

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

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Making fee simple in the British Columbia treaty process<sup>1</sup>.

**Abstract:** Property is entangled in and inseparable from a multitude of relations (ethical, practical, historical, political and so on). Yet for property to function, some of these relationships must be bracketed. This process of framing, as I term it, borrowing from Michel Callon, entails the attempt to stabilize and fix property through the construction of a boundary within which interactions take place more or less independently of their surrounding context. That which is designated as inside the boundary must be, in some senses, disentangled from that identified as outside. Property practice and theory helps organize these exclusions. Yet while framing puts the outside world in brackets, it does not (and can not) sever all links with it. A contract entails a rigorous framing that seeks to carve out a discrete space for the exchange of goods and services. Yet this framing presupposes a legal regime of courts, property rights, and so on. The ability to frame, and the sharpness of the line that is drawn is not, however, a given. It requires hard work, and requires the enrolment of other resources. If property is relational, to frame property is to cut, foreground, or efface some of these relationalities. Property's frames, therefore, can become political battle lines.

Drawing from a modern-day treaty process involving indigenous communities and the federal and provincial 'Crowns' in British Columbia, Canada, I trace the ways in which the state has sought to disentangle property from its recently re-emergent colonial entanglements. Ironically, one of the ways in which it has done this is to insist that First Nations hold their treaty settlement lands as a form of fee simple, this being framed 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 note the powerful performative use of legal categorization on the part of the Crown in their attempt at re-framing fee simple as 'simple'.

**Key words:** property; indigenous treaties; British Columbia; law and geography; framing; legal categorization.

### **Framing property**

In 1993, a modern-day treaty process began in British Columbia, Canada, involving many indigenous communities, or First Nations as they are officially known, and the British Columbia and federal governments (known as the 'Crowns<sup>2</sup>') with individual negotiations at multiple Tables. Unlike most parts of Canada, treaties were not signed (with a few exceptions) between First Nations and the state in British Columbia in the early days of colonial contact, due to provincial refusal to accept the existence of indigenous title (Tennant 1999). However, the past few decades has seen the

increasing recognition of some form of aboriginal title on the part of political, legal and economic elites, opening the door, finally to the treaty process.

The British Columbia Treaty Commission (BCTC), an independent body charged with being the 'keeper of the process', publishes a short layperson's guide entitled 'What's the deal with treaties?' Aboriginal people, it explains, enjoy a set of rights that are 'distinct and different from the rights of other Canadians... They include unique property rights (Aboriginal Title) which are communally held rights' (2007 5). These property rights, the BCTC notes, enjoy constitutional protection and may take priority over the rights of others. While apparently wide-ranging in their reach, there is considerable uncertainty over them, however - 'major questions remain unanswered' (4). But treaties will bring 'certainty' to this fluid and charged property right, as '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' (9).

Property, it seems, has become complex and entangled, but is to be made certain and secure. Aboriginal property rights depart from a norm (they are 'distinct and different'). That which is unclear must be made certain. To understand the way in which institutions constitute the property at issue in this exchange, and more generally, it is useful to consider a prevalent and inescapable tendency to attempt to stabilize and fix property's meanings according to certain frames. To establish a frame 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). Framing, 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 setting (Goffman 1974).

Framing, put thus, seems to have several inter-related dimensions. Most immediately, a boundary is drawn that sets the frame apart. To draw a boundary is to mark an inside and an outside, detached or disentangled from that identified as outside. A relative independence must be delineated for the frame to succeed. However, while framing 'puts the outside world in brackets ... it does not actually abolish all links with it' (Callon 1998b 249). The performance of a play entails a careful bracketing, but it would not succeed were it not for a whole set of prior expectations that are inevitably present (such as set of cultural understandings about what it is to watch a play). Similarly, a legal contract entails a rigorous framing that seeks to carve out a space for the exchange of certain goods and services. Yet this framing presupposes a legal regime of courts, cultural expectations about property, and so on, outside the frame. All of these elements, notes Callon, are both resources and intermediaries: 'they frame the interactions and represent openings into wider networks, to which they give access' (1998b 254).

As the BCTC's pamphlet suggests, it may be useful to think about property through such a lens. If we take property to concern relations between people in regard to valued things, it is inherently entangled: ethically, practically, semantically. Property is productive of, and produced by, networks of power, membership, identity, connection, information and so on. Yet property always entails framings whereby certain cuts in these networks are made.

Contemporary property forms seek to frame property in a number of ways. Sharp lines are to be drawn around the subject and object of property, in order to ensure predictability. Framed as 'secure', or 'clear' ownership, the result is an internalization of the risks and benefits of ownership, ensuring calculable interactions. For property to work, then, '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; Callon 1998a). The relations of property are also framed, and certain relations foregrounded and others ethically severed. Thus it is, for example, that the homeless person outside my house is constituted as a *threat* to property (a potential 'trespasser', for example), rather than a *product* of property relations (Blomley 2009). Property, in this fundamental sense, is a form of geographic practice, entailing the creation of boundaries and the stabilization of categorical zones.

It is tempting to characterize this as a form of 'simplification' or 'reduction'. But this would be misleading for several reasons. Most immediately, the relationship between frame and overflow is a complex one. As individuated 'containers', the subjects and objects of property are not detached. Indeed, they are meaningless unless inserted into dense networks of record keeping, registration and commerce, as well as circuits of ideology, practice, materials and so on. Secondly, simplification implies that framing 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 always a conditional and often hard-won achievement.

Put thus, framing appears a rather bloodless business. Much of it, indeed, is relatively routine and bureaucratic. But as property is relational, to frame, or re-entangle property, is to cut, foreground, or efface its various links. Framings may become political battle lines (Slater 2002). To the extent that property is a crucial means by which we inhabit space, framings and reframings of space shape human geographies (Sawyer 2004).

It is tempting to assume that framing is a sort of ontological con-job, an attempt to carve out a virtual reality from the real world. But to frame is not to engage in a Polynian disembedding, a separation of law or market from culture, but a strategic reformatting (or 'disentangling'). Society is not the (real) context, from which the (virtual) frame has been extracted. Rather, the frame 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; Mitchell 1988, 2002).

### **Categorical framing**

Legal practice in general, and in relation to property, entails the use of many frames, of more or less closed form. Law itself can be thought of as an exercise in framing a realm of expertise and knowledge, and severing ties with a larger domain of society and ethics. Many scholars have criticized a related tendency to carve private property off as a discrete realm, analytically, practically, and ethically (Alexander et al 2009).

We can analyze property's frames in various ways. Rather than seeking the motivations that may underlay framing, however, or criticizing them for what framing leaves out, I choose here to enquire into the practical work entailed in assembling and stabilizing a frame. I do so not because these other questions are uninteresting – far from it. My task, in tracing how property's meanings are contested and secured, is somewhat more modest yet, hopefully, worth doing. First, as I note later, while we may wish to reduce the treaty process to larger logics, such as colonialism, doing so misses the centrality of legal practices and framings to treaty-making. It seems sensible, at least, to try and treat the legalization of the process seriously, as legal knowledge formats do particular types of work. Second, in trying to follow how property gets defined, I hope to challenge the idea that property exists outside its performances and enactments. Most scholars, I imagine, would assume that property is a 'social construction', or something similar, yet there still seems a tendency to attribute to property a solidity and presence such that it begins to appear to exist in the world, independent of human action. However, 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' (Mitchell 1991, Blomley 2013). 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 to say that property is an effect is not to presume that it is somehow illusory. Property is not a trick that we play upon ourselves (or, more cynically, that vested elites impose upon us). Particular framings of property, if successful, can be enacted within the world to powerful effect.

How, then, is a legal frame made and, once established, secured? For law, it seems to me, one particularly important (and rarely reflected upon) framing technology is categorization. Law is an intensely categorical site. 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). Law school entails an induction into the 'proper deployment of ... categories' (Mertz 2007 79).

We are encouraged to think of entities as having some thingness to them, rather than noting the ways in which boundaries constitute the entity. For Abbott, however, 'it is wrong to look for boundaries between pre-existing social entities. Rather we should start with boundaries and investigate how people create entities by linking those boundaries into units. We should not look for boundaries of things but for things of boundaries' (1994 857). Just as the territory does more than delineate an already existent set of distinctions, but helps make those distinctions real, so categories do more than describe a stable prior reality; they help constitute and stabilize it (Lakoff 1987; Minow 1990). 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 legal categories ('contract', 'public/private', 'Whites only'), and the unavailability of others ('common property', etc.) does powerful political work. Put bluntly, not everyone has the power to categorize, and have such categories taken up in the world. The effect is to create and sustain gradients of power (Bowker and Star 1999).

Property law entails the construction of a whole series of categorical framings, operating at a broad level (consider the 'ownership model', for example - Singer 2000) and at a more detailed and technical level. Yet the latter are no less consequential (cf. Riles 2005). The 'estate', within the common law tradition, is one striking example. Formally speaking, the estate denotes the nature of the property holding. A classificatory divide is drawn between freehold and leasehold estates. Of the former, further categorical distinctions can be drawn (between the life, fee tail, and fee simple estate).

Fee simple, of particular interest to the present case, has a reassuring solidity to it within the common law world, connoting certainty, security and fixity. Yet this should be thought of, I suggest, less as a reflection of the stability of 'fee simple' itself, than as an effect, produced through a pre-emptive disambiguation. As we shall see, it risks sticky entanglements with culture, history and practice. Technically, a fee simple is an estate (not the land itself, but a temporal slice); '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 (as compared to a fee tail, for example, which endures as long as a tenant and his descendants live). But the 'simplicity' of fee simple can also be thought of in terms of its framing work, severing the messy relations that entangle all property, marking the owner, the object of

ownership, and the relations as against the world in secure and predictable terms. Yet its meaning, for some, is ambiguous and uncertain (Hohfeld 1917, Gray 1991), or historically contingent (Vandevelde 1980). Rather than a coherent system, indigenous scholars characterize 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). That fee simple appears simple, I suggest, must be thought of as a conditional achievement.

### **Framing and overflows in property in B.C.**

For a framing of fee simple has been effected: common law property law textbooks, while acknowledging the curious nature and archaic roots of fee simple, note that it has cast off its feudal past, and is fit for the neoliberal economy. As such, it can be taken up in other framings, such as that of Law and Economics. Ellickson (1993), for one, celebrates fee simple as a low transaction cost device for inducing a landowner to steward resources for future generations.

However, this infinite planning horizon is complicated in BC. Property in BC has entailed a framing of space and time. Title is traced back to an original Crown grant, that anchors title. However, as in any settler society, this framing foreshortens a few rather messier matters, for land was taken from indigenous peoples. In British Columbia, the significance of this to property's frame has been contentious. For over a century, the official position of the provincial government was that colonial settlement initiated property, given that the land was effectively un-owned. As such, treaties with aboriginal peoples were not required. They, not surprisingly, have long differed, seeking to unsettle the certainties of Crown and settler property. The story of how this unsettlement occurred is a complex and drawn out one (Tennant 1990). Institutionally, what is significant is that the courts, initiated by *Calder* (1973)<sup>3</sup> began tentatively to recognize some of these complexities. In so doing, they developed a new framing, known as 'aboriginal title'. This is not, it should be made clear, a recognition of 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 ultimate 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, Crown title is of limited value as long as the burden of aboriginal title remains. The purpose of modern-day treaties, as far as the state is concerned, is to reconcile Crown sovereignty with un-extinguished aboriginal title (Pennikett 2006).

But these calm assertions belie a messy, hot set of entanglements. The emergence of aboriginal title, however hedged in, complicates a settler society's framing of property (Walters 2009). As such, aboriginal title raises the possibility of novel entanglements

(or rather, it reasserts 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' (Howitt 2001 237), trading in 'ambivalence, uncertainty, change, overlap, and interaction'.

For the Crown, the treaty process offers the chance to reframe property in the face of such deepening entanglements. As Blackburn puts it, in relation to the Nisga'a treaty, established outside the treaty process but a powerful template for what has ensued, the state's objective is to transform aboriginal rights into something certain: 'Their knowability is essential for certainty; it is their transformation to known rights that eliminates them as threats' (2004 599).

This can be traced through the Crown's obsession with establishing what it terms 'certainty'. Certainty, simply put, is a framing that turns Aboriginal Title from overflow and entanglement into something appropriately bracketed and contained. An ambiguous (and 'uncertain') form of property is to be remade, and thus 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)<sup>4</sup>.

But what happens to aboriginal rights in this 'exchange'? Does the treaty deactivate aboriginal rights, or do they 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) 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 agree to release the Crown from future claims, shutting off (it is hoped) future entanglements. Yet for many First Nations, this is extinguishment by other means. The logic of 'certainty' is seen as working a powerful framing of indigenous title: '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' (UBCIC, no date, no page).

## **Fee simple and treaty-making**

Property and its frame is not simply the impetus behind the treaty process. It is also an expected outcome. A First Nation treaty signatory will receive a much-reduced portion of its traditional territory as 'treaty settlement land'. The question, which turns out to be a complicated and fascinating one, then becomes: how will the First Nation hold its land? Which legal categories are to apply?

A treaty, initialed in 1998 and ratified in 2000 with the Nisga'a, outside the treaty process, provided a significant template for the province. According to one of the provincial architects of the treaty, the thinking was that aboriginal title:

'does not have a defined legal structure and legal content. It isn't a defined estate within law. It's ... recognized - it's title, and it's possession - but in terms of ... the modern legal system it doesn't have that definition that say fee simple does. So what form of title should there be after treaty? Well, the treaty settlement lands, it was understood should be a comprehensive form of title. The most general and most comprehensive would be fee simple title'<sup>5</sup>.

Fee simple, apart from being the 'most comprehensive' is also said to be knowable and legible. One former negotiator for a First Nations treaty group characterized the Crown's position thus: 'we want you to have fee simple title because everybody knows what it is. There's no puzzle at all about that....You get all the greatness about the knowability of that thing'<sup>6</sup>. Fee simple, therefore, is a purely technical tool, the clarity of which fosters economic exchange. Uncertain and ambiguous rights are to be made 'certain'. It is also a comprehensive tool, offering the largest bundle of rights to the First Nation.

Some First Nations appear willing to accept fee simple mandate (although, it should be noted, there are very important nuances here, which I treat elsewhere). The Nisga'a and Tsawwassen First Nations, for example, adopted a property holding model in which the First Nation holds land in fee simple as a collective, while then allocating various forms of land holding to Nation members within. This is, as far as the Crown is concerned, fee simple on the outside, as against the world, and collectivity and culture on the inside. One worry of some First Nations, however, is that fee simple is more than a shell, but that it will work to undermine a collective interest, and usher in individualized land holdings. 'Fee simple' is not, as the Crown suggests, a neutral market instrument. Rather, it comes entangled with culture, colonialism, history, politics and place.

## **Overflows**

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 p 309), governed by the doctrine of tenures and estates. With roots deep in the arcane world of English property, it's not unfair to describe it as 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 Tehan 2010 8). For it entrains quite particular vestiges of culture, economics, history, and politics. Fee *simple*, for many First Nations, is anything but.

Essentially, indigenous property is felt to be ill suited to, or positively threatened by, a fee simple property form. Some First Nations object to the idea of an alien cultural import that was seen as delivering individualization and alienation. The experience of the US Dawes Act, which saw the loss of huge swaths of reservation land, is often cited. In effect, fee simple remakes a legal geography:

'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....'<sup>7</sup>.

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 signs 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 B.C. 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'<sup>8</sup>.

For the Crown, fee simple is a technical device that allows for a First Nation to interact with a larger world (de Soto 2010 likens secure property to the membrane surrounding an organism, in his defence of titling for indigenous communities). However, fee simple could be said to do more than this. It is, 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. This overflow, of course, is an essential dimension to the dominant framing of fee simple. However, for some First Nations the effect is to individualize the irreducibly collective, and to turn place into space. Rather than a healthy skin, fee simple has become an invasive carcinoma (cf. 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’<sup>9</sup>

And here another entanglement of fee simple complicates its framing as a detached market mechanism. While it sounds wonderfully libertarian, it also – fear First Nations - smuggles the State (or the Crown) back in. Canadian landholding is tenurial, all lands in private hands being held of the Crown in the form of an estate. Contemporary landholding, although notionally free of the trappings of fealty and obligation, retains the legal fiction of Crown radical title. Only the Crown has allodial tenure, therefore everyone else has a derivative right or interest. As such, fear many First Nations, their Treaty Settlement Lands, if held as a fee simple, could be conceived of as a Crown grant, thus denying their prior relationship to the land. The effect, many fear, is extinguishment of aboriginal identity.

### **Reframing fee simple**

So fee simple is complicated, insist many First Nations negotiators. As such, they engage in a form of categorical politics, resisting and denaturalizing ‘fee simple’, and opening up and attempting to stabilize alternative frames. This is a technical politics, fought within and around property’s categories and ordering frames. Yet it is also has a powerfully destabilizing potential, opening up and remaking the space of reconciliation, and resisting the ‘epistemic injustices’ (Fricker 2007) of dominant categorical forms. I focus, elsewhere, on the ways in which First Nations negotiators attempt to destabilize and work around and through fee simple. My focus here, however, is on the way in which, despite such moves, the Crown seeks to frame 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 frame with sharp, restrictive boundaries. As a result, alternatives become hard or simply unavailable for thought. But the Crown also seeks to govern that which is visible 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 frame. Yet the Crown’s fee simple is only one of several alternative fee simples in circulation. These alternative fee simples are messy, political, cultural and ambiguous, and threaten to burst out of the Crown’s frame. As such the fee simple frame has to be stabilized and made true. This requires hooking up treaty fee simple to a larger network, in particular that of land registration. The aim of the Crown’s categorical work is to frame fee simple as ‘simple’.

*Building the frame*

The legal impulse, as noted, is highly taxonomic. Indigenous property interests must be categorized. 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 analogize them as unsettlingly similar (Banner 1999). But this is not an open-ended process for the Crown, particularly for treaty-making. 'Certainty', it seems, requires stabilizing indigenous interests into a fixed, familiar form, with a discernable inside and outside.

The treaty process attempts to bracket the very question of aboriginal title, with the Crown beginning from the assumption that a First Nation has some legitimate interest in its traditional territory, and that this need not be proven. However, some form of title to 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) upon 'certainty' (cf. 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...' <sup>10</sup> Ambiguous aboriginal interests are to be translated into a certain, knowable frame.

A sharp frame 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<sup>11</sup>. Even to discuss them at the treaty table is said to not be useful. 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 p 5) of indigenous and common law.

To the extent that Treaty Settlement Lands are held as reproducible fee simple estates, then, they can be inserted 'into' the common law, as opposed to some prior, 'external' form of title. For one Crown representative:

'... 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'<sup>12</sup>.

*A sui generis*, community specific form of indigenous title under treaty would, however, create what was termed 'a carving out'<sup>13</sup>.

*Opening the frame:*

That which is outside, then, is to be brought inside. This is premised on the argument that given that the treaty process is not being conducted on a nation-to-nation basis, 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 which, of course, can say nothing else. This powerfully performative legal fiction 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 frame within the common law, surely there are multiple options available? 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.

However, it seems that the Crown only makes one categorical frame 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'<sup>14</sup>. A categorical cleansing seems to have been effected. At work here, perhaps, is a version of a particularly powerful categorical pruning tool, the *numerus clausus* principle, 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, 2000a p 3)<sup>15</sup>. The lush ecosystem that is common law property has been framed and reduced.

*Making a strong frame:*

How, then, to build the fee simple category? Put another way, how sharply defined is the frame to be? Categories can be framed in at least two ways. A *definitional* model of categorization 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 categorization, however, proceeds on a different basis, based on some ideal form (such the robin, for the category of bird), and degrees of similarity to the ideal form (emu, penguin, bat).

It is tempting to assume that law exclusively embraces a definitional model. Yet law seems perfectly capable of embracing prototypical models (Winter 1989; Feinman 1989; Katz, 1979; Rose 1988). However, in the treaty negotiations, fee simple has been constructed by the Crown in definitional terms as a sharply bounded frame. 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 third possibility other than either falling within a category or falling without it). 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. For one First Nations negotiator, 'fee simple' inscribes a bright categorical line: 'Where is the space to be able to work with the indigenous peoples?', he asks<sup>16</sup> In so doing, negotiators are seeking a form of prototypical categorization 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?<sup>17</sup>

*Black-boxing the frame:*

In the treaty process, fee simple is made available, in other words, through the elimination of alternative categorical possibilities. But this technical category is also stabilized 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. What's important about fee simple is not what it *is*, the Crown insists, but what it *does*. For the then Minister of Indian Affairs a treaty provides that 'existing Aboriginal title lands are modified into fee simple. This is to ensure that treaty settlement lands have the attributes of fee simple, which facilitates *harmonization* with established property management systems, *enhances* their economic potential, and *facilitates* economic development opportunities' (Strahl 2009 12, my emphasis).

First Nations who worry about what's inside the fee simple frame, it is suggested by Crown negotiators, should focus more on the desirable outputs that fee simple

generates. Most immediately, fee simple is seen as desirable for a First Nation as 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'<sup>18</sup>. Fee simple, then, is mobile, transferable, and universal.

Aboriginal forms of landholding are also seen as localized, and incapable of being be scaled up. As such, fee simple generates a *reproducible* form that fosters harmonized 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?'<sup>19</sup>. This relies on the characterization 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 a manifestation 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, harmonized governance, and constitutional certainty. Fee simple is not full of history, place, culture, and politics, but is a technical device that fosters certainty and calculation.

#### *Bending the frame:*

But here things get somewhat less simple. For the fee simple that has been offered to First Nations is not quite 'fee simple', but is termed 'fee simple plus'. The 'plus' component technically refers to the fact that the fee is held collectively, by the First Nation, and that the lands are not subject to the normal exceptions and reservations set out in the provincial Land Act. The lands are also not subject to expropriation except under particular terms, and do not fall within the Crown's reversionary interest.

So is the 'plus' simply additive, or does it produce a new creature? For there are many qualities to fee simple plus that appear to depart from the prototypical form. My 'fee simple' does not appear very close to 'fee simple plus.' 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'<sup>20</sup>.

Something strange happens here: 'fee simple plus' seems to escape its own frame. 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'<sup>21</sup>, then why insist on the fee simple designation? Why can we not go further? But for the Crown,

unwittingly channelling pragmatism, debates about what fee simple plus actually is are irrelevant. Don't ask me what fee simple plus is, says the Crown, ask me what it does. As a framing, it works to the extent that can arrange relations and networks to generate the effect of certainty and clarity (Mitchell 2007). Fee simple 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'<sup>22</sup>.

### *Making the frame true:*

But how is it possible for a duck that isn't a duck to walk like one? The fee simple frame at work at the negotiating table, of course, does not live 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. They stabilize and authorize particular categorical arrangements. Similarly, while the registration of land, again, sounds like rather a technical concern, it entails the sanctioning of particular categorical forms. 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 formalized in reserves or treaties, appear to have a hard time inserting themselves into the registration system. Aboriginal title has been determined to have 'no place in the Torrens system'<sup>23</sup>. 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 (providing the correct protocols of registration and survey are completed), whatever it is elsewhere.

### **Closing comments:**

For some, my account may seem somewhat diversionary. If we're interested in the treaty process, it might be argued, we need only point to the workings of 'power'. This was never a conversation between equals, clearly, but always was a grudging exercise conducted on the terms set by a powerful settler society, driven not by a desire at righting historic wrongs, or engaging in inter-legal cultural conversations, but by a wish to resolve an unresolved title question in order to advance investment certainty in an economy based on resource extraction. As a Senior Provincial Negotiator bluntly noted: 'we're into a power game here. You know, 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?<sup>24</sup>

First Nation negotiators continue to worry that the treaty process remakes property in non-integrative and worrisome ways. Perhaps we must follow Coulthard's (2007) 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' (451). But to characterize 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', 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

To get at this requires an attention to legal technicalities. While it may be agreeable to invest critical energy in a critique of concepts such as 'colonialism' (crucial though this is), the danger is that we then miss the quiet framing work at play. The treaty process, it must be understood, is a *legal* one, conducted largely by lawyers (on both sides), with negotiations centring on legal concepts and conducted through a legal language, seeking a treaty, a legal document. Property is performed here, it seems, in essentially technical terms.

Yet rather than writing the technical off as non-political, and looking immediately for larger, more exciting dynamics, I follow Annalise Riles in thinking that the technicalities of law deserves more careful attention on their own terms. Her insistence is that '... the technicalities of law are precisely where the questions that interest us actually are played out' (Riles, 2005 975). We cannot but think about the treaty process through a colonial lens, of course. However, we also need to pay attention to the particular work of law and legal knowledge in this encounter. Legal 'knowledge 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. And thinking of the state as the practice and effects of knowledge work does not trivialize it, but specify it' (Riles 2011 89).

Central to this 'knowledge work', I suggest, is the attempt to place aboriginal property within the category of fee simple. The treaty process, broadly put, entails a battle over framing, 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 categorization works through a logic of framing, I wish to suggest, predicated on the construction and contestation of the brackets surrounding property in general, and fee simple in particular. The treaty process itself entails a struggle over such frames, as does the bracketing of aboriginal title in the fee simple frame.

What I have sought to do here is to trace the ways in which the Crown seeks to simplify fee simple. Put another way, it seeks to stabilize a particular framing. But as with any frame, this bracketing is open to overflows, 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 technical and categorical policing. The frame cannot be taken as given. I have tried, in this paper, to document some of this technical labour. The complex practices of frame-bending and black-boxing suggest that we may need a richer conception of framing than is currently available.

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)<sup>25</sup>. The important task, then, becomes 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 work that legal technicalities can achieve. For them, of course, fee simple is far from an 'easy' category. They're engaged in attempts at arguing from within and around the technicality, of trying to make fee simple less simple. But to do so is to work against a dominant framing, for fee simple is simply unavailable for criticism. Unlike indigenous title, which must be defended through networks of explicit argumentation, case law and overt and often embodied practice, fee simple 'goes without saying because it comes without saying' (Bourdieu 1977, 169).

But if it comes in silence, it does not come without framing. 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. As a non-indigenous scholar, I leave the job of disrupting fee simple's frames to the First Nations' negotiators who, as I show elsewhere, have worked inside and outside fee simple, reframing it, and re-entangling it with culture, history and politics. My task here is simply to reveal the frame. In much the way that the radical dramatist, who breaks the conventions of drama, opens the play up to new and creative possibilities (Kershaw 1992), so by identifying property's frame, perhaps we begin to question the performance, and the role of the actors within it. In so doing, we maybe begin to invite alternative frames.

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<sup>2</sup> While there are historic differences between the provincial and federal positions, there is now considerable commonality between them, at least on the 'status of lands' question. On the strange legal creature that is the Crown in Canadian law see Valverde (2012).

<sup>3</sup> *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1

<sup>4</sup> Business Council of BC – submission to BC Select Standing Committee on Aboriginal Affairs, Dec 4 1996

<http://www.leg.bc.ca/CMT/36thParl/CMT01/1997/hansard/ab1204.htm>

<sup>5</sup> Doug McArthur, former Provincial Deputy Minister, interview with author, September 27 2010.

<sup>6</sup> Brian Thom, former negotiator, Hul'qumi'num Treaty Group

<sup>7</sup> Robert Morales, Chief Negotiator, Hul'qumi'num Treaty Group, interview with author, 9 August 2010.

<sup>8</sup> Interview with author, November 30 2010. The BCTC is an independent body designed to facilitate the treaty process.

<sup>9</sup> Brian Thom, former negotiator, Hul'qumi'num Treaty Group – email May 30 2012

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<sup>10</sup> Tom Molloy, Chief Federal Negotiator (speaking on his own account, not that of government), interview with author, January 22 2010, my emphasis.

<sup>11</sup> Tom Molloy, Chief Federal Negotiator (speaking on his own account, not that of government), interview with author, January 22 2010.

<sup>12</sup> Provincial representative, Interview with author, November 2 2010.

<sup>13</sup> Provincial representative, Interview with author, November 2 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).

<sup>14</sup> Provincial representative, Interview with author, November 2 2010.

<sup>15</sup> While Merrill and Smith (2000a) see economic merit in this principle, others express reservation. For Bright (1998 546) English judges have ‘bolt[ed] the door’ on existing categories of property: ‘[i]t is about time that the door was opened and new rights admitted on a more principled basis’.

<sup>16</sup> Robert Morales, Chief Negotiator, Hul’qumi’num Treaty Group, interview with author, 9 August 2010, my emphasis

<sup>17</sup> Robert Morales, Chief Negotiator, Hul’qumi’num Treaty Group, interview with author, 9 August 2010, my emphasis

<sup>18</sup> Provincial Negotiator, interview with author and Brian Egan, 16 July 2010.

<sup>19</sup> Provincial Negotiator, interview with author and Brian Egan, 16 July 2010.

<sup>20</sup> Kent McNeil, interview with author November 8 2010.

<sup>21</sup> Sophie Pierre, Chief Commissioner, BC Treaty Commission, interview with author, November 30 2010.

<sup>22</sup> Mark Stevenson, chief treaty negotiator, K’ómoks First Nation

<sup>23</sup> (*Skeetchestn et al v Registrar of Land Titles Act* 2000 BCSC 0118 (p 11 in online record – see 10 WWR 222 for official record).

<sup>24</sup> Provincial Negotiator, interview with author and Brian Egan, 16 July 2010.

<sup>25</sup> Law seems full of such easiness. Bourdieu (1987, 838) characterizes law’s performative power, whereby utterances ‘succeed because they have the power to make themselves universally recognized’ as a form of social ‘magic’ (cf. Allen 2008). Borrows (1999) points to the law’s alchemical powers whereby juridical assertions serve to conjure sovereignty. But magic, like ‘easiness’, or ‘mystery’ requires careful explanation. It doesn’t happen on its own.