



Minding the gaps: Property, geography, and Indigenous peoples in Canada

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ABSTRACT

Indigenous peoples' property rights are hotly debated in legal, policy, and academic circles across Canada. This article explores three such debates in which Indigenous peoples and lands are centrally implicated: debates over implementing fee simple ownership on Indigenous lands, over securing land rights through modern treaty making, and over matrimonial real property rights on Indian reserves. Each of these debates, we argue, revolves around a perceived “property gap”, a term we use to denote conflicting understandings of what property is (or should be), what it should accomplish, and a perceived absence or failure in property law. While such gaps are commonly identified as sites where Indigenous and Western ideas about property come into conflict, creating absences or discontinuities that need mending, they can also be understood as openings where taken-for-granted conceptions of property are “up for grabs”. The property debates examined here reflect ongoing struggles over geography, highlighting contention over who can legitimately claim “ownership” over certain spaces and who can control how lands are used and governed. More broadly, they reflect efforts to “locate” Indigenous peoples vis-à-vis the modern settler state of Canada. Rather than working to “fix” these property gaps through imposition of dominant Western property ideas and structures, we stress the need to explore a broader range of property options at these sites, including those shaped by Indigenous understandings of property and geography.

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1. Introduction

In 1999, after more than a century of struggle, the Nisga'a First Nation signed a treaty with Canada and British Columbia, securing title to almost 2000 square kilometers of its ancestral land in northwestern British Columbia. In 2009, the Nisga'a governing body passed legislation allowing members to convert their lands into fee simple holdings, arguing that this would help spur economic development and wealth creation (Nisga'a Lisims Government, 2009). The move was greeted with both praise and dismay. Some argued that the initiative had potentially revolutionary implications, offering a path for Indigenous peoples “to escape the poverty, unemployment and welfare dependency in which they have long languished” (The Economist, 2009, para. 5) and “enter the modern economy” (Quesnel, 2009, para. 1). For Indigenous scholar Taiaiake Alfred, however, the shift represented an abandonment of traditional forms of Indigenous landholding, with potentially disastrous consequences; by opening up their ancestral lands to fee simple, he argued, the Nisga'a were “embracing their own assimilation” (cited in Findlay (2010, para. 21)).

The Nisga'a case illustrates the continuing centrality of property questions—particularly those related to land—to Indigenous peoples in Canada. Questions about property in land are hotly debated within and across Indigenous communities in Canada as well as in broader legal, policy, and academic circles. These property concerns are entangled with broader questions about the economic development and advancement of Indigenous communities, Indigenous identity and self-governance, and, more fundamentally, the relationship between Indigenous peoples and the nation state of Canada. In this article we explore three contemporary debates over Indigenous property in land in Canada—debates over implementing fee simple ownership on Indigenous lands, over securing property rights through modern treaty making, and over matrimonial real property rights on Indian reserves. The article draws on our own extensive empirical work on different aspects of property, geography, and Indigenous peoples in Canada.¹

In each case, we look at the way property is configured and contested, how the particular “problem” of property is defined, and the kinds of “solutions” proposed. We focus on “property gaps”,

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¹ In this article, we use the terms ‘Aboriginal peoples’ and ‘Indigenous peoples’ interchangeably to refer to Canada's original inhabitants, including First Nations, Inuit, and Métis peoples (INAC, 2002). We use the term ‘Indian’ only when quoting historical documents or making reference to extant legal categories (e.g., ‘Indian band’, ‘Indian reserve’).

using this metaphor to refer to different understandings of what property is (or should be) and what it should accomplish, and to flag perceived absences of law regarding particular kinds of property. While a gap may be understood to indicate a “lack” or “discontinuity”—or, in geographic terms, a blank space that needs to be filled—it can also point to an “opening” where taken-for-granted concepts of property are contested and “up for grabs”. In each case, we identify a different kind of property gap and examine proposals advanced to fill it. We argue that these represent tears in Canada’s spatial–legal fabric, places where the settler state’s colonial geography are frayed, and that these are sites of productive opportunity and possibility, where active negotiation between Indigenous peoples and the Canadian state is ongoing.

This article contributes to scholarship on Indigenous peoples, property, and geography in several ways. First, it uses a property lens to examine the contemporary negotiation of state-Indigenous relations, a novel approach to an oft-studied topic. While scholars have examined the challenges of modern treaty-making in British Columbia (Day and Sadik, 2002; McKee, 2009), for example, none have focused on the role of property in shaping these negotiations. Second, it both draws on and contributes to scholarship in legal geography, which emphasizes the ways that law, space, and power are inextricably linked (Blomley, 1994; Blomley et al., 2001). As a particularly potent form of the “law-space-power nexus” (Blomley, 1994, 227) in settler colonial states, property serves as a useful entry to explore the broader implications of ongoing debates over settler and Indigenous rights to land. Finally, our three examples represent current and pressing issues in Canada, issues that remain under-examined by scholars and especially by geographers. In particular, there has been little scholarly analysis of recent proposals to expand private property on Indigenous lands or to create a new law to govern matrimonial real property on Indian reserves, both of which have significant implications for Indigenous peoples and lands in Canada.

Our focus is on the geographic nature of these property debates, and so we begin with a discussion of the links between property, geography and Indigenous peoples. In a settler state like Canada, founded on the dispossession and displacement of Indigenous nations, property has long been a particularly productive concept, key to mapping out distinct settler and Indigenous spaces, but also an important site of struggle or contestation (Harris, 2004; Wood and Rossiter, 2011). We then move to our three examples. In the conclusion, we review the broader meaning and significance of these property debates, arguing that they reflect both ongoing efforts by the settler state to “fix” these problematic gaps in the nation’s social-economic-political constitution, and struggles by Indigenous peoples to redefine property and social relations in these places to meet their own political and economic objectives. As we highlight, however, the lines of contention in these debates are not always so clearly drawn, as some Indigenous groups seek to adapt Western property forms to their own particular uses. This points, we argue, to the need to consider a wide range of property options in the resolution of these debates, including those that draw on both Western and Indigenous traditions.

2. Property, geography, and Indigenous peoples

In liberal-capitalist societies, property is commonly understood to refer to personal possession of some “thing”. Property in land, our focus here, is understood to refer to a person’s individual and private ownership of a parcel of land (Macpherson, 1978). Ownership in this sense confers a bundle of rights to the owner, including the right to use the property as desired and to exclude others from its use. Further, in a market society, property in land is a fungible commodity; it can be separated from the owner and traded in

the marketplace (Cooper, 2007). In these contexts, private property is seen as an ideal fit for the liberal subject, delimiting a space where individual rights prevail and the property owner, whether a person or a corporation, enjoys freedom and autonomy (Nedelsky, 1990). Singer (2000) refers to the dominant notion of property that prevails in liberal capitalist societies as the “ownership model”, denoting the privileged status accorded to property owners in relation to non-owners. Under this model, property owners are seen as self-regarding, concerned only with their own interests and having limited obligations to those outside of their property boundaries.

This, however, is a narrow reading of property. Even in liberal capitalist societies, property is a more complex and commodious concept than indicated by the ownership model. The state can and does intervene in the rights of private property owners, for example, and owners do have obligations to the larger society in which they are situated (Underkuffler, 2003). In addition, while private property may dominate and be held up as an ideal, other forms of property (e.g., common property, state property) persist and prove effective in addressing social and economic objectives (Holder and Flessas, 2008; McCarthy, 2005). A broader reading sees property as intimately bound up with social, economic, and political relations (Macpherson, 1973; Underkuffler-Freund, 1996), as more contingent and fluid, and more subject to contestation and negotiation (Rose, 1994) than the ownership model suggests. This fuller understanding recognizes that property is less about defining a person’s *right to things* and more about defining *relations between people with respect to things* (Nedelsky, 1993).

Blomley (2005a) argues that scholars have largely forgotten about property. This is particularly lamentable in the case of geographers, he notes, given the fundamentally geographical nature of property. As a legal-spatial category, property plays an important role in the maintenance of social and political order and is “deeply implicated in power relations” (Blomley, 1994, p. 42). Property reflects and reinforces “legal relations of power, through complex and layered spatial processes and practices that code, exclude, enable, stage, [and] locate” (Blomley, 2005b, p. 283). Thus, geographers would do well to remember how property relies on and produces certain conceptions of space and to consider the social and political effects of the production of these legal spaces. The ownership model of property described above, for example, relies on a particular spatial representation in which property rights are fully expressed and contained within a discrete parcel of land with clear and unambiguous boundaries (Blomley, 2004, p. 6).

Contemporary Indigenous struggles over property in Canada reflect that settler nation’s colonial constitution. Canada came into being through “a struggle over geography”, with settlers taking possession of Indigenous lands through both brute force and acts of geographic imagination (Said, 1993, p. 7). Dispossessed of most of their lands, Indigenous peoples had to be located, or relocated, somewhere. In Canada, “Indian reserves” were constructed as the confined spaces of Indigenous life and property, carefully mapped off from an emerging settler society (Harris, 2002). Canada’s colonial geography—characterized by separate and highly unequal spaces of Indigenous and settler life—reflected dominant understandings of the proper places for settlers and Indigenous peoples in the emerging nation (Harris, 2002). Not fitting with the image of a Western (White) nation hacked out of the wilderness, Indigenous spaces also had to be “unmade” to allow a colonial geography to take hold (Raibmon, 2008). Exclusion and marginalization—in a social, economic, political, and geographic sense—have been the key features of Indigenous peoples’ placement within the nation state of Canada.

Property has been a particularly important tool in this colonial-geographic project. Writing about colonialism in British Columbia, Harris (2004, p. 177) identifies property law as “the most

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