TOWARDS SHARED OWNERSHIP: PROPERTY, GEOGRAPHY, AND TREATY MAKING IN BRITISH COLUMBIA

by
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ABSTRACT. In British Columbia, Canada's westernmost province, unresolved Aboriginal claims to land remain highly contentious. Since the early 1990s, a unique treaty negotiation process has sought to resolve questions about land ownership and establish a new relationship between Aboriginal peoples and the Crown. After almost two decades, the limitations of this treaty process are increasingly evident and answers to the land question remain elusive. This article examines this treaty-making process through a property lens, focusing on how particular models of property are privileged by and produced through this approach to treaty. I argue that the treaty process, as currently structured, works to entrench dominant Western forms of property across Aboriginal territories in a highly separate and unequal manner, and as such, serves to reinscribe asymmetrical relations of power between Aboriginal peoples and the Crown. To a considerable extent, this asymmetrical approach to property making explains the lack of progress towards treaties. The final part of the article explores alternative approaches to treaty proposed by Aboriginal groups. I argue that these proposals, which reflect Aboriginal understandings of property, offer a new and more promising direction for treaty making. In particular, the emphasis on sharing lands and resources, as well as the wealth generated from these, provides a path to reconcile competing property interests and to build a new and more respectful relationship between the Crown and Aboriginal peoples. I suggest that the difficulties of treaty making in British Columbia reflect broader challenges associated with land restitution and reconciliation in settler colonies.

Keywords: Aboriginal, British Columbia, Canada, land, property, settler colonialism, treaty

Introduction

In Canada, treaties have long played a key role in mediating relations between Aboriginal peoples and the Crown.[1] While early treaties furthered military or economic relationships, by the late nineteenth century the Crown relied on treaty making primarily to secure land for an expanding settler nation. Between 1850 and 1923, land cession treaties extinguished Aboriginal title to vast areas of central and western Canada (Miller 2009). In British Columbia, however, few historic treaties were completed, and questions of land title remained unresolved across most of the province. This uncertainty over land ownership in Canada's westernmost province, heightened by an effective Aboriginal land claims movement, led to the creation, in the early 1990s, of a unique treaty-making process. Under this process, three parties – Canada, British Columbia and Aboriginal groups – seek to negotiate modern comprehensive treaties to clearly define Aboriginal and Crown rights to land and natural resources. By resolving the land question, and establishing a form of Aboriginal self-governance, the treaty process was to help create 'a new relationship based on mutual trust, respect and understanding' between the Crown and Aboriginal peoples in British Columbia (British Columbia 1991, p. 7).

Treaty making in British Columbia has proven to be a highly contested and painfully slow process. After two decades of negotiation, only two treaties have been finalized while negotiations at some four dozen other treaty tables are stalled or progressing at only a glacial pace. A number of Aboriginal groups have withdrawn from treaty talks altogether and many others have refused to join the process at all, believing it to be flawed and ill-suited to their needs. Moreover, relations between the Crown and many Aboriginal groups in the province remain strained, burdened with longstanding disputes and misunderstandings. Reflecting on these challenges, in late 2011 Sophie Pierre, Chief Commissioner for the BC Treaty Commission, called on all three parties to provide a new direction for the treaty process. If the process cannot be fixed, she bluntly concluded, it should be shut down (Lavoie 2011).

In this article, I examine modern treaty making in British Columbia through a property lens. While a number of scholars have highlighted the limitations of the treaty process (e.g. Day and Sadik 2002; de Costa 2003; Woolford 2005), none have explored the role of property in the contemporary effort to resolve Aboriginal land claims in the province.[2] Yet at its core, the treaty process is centrally concerned

with property. It was created to resolve the dispute between First Nations and the Crown over property in land, with treaties establishing certainty about who "owns" what land across the province and serving to reconcile Crown and Aboriginal land titles. Part of the failure to conclude more treaties, I argue, can be attributed to the Crown's insistence on resolving the land dispute primarily through reference to the dominant Western model of property, what Singer (2000) calls the "ownership model". Relying on this model, the process seeks to demarcate a clear boundary between Aboriginal and Crown lands, thus reproducing distinct spaces of Aboriginal and settler (non-Aboriginal) life. Moreover, it seeks to do so in a highly unequal fashion, as the property recovered by First Nations through treaty comprises a small fraction of their ancestral lands. Rather than establishing a new relationship between the Crown and Aboriginal peoples, this approach works to reinforce the asymmetrical relations of power that have long characterized Crown–Aboriginal relations in British Columbia.

I begin by situating treaty making in British Columbia within a broader scholarly discussion of land dispossession and contemporary land restitution in settler colonies. I then review different understandings of property, focusing in particular on key differences between Western and Aboriginal conceptions of property. I examine the role of property in the historic dispossession of Aboriginal peoples and then turn to the treaty process in British Columbia, exploring how different ideas about property are mobilized in negotiations and how property gets transformed and produced through treaty making. Central to this reworking of property is the deployment of a particular approach to achieving "certainty" on the question of land ownership, which transforms a territorially expansive understanding of Aboriginal title into a spatially confined form of property called fee simple plus. Aboriginal opposition to this approach is a key reason for the lack of progress at many treaty tables. I conclude by exploring a number of alternative approaches to resolving the land question, as proposed by First Nations. I argue that these proposals, which reflect particularly Aboriginal conceptions of property, illuminate a path beyond the current treaty impasse. Based on the idea of shared property rights, these proposals provide a means to not only resolve the land question but also to establish a new and more equal relationship between Aboriginal peoples and the Crown.

Settler colonialism, land restitution, and property

The past decade has seen a burgeoning scholarly interest in historical and contemporary dimensions of settler colonialism (Elkins and Pedersen 2005; Coombes 2006; Bateman and Pilkington 2011). Settler colonialism is described as a transnational phenomenon distinct from other colonial formations, a key distinction being that settlers carry sovereignty with them and found new political orders in the spaces they colonize (Veracini 2010). Unlike other forms of colonialism, which exploit Aboriginal labour and local resources to benefit an expanding metropole, in settler colonialism the land itself is the primary interest. For Wolfe (2006), the logic of settler colonialism is one of elimination, as Aboriginal peoples must be removed so that settlers can possess their lands and the settler state can secure their territories. Thus, the histories of settler states like Aotearoa New Zealand, Australia, Canada, South Africa and the United States are marked by efforts to dispossess Aboriginal peoples of their ancestral lands and to eliminate Aboriginal societies from the national physical and imaginative landscape (Banivanua Mar and Edmonds 2010). The logic of elimination is variously expressed through warfare, spatial displacement and the assimilation of Aboriginal subjects into settler society (Wolfe 2011).

The limited success of these colonial projects is evidenced by continuing Aboriginal struggles over land in settler states around the globe and in the contemporary efforts of many settler states to resolve these challenges through programmes of land restitution (van Meijl and Goldsmith 2003; Langton *et al.* 2004; Fay and James 2010). In this sense, modern treaty making in British Columbia can be understood as one manifestation of this broader global project of restitution and reconciliation. Key to understanding treaty making in British Columbia, and to land restitution in settler colonies more generally, is Wolfe's (1999, p. 2) point that colonial 'invasion is a structure not an event'. Settlers come to stay and implant legal, political and economic structures that come to dominate in settler states. Of particular relevance are Western property regimes, which constitute a particularly powerful structure in settler colonies, embedding dominant legal and political-economic ideas across state territories. In these contexts, Aboriginal dispossession and displacement is an ongoing process as the settler state works to constrain Aboriginal claims to land and political

self-determination within these dominant structures. Veracini (2007, p. 25) notes that this containment also works on a discursive level, as there is 'no intuitive/acceptable narrative of settler colonial decolonization, and/or Indigenous/national reconciliation'. Within such constraints, contemporary land restitution efforts, such as modern treaty making in British Columbia, tend to reproduce colonial structures and relations.

Western and Aboriginal property

From a Western perspective, property is most commonly understood to refer to things that one possesses or "owns". A more formal understanding of property, from within Western legal tradition, makes reference to rights *in* or *to* things. Property provides a bundle of such rights, including the right of owners to use their property as they wish, to exclude others, and to transfer title of their property to others. In liberal capitalist states like Canada, the "ownership model" dominates the way we think about property (Singer 2000). At the centre of this model is the owner, understood to hold all (or almost all) of the rights associated with property. When property disputes arise, the rights of the owner are given precedence and the onus is on others (e.g. non-owners, the state) to explain why these rights should be infringed or limited. Further, owners are seen as "self-regarding", largely concerned with their own proprietary interests and free of obligations to those beyond their property lines (Singer 2000, p. 30). From this perspective, property is equated with private property – an exclusive individual right to property – and the ideal property form is fee simple title, an estate in land considered to be the most complete form of individual private property ownership recognized in law (Macpherson 1978).

According to the ownership model, property can have only one owner and a clear line is drawn between this owner and non-owners. Properties, in this model, do not overlap. The right of the owner to exclude non-owners is fundamental to this understanding of property. Also key is seeing property as fungible, a thing that can be possessed, separated from the owner, and traded in the market. In a market economy, property's real value rests on its exchange value. This dominant model also embodies a particular spatial form, with the owner's rights neatly contained within clearly delineated property boundaries (Blomley 2004, pp. 5–6). Property, in this formulation, is a well defined space of individual freedom and autonomy, a bulwark against the state and the larger collective. This model posits property as fixed, objective, pre-political and certain.

The ownership model may dominate the way we think about property and tell us what property ought to look like, but the way that property actually works on the ground is somewhat different (Underkuffler-Freund 1996). While the dominant model emphasizes the freedom and autonomy of owners, separate and secure within the bounds of their property, closer scrutiny suggests a more complex relationship between property holders and society. Property rights are not separate from but rather embedded in, and dependent on, social and political relations. Property rights are protected by the state, in property law, and rely on broad social agreement to function effectively. Property, even private property, requires a kind of social consensus and must persuade us of its usefulness and legitimacy (Rose 1994). In everyday life, then, property is not fixed, objective and beyond politics, but rather fluid, contingent and open to contestation (Blomley 2004, p. 14). The contingent and contested nature of property is particularly evident in settler states, where Western property regimes overlay pre-existing and continuing Aboriginal property systems. The unstable legal foundation of settler property systems in Canada is highlighted by Borrows (1999, p. 558), who notes how the Crown's assertion of sovereignty somehow transmuted Aboriginal possession of lands and resources into 'the golden bedrock of Crown title'.

In contrast to the ownership model, critical legal scholars articulate a broader conception of property, one that recognizes the centrality of social relations to this institution. Rather than being centrally concerned with organizing a person's rights *to things*, they argue, property is more fully and usefully understood as being about organizing relations *between* people *with respect to* things (e.g. Nedelsky 1993; Cooper 2007). Understood in this way, property becomes a more complex concept, bound up with questions of identity, belonging, citizenship, freedom, status and economic progress. Seeing property as a historically contingent social institution, one deeply enmeshed in, and constitutive of, social and political relations, allows us to move beyond hegemonic understandings of property and consider alternative ways of organizing property to meet various social, economic and political goals (Macpherson 1973). Further, understanding property as a socio-cultural practice acknowledges that

conceptions of property vary from culture to culture, reflecting not only variations in modes of owning and possessing but very different ways of relating to the world at large. In a process like treaty making, centrally concerned with negotiating new property relations between Aboriginal and settler cultures, paying attention to the socio-cultural dimensions of property is critically important.

Bryan (2000) argues that there is no universal Aboriginal conception of property, noting that understandings of property vary greatly across Aboriginal cultures. Just as there is no unitary Aboriginal identity so there is no unitary Aboriginal model of property, as Indigenous peoples have developed distinctive property systems to suit their particular ecological, economic and political contexts. While a universal definition of Aboriginal property may be neither possible nor useful, it is possible to identify a number of differences between Aboriginal and Western conceptions of property. I focus here on three areas where Aboriginal property conceptions may be distinguished from the dominant Western model – relating to the spatiality, fungibility and exclusivity of property – all of which reflect and shape different ways of relating to the world, to the land and to the people around us. It should be noted that while I emphasize important differences between Western and Aboriginal conceptions of property – and in particular between somewhat idealized property models, the ownership model on one hand and more traditional Aboriginal property models on the other – there are also many similarities between them. In settler colonies, Aboriginal peoples are typically adept in both property systems, and often draw on Western property concepts to make their land claims intelligible to the state and to advance their objective of regaining control over their ancestral territory and the resources it contains (Nadasdy 2002).

In their idealized forms, Western and Aboriginal conceptions of property differ in their spatial form. The cadastral map provides the clearest image of property's spatial form under the ownership model, a grid of land parcels with clear, unambiguous boundaries. Within the property grid, relations between property holder, property and fellow citizens are mediated through the notion of ownership. Propertied spaces are seen as spaces of separation and autonomy. Aboriginal conceptions of property embody a different kind of spatiality, less reliant on the enclosure of property rights within clearly bounded spaces and defined more by the allocation of property rights on what Banner (1999, p. 811) calls a "functional" basis. In traditional Maori property systems, Banner notes, several different individuals or family groups can hold property rights in the same area. Within one area, for example, the rights to fish, hunt, till the ground and gather berries can be allocated to different individuals or groups. In his study of Coast Salish peoples on British Columbia's south coast, Thom provides a similarly complex picture of the spatiality of Aboriginal property. In this region, property boundaries are permeable, with property rights constituted through 'ideas and practices of kin, travel, descent and sharing' (Thom 2009, p. 179). From an Aboriginal perspective, property boundaries are as much about drawing lines of relation or connection as they are about marking lines of separation.

Central to the ownership model is the idea that property is fungible, a "thing" (or an object) that is interchangeable or replaceable with something else and that 'can be separated – legally, physically, and emotionally – from the one who possesses it' (Cooper 2007, p. 629). The spatial form of property under the ownership model, an unambiguous plot of land with one individual owner, makes it easier to see property as a thing that can be owned and traded in the market. Bryan (2000, p. 28) argues that fungibility is uncommon in Aboriginal understandings of property. In Aboriginal worldviews, he notes, a thing may embody a specific person or relationship; a tree may be someone's grandfather, for example, a mountain may embody a mythical spirit or ancestor. As a result, things are not always interchangeable with each other; one piece of land is not the same as another, all trees are not the same. The idea of land being separable from the property holder is also less common in Aboriginal worldviews, where land is often understood not as a lifeless substrate but as a lively presence or a ground from which things develop and grow, and through which Aboriginal identities are constituted (Ingold 2000, p. 133). Common to many Aboriginal worldviews is the understanding that all things are related and connected to each other (Shaw *et al.* 2006; Mack 2011). Aboriginal conceptions of property reflect this relational ontology, which emphasizes connections and relations between humans, ancestors, spirit beings, animals, plants, and what most Westerners would consider inanimate nature (Feit 2004; Ingold 2004). Shaped by this worldview, it is difficult to frame Aboriginal property understandings within Western ideas about ownership (Bryan 2000; Nadasdy 2002).

The ability to exclude others from one's property is also key to the ownership model. Private property entails fences and "No Trespassing" signs, and owners rely on the state to remove non-owners from their land. Property owners see themselves as having few, if any, obligations to those who live beyond the boundaries of their property. The ability to exclude is also common to Aboriginal property systems, which provide rules for access to land and natural resources. Depending on the Aboriginal group and the type of resource involved, access rights may be held by individuals, families or the tribe. However, as Thom discusses in the case of Coast Salish peoples, a pervasive ethic of sharing and reciprocity often allows "owned" resources to be opened up to others, not only to close and distant relations but also, when proper protocols are followed, to those with no clear claims to ownership (Thom 2005). More generally, scholars have noted that ethics of sharing, reciprocity, and redistribution are common to Aboriginal conceptions of property (e.g. Ingold 1986; Tully 2000; Gombay 2010). What may appear as the absence of clear property rules – the sharing of lands and resources, for example, or the redistribution of wealth through ceremonies such as potlatches – actually represent ways of organizing relations between different social groups with respect to important properties, including lands and natural resources.

Unmaking Aboriginal property

In settler states, colonialism relies on the displacement and dispossession of Aboriginal peoples to open up lands for European settlers. The colonial project entails the "unmaking" of Aboriginal space, the transformation of ancestral territories into colonial properties (Raibmon 2008). Dispossessed of their territories, Aboriginal peoples have to be located elsewhere; thus, settler colonialism also required a "making" (or re-making) of Aboriginal space, albeit on a much more limited scale (Harris 2002). The production of these colonial geographies is neither easy nor frictionless, as Aboriginal peoples resist displacement and dispossession at every turn. As Said (1994, p. 7) puts it, colonialism entails a 'struggle over geography', a contest not only over the remaking of material space (land) but also over how spaces are conceived and imagined. As a spatial-legal concept and an institution that shapes socio-economic and political relations, property serves as both a key tool in dispossession and a productive site of Aboriginal resistance (Harris 2004, p. 177). Across settler colonial states today, these struggles over property and geography continue.

European misconceptions of Aboriginal property are evident from the earliest encounters between these two groups. In 1493, Columbus expressed doubt about whether the Aboriginal peoples he encountered in America had private property, observing that they appeared to share in whatever anyone had (Berkhofer 1978, p. 6). The notion that Aboriginal peoples held all things in common – meaning, in effect, that they had no property systems at all – became central to settler colonial discourse and served to legitimate European appropriation of Aboriginal land in many different settings (Williams 1990, pp. 208–212; Banner 1999, 2005; Weaver 2003). The failure to find familiar visual cues of land ownership – such as fences or enclosed gardens, in the case of English settlers – reinforced European beliefs that Aboriginal peoples lacked any conception of property (Cronon 1983; Seed 1995). Settlers adopted a Lockean view, where America represented the world as it was in the beginning, a land without property, and the frontier, the imagined line between civilization and savagery, was where property was created through the application of settler labour to raw nature (Arneil 1996; Blomley 2003).

In Canada, land cession treaties were the primary vehicles for effecting the displacement of Aboriginal peoples and the appropriation of Aboriginal properties. Although treaties formally extinguished Aboriginal title across much of Western Canada in the late nineteenth and early twentieth centuries, few such agreements were concluded in British Columbia.[3] For a brief period, colonial authorities in British Columbia did recognize Aboriginal property rights and sought to secure space for settlement by purchasing land from Aboriginal groups. Between 1850 and 1854, colonial governor James Douglas concluded 14 land purchase agreements with Aboriginal groups on Vancouver Island, securing about 93,000 hectares of land for colonial settlement (Tennant 1990, pp. 17–25). When Douglas retired in 1864, however, control over land policy fell to colonial authorities much less sympathetic to Aboriginal peoples and their land rights, and the denial of Aboriginal property rights became firmly entrenched in British Columbia's colonial leadership. This denial, which continued under the new provincial leadership once British Columbia became part of the Dominion of Canada in 1871, fundamentally shaped the province's early land policy.

The denial of Aboriginal land rights obviated the need to purchase Aboriginal lands or to take any formal legal measures, such as treaty making, to extinguish Aboriginal title.[4] From the Crown's perspective, Aboriginal land needs could be met through the creation of a system of Indian reserves, which would simultaneously open up Aboriginal territories to settler appropriation. As Harris (2002, p. 261) documents, the construction of British Columbia's Indian reserve system was a drawn out and one-sided affair; when completed in the 1920s, 1,536 reserves had been mapped out encompassing about one-third of 1 per cent of the province's land area, meaning that more than 99 per cent of the province was made available for settlers and the settler state. The reserves that made up this system tended to be small, particularly when compared to Indian reserve allocations elsewhere in Canada or in the United States, reflecting the desire of provincial leaders to minimize the amount of land set aside for Aboriginal communities. Restricted to village and critical resource procurement sites, Indian reserves were demarcated so as not to inhibit the land demands of the growing settler population. Under this system, Aboriginal life was increasingly constrained within a grid of settler private and public properties (Fig. 1), with the boundary drawn around reserves coming to mark important differences in socio-economic status and civil, political, and legal rights for Aboriginal and non-Aboriginal peoples in British Columbia.[5]

While the focus here is on the taking of Aboriginal lands, First Nation communities in British Columbia and across Canada have long been subject to other forms of dispossession, marginalization, and political control. Key to this is the federal *Indian Act*, originally passed in 1876, which allows the federal government to define who is (and is not) a "status Indian" and to administer and regulate the lives of Aboriginal peoples. Under the *Indian Act*, Canada outlawed important Aboriginal socio-cultural institutions, such as the potlatch (Cole and Chaikin 1990), imposed foreign systems of community governance, and prohibited First Nations from engaging in political and legal activity in pursuit of their land claims (Tennant 1990). While some of the most harmful elements of the law were removed in subsequent decades, the *Indian Act* remained in place as a key part of the broader settler colonial structure shaping Aboriginal lives. Perhaps most damaging was the federal government's residential school system, in which Aboriginal children were taken from their families and "educated" in centralized boarding schools (Milloy 1999). A key tool in the federal government's effort to assimilate Aboriginal peoples into settler society, the residential school system spawned untold social and cultural dislocation among Aboriginal communities, the legacy of which the nation is only now beginning to comprehend (Regan 2010). For Aboriginal peoples in Canada, this colonial history continues to reverberate in the present, affecting their everyday lives in myriad ways and generating deep mistrust of Crown policies and programmes.

Modern treaty making in British Columbia

The dispossession of Aboriginal peoples was never fully accomplished, as First Nations across British Columbia resisted confinement to small Indian reserves and continuously asserted rights to land and resources across their broader ancestral territories (Tennant 1990). Over the past four decades, this resistance has yielded important advances for Aboriginal land rights, particularly in the legal realm. Starting with the Supreme Court of Canada's 1973 decision in the *Calder* case, a series of court decisions has dismissed the Crown's argument that Aboriginal title had long been extinguished and has established in Canadian law the continuing existence of Aboriginal property rights across much of British Columbia, including on ancestral lands outside of Indian reserves (Godlewska and Webber 2007). In the 1980s, Aboriginal blockades of resource extraction activities across the province, in combination with pressure from the courts, forced the Crown to engage with First Nations on the land issue (Blomley 1996). This led, in 1990, to the establishment of the BC Claims Task Force, charged with finding a way to negotiate the resolution of Aboriginal land claims in the province (McKee 2009, pp. 26–31).

In 1991, the task force recommended that First Nations, Canada and British Columbia 'establish a new relationship based on mutual trust, respect and understanding – through political negotiations' (British Columbia 1991, p. 8). This new relationship, it was further asserted, was to be achieved through 'voluntary negotiations, fairly conducted, in which the First Nations, Canada, and British Columbia are equal participants'. Negotiations would move through six stages, producing modern comprehensive treaties that would resolve competing interests in the land and deal with questions of Aboriginal

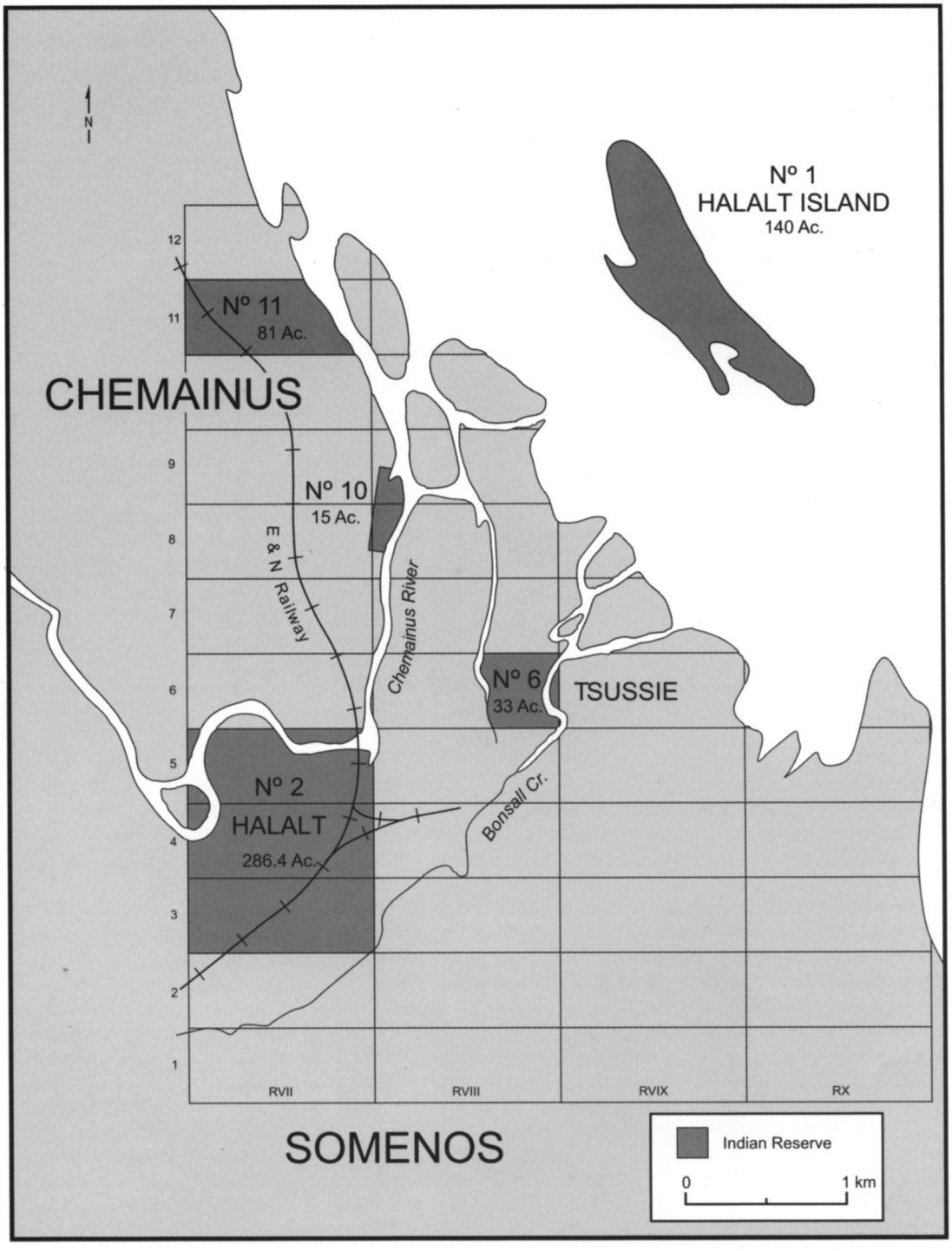

Figure 1. Indian reserves and the property grid on southeast Vancouver Island, British Columbia. Map by Ian Macek.

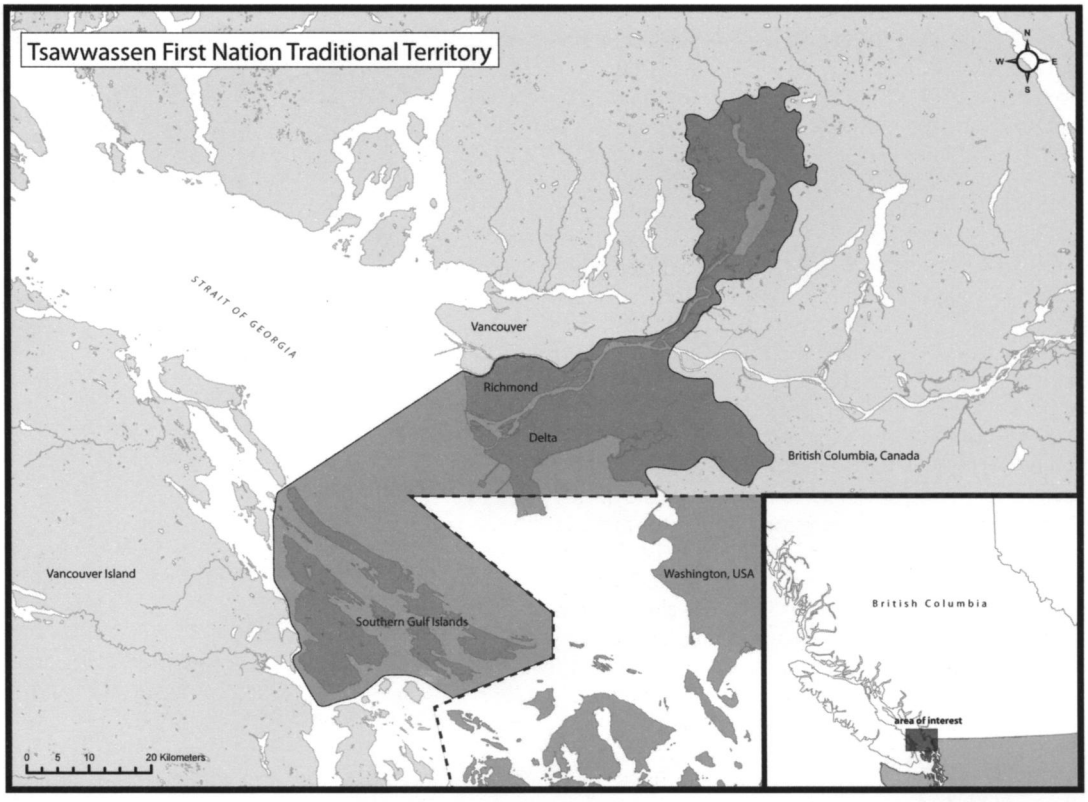

Figure 2. Tsawwassen First Nation traditional territory on British Columbia's south coast region. Map by John Ng.

self-government, the application of different legal systems, intergovernmental relations, financial compensation, and the provision of government services. Defining treaty making as a process of political negotiations represented an important shift in approach for the federal government, which, up to that point, had required Aboriginal claimants to clearly demonstrate their title to land according to narrow Euro-Canadian criteria. The treaty process proposed for British Columbia would require no such discussion of Aboriginal property rights; rather negotiations would focus on Aboriginal peoples' claims to self-defined traditional territories (Thom 2009).

The task force pointed to certainty as a key issue to be addressed in treaty talks. Competing Aboriginal and Crown claims to the land created uncertainty about ownership and jurisdiction, which treaties were intended to resolve. While certainty on the question of land ownership had, up to that point, been achieved through blanket extinguishment of Aboriginal title, the task force explicitly rejected this approach. Rather, it argued, the 'parties must strive to achieve certainty through treaties which state precisely each party's rights, duties, and jurisdiction' (British Columbia 1991, p. 11).

The creation of the British Columbia Treaty Commission in 1993, an independent body charged with monitoring the negotiations process, marked the onset of modern treaty making in British Columbia. Under this process, treaty negotiations are organized around First Nations' traditional territories. First Nations initiate the process by submitting a Statement of Intent to the Treaty Commission, indicating their desire to negotiate and identifying the area, or traditional territory, that is to be subject to treaty talks. (By way of example, Fig. 2 shows the traditional territory of the Tsawwassen First Nation, located in southwestern British Columbia, as identified in its Statement of Intent submitted to the Treaty Commission in 1993.) The Commission was quickly flooded with Statements of Intent; by 1996 some

four dozen First Nations had entered the treaty process (BC Treaty Commission 1997). In December 2012, there were 60 First Nations in treaty negotiations at 49 different treaty tables, representing about two-thirds of the province's Aboriginal population (BC Treaty Commission 2011a).

Progress towards treaty settlements has been slow. By late 2012, only two final treaty agreements had been ratified, with the Tsawwassen and Maanulth First Nations respectively, while a dozen other Aboriginal groups had progressed to stage five or six of the process, indicating that a final agreement was likely at these tables within a few years. However, 80 per cent of First Nations engaged in the process remained far from a final treaty agreement; twenty-nine Aboriginal groups had not progressed beyond stage four, where negotiations over substantive issues like land and governance take place, and an additional nineteen groups remained in the process but were no longer actively negotiating (BC Treaty Commission 2011b). In 2007, eight First Nations withdrew from treaty negotiations, concluding that an equitable deal was not possible under the process.[6] In addition, a significant minority (about 40 per cent) of British Columbia's First Nations, representing approximately one-third of the province's Aboriginal population, had chosen not to enter the treaty process at all, seeing the process as flawed and ill suited to their needs (British Columbia 2006, p. 19).

There are numerous impediments to treaty making in British Columbia. At many treaty tables the gap between what the Crown is offering, in terms of the amount of land and other treaty benefits (e.g. cash, access to natural resources), and what Aboriginal communities are seeking is large. There are also significant differences between Crown and Aboriginal negotiators over issues such as the nature of Aboriginal self-governance, the application of federal and provincial laws, and intergovernmental fiscal relations – all key elements of modern treaties (BC Treaty Commission 2008). The framing of treaty making as a process focused on establishing a new relationship for the future, rather than one concerned with addressing past injustices, is problematic for many First Nations. The failure to address the colonial past in any meaningful way means that compensation for historic infringement of Aboriginal title and rights, something of importance to many First Nations, is not on the table for negotiation (Day and Sadik 2002).

While all of these issues impede progress towards treaty, perhaps the most difficult challenge relates to the question of how to achieve certainty on the land question. While certainty of land ownership is important to all negotiating parties in the treaty process, for the Crown this issue is seen as particularly critical. Unresolved Aboriginal land claims create an uncertain climate for private investment in land and natural resource sectors (e.g. forestry, mining, oil and gas), which generate significant Crown revenues in British Columbia. By removing this uncertainty, the Crown argues, treaties will provide economic benefits to all British Columbians, Aboriginal and non-Aboriginal (BC Treaty Commission 2004). For many First Nations engaged in the treaty process, however, the certainty model employed by the Crown is deeply problematic, requiring them to cede their property claims to their larger traditional territories in exchange for secure ownership over a much smaller area. First Nation opposition to this certainty model is a major reason that talks are stalled at many treaty tables.

Reworking property and geography

The British Columbia treaty process is centrally concerned with property. It was created to resolve a longstanding property dispute between the Crown and Aboriginal communities. At its core, it seeks to achieve clarity and certainty with respect to Crown and Aboriginal ownership of land within specific Aboriginal territories and, by extension, across the breadth of the province. However, Crown and Aboriginal groups have very different ideas about how this certainty is to be accomplished. From a Crown perspective, treaty making is seen as a tool to transform Aboriginal title – which it views as an ill-defined and geographically amorphous property claim – into a more certain and spatially delimited set of property rights. Final treaty agreements clearly set out the land and resource rights of the Aboriginal signatories in exhaustive detail and in highly legalistic and technical language. Through these agreements, "treaty settlement lands" – which include existing Indian reserves and any additional lands identified in the treaty – are designated as properties owned by the Aboriginal signatory in fee simple.

The treaty process is based on what is called a land selection model, whereby the Crown identifies parcels of land within a First Nation's traditional territory that may be included in a treaty. Through the negotiation process, a subset of these lands is then selected for inclusion in the final treaty agreement. It is

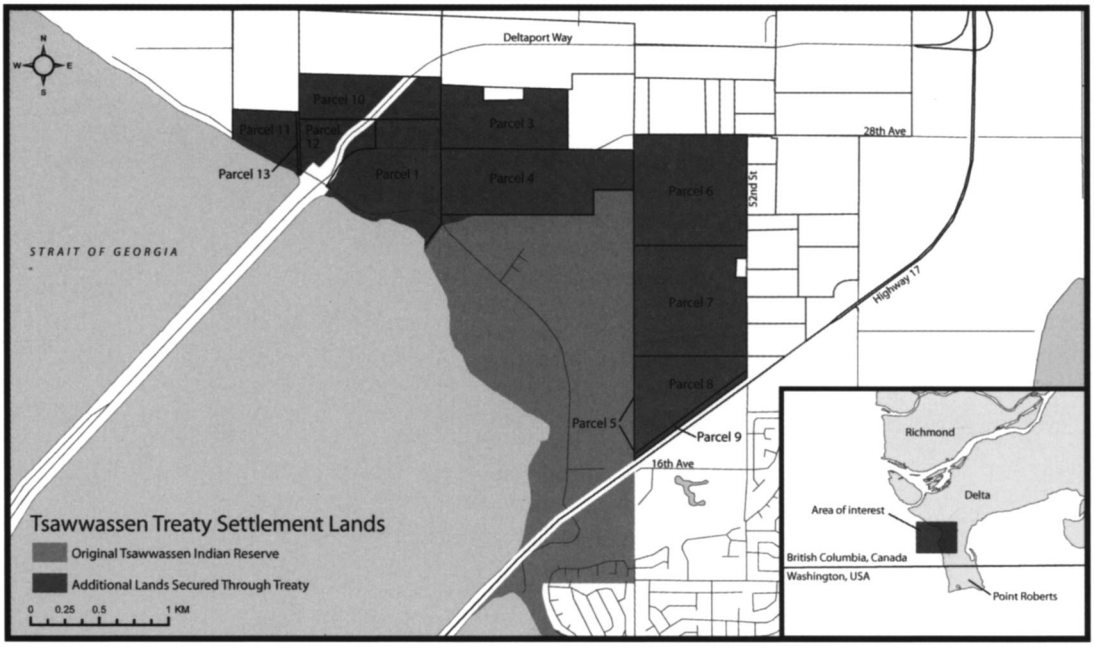

Figure 3. Tsawwassen First Nation treaty settlement lands. Map by John Ng.

important to note that this selection process is asymmetrical, as the Crown reserves itself the right to determine whether or not a particular area of land can be included in a treaty agreement. This model, central to land claims negotiations across Canada, was clearly evident in the first modern treaty finalized in British Columbia – with the Nisga'a Nation in 1999 – and remains central to the treaty process.[7] Figure 3 provides a graphical illustration of the end result of the land selection model of treaty making for the Tsawwassen First Nation, showing how the original Indian reserve lands have been expanded by the addition of adjacent land parcels selected through the negotiation process.[8] Tsawwassen treaty settlement lands comprise a small fraction of the Tsawwassen Nation's traditional territory, highlighting how this approach to treaty making works to spatially delimit Aboriginal property rights. The Crown's desire for certainty on the land question is met by identifying, through treaty agreements, precisely where Aboriginal property rights exist and where they do not.

While treaty agreements clearly establish Aboriginal property rights over treaty lands, they effectively extinguish Aboriginal property claims across larger ancestral territories. While the term "extinguishment" has been expunged from modern treaty language, the "modification" and "release" provisions of treaty agreements have much the same effect.[9] Aboriginal treaty signatories agree to the modification of their Aboriginal property rights as set out in the treaty, and to the release of the Crown and other persons from all past, present and future claims it may have (or have had) relating to 'any act or omission … that may have affected, interfered with or infringed any aboriginal right, including aboriginal title' (Tsawwassen First Nation *et al.* 2007, p. 23). To further address the Crown's need for certainty and close off any potential future claims, the treaty is understood to constitute 'the full and final settlement in respect of the aboriginal rights, including aboriginal title' of the Aboriginal signatories (Tsawwassen First Nation *et al.* 2007, p. 22).

Treaty settlements rely on fee simple property, seen, from a Western perspective, as 'the largest estate known in law' (Tsawwassen First Nation *et al.* 2007, p. 39). More specifically, under the British Columbia treaty process, treaty settlement lands take the form of fee simple plus, an approach designed to provide Aboriginal groups with the certainty that their treaty lands will never be fully and permanently alienated from them. Like any fee

simple titleholder, the Aboriginal landowner may transfer or sell its property in land to any other person. However, under the fee simple plus model, if treaty lands ever revert to the Crown, they will be returned to the Aboriginal treaty signatory without charge. Despite these assurances, the designation of treaty settlement lands as an estate in fee simple (including fee simple plus) remains troubling for many First Nations. Fee simple derives from the Anglo-Saxon feudal property system in which the landholder does not technically own the land but rather is considered a tenant of the Crown, which continues to hold underlying title. The idea of being a tenant of the Crown does not fit with the vision many Aboriginal groups have of their relationship to both the Crown and their ancestral lands (Pesklevits 2007).

While treaties transform Aboriginal title into a kind of property that meshes more smoothly with the Canadian legal system, the Crown also works to shield some forms of property from the negotiation process altogether. Canada and British Columbia have both asserted that they will not expropriate private property in order to settle treaties. In addition, British Columbia has committed itself to ensuring that private interests in Crown lands, such as commercial tenures to extract natural resources (e.g. timber, water, minerals), will not be negatively affected by treaties. Where such adverse effects are unavoidable, the provincial government has committed itself to fair and timely compensation of these rights holders (British Columbia 1996).

Although most First Nations have no desire to see private lands expropriated, a number of Aboriginal groups argue that the issue of private property should be open for discussion at the treaty table. This is particularly true for Aboriginal groups in more intensively developed areas of the province, whose territories have been subject to extensive land and resource privatization. For these groups, the Crown's historic sale or granting of land in their traditional territories to private individuals and corporations, without their prior consent, is understood as an illegal taking of their property. Like any other property owner, they argue, they should be compensated for the taking of their land. Indeed, some argue that their Aboriginal title continues to exist on private lands and that they should be consulted when land use decisions are contemplated, especially when it comes to managing important cultural sites (e.g. burial grounds). The Crown, however, has clearly stated that it will not compensate First Nations for 'past use and alienation of the lands and resources within their traditional territories' (British Columbia 1996, no pagination) and asserts that Aboriginal title has been extinguished on private lands.

Modern treaty making in British Columbia is also centrally concerned with geography, as the reworking of property entails a simultaneous reworking of Aboriginal and settler space. The treaty process does work to expand the space available to Aboriginal peoples within their traditional territories: treaty agreements identify lands that become the property of the Aboriginal signatories and may also formalize Aboriginal access to resources (e.g. fish, wildlife, migratory birds, water) located beyond the boundaries of treaty settlement lands. The package of land and other material benefits (e.g. cash, resource access) offered to Aboriginal groups in British Columbia through treaty varies from place to place, depending on factors such as the price of land, the local availability of natural resources, and the size (population) of the Aboriginal group. At each treaty table in the province, Crown negotiators work within an overall "financial mandate" that determines the size of this package in gross monetary terms. In negotiating treaties across the province, the Crown seeks to offer all Aboriginal groups a roughly similar set of benefits, in terms of the gross monetary value of the package on a per capita basis (Proverbs 2010).

This standardized approach to treaty making, wherein all Aboriginal groups are offered treaty benefits of the same gross financial value on a per capita basis, means that the extent to which treaties expand Aboriginal space varies from place to place. Where market land values are very high, as in urban or suburban areas, the amount of land offered will be small, whereas in rural areas treaty agreements will include a much larger allocation of land. The two final agreements completed under the treaty process to date illustrate the extent to which real property values shape the size of the land offer. In the case of the Tsawwassen treaty, covering an area just south of Vancouver, the treaty yielded 1.2 hectares of new land (on a per capita basis) for the Tsawwassen First Nation. For the Maa-nulth First Nations, located on the remote west coast of Vancouver Island, the treaty provided about 8 hectares of new land on a per capita basis.

This technical calculation of the amount of land allocated to Aboriginal groups through treaty is shaped by the Crown's broader objective of

minimizing both its costs in the treaty process and the area over which its jurisdictions are fettered by Aboriginal rights after treaty. In the mid-1990s, when the treaty process was in its early stages, the Crown came under pressure from non-Aboriginal interests concerned about the extent to which treaties would impinge on the province's land and resource base. Resource industries, and the non-Aboriginal communities that rely on resource extraction, were particularly worried about a process that would re-allocate Crown property to Aboriginal communities. In response to this pressure, Mike Harcourt, then Premier of British Columbia, announced that lands allocated to Aboriginal groups through treaty would amount to only 5 per cent of British Columbia's land area (McKee 2009, p. 70). This statement highlights the Crown's position that Aboriginal groups can only come to own or control a small portion of their traditional territories, with the rest confirmed as Crown property. In summary, through the existing treaty model the Crown seeks to transform Aboriginal title into a form of property more acceptable to the liberal democratic settler state – a spatially constrained form of fee simple title – and to achieve a full and final settlement on the question of Aboriginal land ownership.

Alternatives

Many Aboriginal groups in the British Columbia treaty process balk at the Crown's model for achieving certainty on the land issue. For these groups, the notion of their ceding all claims to lands and resources across their ancestral territories in exchange for the package of benefits on offer from the Crown, particularly a small land and resource base, is a major obstacle to reaching agreement on treaty. The existing certainty model, like the treaty process itself, is one sided: it meets the Crown's desire for certainty but does not provide for the kind of certainty that First Nations seek. For many Aboriginal groups, certainty comes through the knowledge that they will have an important role in managing lands and natural resources across their traditional territories and that they will be able to share in the benefits that flow from these valuable assets. Aboriginal opposition to this certainty model is also rooted in broader social and cultural concerns. Chief Edward John argues that the idea of ceding Aboriginal title to their ancestral territory is anathema to many Aboriginal people (Royal Commission on Aboriginal Peoples 1995, p. 46):

> When government asks us to agree to surrender our title and agree to its extinguishment, they ask us to do away with our most basic sense of ourselves, and our relationship to the Creator, our territory and the other peoples of the worlds. We could no longer do that without agreeing that we no longer wish to exist as a distinct people. That is completely at odds with our intentions in negotiating treaties.

Rather than resulting in its extinguishment, John and other First Nations leaders argue, treaties should provide for a clear recognition of Aboriginal title and rights throughout their territories. This need not mean ownership of all traditional lands, but rather the adoption of measures to allow Aboriginal peoples to maintain an ongoing and meaningful connection to their territories.

A number of First Nations have proposed alternative approaches to treaty making and to the resolution of questions about land and resource ownership and access. Here, I briefly review three such alternatives, proposed by the Hul'qumi'num Treaty Group, the Gitxsan Nation and the Haida Nation, respectively. While different in some ways, these proposals are similar in that they all provide an alternative to the existing certainty model, one that does not require the extinguishment of Aboriginal title across their traditional territories. All three proposals, or alternative models, rely on the idea of Aboriginal peoples and the Crown working together to make decisions about lands and resources within traditional territories and sharing in the benefits that flow from these lands. Rather than seeking to divide Aboriginal territories into separate Aboriginal and Crown properties, these models emphasize the overlapping and sharing of rights and responsibilities with respect to lands and resources.

The Hul'qumi'num Treaty Group (HTG) represents the treaty interests of six Coast Salish First Nations in British Columbia's south coastal region. While these groups have been at the treaty table since 1993, in late 2012 they remained far from a final agreement (Egan 2012). In 2008 the HTG released a report identifying the current certainty model as a major impediment to treaty, arguing that it failed to offer the kind of certainty that First Nations need. More specifically, the report noted that this approach 'does not provide First Nations with the necessary decision-making authority to protect, manage, or benefit from the natural resources within their traditional territories' (Olding *et al.* 2008, p. 6). What is needed,

the HTG suggested, is 'a comprehensive new vision for treaties to act as a vehicle to implement shared decision-making throughout First Nations territories in British Columbia' (Olding *et al.* 2008, p. 2).

According to the HTG proposal, shared decision-making over lands and natural resources would involve mutual recognition of Crown and Aboriginal titles and jurisdictions across traditional territories, eliminating the need to extinguish Aboriginal property rights. This alternative approach would involve a commitment by both parties, expressed within a treaty agreement, to shared decision-making across the traditional territory, while the specific details of the shared decision-making model would be negotiated and established outside the formal structure of treaty. Such an approach, the HTG report argued, would meet both Crown and Aboriginal needs for certainty. More broadly, the HTG report proposed a multi-level governance structure, with bodies at provincial, regional (sub-provincial), and local levels, to guide implementation of the shared decision-making model across the province.

The Gitxsan Nation, based in northwestern British Columbia, has long argued for an alternative approach to treaty making (Derrick 2004). The Gitxsan entered the treaty process in 1994 and, as of late 2012, were at stage four in the negotiation process. In 2008 the Gitxsan Treaty Team released a report rejecting the land selection model at the heart of the treaty process and describing an alternative approach to reconciling Crown and Aboriginal interests in Gitxsan territory (Gitxsan Treaty Team 2008, p. 3). Rather than identifying and allocating parcels of land to be included in a treaty agreement, the Gitxsan argued that treaty making should focus on finding ways that the Gitxsan and the Crown could work together to share the use and governance of lands and resources across their larger traditional territories. This proposal rested on their asserted Aboriginal property rights (Gitxsan Treaty Team 2008, p. 8):

> Our claim, and our only distinct claim, is to the inherited collective rights of our ancestors ... All Canadians have the right to inherit property. So do we. Our inheritance is an interest in the land making up our traditional territories. That interest entitles us to a shared decision making in the development of that territory and a share of the wealth it generates ... The detail of this is what we wish to negotiate.

If provided with access to their ancestral lands, the Gitsxan argued, they would not require special funding from the Crown, but would meet their economic needs through partnerships with provincial and federal agencies and with private interests who seek to develop the valuable resources found in their territory.

The Haida Nation asserts collective hereditary and Aboriginal title and rights to Haida Gwaii, an archipelago off the north coast of British Columbia. While the Haida are engaged in the treaty process, they have not invested significant resources in the process and as of late 2012 remained at an early stage of negotiation. Over the past two decades the Haida have largely pursued their land interests outside of the treaty process, including through litigation, direct protest, and negotiation of non-treaty agreements with governments and private interests (Takeda and Røpke 2010). This strategy has yielded important advances for the Haida, including the creation of co-management agreements with the federal government that give the Haida an important role in governing extensive terrestrial and marine ecosystems, including in Gwaii Haanas National Park and surrounding marine areas (Gill 2009; Canada and Haida Nation 2010).

In 2009, these co-management agreements were bolstered by the signing of a "reconciliation protocol" agreement between the Haida Nation and the government of British Columbia. In this agreement both parties committed themselves to seeking 'a more respectful approach to co-existence by way of land and natural resource management on Haida Gwaii through shared decision-making' (British Columbia and Haida Nation 2009, p. 1). The protocol is described as 'an incremental step in a process of reconciliation of Haida and Crown titles' and the agreement is prefaced with an acknowledgement that the parties 'hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii' (British Columbia and Haida Nation 2009, p. 1). Despite fundamental disagreement about which party owns or has jurisdiction over Haida Gwaii, the Haida and the provincial Crown agreed to work together towards a set of common goals, such as the provision of socio-economic and ecological benefits, which are to be achieved through a process of shared decision-making.

It is important to recognize that some progress has been made towards the restitution of Aboriginal land and resource rights in Canada over the past few decades. Major land claims agreements have been

negotiated in the Canadian North (Usher 2003; Miller 2009), several modern treaties have been completed in British Columbia (McKee 2009), and federal and provincial governments have negotiated a range of co-management agreements with First Nations that provide the latter with a role in managing their ancestral lands and resources (Notzke 1995; Berkes 2009). In addition, the Crown is now required to consult with (and, in some cases, accommodate) First Nations when contemplating land and resource developments in areas where Aboriginal title and rights may exist (Isaac and Knox 2005) and this has triggered a greater role for Aboriginal peoples in such projects. Finally, in a small number of cases the Crown has negotiated revenue-sharing agreements with First Nations, which allow Aboriginal communities to share in some of the economic benefits that accrue from land and resource development (British Columbia 2012). While these represent progress towards recognition of Aboriginal property rights and allow Aboriginal communities to benefit from the use of lands and resources in their ancestral territories, these advances are partial, fragile, and applied inconsistently across the landscape (Coates and Poelzer 2010), falling well short of the kind of comprehensive shared land and resource management models advocated by the Gitxsan Nation, the Haida Nation and the Hul'qumi'num Treaty Group.

Conclusion: towards shared ownership

The British Columbia treaty process was created to resolve a longstanding dispute between the Crown and Aboriginal peoples over ownership of land. For the Crown, treaties are seen as a way to transform Aboriginal title, a property claim it views as weakly defined and geographically amorphous, into property forms that mesh smoothly with the legal and political-economic structures of the settler state. Treaties produce treaty settlement lands, held by First Nations in fee simple title, and confirm all other lands as property of the Crown. The Crown insists that certain forms of property, particularly lands already held in fee simple, be excluded from treaty negotiations and, more broadly, commits itself to minimizing the impact of treaty making on private interests in Crown lands, such as tenures to cut timber or extract water, and to compensating these interests when their rights are disrupted by treaty agreements. At the same time, the Crown is unwilling to compensate Aboriginal peoples for past disruption of their property rights, caused by privatization of their lands or extraction of resources from their territories, arguing that treaty talks are about establishing a new relationship between the Crown and Aboriginal peoples rather than about dealing with the past.

This reworking of property through treaty making involves a simultaneous reworking of British Columbia's geography. Under the current model, treaty making is focused on redrawing the line between Aboriginal and settler spaces. Although this new line allows somewhat more space for Aboriginal peoples and properties, it requires that First Nations give up rights to lands and resources across their traditional territories, except where these are specifically identified in the treaty. The result is the reproduction of the kind of colonial geography – a highly asymmetrical allocation of space – that Aboriginal peoples have long been struggling to overcome. This reworking of property and geography is underwritten by the dominant Western conception of property, the ownership model, which relies on a particular spatial form (the clearly bounded plot), on the idea that property is a fungible thing, and that emphasizes the exclusive right of property holders. For the Crown, the institutionalization of this property model through treaty agreements that settle any and all claims to Aboriginal title once and for all time, provides the kind of certainty of land ownership that it desires. For many Aboriginal groups engaged in the treaty process, however, this model provides for an uncertain future. Few First Nations have been willing to sign on to this kind of lopsided property trade-off, which requires them to give up important connections to their traditional territories.

The Chief Commissioner of the BC Treaty Commission recently called on the negotiating parties to provide a new direction for the faltering treaty process. I argue that this new direction can be found in the proposals for an alternative approach to treaty advanced by the Hul'qumi'num Treaty Group, the Gitxsan Nation and the Haida Nation, all of which draw on ideas important to Aboriginal property systems. These proposals reject the idea of dividing traditional territories into separate (and highly unequal) spaces of Aboriginal and settler property, and propose the organization of property rights on a more functional basis, with Aboriginal title overlapping with Crown title across the breadth of Aboriginal traditional territories. This need not mean that Aboriginal peoples own their traditional territories, in the Western sense of ownership, but rather that treaties allow for the ongoing exercise of those rights rather than their extinguishment.

The current approach to treaty making also relies on the idea that land is fungible, a commodity that can be easily separated from the landholder and traded in the market. Shaped by the ownership model, the treaty process is based on the notion of one parcel of land being largely interchangeable with any other, and that this interchange is facilitated by the market value of land. In treaty negotiations, Aboriginal groups must select one piece of land over another for inclusion as treaty settlement land, within the constraints of the Crown's financial mandate for that treaty table, and then relinquish claims to all other lands. As Edward John argues, this notion of land as a fungible property and that treaties will extinguish Aboriginal title, which embodies a more fundamental connection to the land, is anathema to many Aboriginal people. By obviating the need to extinguish Aboriginal title and rights, the alternative proposals discussed here recognize the need for Aboriginal peoples to maintain an ongoing connection to their traditional territories.

Perhaps most fundamentally, these alternative models reject the exclusivity at the heart of the current treaty model, the idea that treaty must result in the production of separate and exclusive Aboriginal and Crown spaces and properties. Instead, they argue that treaties should be organized around principles of reciprocity and sharing – sharing space, sharing properties, sharing wealth – values close to the heart of many Aboriginal cultures. As Tully (2000) notes, Canada was founded on a profound act of sharing, with Aboriginal peoples sharing lands, resources, and ecological knowledge with European newcomers, and this mutual commitment to the principles of sharing and reciprocity was reflected in early treaty agreements. This commitment to sharing in treaty-making processes, and in relations between the Crown and Aboriginal peoples more broadly, was lost over time, as settlers became dominant and sought to incorporate Aboriginal lands, resources and peoples into the settler state. By the late nineteenth century, the Crown saw treaties predominately as vehicles to take possession of Aboriginal lands and to eliminate Aboriginal peoples from the landscape, and any commitments on its part to sharing of lands and wealth with Aboriginal signatories often were lost or forgotten once treaties were in place.

In British Columbia, historic treaties were largely absent as the Crown decided that it could simply take the land and relocate Aboriginal peoples to small Indian reserves. Over the past century and half, settlers and the settler state have enjoyed the lion's share of the wealth generated by the province's lands and resources, as Aboriginal communities were largely excluded from the province's social, economic and political life. The alternatives discussed here point the way towards a more equal, respectful and productive relationship between the Crown and Aboriginal peoples, where lands and resources (and the benefits derived from them) are shared and where treaties are not so much about achieving full and final closure on questions to do with land and governance but rather about creating conditions for ongoing discussion and engagement on the full range of concerns that shape contemporary Crown–Aboriginal relations.

Treaty making in British Columbia has reached an impasse. Few First Nations are willing to sign onto the kind of treaty deals on offer from the Crown. While the Crown has shown some flexibility in addressing Aboriginal concerns about land and resources, it has not moved far enough to allay deep rooted Aboriginal concerns about loss of access to their ancestral territories. Further, at present there is no indication that the Crown is willing to undertake the kind of fundamental rethink of the existing treaty model that is called for by the Haida, Gitxsan or Hul'qumi'num proposals. Putting the principle of sharing at the heart of the treaty process, I believe, will provide the direction needed to move past the current impasse. In practical terms this means moving towards treaties that embody ideas about shared Aboriginal–Crown titles and jurisdictions, and that institutionalize processes and structures for shared decision making and the sharing of wealth that flows from lands and natural resources. This approach would help the parties reach the overarching goals set out for the treaty process two decades ago, including reconciling conflicting interest in the land and establishing a new relationship between the Crown and Aboriginal peoples based on 'mutual trust, respect and understanding' (British Columbia 1991, p. 8). More broadly, an emphasis on sharing ownership of the land, and of Aboriginal and non-Aboriginal peoples working together to use and govern the land, offers a hopeful model for bridging the deep divide between Aboriginal and settler societies.

The difficulties of treaty making in British Columbia reflect broader challenges associated with restitution and reconciliation in settler colonies. More particularly, this study reaffirms property as a central site of contestation in settler colonial states, especially when it comes to processes of land restitution and efforts to reconcile competing Aboriginal

and Crown claims to territory. As a key part of the structure of settler colonialism – that is, of the legal, political and economic framework that shapes life in settler colonies – dominant Western property conceptions and practices serve to constrain such processes narrowly within the bounds of the settler state. When it does occur, land restitution typically comes in the form of fee simple title, reproducing the spatially confined, fungible and exclusionary characteristics of the settler property regime, and there is little room for property proposals that do not fit into this dominant mould. Under these terms, land restitution may represent, at best, an important effort to address past injustices, but hardly a significant break with the colonial past and present.

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Notes

1 .In this article, I use the terms Aboriginal peoples and First Nations interchangeably to refer to the peoples who inhabited what is now British Columbia prior to the arrival of settlers (peoples of European descent). The Crown refers collectively to the governments of Canada and British Columbia.
2. Elsewhere, I have explored property issues in the British Columbia treaty process, though in a much less detailed and systematic fashion. In my case study of treaty making in Hul'qumi'num territory (Egan 2012), I focus on the challenges posed by extensive private land holdings to treaty settlement in that particular case. In a survey article on property, geography and Indigenous peoples in Canada (Egan and Place 2013), we discuss the centrality of property concerns to modern treaty making, matrimonial real property reform, and the privatization of landholdings within existing First Nations reserves.
3. The meaning of such treaties, including the extent to which they extinguish of Aboriginal title and rights, is contested by Aboriginal groups. See, for example, Hildebrandt *et al.* (1996) and Venne (2007).
4. In addition to the Douglas treaties on Vancouver Island, the northeastern portion of the province, including the lands lying to the east of the continental divide, was included in the 1899 settlement of Treaty 8, which extends into Alberta, Saskatchewan, and the Northwest Territories Fumoleau 2004).
5. In Canada, Indian reserve lands are not actually owned by Aboriginal peoples; rather, under Section 91(24) of the British North America Act of 1867, these lands are held in trust by the Canadian government 'as lands reserved for Indians'.
6. These First Nations were represented at the treaty table by the Carrier Sekani Tribal Council. After more than a decade of negotiations, in 2007 the Tribal Council withdrew from the treaty process. As of late 2012, these eight Carrier Sekani First Nations had not re-engaged with the treaty process (BC Treaty Commission 2012, p. 22).
7. The federal government began treaty negotiations with the Nisga'a in 1976 under its comprehensive claims process and the Nisga'a final treaty agreement was completed in 2000. Although negotiated outside of the formal British Columbia treaty process, in many ways the Nisga'a treaty has served as a template for all modern treaties negotiated in the province.
8. Fig. 3 shows most but not all Tsawwassen treaty settlement lands. For illustrative purposes only, a few small non-contiguous parcels of treaty land are not shown in this figure.
9. In 2007, the United Nations Committee on the Elimination of Racial Discrimination (CERD) expressed concern about the lack of perceptible difference between the older extinguishment approach, which required Aboriginal peoples to 'cede, release and surrender' their broader Aboriginal title, and the 'modification and release' approach which has replaced it (UN CERD 2007, para. 22).

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