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Natives making space: The *Softwood Lumber* dispute and the legal geographies of Indigenous property rights

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ABSTRACT

In a claim for property rights, the Interior Alliance of Native Nations contributed toward a precedent for standing for Indigenous peoples with the acceptance of their "friend of the court" brief by the World Trade Organization. However, the brief's greater significance remains in the design of a right burdened by a moral economy and the forging of new space for the reproduction of the conditions of possibility for Indigenous law. Through a legal geography of rights, I map *Indigenous property* as it circulates on Indigenous territory—and now—through the brief and international scale. I explore associated geographical practices and imaginations insofar as different subject positions, different spaces, and the performativity of legal paradigms open up social justice possibilities. On the land, the enactment of Indigenous property affirms community life and identity, and sustains anti-colonial efforts. At the WTO, being a property holder and the enunciation of normative alterity further rework the emancipatory potential of rights. From the perspective of legal performativity and its concern for how the doing of the law is also a doing of the world, these enactments are reassessed as renovations of the spatio-juridical legacy. In particular, the international level is fertile terrain for expanding the space for Indigenous property given the possibility of its circulation in other social justice campaigns, as well as the potential for similar rights to "boomerang" into national-level politics. Rather than retreating to traditional territories and abandoning an incremental strategy of recognition, the brief exemplifies a politics that understands "failure" as a necessary part of attempting to re-inhabit—and re-write—hegemonic law and the world. In response to shortcomings in international legal scholarship and legal geography, I contribute a better understanding of the norm-making of civil society actors and the spatiality of the normative systems of Indigenous peoples.

Introduction

The Interior Alliance of Native Nations comprises five Interior Salish peoples, the Secwepemc ("Shuswap"), Syilx ("Okanagan"), St'át'imc ("Lillooet"), Nlaka'pamux ("Thompson"), and Southern Carrier.[1] Located across the boundaries of British Columbia ("BC"), Canada and Washington, United States, their combined traditional territories are home to 20,000 Indigenous people. On April 26, 2002, they submitted an *amicus curiae* ("friend of the court") brief to the World Trade Organization (WTO) in the *United States-Canada Softwood Lumber* subsidy dispute ("Softwood Lumber") (Interior Alliance, 2002). At the appellate level in 2003, a second brief was filed under the auspices of the Indigenous Network for Economies and Trade (INET) that further claimed a representative voice for Indigenous peoples from across Canada (Manuel, 2003: 335; INET, 2003).[2] The 2002 brief was adopted in the arguments of the United States Department of Commerce submission (WTO, 2002: paragraph 4.252–4.297) but received only limited mention by the WTO (WTO, 2002: paragraph 7.2). As no participant or third party adopted the 2003 brief, it was not taken into account (WTO, 2004: 5).

The Interior Alliance sided with the US claim that the noncompetitive allocation of stumpage in Canada amounted to a countervailable subsidy to industry and was in contravention of the principles of free trade. But their central claim was that since the timber harvested in BC comes from unceded Native territory, a

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[1] In addition to their proper names, I follow the practice of members of the research host nations to also use Native, Aboriginal and Indigenous to describe peoples "whose ancestors held that land prior to colonization by outside powers, and whose nations remain submerged within the states created by those powers" (Shaw et al., 2006: 269, my parentheses). I use "First Nations" to describe Indigenous collectivities legally produced by the Federal government.

[2] In the interests of clarity, I refer to the Interior Alliance hereafter even though it operated under the mantle of INET in respect of the 2003 brief.

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portion of the subsidy was directly attributable to their land interests. In the early 2000s, none of the Interior Alliance nations were involved in the treaty process with the governments of BC or Canada. Although not the first independently submitted, non-member *amicus curiae* brief accepted and circulated by a WTO Dispute Settlement Panel (WTO, 1994a; Umbricht, 2001: note 9; Mavroidis, 2001), the Interior Alliance brief was the first from an Indigenous group (Interior Alliance, 2002; WTO, 2002). This amounted to a procedural precedent that Indigenous groups should be granted *standing* where they present new factual and legal arguments within the time period of the first panel hearing (Manuel and Schabus, 2005: 249). Its acceptance contributed to international Indigenous legal space (Sanders, 1985; Jenson and Papillon, 2000; Anaya, 2004; Coombe, 2009), now in the area of trade and human rights (Davis, 2003, 2005; Ladner and Dick, 2008).

However, the brief (hereafter I refer to both briefs collectively in the singular) is far more noteworthy owing to its revision of Native entitlements as a matter of *property rights* which aim to respect Indigenous land interests and stewardship principles. By citing the suspension of Native constitutional, territorial and economic rights, the brief addresses a series of well-known political and legislative shortcomings. According to some, these must be overcome because property rights promise Indigenous peoples the freedom to benefit from the liberal market economy and to wrest loose from structural dependencies on the state (Flanagan et al., 2010).

More important is the crafting of an *Indigenous property* right burdened by a moral economy of environmental, social and spiritual obligations that, through its enactment, furthers a new space for the reproduction of the conditions of possibility for Indigenous law. Conceptually, I follow the contention of legal geographers that there are important analytical and political reasons for regarding law and space not as separate but as co-constitutive. I therefore explore the iterations of Indigenous property on the land and, now, at the international scale to uncover the social justice possibilities for rights otherwise closed off (Pratt, 2004) through legal misrecognition by state institutions, hegemonic legal subjectivity and hegemonic legal paradigms. Said differently, Indigenous property—an "excessive" legal artifact (Bhabha, 1990: 211)—has been reduced to the outlines of the common law and its norms have been misrecognized in Canadian courts and political fora. Through a legal geography of rights (Blomley and Pratt, 2001), I investigate the geographical practices and imaginations of Indigenous property in terms of the emancipatory potential of different subject positions, different spaces, and the performativity of juridical paradigms. On the land, the enactment of Indigenous property affirms community life, relations with (non)humans, identity, territorial relations, and sovereignty against a colonial present bent on discounting these things. This "war of maneuver" was turned outward into a "war of position" (Omi and Winant, 1994) at the WTO. There, being a property holder and crafting a counter-hegemonic right by drawing on a range of norm-making regimes—including some wherein the Interior Alliance participated—also opened up rights.

Through a post-disciplinary legal geographic approach to law and space, I further follow a performative theory of law (Blomley, 2013; Delaney, 2010) and its concern for embodiment and the renovation of the spatio-juridical legacy: how the doing of the law is also a doing of the world. I explain how the practice of heretic ontologies and forms of property on traditional Indigenous territories furthers space for the reproduction and recognition of Indigenous property. Similarly, although the WTO did not decide on this claim, the enactment of Indigenous property and its moral economy nevertheless furthered its conditions of possibility. In addition to acquiring legitimacy by drawing on legal regimes, Indigenous property denaturalized Canada's property claim and efficiency-based forms of liberal property, and summoned a type of precedent that may be mobilized by other international civil society groups within a now-renovated spatio-juridical legacy. Over time, this doing of counter-hegemonic law and the space of its reception may come to impact the national scale. Given the recognition accorded to international law by Canadian courts and Canadians' self-definition as adherents to international human rights norms (Blomley and Pratt, 2001; Pratt, 2004 and on "moral leverage," Keck and Sikkink, 1998: 23), Indigenous property may operate through a "boomerang" effect (Keck and Sikkink, 1998: 12–13) to pressure Canada to more broadly answer to Indigenous rights. In response to shortcomings noted in international legal scholarship (Rajagopal, 2003, cf. Pearson, 2006, 2008) and legal geography (Braverman et al., 2014), I contribute toward a better understanding of the norm making of civil society actors and the spatiality of the normative systems of Indigenous peoples.

The brief may be impugned for disciplining Indigenous subjects (cf. Coulthard, 2007), for drawing advocacy energies away from community practices (cf. Corntassel, 2008), and because it did not succeed in a more transformative and direct relationship with power (Gibson-Graham, 2006). The first two objections may be challenged for not recognizing the extent to which the Interior Alliance availed itself of different discourses in different spaces, and how its activities emerged from, were grounded upon and aimed to support practices on traditional territories. In terms of the third objection, performativity theory holds that power does not rest only in the state, but is also diffuse; meanings, subjectivity and objects owe their obdurateness to their iteration over time, and incremental, embodied change is therefore crucial. As opposed to "strong theory," performativity does not reduce politics to a frontal assault on the Sovereign. I therefore take the position of "weak theory" (Sedgwick, 2003 cited by Gibson-Graham, 2006: 4) and argue that the legal and other practices constellated through the brief and on the land represent a politics of experimentation and possibility that accepts impurity and "failure" (Gibson-Graham, 2006: 6) as necessary toward re-scripting and re-inhabiting hegemonic law and the world in the here and now.

Methodology

This study responds to the principles of Indigenous and feminist research methodologies. They emphasize that Indigenous peoples have authority over research on their territories; research should be conducted to further Indigenous ontologies and relationships; reciprocity must replace the extractive terms of colonialism (Tuhiwai Smith, 1999; Lakes Secwepemc, 2005; Kovach, 2009); and, situated knowledge is important for delineating the limits of dominant epistemologies (Haraway, 1991; Rose, 1997; Pratt, 2000). Through volunteer note-taking at grassroots Indigenous conferences and preparing a paper on the challenges faced by the Okanagans in protecting their traditional environmental knowledge ("TEK": e.g. forest stewardship, hunting, fishing, gathering, and other food- and medicine-related practices and obligatory norms, see below) for a civil society organization (Robertson, 2006), I made contact with other representatives of Interior Alliance nations and discussed the possibility of further research. For the present study, the Lakes Secwepemc Community Circle, a research gate-keeping organization that rejects the authority of the federal band system, kindly agreed to collaborate and approved the research topic and interview questions. Permission was also secured from other grassroots organizations as well as numerous First Nations. From 2005 to 2010, I learned of the cultural basis of the Interior Alliance's argument through semi-directed interviews (1–2 h in length) with 22 individuals (including 5 elders