriginal life and identity, and ritualizing and sustaining the power of the colonial state. After a brief attempt at extinguishing indigenous title through treaties, provincial policy quickly hardened into a refusal to acknowledge its very existence. Treaties were thus not required. Tiny, scattered reserves were allocated, and the remaining 99.6 percent of the land, now reimagined as unencumbered and free, was now to be held by the province and thus made available to colonial settlement. Since settlement, indigenous communities have staunchly resisted this remaking of space and property, contesting both the form and validity of the state’s system of “Indian” governance and its unilateral assumption of title and sovereignty (Tennant 1999). Over a century and half later, the “land question” continues to be unfinished business. Its just resolution is of profound ethical importance, implicating settler and indigenous communities alike.

This story, with local inflections, has been repeated in many common-law settler societies worldwide. The past few decades have seen an important legal shift, however, overturning a history of indifference and neglect, with courts beginning to carve out a form of common-law Aboriginal title (McHugh 2004). Increasingly, settler states have thus been obliged to deal with Aboriginal title as a matter of rights and law. After more than a hundred years of denial, British Columbia has been obliged by the courts to recognize the existence of unextinguished Aboriginal title to the lands it claims as its own. Aboriginal title is understood in Canadian law as a body of common law generated by the Crown in its dealings with Indigenous nations. Essentially, it recognizes an exclusive interest (the exact scope of which is uncertain) on the part of an indigenous group to the lands it traditionally occupied and controlled, yet also asserts the coexistence of this interest with the ultimate or underlying title of the Crown. As such, Aboriginal title is viewed as coexisting with the radical or underlying title of the Crown (indeed, it is said by the courts to have come into existence at the moment Crown sovereignty was asserted). Because Aboriginal title carries with it a right of use and possession, however, it constitutes a legal impediment, or burden, on the title of the Crown (Slattery 2006). The unburdening of the Crown is to be achieved through the “reconciliation of the pre-existence of Aboriginal sovereignty with the sovereignty of the Crown.” This is the purpose of the treaty process, as far as the Crown is concerned (Penikett 2006).

For McHugh (2004), the legal question in settler societies such as British Columbia has thus moved
downstream from the bare recognition of Aboriginal rights and title, to the knotty question of how these rights are to be articulated by, and managed within, a common-law legal system. The process of identifying specific legal titles and assets raises difficult technical questions concerning who will hold these rights and the basis on which they will do so. The ambiguous promise of reconciliation, in this sense, is that settler law, an instrument of dispossession, can be used to sustain indigenous human geographies. But this has often proven challenging, given a profound asymmetry between the two. Reconciliation is on the dominant society’s terms, many note, with the fear that it entails reconciling indigenous peoples to their own dispossession (Coulthard 2007). Aboriginal people are thus forced to make “hard and controversial strategic choices about inhabiting the colonialist constitutional system surrounding them” (McHugh 2004, 56). The shoehorning of indigenous title into statist and individualizing property forms has become a particular flashpoint (Dempsey, Gould, and Sundberg 2011; Woolford 2011).

The constraints and possibilities of the space of reconciliation have thus become a crucial question (White 1990; Tully 1995; Bhandar 2004; Hepburn 2005; Henderson 2006; Slattery 2006; Walters 2009). As such, it is imperative to make sense of what it contains and how it works, and the work of indigenous actors in negotiating it. Much of the scholarship on this question has focused on the judiciary, for understandable reasons. The modern-day treaty process in British Columbia that Tsawwassen participated in, involving sixty First Nations and the federal and provincial government (or Crowns as they are known), with negotiations at forty-nine Treaty Tables across the province, offers an understudied alternative (although see Egan 2011, 2012, 2013). Through a close reading of the treaty process, I attempt to understand how property and space are mutually defined at this colonial contact zone. I base this, first, on an invaluable archive covering the period 1999 to 2008 provided by the Hul’qumi’num Treaty Group (HTG), a coalition of First Nations on Vancouver Island who have played a central role in the dispute I outline here. This archive provides a vital context for an understanding of the evolving attempt of HTG and other First Nations negotiators to negotiate and shape the space of reconciliation within the treaty process. I also draw from eighteen key informant interviews with the central actors either directly involved in treaty negotiations or serving as advisors and analysts for either individual First Nations or the federal or provincial Crown over the period 2010 to 2013 (Figure 1). The HTG archive provided a basis for the initial selection of respondents: Others were added based on recommendations. The archive also proved immensely helpful in grounding me in the key issues, many of them technical, thus allowing for more focused interviews. Almost without exception, all of the informants were lawyers. Indeed, the treaty process is saturated by law: Legal actors negotiate over legal concepts, aiming for a legally binding and legally framed agreement. This project seeks to take the work that law does, and the knowledge formats that it relies on, very seriously (Riles 2005, 2011). It is not intended, however, as an attempt to engage with the perceptions of First Nations community members or members of settler society more broadly.

Certainty and Singularity

Aboriginal title is viewed with considerable institutional anxiety, as it threatens to remake the seemingly secure geographies of colonial settlement. Precisely what is it? Where is it operative? What are its implications for “normal” property? The treaty process is designed to resolve these anxieties through the production of certainty: “People need to know who owns a piece of land, who has the right to the resources on it, and who has law-making authority over it. Treaties will provide that certainty” (B.C. Treaty Commission n.d., 9). The appeal to certainty by the Crown is endemic, almost obsessive. As such, it would seem to deserve a closer look (Blackburn 2005). Certainty refers to a “legal technique that is intended to define with a high degree of specificity all of the rights and obligations that flow from a treaty and ensure that there remain no undefined rights outside of a treaty” (Stevenson 2000, 114). Certainty is about definition and specificity, therefore, and is designed to hedge against ambiguity and multiplicity. As such, certainty can also be understood as an attempt to “brace” many of property’s entanglements (Blomley forthcoming).

One way in which the Crown seeks to generate certainty relates to the form of the landholding that a First Nation will have the lands it recovers from the Crown. The treaty settlement lands (TSL) make up a very small proportion of the traditional territory claimed by a First Nation. The TSL for Tsawwassen First Nation, for example, was some 1 percent of its traditional territory, and only around four times the size of its original reserve. The nature of treaty landholding has proven controversial in the past, given the Crown’s use of a language of extinguishment, in which the Crown required signatories to “cede, release and surrender” their Aboriginal
First Nations (individual and Treaty Groups) referenced in this article. (Color figure available online.)

rights, including their traditional title to their lands. This has been replaced by a lexicon of modification and release, whereby signatories agree to the continuation of an Aboriginal right "as modified" by the treaty, and the First Nation agrees to release the Crown from future claims, shutting off (it is hoped) future entanglements. The astute reader will note an interesting tension between continuation and modification, which will later emerge as an important and sometimes live issue, as we shall see. Does the modification of Aboriginal title turn it into something else? If so, how can it continue? If it continues, how can it be modified?

But what will Aboriginal title be modified into? The Crown has insisted, from the very outset of the process, that it will become a form of fee simple, claiming that this is the most generous form of property holding available to the common law. The expectation is that a First Nation will collectively hold its land in fee simple and then allocate property interests to band members as it sees fit. This is the approach adopted by Tsawwassen, for example, which allocates fee simple interests to those band members who held land in Certificates of Possession. There are strict limits on alienability, however: Only Tsawwassen members can acquire a fee simple
Technically, a fee simple estate is the largest estate enjoying broad rights to access, use, and alienation. colloquially, the subject of the article. Colloquially, fee simple is the way most private property owners hold their property, and, should they leave, they are required to dispose of it. An estate describes the length of time an interest in land can be held. A fee simple estate means that the interest is held without limitation as to alienation for an unlimited time.

The fee simple model has been central to the Crown’s negotiating mandate from the very first day of the treaty process more than twenty years ago. Yet fee simple is seen as deeply problematic to many First Nations negotiators. As we shall see, rather than a disinterested, technical device, they fear that it is ill suited to indigenous interests, at best, and positively destructive, at worst. Although the treaty process presumes the adoption of Canadian common law as the constitutional framework for treaties, the insistence on fee simple requires First Nations to conform to a categorical logic that is said by many to be unduly restrictive. For one critic of the treaty process, the space of reconciliation is a disciplinary one, working 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 n.d.). Constituted in this way, the treaty process, for many critics, is not so much a means to reconciliation, as its very negation (Coulthard 2007; Egan 2011).

There are other obstacles, but the “status of lands” question, as it is known, has become a significant impediment to the successful resolution of many treaties. It should be noted that only a few have been concluded, despite two decades of negotiations and huge expenditures. Despite the enthusiasm with which many observers viewed the process at its outset, many now fear that it has failed. The refusal of the Crown to budge on its fee simple mandate has generated considerable frustration and anger on the part of many First Nations negotiators. “This is not a shell game in front of some stupid people,” Snuneymuxw Chief Douglas White, angrily pointed out to me, “this is serious business” (Telephone interview with author, 15 November 2012).

How can we understand what is at stake in this serious business, and how it has unfolded? It is my argument that although this might be a highly technical and lawyerly debate, it is fully political. This is not only a contest over different interpretations of property and space but also entails an attempt to stabilize or remake their very reality. Fee simple, I wish to suggest, is far from simple. There are, as we shall see, several competing or overlapping fee simples in circulation. These are not variants on a “true” fee simple, I wish to argue, but are ontologically different. The legal space at the center of the treaty process appears to be a singular, static, and sharply defined one. A performatives analysis, however, that looks at the moving enactments of property, and the way in which such claims are stabilized (Blomley 2013), reveals multiplicity and fluidity, both among First Nations and the Crown. The identification and exploration of this multiplicity offers valuable lessons for our understanding of the contemporary space of reconciliation.

Such a view differs from the Crown’s implied view of property, reliant on what Law (2011, 3; see also Law [2004]) termed a “one world metaphysics” of property. The problem with aboriginal title, it is implied, is that it is not “real” property. It lacks the solidity and legibility of fee simple. By modifying it into a fee simple, we make it real and thus make it useful. This relies, first, on an assumption that fee simple is out there in the world, broadly independent of our actions and perceptions. Fee simple, put another way, is constative, not performative: “Treaty negotiations,” insists the province, will trade “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, emphasis added). Property would seem to have an essence that can be said to exist prior to our interpretations and actions. Second, and relatedly, the essence of property is singular. Fee simple has one stable essence; in other words, not multiple or overlapping ones. Although different perspectives on a category such as fee simple might exist, drawn from opposing standpoints, these are all assumed to be partial approximations of its unitary form. Diverse and localized forms of indigenous title will be transformed into a unitary and coherent form, allowing treaty lands to insert themselves into a settler property regime. And, third, fee simple’s singular essence is assumed to be definite, rather than diffuse. It provides clear, hard-edged signals to others. Property law is heavily invested in drawing sharp lines around our entitlements, so that
we can identify the relevant property subjects, objects, and relations at play in any given context and thus, so generations of scholars observe, minimize confusion and dispute.

I resist the idea of property as an independent essence, however, preferring to think of it as a relational effect, performed into being through the alignment of human and nonhuman resources (Mitchell 1991, 2007; Blomley 2013). Property is only property to the extent that it is stabilized as such through complex assemblages of land titling, jurisprudence, belief, everyday practice, maps, hedges, fences, and so on. Rather than seeking it in abstractions, it should be “read in the documents, title records, zoning codes, built environment, and heard in the melodic patterns of financial market activities” (Malloy 2009, 270). Yet the hard work of property, in its complicated connections and stabilizations, is easily overlooked. There appears to be a magic to property, such that apparently isolated moments, such as the registration of a deed or the declaration of a judge in an adverse possession case, appear, by themselves, to have performative effect (Bourdieu [1972] 1977; Allen 2008). Such an analysis is useful in directing us to the possibility that property does not preexist its performances. If property is performed through a variety of practices, it follows that it is available in multiple ways. Although it does not follow that all performances of property are equally possible, such an argument also suggests that the conditions of property’s possibility are not given but could be the grounds for contestation (Mol 1999; Gibson-Graham 2008).

A Complicated Fee Simple

First Nations negotiators began to open the black box of fee simple in the late 1990s, when the various Treaty Tables began ironing out the crucial fine print of treaties. The HTG archive reveals considerable internal discussion and debate among First Nations negotiators, with comparisons drawn to the Nisga’a Agreement, settled outside the treaty process, but a crucial template for it. Some alarming conclusions were reached. For example, leading Canadian property academic Kent McNeil argued that “the creation of a fee simple interest would probably cancel out Aboriginal title to the extent that the two are inconsistent” (McNeil, letter to M. Browne, 11 December 2000). Fee “simple” seems anything but. The practices of the First Nations negotiators constitute fee simple not as certain and definite but as ambiguous and entangled. A complicated fee simple thus contends with the Crown’s certain fee simple.

Most immediately, one reaction is to note that fee simple is an import, and thus comes with “baggage.” For Robert Morales, Chief Negotiator, HTG, to accept it would entail a “gutting” of any Aboriginal interest in the land, and its replacement with “this English land law model of a fee simple” (Interview with author, 9 August 2010).

Fee simple is not only geographically entangled but also inseparable from a particular set of historical relations, First Nations negotiators began insisting, as they dug deeper into the colonial space of reconciliation. A PowerPoint presentation from HTG negotiators to community members in the early 2000s reveals these technical complexities, with fine-grained explanations of the theory of tenure and the Crown’s conjoined claim to imperium and dominium. A legal analysis commissioned by HTG on the ownership of land within common law jurisdictions runs for nearly fifty single-spaced pages, with close readings of Anglo-Saxon feudalism and Crown radical title (Peslevits 2007).

Fee simple emerges from these excavations not as a dispassionate, modern instrument but a charged, feudal concept, governed by the doctrine of tenure, which rests on the principle of nulle terre sans seigneur, whereby the Crown, holding allodial title, allocates estates, including the fee simple. Although the treaty process necessarily entails the recognition of Crown sovereignty, the notion that a First Nation would receive land as a “Crown grant” is hard to stomach, given the assumption of a prior, direct relationship to the land. For Rod Naknakim, Chief Negotiator of the Laich-kwil-tach Treaty Society on northern Vancouver Island:

Our position is this. It’s really basic. We’re the allodial titleholders to the land. We’re the base and prime holders to the land. (Interview with author, 23 August 2010)

The effect of the doctrine of tenures, it is feared, if “the Crown is the ‘Lord’ of the land, having dominium in it and the First Nation is the ‘vassal’ having tenures or estates in land” (Minutes from Negotiation Prep Session, Status of lands/land tenure, 16 February 2004, HTG Archive) is to negate indigenous histories and geographies.

Fee simple, it is also noted, has become plugged into capitalist circuits and has thus become imbued with market logics of exchange and alienation, reworking property from a set of localized relations into abstract commodities. First Nations wish to insert themselves into the larger economy, but the fear is that to accept fee simple would entangle emplaced collectives with individualizing networks, “cutting ourselves off at the
ankles” (Manuel 2010, 6). “Do we view our land . . . as our homes, or do we view it as a market commodity?” (R. Morales, Interview with author, 9 August 2010). As J. Christakos, a technical negotiator in First Nations treaty negotiations, noted:

If . . . fee simple lands, basically are the same as my house and your house and if we sell it to somebody else, it’s gone from the family holdings, if you will. And so some First Nations are saying, no, these lands are the hereditary lands of our people and they don’t just belong to our generation, they belong to succeeding generations. And therefore, they cannot be ultimately alienated. (J. Christakos, telephone interview with author, 15 September 2010)

Many First Nations negotiators also raise objections to a fee simple template that denies the possibility of different property arrangements in different places. Fee simple is too homogenizing a device to accommodate the spatial diversity of property forms and attitudes that obtain within different communities, it is argued. Even the HTG combines First Nations with very different geographies of property, noted their chief negotiator, Robert Morales: “So community-by-community we have a different objective, right?” (Interview with author, 9 August 2010). Like the category of Aboriginal title, fee simple is rejected as a procrustean device, imposed by settler society. What is needed is some recognition of the specific title held by individual First Nations:

This word “Aboriginal” is like calling all of the First Nations people in Canada “Indians.” It’s the same kind of thing. It’s a general expression of a category of rights. But when you’re dealing with Laich-kwil-tach, it’s Laich-kwil-tach title. So, say we end up in court over this final agreement as an interpretation of title, it’ll be a Laich-kwil-tach title versus a Crown title. It’ll be clear. There’ll be no mystical other group trying to claim rights. It’ll be our specific group. (R. Naknakim, chief negotiator, Laich-kwil-tach Treaty Group, interview with author, 23 August 2010).

The archive reveals the tortured navigation of the space of reconciliation by First Nations negotiators. A classificatory “torque” (Bowker and Star 1999, 225), or a profound mismatch between individual biographies and prevailing systems of categorization, seems at work here. This was made powerfully clear to me at a meeting of First Nations negotiators in late 2012, when a rather dry discussion of federal policy was halted to allow a Nuu-chah-nulth elder to communicate, in song and words, his relationship to land. In a subsequent interview, Snuneymuxw Chief Douglas White, who was present at the meeting, used this potent performance to explain the inadequacies of Aboriginal title, let alone fee simple, in capturing the relationship between people and place:

That’s who they [Nuu-chah-nulth] are. That’s at the core of their identity. They’re talking about indigenous title in accordance with Nuu-chah-nulth law that’s been recognized and sorted out . . . over millennia. I mean that’s an absolutely critical dimension of who they are as people, and their dignity is attached to it. . . . And Aboriginal title is just the merest shimmer of a reflection of that right. It’s a concept derived by common law judges trying to grapple with these complicated issues. And so the idea that even this meagre concept of Aboriginal title, even that has to be put aside [for fee simple]? (Telephone interview with author, 15 November 2012)

A Mirrored Fee Simple

A different fee simple emerges, then: Far from pure and technical, this fee simple is entangled and political. The space of recognition, then, seems an ambiguous one to many First Nations. First Nations negotiators are “struggling with not wanting to have their property relations defined by these non-Aboriginal institutions” (B. Thom, former HTG negotiator, interview with author, 11 June 2010), yet are obliged to insert themselves into the common law. Yet for HTG Chief Negotiator Robert Morales, the idea of interests in land is not inherently foreign to his community. The notes from his presentation to community members in 2003 indicate that indigenous societies recognized various forms of permanent or semipermanent private rights in communally held tribal land, allowing for the accumulation of wealth. Fee simple is seen as an inappropriate model, however, as it risks the alienation of communal land. As such, alternative forms of landholding must be made available: “Our challenge is to find a way to achieve our vision for the future” (Morales 2003). It is recognized, however, that the alternative still has to find an analogue in the common law. HTG characterized this process as the “mirroring” of indigenous understandings with those of the common law. Notes from a 2004 HTG brainstorming session reveal some of the resultant twists and turns, as Hul’qumi’num struggles with translation between two legal codes:

How is Hul’qumi’num Aboriginal title going to be transformed under treaty? Is it going to be done away with in every aspect as a straight fee-simple holding . . . (virtually eliminating all aspects of Aboriginal title). . . . [W]hat is the relationship going to be between Hul’qumi’num people and the Crown with respect to land? How do we deal
with the Hul’qumi’num people’s ability to raise capital and to have value attributed to their lands? It is not that we are opposed to the concept of fee simple. It may be OK. But what are the implications to the relationship with the Crown? (Brainstorming Session: Negotiation prep, 14 March 2004, HTG Archive)

One option is to mirror Aboriginal title to common law allodial title (i.e., land that does not require a Crown grant). At one special chief negotiators meeting regarding fee simple status in 2001, a Vancouver Island Chief Negotiator characterized Aboriginal title as

Truthly the “highest” level of land holding, as it has been in existence since time immemorial and is more encompassing than any form of land tenure in European law. . . . She stated that the Crown holds allodial title without obligation to anyone else. She stated that this is the kind of land holding First Nations want and wondered if there is any land tenure greater than fee simple to accomplish this which is not inconsistent with Aboriginal title. (Special First Nations chief negotiators meeting, 18 January 2001, 5, HTG Archive)

Similarly, an HTG presentation to community members distinguished fee simple from allodial title within the English common law, noting that the latter “does not owe its existence to the Crown, but is rather held as a matter of right.” It is characterized as detached from feudal hierarchies, and allowing for a right in perpetuity: “It is submitted that as the source of aboriginal title lies in the claimant’s traditional laws and customs, rather than a Crown grant, an analysis in terms of allodial title would be more logical than the use of the theory of tenure [i.e., fee simple]” (Allodial vs. Fee simple title, Powerpoint slides, HTG Archive, undated copy available from author).

The archive reveals an exploration of other alternatives to fee simple, including mixed models, such as holding developable land in fee simple, with cultural or resource sites under a different form of title (Murray A. Brown notes, 1 November 2001, HTG Archive). In one remarkable move, HTG negotiators even explored an analogy to the strange case of udal law, operative in the Shetland and Orkney Islands. Udal lands derive from Norse law and thus are exempt from the doctrine of tenure. As such, udal lands are held as a form of allodial title: All of this can be thought of as an attempt to find a “middle ground.” . . . [T]he trick is we were trying to relate [indigenous property] to English law somehow. In that quest for certainty, is there some familiar thing to the Crown that they can live with?” (B. Thom, former HTG negotiator, interview with author, 11 June 2010).

The space of reconciliation, it seems, can be one of improvisation (Jeffrey 2013). These categorical maneuvers are powerfully evident in some internal notes (Figure 2) from an HTG “whiteboarding session.” The printed document shows three categorical frames for title: customary Coast Salish title (i.e., precontact title), fee simple, and allodial title. The handwritten notes from the session sketch, from left to right, the current treaty model, premised on a Crown grant, with Crown title and sovereignty conjoined, the Indian Act model (i.e., the current arrangement, where reserve land is held by the federal Crown, and use rights are allocated to a band), and—most important—a “third space” in which Crown title and sovereignty are separated, and an alternative form of landholding is carved out.

The very ambiguity of the assigned name for this third option (sui generis, “customary law,” “allodial title”) speaks to its tentative and interstitial character, for this mirrored title must have a name if it is to enter into a treaty, given the Crown’s certainty logic. HTG has thus experimented with borrowing from indigenous law, with the invocation of St’ul nap, identified by elders as a Hul’qumi’num term with which to capture Coast Salish indigenous title, as a placeholder for

that [which] is not everything else. This indigenous title. . . . The elders were trying to say, “Well, we’ve got to use something. Why don’t we use this word?” (B. Thom, former HTG negotiator, interview with author, 11 June 2010)

Yet the Crown refuses to consider such alternatives. As one technical negotiator noted, if such alternatives are mooted at the table, the response from Crown negotiators is, “I have no mandate to deal with these things, so we have to set them aside.” The danger is that the Crown argues that “We have talked about all of the things that we can talk about and until you capitulate, we can’t talk any more. So we’re going to down the workload on your Table and shift to the Tables where we’re making progress” (J. Christakos, technical negotiator in First Nations treaty negotiations, telephone interview with author, 15 September 2010).

An Allodial Fee Simple

So we see competing fee simples in circulation: one seemingly pure and certain, one entangled, and one “mirrored.” What then of those First Nations who have concluded the treaty process? Here, at the apogee of
a drawn-out process, knee deep in lawyers, surely we have reached certainty’s promised land? At first sight, all is bright and clear. Many hundreds of pages long, with numerous appendices, these are not the crude Indian treaties of yesteryear but highly formalistic framings. And yet, when we look more carefully, we find multiplicity here, too. To understand this requires an attention to the Nisga’a Final Agreement, which casts a long shadow over the treaty process. Although concluded outside the process, it has become the organizing template that the Crown uses in its current negotiations. Nisga’a was signed in 1999, at precisely
the same moment that the status of land question crystallized as a central issue for First Nations negotiators. The model that Nisga’a arrived at was thus the object of considerable scrutiny. The Chief Negotiators Group of the First Nations Summit convened a special meeting in early 2001 to discuss the Nisga’a Agreement. Judging by the notes of the meeting, the Nisga’a landholding model was viewed with considerable suspicion. A Nisga’a representative, however, insisted that “the Nisga’a did not cede, extinguish, surrender or release their aboriginal title, arguing that the Nisga’a hold their lands under the agreement as a form of modified fee simple, characterized as the highest estate, with underlying Nisga’a title” (Executive summary and report to the special First Nations chief negotiators meeting, 18 January 2001, HTG Archive, 3). A Vancouver Island First Nations negotiator queried how “modified fee simple lands” can have underlying Nisga’a title, given that fee simple lands have underlying Crown title. An advisor to a First Nation in northwestern British Columbia queried the same point, wondering whether the Nisga’a Agreement created a new constitutional category of lands. The Nisga’a representative responded that the Nisga’a view is that the prevailing system “does not exhaust all categories of land tenure.” Yet many First Nations negotiators continued to be suspicious. At a 2005 meeting of Treaty Negotiators, a Vancouver Island First Nations negotiator noted: “We have always felt that with the accepting of the fee-simple lands, the aboriginal title is extinguished. We don’t want to extinguish [our aboriginal title]. We feel like the Nisga’a did extinguish” (Minutes, First Nations Treaty Negotiators Alliance meeting, 18 February 2005, 13, HTG Archive).

James Aldridge, counsel for Nisga’a during their negotiations, expressed frustration to me at this view and the related argument that fee simple was foisted on Nisga’a. Rather, he insisted, the question of landholding was something negotiated from the ground up, involving considerable exploration with all parties (Blackburn 2005). It emerged following the agreement-in-principle stage, which stated that Nisga’a would own its lands. As Aldridge put it, the provincial negotiator subsequently came to him and said, “We need to discuss that clause because the clause is not clear as to the nature of the ownership. So, when you say you own Nisga’a lands, you own it how?” (J. Aldridge, counsel for Nisga’a, telephone interview with author, 24 May 2011, emphasis added). Aldridge explored various alternatives—it was sui generis, it was a form of alodial title, it was Aboriginal title—but these were determined to be vacuous, too threatening to the Crown, and deficient, respectively. The Crown thus proposed fee simple. Aldridge’s initial response was that this was unacceptable, given the belief that this implied a Crown grant, and would amount to extinguishment of Nisga’a title. The Nisga’a legal team, however, opted to dive deep into the murky historical waters of English feudalism and the doctrine of tenures and estates. Aldridge claimed to surface an original fee simple, prior to the accretion of statutory limitations over the ensuing centuries, such as the Crown’s right of resumption, expropriation, and so on:

So, in order to be persuaded that this was the right way to go, what we held out for—and what we successfully obtained—was that what was being recognized in the treaty, what Nisga’a Lands would be, would be owned in the original fee simple. (J. Aldridge, telephone interview with author, 24 May 2011, emphasis added)

As such, Nisga’a fee simple is not subject to the normal powers carved out by the state, such as its powers of expropriation, the right of reversion (whereby land reverts to the Crown if it is without heirs), or the Crown’s claim to subsurface mineral rights. This is what became known as the fee simple plus model, which the Crown adopted in the treaty process to attempt to soothe First Nations’ concerns.

But what is the source of the fee simple? Is this not a Crown grant? Aldridge noted that the land section of the Treaty describes the interest but is studiously silent on this point: “Read the treaty from back to front, read the statutes from back to front, go look in the land titles office, you will not see anything anywhere that says that the Nisga’a Lands were granted to it by the Crown” (J. Aldridge, telephone interview with author, 24 May 2011). A fee simple, he argued, is to be defined according to its content, not according to its source. The inclusion of a clause that Nisga’a Aboriginal title “continues as modified” into the fee simple, he argued, ensures that “the link with the ancestral inheritance is not severed and there’s no grant and what the Nisga’a end up with is everything there is.”

This lawyerly juggling of the “legal architecture,” as he described it, entailed the reworking of legal fictions: “Because this is all legal fiction, it’s all legal metaphysics—but to say that it’s a fiction is of course not to say it’s unimportant” (J. Aldridge, telephone interview with author, 24 May 2011). The technical magic of Crown alodial title, he noted, was one that Nisga’a reperformed through a legal–geographic move. Although William the Conqueror might have acquired title to the land of England, in Canada, matters here
were different, given the prior existence of Aboriginal title that is irrefutably not derived from a Crown grant. As such, the legal fiction that is at the basis of landholding is necessarily different in British Columbia than in England. Put another way, a Canadian fee simple differs from its English counterpart. It thus becomes possible to contemplate an Aboriginal fee simple interest. Aldridge’s view is echoed by at least one commentator on the Nisga’a Final Agreement:

We can observe the usage of a common Canadian legal construct—the fee simple—that on further examination no longer look so familiar. The Nisga’a interest recognized in the treaty by the term “fee simple,” under scrutiny, exceeds the limits of a typical, garden-variety fee simple. (Scott 2012, 61, emphasis added)

Those other First Nations who have concluded treaties have also adopted fee simple, using very similar language to that set out in the Nisga’a Final Agreement. The acceptance of fee simple recognizes, in many cases, pragmatic needs. One negotiator argued that one can only fight fee simple so long, given that “there’s still families that need homes” (R. Francis, Chief Negotiator, Tla’amin First Nation, telephone interview with author, 18 January 2013). Those First Nations who have adopted fee simple insist, however, with Nisga’a, that they have also developed a different fee simple. For Mark Stevenson, Chief Treaty Negotiator for the K’ómoks First Nation (Telephone interview with author, 29 July 2011), if you were “to really, really explore [K’ómoks landholding in the treaty], I think you would have to come to the conclusion that because Aboriginal title is an allodial title, and that title is modified and continued, that it is an allodial title”:

I think it’s likely that we’ve created a new interest. . . . There is no room in the common law for a fee simple grant that is allodial title. But you have to remember that Aboriginal title is continued, and there is room in the common law for a concept of Aboriginal title that is allodial title. Because in the common law, all allodial title is, is ownership of land that does not come from the Crown. It’s not a grant of land. . . . The Nation has [allodial] title, and then the Nation grants fee simple interest.

So, this is an allodial fee simple. As such, treaty First Nations claim a form of property that rewrites a millennium of English and Canadian common law and detonates the doctrine of tenures, in which all landholding in common-law jurisdictions is not allodial but tenurial; that is, held “of the Crown” (Ziff 2006). Perhaps this can be seen as a step toward the postcolonial “defeudalization” of the common law (Hepburn 2007), predicated on the recognition that the doctrine of tenure cannot coexist with indigenous title.

The Tsawwassen treaty, noted earlier, similarly specifies that Tsawwassen owns Tsawwassen lands in “fee simple.” Tsawwassen representatives, however, also insist that there is more to this than meets the eye. Tsawwassen insisted that the treaty include a “Tsawwassen fee simple interest” (Benson 2013, 88). As is standard, the treaty, following the Nisga’a template, adopts the fee simple plus model. As far as the Crown is concerned, the “plus” is simply additive. Fee simple plus, whatever its essence, still performs fee simple in the world (Blomley forthcoming). For Tsawwassen, however, fee simple plus is transformative. As such, the moment the treaty was put into effect, it follows that it holds the land in a form analogous to Crown allodial title. It might be called fee simple but, given its scope and extent, it is effectively allodial. This was sketched out for me during an interview with Tsawwassen representatives, as shown in Figure 3. On the left, the Crown is shown, holding allodial title and allocating fee simple interests (noted as “minus,” to the extent that they do not include the fee simple plus option). On the right, Tsawwassen is shown holding its public lands, on par with the Crown, allocating Tsawwassen fee simple interests to its members.

Figure 3. Tsawwassen allodial fee simple. Source: Sketch by interview respondent, Tsawwassen First Nation, 12 July 2011.

An allodial fee simple is an assertion rather than a pregiven fact. The Crown appears to operate under a somewhat different assumption. During a 1999 provincial debate on the Nisga’a Agreement, for example,
the question was raised concerning where the provincial government believed the allodial title to Nisga’a fee simple lands lay. A government representative responded that “our conclusion is that allodial title is with the provincial Crown.” This was met with approbation: “The very fact that we now have some certainty with respect to the allodial title with the provincial Crown builds greater certainty for the province... and therefore builds greater stability” (British Columbia, Legislative Assembly 1998–1999, 11149). This assumption appears to continue in the treaty process. First Nations’ negotiators noted that the Crown might have a very different interpretation of fee simple. As such, one put it, the “parties... come away from the table with some different ways of seeing the outcome” (R. Francis, Chief Negotiator, Tla’amin First Nation, telephone interview with author, 18 January 2013).13

This is not a contest between a true and a false fee simple, however, but between two different fee simples. The truth of these different fee simples is not to be determined by their verisimilitude but by their success: “Truth,” as James (1907, 201) put it, “happens to an idea. It becomes true, it is made true by events.” These events, of course, are unpredictable. A judicial decision, for many skeptics, might make allodial fee simple untrue. For now, however, its truth is made by what one Tsawwassen representative termed “the exercise of the tool” (T. McCarthy, policy advisor, Tsawwassen First Nation, telephone interview with author, 12 July 2011); that is, jurisdiction. Treaty First Nations have jurisdiction over a relatively wide array of governmental responsibilities.14 For Tsawwassen, jurisdiction and allodial title are coperformative: The enactment of law requires jurisdiction; jurisdiction flows from allodial title; and the exercise of allodial title advances jurisdiction. “What you’re doing is you’re rooting that law effectively in that jurisdiction that’s tied to ownership” (C. Ward, policy advisor, Tsawwassen First Nation, interview with author, 12 July 2011).15 Space and jurisdiction are mutually coperformed, so as to enact allodial title:

[W]e have this very fundamental title over land, and we have this jurisdiction. And we’re going to use this jurisdiction not just in respect of the ordinary sort of management of the land. ... We’re going to assert our authority in this other way. (C. Ward, interview with author, 12 July 2011, emphasis added)

But this “other way” is not, as with Nisga’a, a radical assertion of separateness and sovereign autonomy. Instead, it reflects the recognition that “you are within someone [else’s] legal system” (T. McCarthy, policy advisor, Tsawwassen First Nation, interview with author, 12 July 2011). What is needed, therefore, is a delicate legal-spatial negotiation of the space of reconciliation, using a framework that “helps others understand how Tsawwassen integrates into the rest of Canada, which is very different from assimilation, and is very different from... a ‘two solitudes’ kind of thing” (T. McCarthy, interview with author, 12 July 2011). A sui generis form of landholding would not allow for “comparability to the external world” (T. McCarthy, interview with author, 12 July 2011), but a fee simple makes possible a “delicate balance between community interest and familiarity” (C. Ward, interview with author, 12 July 2011). For Tsawwassen, the merit of fee simple is that it is a boundary object that can travel between interpretive communities and yet still maintain some constant identity (Star and Griesemer 1989). It is, put another way, an allodial title insofar as the Tsawwassen community is concerned but a certain fee simple for the outside larger world.

The work that treaty fee simple does in the world is an important point, noted by other First Nations negotiators. As Mark Stevenson, Chief Treaty Negotiator for K’ómoks First Nation noted, if treaty fee simple “is not your typical fee simple grant in lands” (Telephone interview with author, 29 July 2011), it nevertheless acts like one outside K’ómoks. It does so, he noted, because of the powerful role of the state’s land titling system in performing fee simple. Fee simple does not stand alone but relies on and is stabilized through relations to other resources. We might assume that land registration simply acknowledges that which already exists. As Bowker and Star (1999) noted, however, such bureaucracies are essential in authorizing particular classificatory systems. Similarly, the BC Land Titles Act (Schedule 1, 2.1) specifies that treaty lands registered under the Act will be treated as an indefeasible fee simple title. Thus, registration would seem to produce the effect of a conventional fee simple (providing the correct protocols of registration and survey are completed) whatever it might be elsewhere, allowing it to be hooked up into other networks:

You can’t categorize [them] as fee simple lands in the standard property law sense because there are many other attributes to them. But one of the attributes is that they can be registered in the provincial land title system, and in doing that, you get the same security as any other piece of land registered in the land title system. ... When K’ómoks does a grant, the grant is registered in the provincial land title system. But that grant from K’ómoks has the same features as any fee simple grant to anyone else. (M. Stevenson, telephone interview with author, 29 July 2011)16
Conclusion

If, as McHugh (2004) notes, settler societies are increasingly struggling with questions of how aboriginal rights and title are to be articulated with common-law systems, it is imperative to enter into the space of reconciliation, foregrounding its deeply ambiguous promise. Far from a welcoming space of open translation (White 1990) or a “uniquely Canadian amalgam” of indigenous and common law (Borrows 2002, 5), it appears to rely on a monist and conceptivist framing. The treaty process is designed to generate “certainty.” Ambiguous entitlements are to be translated into a certain, singular, stable fee simple.

Yet once we carefully follow the enactments of fee simple, the space of reconciliation is more fluid and multiple than at first sight. When we look, we find multiplicity, not singularity. An allodial fee simple jostles for room in the space of reconciliation, alongside a certain fee simple, an entangled fee simple, a Canadian fee simple, a fee simple plus, and an original fee simple. This seems important: A fully postcolonial land policy, surely, rests on a politics of difference, rather than one of homogenization (Harris 2002). Perhaps there is considerably more fluidity and diversity than first meets the eye, drawn as it is by law’s effect of fixity and monism. Although the space of reconciliation is undeniably confining, there is also, perhaps, room for creativity within common law’s technicalities.

Let us not be naïve, however. Certainty, like other “one world metaphysics” may be sustained by a rather “raggedy set of strategies” (Law 2011, 10), yet it does powerful work in the world. Reconciliation in general, and the treaty process in particular, is profoundly asymmetrical. Although property law can be capable of remarkable flexibility and dynamism, it can also be obdurate and conservative, inscribing colonial power relations as facts on the ground. Although there might be more diversity within the space of reconciliation than appears at first sight, there is a danger in assuming that these alternatives are viable, as not all performances of property are successful. Attending carefully to the relations that make certain performances true while others fail thus becomes an urgent ethical and analytical task. Will the other fee simples I document here prove successful? It is too early to tell: However, if the truth of fee simple is performed relationally, we should judge them not according to an inherent fit with the “real” fee simple but by their ability to make a world in which they can become true.

This is an important point, as it invites us to ask how property can be differently performed through the remaking of its relations. Rather than just asking how aboriginal relations to land can be inserted into extant networks, we might want to also explore how networks can be remade so as to make other forms of property successful. We can learn from fee simple. Whatever it is, it is able to perform fee simple through the mobilization of relations, such as land titling, and credit. As Wallace (2010, 44, emphasis added) noted:

Private owners get more than tenure security. We build their roads, give owners tax breaks, subsidize their services . . . then provide schools and services for their children. We add value, create secure credit tenures, organize opportunities for owners to shift risks, and construct legal and administrative systems to legitimate power and opportunities relating to their property. We could do exactly the same thing for socially tenured Aboriginal people.

Put another way, “[t]he big question facing us today,” for one indigenous commentator in British Columbia, “is not how we can fit into the mainstream economy, but how the mainstream economy can fairly, honestly and justly manage the fundamental change that recognition of Aboriginal Rights creates” (Manuel 2010, 7). This would require a significant change, of course. At minimum, it would require us to stop treating settler property as a stable norm, against which indigenous property is always an aberrant outlier. Valverde (2012) noted that “the marked epistemological hybridity of white law’s discourse about itself is taken for granted, . . . while aboriginal peoples’ knowledge formats are critically scrutinized and often sidelined” (5). Those First Nations negotiators who open up the black box of colonial property, contest its certainty, and push for different fee simples, direct us to the urgent need to upend this logic (Verran 1998).

There are lessons here for geography’s engagement with property more generally. The treaty process entails a struggle to carve out both metaphoric and material property spaces for First Nations. As such, the negotiators on both sides should be thought of as legal geographers or as nomospheric technicians (Delaney 2010), engaged in the making of law and space. Property is an instrument of sociospatial justice, whether in relation to colonialism or other social and political settings. As a set of relations, powerfully constitutive of space, property can serve both as an instrument of dispossession and as a ground for resistance. Although it might be expedient to criticize dominant property forms, it might also be useful to spend time figuring out how they become true and what work might be needed to make successful other more agreeable property arrangements. It might also be useful, as here, to
note the multiplicity and fluidity even at the core of a “certain” property and the possibility of carving out space for difference even within legal systems that seem bent on purification (Gibson-Graham 2008). In so doing, perhaps, we can perform property and its spaces in more inclusive and just ways.

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Notes

1. I use the terms First Nations or Aboriginal to refer to government-designated status Indians and the nations to which they are attached. I use Indigenous to reference forms of identity that exceed or expand on such state categories, including the attempt to link the local experiences of first peoples in Canada with others around the world. Indigenous words for specific nations are also used where possible.


4. Some First Nations have elected not to participate in the treaty process.

5. On the strange legal creature that is the Crown, in Canadian law, see Valverde (2012).

6. Some First Nations have elected not to participate in the treaty process.

7. Some of the material was confidential and thus cannot be reproduced here.

8. Manuel (2010), an indigenous commentator, argued that fee simple, a “title to private property for settlers,” is “in deep trouble in British Columbia” given the court’s recognition that Aboriginal title has not been extinguished. This makes fee simple “uncertain”: While the Crown insists that aboriginal rights are uncertain, it “fails to say that, if, Aboriginal Rights is [sic] undefined then all federally and provincially created property rights, including Fee Simple, must also be equally undefined” (4–3).

9. A Certificate of Possession allots land to a band member of a First Nation. It is issued under the authority of the Indian Act by the federal Minister of Indian Affairs. Underlying title remains with the Crown. The interest falls between a fee simple and a life estate interest.

10. There is no evidence that this analogy was pursued. It is interesting to note, moreover, that some Orcadians and Shetlanders have invoked udal law in the articulation of claims to indigenous identity status (Jones 2012).

11. There are forty-nine separate negotiating tables but only two state players. The imbalance in information, as well as the disciplining of intransigent tables, has long proved a point of tension, exacerbated by the federal government’s recent move to a “results-based” process.

12. Both Tla’amin and K’ómoks treaties have yet to be finalized.


14. Tsawwassen First Nation has been likened to a third order of government in Canada, with paramount power over its own lands, controlling many programs formerly under federal or provincial jurisdiction, such as education, fisheries, and social assistance (Benson 2013, 92).

15. Although title and sovereignty, technically speaking, are separate matters, the two have a tendency to become blurred in the treaty process. The Crown has insisted that the treaty process was never intended to realize indigenous sovereignty, but a treaty does carve out a heightened degree of autonomy for a First Nation, as it frees itself from the paternalism of the Indian Act. Many First Nations see autonomy as crucial to the realization of indigenous title, as it entails an obligation to protect and use land and resources. Indigenous title is thus more than proprietary but is also necessarily jurisdictional (McNeil 2013).

16. This is echoed by other treaty First Nations. A presentation explaining the Maa-Nulth treaty notes that “Treaty lands will not be owned by the Crown. The character of the ‘fee simple’ interest in Maa-nulth Lands is different from fee simple ownership elsewhere in BC” (First Nations of Maa-Nulth Treaty Society n.d.).

17. That said, “uncertainty” has been, and can be, used to advance indigenous claims, at least insofar as it might compel the state to negotiate to produce “certainty.”

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