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**The Legal Relations of ‘Private’ Forests: Making and unmaking private forest  
lands on Vancouver Island**

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## **The Legal Relations of ‘Private’ Forests: Making and unmaking private forest lands on Vancouver Island**

While the vast majority of forestlands in Canada are considered ‘Crown land’, there are key areas of private forestland. On private land the incidents of fee simple ownership mean the owner emerges as land use decision maker – the “agenda setter” for the land. Yet a richer set of legal relations exists in these forests. Indigenous legal orders derived from an enduring relationship with the land and place also govern forestlands. Using the case of the Esquimalt and Nanaimo Railway lands in British Columbia, this article explores the intersection between historical and contemporary human-forest relations upheld by Anglo-Canadian law and the pre-existing Indigenous legal relations with forestland. This paper illustrates how the current model of Canadian natural resource governance, centered on consultation and accommodation of judicially recognized rights, fails to create adequate space for pluralistic human-forest relations and Indigenous environmental jurisdiction.

Keywords: Natural Resource Law, Property Law, Aboriginal title; Indigenous law; forests; Canada; British Columbia

### **Introduction: The legal relations of a forest**

While the vast majority of land, and forestlands in particular, are considered ‘Crown land’ in Canada, there are key areas of private forestland. If a forest is on private land, the common law incidents of fee simple ownership come to the fore. The owner emerges as the “agenda setter” for the land (Katz 2008). The trees and other more-than-human entities are understood as owned and dominated by humans as separate and severable commodities (Davies 2015, 221; Whatmore 2006).<sup>1</sup> The exclusive possession of ownership is overlaid with public and private planning tools, such as land use planning restrictions, controls on the use of pesticides, and protections for

waterways and species habitat. Forests are governed as natural resources to be exploited for public or private benefit. As such, the most visible legal relationship in the forests of Anglo-Canadian law is ownership: forests as owned by the state as Crown land or owned by a private actor as fee simple private land. The trees and the land are objects of property, defined by the uses to which their owners put them.

Yet, the lands that now make up Canada are also covered by Indigenous legal orders, each derived from a direct enduring relationship with the land (Borrows 2010). These place-based legal relations pre-exist the assertion of colonial sovereignty, acquisition of Crown ownership, or any grant of private fee simple interests. They include systems for the governance of land and resources (Mauzé 1998; Thom 2005; Turner et al. 2009). In many parts of Canada forestland is also the subject of historic treaties between Indigenous and colonial parties. These agreements are understood by Indigenous signatories to recognize their jurisdiction and determine how the land would be shared and cared for (Krasowski 2019). Treaties between Indigenous nations may also govern relations with and access to forestland, including shared responsibility to care for the ecosystems that sustain communities (Simpson 2008).

Examining Indigenous forest relations also requires looking beyond the human to explore the agreements and relationships between humans and the more-than-human world of the forest, including the metaphysical realm (Morales 2017a; Simpson 2008; Todd 2017). As Owain Jones and Paul Cloke tell us, trees are “embedded in a plethora of relationships, both with humans and other non-humans” (Jones and Cloke 2002). When ecological and spiritual relations of the forest are incorporated into the legal relations of the forest, trees and other parts of the forest can be understood as an integrated and integral part of a particular place. The legal relations of the forest can then be understood as “patterned on the co-existence of different materialities, which

include but are not limited to human existence” (Davies 2015, 222). We can begin to uncover the legal pluralism of the forest where the state, and even the human, are not the unitary source of law. Once we start to uncover these pluralistic legal relations, which unsettle Anglo-Canadian notions of exclusivity and human dominium over nature, questions emerge about whether and how a forest can ever be ‘private’. How might we understand human-forest relations differently if place-based Indigenous legal orders were central to the governance of forestlands?

Using the case of British Columbia’s ‘private’ forestlands on Vancouver Island, I explore how Indigenous forest commons, held by specific and identifiable groups with the power to exclude and responsibility to govern the forest, were unilaterally transformed into fee simple private land. I assess contemporary attempts to address Indigenous assertions of property rights and jurisdiction through state-based law. While imperial law and the common law recognized customary law and commonly-held lands, legal and social conceptions of commons imposed by colonial powers were profoundly influenced by racist conceptions of property rooted in the doctrine of discovery (Borrows 2015b). These concepts justified colonial refusals to treat Indigenous law as establishing enforceable interests in land (Bhandar 2018; Boisselle 2015; Macklem 2001).

Vancouver Island’s forestlands illustrate the unresolved relationship between Indigenous land tenure and private property in the common law system. In Canada, the current model of engagement with Indigenous land rights and jurisdiction centres on consultation and accommodation of judicially recognized rights. As I argue below, this approach fails to create adequate space for pluralistic legal relations. Rather, a more transformative approach is required: the recognition of Indigenous environmental jurisdiction in relation to private land. This will unsettle the unilateral authority of the state over land use decisions and disrupt the presumptive

primacy of fee simple property relations, pushing property relations towards meaningful and pluralistic engagement with Indigenous law.

### **Island Hul'qumi'num Human-Forests Relations: Enduring Indigenous Jurisdiction**

Close your gates if you like...and I will batter them down. Close your gates forsooth! Think you we did not live before the white man came? And think you we should die were he swept from these shores?"

Chief Tzouhalem at Fort Victoria, 1844

In the summer of 1844 Kw'amutsun (Cowichan) Chief Tzouhalem and his party visited the newly established Fort Victoria. Upon discovering the cattle grazing outside the fort they shot and claimed several for themselves. The Fort's Chief Trader Roderick Finlayson demanded compensation and the surrender of the persons who shot the cattle and promptly closed the gates and cut off trading. Chief Tzouhalem responded by asserting that the land remained Indigenous and they thus had a right to hunt the creatures upon it. A two-day siege, in which he was joined by many other Coast Salish communities, ultimately resulted in a negotiated settlement after Finlayson used the fort's cannon to demonstrate colonial fire power. However, the ongoing assertion of Indigenous ownership and jurisdiction on Vancouver Island was made clear (Arnett 1999, 27; Begg 1894, 163).

As the story of Fort Victoria's cattle illustrates, Europeans arriving on the lands that would become North America found complex societies with established legal orders.<sup>2</sup> These systems of law were developed over generations of living with the land. They were embedded in

Indigenous worldviews that informed the structure of rules determining ownership, access, and use of land, waters, and resources (Borrows 2010; Morales 2017b). Here, Hul’qumi’num law is examined as one example of the Indigenous legal orders enduring in Vancouver Island’s forests. As Hul’qumi’num legal scholar Sarah Morales notes, “[w]hen settlers arrived, resources and inter-personal relationships were already governed by an existing legal tradition. This was reflected in our lands” (Morales 2014, 154). These Coast Salish communities have lived in and around the southeast coast of Vancouver Island since time immemorial. Hul’qumi’num leader Raymond Wilson of the Hwlitsum First Nation describes their jurisdiction over the land as rooted in a responsibility-based ownership: “prior to European contact, the Coast Salish people owned all of their territory. The land was given to them by the Creator to have stewardship over”(Wilson 2011, 133). The profound and compounding impacts of colonialism – dispossession, disease, and the suppression of law, culture, and language through residential schools and missionary influences – have undoubtedly undermined the intergenerational transmission of the knowledge underpinning Island Hul’quimi’num legal orders. Yet, despite this “long shadow” they persist, continuing to guide internal and external property relations (Morales & Thom 2020, 131).

### **More-Than-Human Relations**

Hul’qumi’num property relations include spiritual and ancestral dimensions through links to key “First Ancestor stories” in which “the legitimacy of claims to land and resource ownership, and to self-government” are expressed (Thom 2005, 83). These *syuth* are not fictional – they are stories of the actual ancestors from whom community members trace their descent and their place in particular villages (Arnett 1999, 17; Thom 2005, 84). They record title to land and resources and various forms of material and intangible property, including names, resource

harvesting teachings, and ceremonies (Arnett 1999, 17; Thom 2005, 85). Morales describes the relationship between law and the places associated with First Ancestors: “In essence, these places *become* the ancestors: they serve as “living” legal scholars” (Morales 2014, 144). From an external perspective, the stories are “organizing principles” for self-government and title to their lands. However, the inherent variability of the “mythic basis to the land tenure system” makes it challenging to Western discourses of law and property (Thom 2005, 111, 117).

Successful life in the Coast Salish world requires “a relationship with the non-human world,” established through ceremony and encounters with the spirit world (Thom 2005, 140). The need to maintain respectful relationships takes on particular significance in the context of the loss of forestlands, which are relied upon to fulfill a range of social, spiritual, and economic needs. The agency of more-than-human entities is a core aspect of the Coast Salish worldview. Personhood is extended beyond humans to include both ‘natural’ beings such as plants, animals, rocks, and supernatural beings (Thom 2005, 136, 140).

Forestlands have always provided an important economic foundation for Island Hul’qumi’num communities. At the same time, forests have significance beyond their potential for economic development and as hunting and resource gathering areas. Spiritual activities were the highest ranked category in a study of Cowichan Tribes First Nation’s forest values.<sup>3</sup> Bathing sites in forested areas, away from settled areas, are a crucial site of connection to the more-than-human world and encounter with spirit power. *Kw’aythut*, Coast Salish ritual bathing, remains a crucially important practice today. Secluded forest areas are also places of strength, cleansing, and encounters with power. They are viewed as places that can help people in times of crisis or grief (Morales 2014; Thom 2005). Elder George Harris explained what he was taught about the importance of these sites to Morales: “our forests and our trees are like cathedrals and that we

should pray and meditate in the forests to gain the spiritual strength that we need” (Morales 2014, 192). The study found Cowichan Tribes members emphasized human engagement with the forest, particularly cultural and spiritual activities, as well as learning and recreational opportunities. While there was diversity of responses, the data demonstrated an overwhelming consensus that “traditional” and “ecological” values are “very important” to members (Hutton 2004). Therefore, in addition to the critical importance of a land base to self-determination, the explicit extension of forest relations beyond human needs and colonial understandings of economic benefit crucially shapes the nature of Island Hul’qumi’num property relations.

### **Island Hul’qumi’num Property Relations**

Coast Salish peoples have a unique “social organization among hunter-gatherer society with winter settlement in large permanent winter villages while recognizing local descent groups, having pervasive notions of property, and having long-standing class-based social stratification” (Suttles 1958, 1960; Thom 2005, 83). Indeed, as Governor of the Colony of Vancouver Island, James Douglas, warned the British government in 1861, Hul’qumi’num peoples, “have distinct ideas of property in land, mutually recognize their several exclusive possessory rights...they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs” (Douglas 1861; Marshall 1999, 112).

Despite “operating in the shadow” of Canadian law, Hul’quimin’um legal orders continue to deeply inform the actual exercise of property relations (Morales and Thom 2020, 133). According to anthropological models, this includes exclusive small group or family-based forms of tenure with strict rules for access and inclusion, as well as forms of common property with

broader but controlled and restricted access group (Thom 2005, 273; Morales and Thom 2020).<sup>4</sup> The latter would have encompassed large areas of the now privatized forestlands.

The cognatic descent group, *hwunutsakuwum*, are understood as the kin traced from a common founding ancestor and can be made up of several smaller family units.<sup>5</sup> Land is held by stewards for the benefit of the members and their participation in the traditional economy rather than as a commodity (Arnett, 1999, 22). Affiliation with a particular group is descent-based but membership is flexible and activated through what Morales and Thom call the “*actual practice of ordered kin relations*” (2020, 136). As they describe, claims to property rights require social and ceremonial engagement through traditional feasting, potlaches, and granting of “Indigenous names or ritual privileges or prerogatives” (Thom 2005, 275; Morales and Thom 2020). Further, they note, property rights come with responsibilities, including obligations to share harvested resources, and respect local knowledge and protocols (Morales and Thom 2020). The ownership of places by *hwunutsakuwum* is inalienable, indivisible and indestructible (Thom 2005, 279). Morales and Thom point out that while the kinship group was “potentially expansive”, property rights apply to a presumptively closed group and there are “serious consequences for those who do not recognize and respect local protocols and laws” (2020, 141).

The broader residence group *nutsuwmuhw*, holds common property collectively or jointly between residence groups. Thom characterizes these as “largely places for procurement of productive resources” (Thom 2005, 280). Such lands would make up a large percentage of the total area and may be jointly owned by multiple *nutsuwmuhw* in accordance with mechanisms for the sharing of important resources (Thom 2005, 284). In a presentation to the Crown, Cowichan Tribes explained (Treaty Presentation 2000): “The Cowichan have traditionally relied extensively on the resources of the forest to provide them with food, medicine, clothing, housing

and transportation; in short, for most of their basic needs.” As noted above, these common property areas would encompass the types of land converted to private forestlands by the E&N grants. Thus, this conversion represents a massive and ongoing transfer of wealth and resources out of Island Hul’qumi’num economies and jurisdiction.

Island Hul’qumi’num common property is both inclusive and exclusive. Inclusion is based on kinship networks and interconnected guest-host relations throughout the larger territory (Morales and Thom 2020). But these commons are not unrestricted. They are controlled through “the strict regime of private knowledge held about certain areas of land and the resources that are available to them” (Thom 2005, 289). While permission could be granted, both resident and kinship groups strictly enforce exclusion to defend against trespass and unsanctioned resource use (Arnett 1999, 23). This is a core principle of resource management to enact stewardship responsibilities in the territory, but also the practice of kinship and hospitality.

While a strong ethic of sharing underpins Island Hul’qumi’num property relations in order to facilitate access to areas and resources between groups, people outside the kinship networks and invited guests would not have access to property. Entry without permission would be trespass. Trespass is treated seriously as access must be restricted to those who understand the law and can uphold the system of property relations that sustains the resource (Morales and Thom 2020). This is not only a material responsibility. Upholding Hul’qumi’num property relations sustains core cultural and spiritual dimensions of Hul’qumi’num life.

### **British Columbia’s Private Forests: From Indigenous Commons to ‘the Private Land it Always Was’**

The ‘private’ character of a vast expanse of forestland on Vancouver Island dates back to one of the most significant land grabs in Canadian history (Ekers 2019; Hul’qumi’num Treaty Group

n.d.). In a series of 19<sup>th</sup>-century grants the Esquimalt & Nanaimo Railway Company was granted almost 800,000 acres in exchange for building a railway on a small part of the Island (Morales 2014; Thom 2014). The grants converted a large area of collectively-held Indigenous territory into one of the largest contiguous stretches of private land in the province (Egan 2012; Thom 2014). Almost 600,000 acres are now managed as private industrial forest lands. Aggressive harvesting of these forests continues to be a key stumbling block for Crown-Indigenous relations on the Island (Ekers et al. 2020).

Several Indigenous nations with distinct legal traditions continue to inhabit the E&N lands and assert their jurisdiction. Nuu-chah-nulth, Hul'qumi'num, T'Sou-ke, and Kwakwaka'wakw Peoples have also consistently asserted political and legal claims<sup>6</sup> in relation to the E&N lands in Canadian and international law (Egan 2012; Foster 2007; Foster and Berger 2008; Thom 2014). The E&N land grants effectively privatized 85% of Island Hul'qumi'num territory (Morales 2014). Today this means that private forestry companies now own 60% of their territory, the balance having passed into other private hands (Egan 2012; Ekers 2019; Thom 2019). The impact of the E&N land grants on Island Hul'qumi'num communities and legal orders is profound (Morales 2014). Many traditional forest uses require quiet seclusion and are simply not compatible with commercial logging, or urban development (Cowichan Treaty Presentation 2000, 30; Thom 2005, 155). As Elder Harris described, even where sites have not been destroyed, "they are no longer accessible because they are on private lands; therefore, if we try to access those places we are considered trespassers" (Morales 2014, 193). Thus, despite the enduring presence of their tenure and property relations, Hul'qumi'num peoples are transformed by state law from owners and descendants to trespassers in their own territory. Nonetheless, as Morales and Thom note, Hul'qumi'num property law continues to inform negotiations and

consultations about the E&N lands even as it struggles for practical expression (Morales and Thom 2020).

### **Producing British Columbia's Private Forests: From Forest Clearance to Forestry**

In British Columbia settlement largely occurred without treaties or compensation to Indigenous peoples. In contrast to many other parts of what would become Canada, the vast majority of British Columbia was formally 'treated as terra nullius' (Banner 2007, 195). Settlers rapidly took up lands in accordance with colonial pre-emption policies, which opened up "unoccupied and unreserved and unsurveyed Crown Lands" other than an Indian Reserve or settlement.<sup>7</sup> The creation of reserves afforded limited protection as boundaries were defined by common law conceptions of property recognizing areas such as demarcated village sites or cultivated areas, but deeming the majority of traditional territories "an empty nature open to settlement or enterprise" (Willems-Braun 1997, 12).

While Indigenous cultivation was recognized by imperial law, in practice what European colonial authorities recognized as agricultural cultivation was highly specific (Murton 2015). Communities on Vancouver Island practiced various forms of cultivation and environmental modification for food production in a range of "anthropogenic landscapes" (Deur and Turner 2005, 134), yet lands outside of "villages sites and potato patches" on Vancouver Island were deemed uncultivated and available for settlement by colonial powers (Marshall 1999, 115; Morales 2014, 168). The small areas of cultivation recognizable as property were created as reserves for First Nations (Harris 2002). However, even these came to be presented by the colonial government as benevolent "gifts" rather than recognition of the pre-existing title to the land under Indigenous systems of tenure (Marshall 1999, 41; Morales 2014, 174). Indeed, the very existence of reserves on Vancouver Island was premised on the notion of *terra nullius* and

the validation of Crown sovereignty (Banner 2007, 214). In this way the colonial erasure of complex place-based Indigenous property relations led directly to European claims to ownership of the forestlands of Vancouver Island.

Colonial settlement of the Cowichan Valley, at the heart of the E&N lands, was initially focused on agriculture and related land clearing, particularly the elimination of forests. As Kelly Black explains, ‘the “impenetrable forest” become an obstacle to be eliminated: a family could clear the land, demonstrate ownership, and over generations, form a society that mirrored the one they left behind’ (Black 2017, 88). It was the human transformation, or ‘improvement’ of the forest that eventually made it property cognizable at colonial law. Yet this was despite – and in violation of – the existing property regimes that tightly regulated access. These were deliberately ignored and actively undermined, as colonial land use practices removed and destroyed markers of Indigenous property relations (Black 2017, 89; Morales, 2014). The ‘wild’ and ‘empty’ forest was the justification for productive settlement, but also the foundation of Settler belonging through its transformation to productive agricultural land, and then later as a source of timber within the Canadian staples economy (Black 2017, 101).

Persistent and determined efforts by Indigenous nations (McNeil 2019, 132–133), including Island Hul’qumi’num communities (Foster 2007; Foster and Berger 2008), to have their title and rights addressed by colonial and imperial authorities, resulted in a short-lived attempt to enter into treaty (Foster 2007). However, just the few Vancouver Island Treaties were ultimately completed (Coates and Carlson 2013). In accordance with provincial pre-emption policy, lands were granted to settlers who strategically arrived during a seasonal migration to fishing grounds (Marshall 1999, 109), and eventually to the E&N company. These grants were a violation of Indigenous legal orders, including Hul’qumi’num law, which required protocols be

followed and permission given for land to be shared (Morales 2014, 162). As discussed below, they were also inconsistent with colonial practice and a line of imperial jurisprudence<sup>8</sup> recognizing Indigenous title and rights and the continuity of customary and Indigenous property law (McNeil 2019, 137).

Despite persistent Indigenous resistance and recognition of the problem of unresolved title by both local and colonial authorities, the Crown in British Columbia actively avoided challenges to land grants and pre-emption until the 1970s (Foster 2007; Foster and Berger 2008). Appeals to the federal government, which was constitutionally entrusted with protecting the interests of Indigenous peoples, were unsuccessful. Procedural barriers, interjurisdictional disputes about the Dominion's interest in provincial lands, and a lack of political will resulted in compromise at best, and more often inaction (Foster and Berger 2008). Direct access to courts was limited by the doctrine of sovereign immunity, which required permission to sue the Crown. Hopes for federal court action to force judicial consideration of the land question in British Columbia were dashed when the sympathetic Liberal Prime Minister Laurier lost the 1911 election. The newly elected Conservative government reached a political compromise with the province leaving the land question unresolved once again (Foster 2007; Foster and Berger 2008). Legal action by Indigenous peoples was subsequently statutorily barred through the federal Indian Act 1927,<sup>9</sup> which was amended to make it an offence for Indians to pay legal counsel to pursue their claims (Foster 1995). The prohibition was enacted as a response to Indigenous attempts to have the British Columbia land question put before the Privy Council and was only repealed in 1951 (Foster 1995, 30; McNeil 2019, 138). Unsurprisingly, much of the E&N lands, like the vast majority of the province, remains subject to unextinguished title claims, with the relationship between pre-existing Indigenous legal orders and colonial law still unresolved.

## **Sustaining Private Forests on Vancouver Island**

By the time of the E&N grants, sparse settlement of lands in British Columbia had evolved into a resource boom facilitated and subsidized by provincial authorities pushing for major infrastructure investments. The operation of the railway and industrial forestry were intertwined, with forestry serving to clear the land and ready it for settlement. Black details how logged land became a valuable asset for the E&N Company, allowing it to avoid the boom and bust of resource production from its other activities, primarily coal and timber (Black 2017, 121). The E&N lands were subject to large-scale and unregulated land clearances from early on. Even on Crown lands forestry the ethos of land clearance dominated, with essentially unregulated timber rights available on a free entry system, where someone could set a post to mark the boundaries of their claims. The Forest Act 1912<sup>10</sup> set in place the current policy of retaining title while selling rights to timber on Crown lands. Standing trees and intact forests were targeted by provincial policy as “waste”.

In the mid-20<sup>th</sup> Century, the depletion of forests and the beginnings of a Settler conservation movement led to a Royal Commission on Forest Resources. The Sloan Commission recommended shifting to an agricultural management style for forestry, to provide for a sustained yield of timber in perpetuity (Sloan 1956, 127). While it was aimed at preventing the liquidation of timber resources it brought about a shift from natural regeneration to silviculture, dramatically changing the more-than-human relations of the forests through the uniformity of plantation forestry. The resulting Forest Act Amendment Act 1947<sup>11</sup> implemented the shift to ‘sustained yield forestry’, including the introduction of licenses, the precursor to contemporary Tree Farm Licenses (TFLs) which remain the key harvesting tenures today. Appurtenance clauses requiring holders to have a processing facility and to take on management responsibilities led to a

concentration of forestry rights in a very small number of large companies who could afford to take on such responsibilities and capital investments. After a period of ownership by the Canadian Pacific Railway, the remaining E&N lands were purchased by large integrated forestry companies, largely Crown Zellerbach and MacMillan Bloedel (Ekers 2019, 280).

Private forest owners understood the potential for broad public management of forests to impact their power over their land holdings. They have actively lobbied to protect the “private” character of their lands and resources and ensure certainty in the forest management system (Ekers 2019). However, ultimately the option to “bundle” private lands with Crown lands in exchange for cheap access to the Crown timber placed large portions of the E&N lands under the broader forest management regime of the Forest Act, facilitating consistent forest management practices across the province from the 1950s (Auditor General of British Columbia 2008).<sup>12</sup> In exchange for agreeing to bring private forestland under the provincial regulatory regime, land owners were granted inexpensive access to public large areas of Crown land (Ekers et al. 2020). These hybrid areas were uniformly regulated by statutory licences as if they were entirely Crown land.

This era of uniform forest regulation came to an end during a time of sustained decline in the forestry industry. In 1996 the Forest Act was amended<sup>13</sup> to provide for removals of private land from existing TFLs (Ekers 2019, 285). The impact of this only became clear in 2003 when the British Columbia government enacted the Private Managed Forest Land Act.<sup>14</sup> The Act deregulated forestry on private land by drastically reducing standards and oversight, including limits on annual harvesting rates, environmental conditions, and Indigenous rights. The Act also facilitated significant financial investment in the E&N lands (Ekers 2019, 287; Thom 2019). Immediately following enactment, Weyerhaeuser, which now owned much of the E&N land,

successfully applied to remove large swaths of their land from Vancouver Island TFLs (Parfitt 2008). An asset management company, Brookfield, subsequently purchased the coastal timber assets of Weyerhaeuser and Western Forest Products, including the E&N forestlands. Three public pension plans, the British Columbia Investment Management Corporation (bcIMC) and the Alberta Investment Management Corporation (AIMco), and the federal Public Sector Pension Investment Board (PSP Investments) then came to wholly own these private forestlands as investors in two Brookfield subsidiaries, Island Timberlands and TimberWest. Thus the ‘private’ forestlands are now owned by three of the largest public pension funds in Canada, and therefore ultimately by Canadian workers and retirees (Ekers 2019; Ekers et al. 2020).

In *Hupačasath First Nation v British Colombia* the character of the land as ‘private’ forest land, and the application of the distinct regulatory regime, was described in Brookfield’s affidavit as a “critical consideration” for its decision to purchase the lands:

Unlike lands in the TFL system, private timberlands can be ‘harvested to market’, thus allowing private owners to harvest the species commanding the best prices in the market. A further benefit for private owners is that they are not subject to TFL restrictions on the export of logs that are surplus to the demands of domestic mills.<sup>15</sup>

The removals also allow for conversion of forestlands to residential real estate, prohibited under the public forestry regime to sustain the forestry industry in the province. Following the removals, both the owners and the Crown took the position there was no longer any legal obligation to consult Indigenous communities. In the words of one ministerial briefing note, the

forestlands would “return to the private land it always was.”<sup>16</sup> Of course, “always” refers to its status under the fee simple grants in the 19<sup>th</sup> century, not to its much longer history as land governed by Indigenous property regimes. Unsurprisingly, this affirmation of the private character of the E&N lands has become a significant roadblock in treaty negotiations with Vancouver Island First Nations. Insulation from the ‘uncertainty’ of Indigenous claims was a key motivator for the removal applications (Ekers 2019, 287). However, uncovering the legal pluralism of British Columbia’s forests brings the private character of the land into question, both with respect to the validity of the grants themselves and the jurisdictional consequences for forest governance. As the following section explores, recognition of commonly held lands in England and other colonial contexts demonstrates the possibility of a legally pluralistic forest where multiple regimes of human-forest relations co-exist.

### **Forest Commons and the Production of Private Forests in Colonial Law**

The E&N grants treated the pre-existing interests of the Island Hul’qumi’num and their Indigenous neighbours as non-existent or extinguished. Yet, customary common property regimes and Indigenous land tenures were cognizable in English statutory law and at common law at the time of the grants. The E&N grant and its consequences expose the flawed and racist logic underpinning of Indigenous colonial property relations on Vancouver Island. Indigenous legal orders were denigrated not because they were unrecognizable at law, but because they conflicted with the exercise of colonial power (Morales and Thom 2020). The following discussion briefly examines how English statutory law and the common law of property provided space for customary regimes of common property and the co-existence of differential legal systems – space that could have provided for recognition of Island Hul’qumi’num law and governance in Vancouver Island’s forests.

## **English Forest Commons and The Forest Charter: Customary Forest Regulation**

Customary rights to forest commons have a long history of recognition and protection in domestic English law. Rights to acquire resources in forest lands, such as wood, fish, birds, some wild animals and plants were historically regulated through local systems of rights for common lands (Bottomley 2018, 3). The collectively owned property recognized in English law as commons was not the property of all, but rather “the joint property” of a particular geographic community (Locke 1988, 137). As with Hul’qumi’num *nutsuwmuhw* property, rules about use and access were recognized and enforced by those included in the rights holding group.

This customary law of the commons was threatened following the Norman Conquest by the enclosure of forested common lands as royal game preserves in the twelfth century. A new unilaterally imposed framework of King-made “forest law” was enforced “alongside but apart from the common law” (Green 2013, 423–424; Young and Young, 1979, 6). It entrenched royal rights of use and access that superseded common law and customary property rights to preserve game for the King (Clark and Page 2019, 35; Babie 2015, 1453). The extinguishment of commoner rights and evictions were a central element of the creation of this new “legal forest” (Clark and Page 2019). Indeed, forest law was notable for its particularly harsh and arbitrary exercise of power with severe punishments for harvesting anything from the reserves that had formerly sustained communities (Petit-Dutaillis and Lefebvre 1915, 165). As Anne Bottomly notes,

[c]ustomary rights to use the land to gather produce or graze animals, practices often economically critical for subsistence agriculture, had been simply

ignored, denied or removed. This was a wholesale loss of access to resource which had been relied on ‘since time immemorial’ (Bottomley 2018, 3).

Resistance to forest enclosures ultimately led to the enactment of the Charter of the Forest 1217,<sup>17</sup> (“the Charter”) the lesser known companion to the *Magna Carta*,<sup>18</sup> which restored common access rights and agricultural and subsistence rights. While some burdens and restrictions on the exercise of customary rights remained, the unitary and unilaterally imposed structure of legal relations in the forest was disrupted by the recognition and restoration of a range of place-based community rights to the forest (Petit-Dutaillis and Lefebvre 1915, 191). Paul Babie argues the Charter “elevated the place of community relative to the Crown” (Babie 2015, 1457), restoring recognition of collectively owned property (Clark and Page 2019). Under the Charter the exercise of common rights was to be regulated by the community: “[t]his new system placed the community, and not the personal prerogative of the Crown, at the centre of land ownership” (2015, 1457).

Subsequent practices of enclosures of English commons in the 18<sup>th</sup> and 19<sup>th</sup> centuries obscured the legal basis for customary property rights, but did not eliminate it (Neeson 1996). Bottomly argues that critical scholars should “recover and celebrate the Charter – not simply for what it stood for historically, but for its relevance to the dominant narratives of property, specifically the dominant narrative of private property through ownership” (Bottomley 2018, 2). In this way it represents an important and interesting counterpoint to the dominance of private property relations in Anglo-colonial law. One that found resonance in imperial law’s treatment of customary land rights beginning in the 17<sup>th</sup> century.

## **Troubling the Colonial Commons: From Collectively Held Lands to Empty Wilderness**

In addition to English law's statutory protection of commons in the Charter, at the time of the E&N grants imperial common law also recognized customary Indigenous land rights rooted in Indigenous legal orders. As Kent McNeil has argued, 17<sup>th</sup> century decisions about lands in Ireland and Wales found "the land rights of the inhabitants of conquered and ceded colonies continue without confirmation by the Crown" (McNeil 2019, 116–117). Privy Council decisions about Indigenous property rights in other British colonies confirmed the continuity of customary land rights. For example, not long after the E&N lands were granted, the Privy Council in *Tamaki v Baker*<sup>19</sup> rejected claims by the Attorney General for New Zealand that Māori were a primitive society with no system of law cognisable by the English common law courts. Instead, the Privy Council recognized the existence of Māori customary law and its system of land tenure. Later, in the 1921 landmark decision in *Amondu Tijani v Secretary, Southern Nigeria*<sup>20</sup> the Privy Council determined that even where the cession of sovereignty had led to the Crown holding radical title in the territory of a Nigerian community, the communal land rights of the original peoples were unaffected and amounted to the full beneficial interest in the land. Moreover, the structure and contours of those land rights were not to be determined by English common law, but by the customs of the Indigenous inhabitants. Yet Indigenous commons on Vancouver Island received different treatment.

Allen Greer argues North American commons were understood as "wide open and available to all; not the collective property of a community, but rather the antithesis of property" and therefore not akin to those protected by the Charter and English law (Greer 2018, 246). As Wilson notes, the contrasting Hul'qumi'num and colonial understandings of what ownership is and how and to what it applies is a foundational source of conflict with the Crown (Wilson 2011,

133). Colonial dispossessions “came about to a significant degree through the clash of an Indigenous commons and a colonial commons” (Greer 2018, 242). This was not simply a failure of translation from one legal system to another. Rather, as Brenna Bhandar argues, it reflects the development of a “racial regime of ownership” tied to the ideology of improvement through forms of cultivation recognizable to the colonial imagination (Bhandar 2018, 56). Therefore, while enclosure and the drive towards agrarian capitalism diminished but did not remove common rights protected by the Charter in England, property regimes like the Hul’qumi’num’s were violently disregarded through the intertwined legal fictions of the Crown’s radical title to the land and the lawlessness of the ‘empty’ forest wilderness.

Canadian colonial tropes of the untamed wilderness often invoked the darkness of the forest as an uninhabited and potentially dangerous place, an “enemy to be eradicated as quickly as possible” (Lambert and Pross 1967, xiii; McGregor 2011, 302). Despite the British colonial practice of negotiating land rights through treaty, the settler state understood the forests of colonial Vancouver Island not as the subject of complex customary local property regimes, but as lawless wastelands, waiting to be parceled and contained by clearance and agricultural development. Crown grants ultimately rewarded such improvements of ‘waste’ with legal recognition of fee simple status. As Bottomly describes, European philosophy saw these “[w]ild commons” as waiting “to be made into, reduced into, property by the inventive intrusion of the human” (Bottomley 2018, 16) But not just any human intrusion could produce legal property - Indigenous property regimes were deemed incapable of producing lawful ownership by colonial authorities (Arneil 1996; De Vattel 1883; Dorsett 1995; Locke 1988). Thus, the reality of pluralistic property relations was denied by the colonial state in British Columbia, with drastic consequences for Indigenous nations whose territory was privatized.

## **The Legality of Vancouver Island's Forest Relations**

As the story of Vancouver Island's private forests exemplifies, despite the room for legal pluralism in imperial law and the protection of commons in domestic English law, Indigenous peoples throughout the colonial common law world were dispossessed of their lands. The lawfulness of these actions, and the relationship between Indigenous and colonial law, remains a crucial and timely historical and legal question today. As outlined above, the fact that these issues remain unresolved are often illustrative of the lack of access to justice for Indigenous peoples rather than the lack of a legal basis or relevant law (McNeil 2014, 181–182). The lawfulness of the E&N grants has profound implications for how the interests and jurisdiction of the Indigenous title holders should be considered in contemporary decision making about those lands.

The E&N railway grants are the result of a series of interjurisdictional conflicts and settlements. Simply put, in 1884 British Columbia transferred a large area of land, much of which was Hul'qumi'num and Nuu-Chah-Nulth land, as well as some areas covered by the Vancouver Island (Douglas) Treaties in T'Sou-ke and Kwakiutil territories, to the Dominion government to satisfy the Terms of the Union under which they came into confederation.<sup>21</sup> The Dominion government then agreed to transfer the lands to the E&N Railway Company upon their completion of the railway, which took place in 1887. A subsequent transfer from the province to the Dominion government accounted for lands alienated by the province for settlement.

Apart from their inconsistency with the line of imperial law recognizing Indigenous tenure noted above, both transactions include significant flaws with respect to the legitimacy of the transfer to the E&N Company. This brings into question their capacity to have extinguished

Indigenous rights and title. The legal relationship between these potentially unextinguished Indigenous property interests and the fee simple grants therefore remains unresolved.

The first grant from British Columbia to Canada should not have included the majority of the lands for the simple reason that the province's "ownership" was subject to the Aboriginal title held by Hul'qumi'num nations and their neighbours. In accordance with the longstanding common law rule of *nemo dat quod non habet*, the province could only have been understood to transfer lands that were no longer subject to Indigenous property interests (McNeil 2001, 330). While provinces own public lands pursuant to section 109 of the Constitution,<sup>22</sup> these lands are explicitly held "subject to ... any Interest other than that of the Province in the same".<sup>23</sup> This includes Indigenous title, which the Supreme Court of Canada has since made clear is a legally protected interest in property that burdened the Crown's underlying title at the time of the assertion of sovereignty.<sup>24</sup> Therefore, while some 19<sup>th</sup> century case law, limited recognition of Indigenous title in Canada, provincial title to lands was nonetheless understood to be burdened by the Indigenous interest until it was removed by treaty or extinguishment.<sup>25</sup> As can be inferred from the decision of the Judicial Committee of the Privy Council in *St Catherine's Milling and Lumber Co v R*, and was then expressly set out by the Supreme Court in *Delgamuukw v British Columbia*, provincial governments have never had the power to extinguish Aboriginal title.<sup>26</sup> Only the Dominion could have extinguished title or accepted its surrender. In the case of the E&N lands, this was never done. As noted above, while there was substantial pressure from Indigenous communities in British Columbia to enter into reciprocal treaty relationships respecting their jurisdiction and how to share the land, no such agreement was formally concluded with regard to the majority of the E&N lands prior to confederation or thereafter (Arnett 1999; Foster 2007).

While it is clear that key colonial authorities in British Columbia took the position that no treaties were needed for settlement and development of the majority of the province to proceed (Foster 2007; Foster and Berger 2008; Harris 2003), in *Delgamuukw*<sup>27</sup> the Supreme Court held that a provincial policy of ignoring Indigenous rights is not sufficient to have legally extinguished Indigenous interests and thus removed those lands from contemporary constitutional protection (McNeil 2014). At the very least, the legal status of these interests was an open question in Canadian law at the time. The precise nature of the Indigenous interest in the E&N lands, and therefore the content of the Crown's interest, would be a matter to be determined based on evidence of the Indigenous possession of the land and system of tenure and property rights (McNeil 2014). As Justice Hall of the Supreme Court of Canada found in *Calder v British Columbia*, such an assessment “must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete”.<sup>28</sup>

The second grant from the Dominion government to the E&N Company is similarly flawed. Pursuant to the limitations on executive powers originating in the Magna Carta, the Federal Crown could unilaterally extinguish Aboriginal title but only through “clear and plain legislation” and not through pure prerogative (McNeil 2001, 315). Yet in the statute authorizing the transfer to the E&N corporate body, section 7(5) expressly saves all existing rights: “The existing rights, if any, of any persons or corporations in any of the lands so to be acquired by the company, shall not be affected by this Act”.<sup>29</sup> At Canadian law, and despite any contrary positions taken by local authorities at the time, Aboriginal title “crystalized at the assertion of sovereignty” and therefore was an existing right at the time of the grant: ‘a proprietary interest in land that can “compete on *an equal footing* with other proprietary interests.”’<sup>30</sup> Therefore, any

grant under the Act should be understood to have necessarily excluded these interests. Further, the Crown's discretionary power to extinguish or accept surrenders of Indigenous title brings with it an obligation to deal honourably with Indigenous peoples and lands and protect them from exploitation, which the Supreme Court in *Guerin v The Queen*, and *Mitchell v MNR* has characterized as a fiduciary duty.<sup>31</sup> A unilateral transfer of lands without consultation, consent, or compensation seems unlikely to be consistent with the fiduciary duty of the Crown to act in the interests of Indigenous peoples.

Stripped down to the basic transactions, the E&N grants are grounded in the position that Vancouver Island was *terra nullius* and the Indigenous owners were not rights holding persons with legal systems capable of producing property rights. However, this position was inconsistent with the Royal Proclamation of 1763,<sup>32</sup> the colonial practice of treaty making, and the imperial law of the time. It was also subsequently expressly rejected in a series of decisions by the Supreme Court of Canada beginning with *Calder* and most clearly in *Tsilhqot'in Nation v British Columbia*.<sup>33</sup> However, the Crown continues to treat these grants as presumptively extinguishing Indigenous title and jurisdiction, relying on Crown sovereignty and title to justify the dispossession of Indigenous lands. This "mythic foundation" at the heart of the Crown's proprietary power justified the authority to "grant third-party interests to whomever it pleased" (Macklem 2001, 93). Now, despite their dubious legal origins, these interests are routinely upheld without any inquiry into their legal ability to extinguish Indigenous interests. On this basis, private lands have been effectively excluded from treaty negotiations and subject to limited consultation. As examined below, the effect of the deregulation of provincial forest governance continues to compound this initial dispossession by denying Indigenous parties jurisdiction or any meaningful role in land use decision making (Ekers 2019, 274). As John

Borrows has succinctly argued, “[t]he doctrine of discovery is alive and well in Canada” (Borrows, 2015b, 726).

### **The Private Managed Forest Land Act: Judicial Enclosure and Regulatory Dispossession**

Indigenous communities have challenged the management of the E&N lands, particularly in light of the deregulation of operations on private land. A group of Hul’qumi’num nations have taken their case to the Inter-American Commission on Human Rights in an ongoing claim<sup>34</sup> (Thom, 2019). Cowichan Tribes also successfully upheld Pest Management conditions in their territory.<sup>35</sup> In both venues, Hul’qumi’num communities have clearly asserted their enduring relationships with the land. Yet, in the face of these relations, asserted title claims, and advanced treaty negotiations, private landowners have continued aggressively harvesting Hul’qumi’num territory with impunity (Ekers et al. 2020).

There has been limited treatment of the E&N lands by domestic Canadian courts. Here I briefly examine a challenge brought by the Hupačasath First Nation, a Nuu-chah-nulth community whose territory sits northwest of Island Hul’qumi’num territory in central Vancouver Island. In *Hupačasath First Nation v British Columbia* the Hupačasath challenged the removal of their territory from the public forestry regime without proper consultation. While the relationship between private property and Aboriginal title in Canadian law remains unresolved in Canadian law and has yet to be considered by the Supreme Court (Borrows, 2015a; Hamilton 2018; Lavoie 2017; McNeil 2010), these trial level decisions illustrate the limitations of current section 35 jurisprudence to address the complexity of pluralistic property relations on fee simple lands.

Section 35 of the Canadian Constitution formally recognizes and affirms existing Aboriginal rights and title.<sup>36</sup> One key section 35 doctrine is the Crown’s duty to consult and accommodate, rooted in what the Supreme Court has described as the “honour of the Crown”.<sup>37</sup>

This constitutional principle arises from the Crown's assertion of sovereignty in the face of Indigenous peoples' pre-existing occupation and requires the Crown to act honourably in its dealings with Indigenous peoples.<sup>38</sup> The Crown must engage in consultation and be prepared to accommodate Indigenous interests prior to making decisions or allowing impactful activities on Indigenous territories.<sup>39</sup> This duty arises whenever the Crown has real or constructive knowledge of a proven or credible, potential Aboriginal right or title claim, and contemplates actions that may adversely impact that right or title.<sup>40</sup> The treatment of Indigenous legal orders and jurisdiction in Canadian law, however, remains very unsettled and continues to be subject to legal and non-legal challenges (King and Pasternak 2019). Given the complexity, expense, and length of establishing Aboriginal title through the courts, the duty to consult and accommodate has become one of the primary ways in which Canadian courts engage with Indigenous law and property relations (Christie 2019).

The Hupačasath First Nation applied for a judicial review based on the failure of the Ministry of Forests to consult them about the removal of an area of their territory from the public forests regime.<sup>41</sup> Then Chief, and now President of the Nuu-chah-nulth Tribal Council, Dr Judith Sayers described the removal decision in stark terms: “[it] allows Weyerhaeuser to do anything they want on one third of our Territory (Affidavit #2 of Judith Sayers 2005, 26). Indeed, this is the position that the Crown and the owner asserted. However, the relationship between fee simple private property rights and Aboriginal rights and title is not settled in Canadian law (Borrows 2015a; Borrows 2015b; Lavoie 2017; McNeil 2010; Reynolds 2018). Presumptions about the priority of fee simple interests over Indigenous interests have led to narrow interpretations of the relationship between private land and Indigenous peoples, and the legal remedies available.<sup>42</sup> As Gordon Christie argues, the predominant judicial response has been

“allaying the fears of private property owners” (Christie 2009, 191). Despite the unresolved nature of the relationship between Aboriginal title and fee simple property, courts avoid complicated and uncomfortable questions by presuming such interests largely extinguish Indigenous relations with place (Borrows 2015a; Christie 2009). Such interpretations fail to acknowledge Indigenous property and land use laws and fail to account for the nature of Aboriginal title as both a beneficial property interest and a source of jurisdiction over collectively held lands (Borrows 2015a; Borrows 2015b). While Indigenous laws governing relations with place may provide context to assess the Crown’s determination of the scope of the duty, they are not held to ground enforceable decision-making authority or interests in land (Collins and Sossin 2019, 335; Van Wagner 2021). In the context of the E&N land grants, where the lawfulness of the original grant remains questionable, the presumption that a fee simple grant would extinguish all Indigenous jurisdiction over the land is particularly problematic. Indeed, it assumes that the law follows from the fee simple property interest, rather than the property interest requiring a legitimate grounding in law.

Dr Sayers, described the importance of the private forestlands to the Hupačasath:

Our culture as Hupačasath comes from our relationship to the land. Our language comes from the land, our place names describe what is on the land, the sound the animals make or what animals do. The material for our homes, longhouses, our canoes, our regalia, our art and some of our clothing comes from forest ecosystems. The forests cradle the very watersheds that make viable streams for our salmon which are the mainstay of our diet (Affidavit #2 of Judith Sayers, para. 3).

In contrast, the companies and the Crown both emphasized the private character of the land. Without the Forest Act jurisdiction to treat these lands as having some public character, they argued, the Crown would step back and the landowner would be restored as primary decision maker. Any constitutionally protected rights were subsumed by the landowner's authority as owner; and therefore, the Crown no longer had an obligation to consult. Hupačasath access and use of the land was "at the sufferance of the private land owner, which can at any time prohibit access to its private property" including by putting the land to visibly incompatible use, such as commercial logging.<sup>43</sup> Further, the Crown and landowner argued, the government's treaty negotiations policy expressly excludes private land. Therefore, Hupačasath title could and would never be realized.

While the Court in *Hupačasath* formally rejected the argument that the duty could not apply to private property, its characterization of the Hupačasath relationship with the E&N lands effected almost the same result.<sup>44</sup> The judge characterized Hupačasath rights as "at best highly attenuated" and their title "if it has not been extinguished seems very unlikely to result in obtaining exclusive possession of the Removed Lands in the future".<sup>45</sup> Therefore, while the Court concluded the Crown had "relinquished its ability to protect unproven aboriginal claims and the integrity of the treaty process" and recognized potentially significant adverse effects on Indigenous interests, the duty to consult was deemed minimal because the title claims purportedly could not be realized through the Crown's treaty process. The claimants were granted declaratory relief requiring minimal consultation, but the removal decision was upheld. The Hupačasath were left with few, if any, safeguards for their asserted constitutional rights. Just three years later they were back in court, locked out of the Territory, unable to access sacred sites

and care for the land.<sup>46</sup> Analysis of public harvesting data reveals the private forestland owners continue to harvest timber at unsustainable rates, extracting tremendous value from the territories within the E&N lands (Ekers et al. 2020).

The Court in *Hupačasath* concluded the land removals and the application of the Private Managed Forest Land Act were integral to the decision to purchase the land. Therefore, “there would be significant prejudice” to the landowners if the removal decision were set aside or delayed, particularly “the need to reassess and reconfigure” its business plan and the threat of job losses.<sup>47</sup> Despite constitutional protection, the Court in *Ke-Kin-Is-Uqs v British Columbia* held that Hupačasath loss of access to territory and the inability to safeguard sacred sites and ecological integrity would result in “lesser prejudice”.<sup>48</sup> Their relations were presumed to be already severed - first by the unilateral Crown grant of their lands to the E&N, and then by the Crown’s unilateral policy to exclude fee simple lands from treaty negotiations. The original wrong of the E&N grant could not be righted because of the wrongs that followed, all of which were unilateral decisions of the Crown.

Limiting the remedies available to a potential Indigenous titleholder because of the existence of a subsequent fee simple title is akin to a judicial extinguishment of property rights prior to the determination of the claim. Even if a title claim were to proceed, by the Court’s own admission the very human-forest relations in which that title is grounded may no longer exist as a result of deregulated resource extraction and conversion to residential land. In a telling failure of judicial imagination, the court ignored the jurisdictional content of the Hupačasath title entirely. Aboriginal title, unlike fee simple ownership, includes jurisdictional power rooted in the pre-existing systems of law of Indigenous nations, as well as intergenerational collective obligations to care for the land.<sup>49</sup> Thus, even if we accept the continuation of the fee simple interests in the

land, the potential title claim would not be exhausted by a lack of exclusive possession. Yet the E&N lands operate exclusively under the Private Managed Forest Act today – as “the private lands they always were” – without the content of Indigenous title to the E&N lands having been resolved and without addressing the role of Indigenous jurisdiction.

### **The Boundaries and Limitations of ‘Private’ Forests: Indigenous law, governance, and more than human forest relations**

Recognition of Indigenous jurisdiction is an opportunity to reshape Vancouver Island’s ‘private’ forestlands to reflect the enduring legal pluralism of the E&N lands. This would not only begin the essential work of righting the wrongs of these 19<sup>th</sup> century land grants. It also presents a crucial opportunity to clarify the relationship between fee simple title and Indigenous rights and title in Canada. Ensuring Settler property interests are grounded in meaningful, and lawful, engagement with the laws of the land, including Indigenous legal orders and modes of governance, is an important step in the journey towards “being here to stay”<sup>50</sup> (Asch 2014).

The settled nature of private property rights is central to Anglo-Canadian legal and political frameworks (Blomley 2014). Yet, the story of Vancouver Island’s forests illustrates how incomplete and inadequate this understanding of property relations can be. The analysis above demonstrates how Indigenous property relations endure on the E&N lands despite overlapping fee simple grants and ongoing dispossession through resource extraction. While the Crown and the courts actively resist and diminish assertions of Indigenous property rights and jurisdiction, Canadian law remains unsettled about the relationship between Aboriginal title and fee simple (Morales 2014; Thom 2005). In the context of the E&N grants, important questions remain not only about what beneficial interests the Indigenous title holders may have in the lands and resources, but also what their role in governance of the territories can and should be.

Meaningfully addressing these questions requires substantive engagement with place-based Indigenous legal orders towards the recognition of Indigenous interests and jurisdiction in relation to private land (Borrows 2015a; Borrows 2015b; Morales 2017a).

## Notes

1. I adopt the term “more-than-human” from Sarah Whatmore who describes the effect of the “materialist recuperations” in geography as a “return to the livingness of the world shifts the register of materiality from the indifferent stuff of the world ‘out there’, articulated through notions of ‘land’, ‘nature’, or ‘environment’, to the intimate fabric of corporeality that includes and redistributes the ‘in here’ of human being.” See her article, “Materialist returns: practising cultural geography in and for a more-than-human world” (2006) 13 *Cultural Geographies* 4 600 at 602. This approach avoids defining other parts of the material world as non- or other-than human and reinscribing the enlightenment dichotomy between humans and nature. ‘More’ is intended to extend the boundaries of relation rather than imply an inverted hierarchical ordering between humans and other beings.
2. Mitchell v MNR 2001 SCC 33.
3. When asked about forest management the majority disagreed economic benefits should be the priority, with only 9% agreeing that they should. This did not result in an overwhelming rejection of logging activity, 44% of respondents stated logging should occur, with 56% disagreeing. However, overwhelmingly (90%) agreed, “Cowichan teachings should be a part of how we manage our forest.” There was a strong (80%) preference for selection harvesting and almost no support for clearcutting (4%).
4. A full examination of the various anthropological models of Coast Salish property relations and the ongoing debates amongst researchers is beyond the scope of this article (Carlson 2010; Kennedy 2007; Miller 1999). Rather, the discussion below describes the model developed by Brian Thom in

his work with Island Hul'qumi'num communities, and more recently elaborated in collaboration with Island Hul'qumi'num scholar Morales. While no model can claim to truly represent the Coast Salish land tenure system itself, examining Thom's model helpfully situates colonial property relations within the legal pluralism of the territories that now make up Vancouver Island.

5. Others describe this as the hw'nuchalewum or 'house group' in which a group of nuclear families would reside in a large cedar house, see Arnett (1999).
6. Hupačasath First Nation v British Columbia 2005 BCSC 1712; Ke-Kin-Is-Uqs v British Columbia 2008 BCSC 1505; Hul'qumi'num Treaty Group v Canada, Inter-Am CHR Report No. 105/09; Chartrand v The District Manager 2013 BCSC 1068.
7. Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development) 2018 SCC 4.
8. Mitchell, 2001 SCC 33.
9. Indian Act RSC 1927, c 98, section 141.
10. Forest Act SBC 1912, c 17.
11. Forest Act Amendment Act SBC 1947, c 38.
12. It is unclear exactly how much of the E&N lands were brought into the Forests Act regime, further research on this is required and is dependent on accessing the early licences. However, initial research indicates that the large forestry companies were incentivized to bring the vast majority of their private lands into the bundled licence areas. Some smaller forestland owners throughout the province maintained their lands outside the public regime.
13. Forest Act RSBC 1996, c 157.
14. Private Managed Forest Land Act SBC 2003, c 80.
15. Hupačasath, 2005 BCSC 1712 at 59.
16. Hupačasath, 2005 BCSC 1712 at 59.
17. Charter of the Forest 1217 "CHARTA de Foresta" Westminster, 11 Febr., 9 Hen. III. [1225]. With great seal. <https://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/>.

18. The Charter of Runnymede 1215 came to be called Magna Carta from 1217, when it was re-issued in an amended form, alongside the new Charter of the Forest.
19. *Tamaki v Baker* [1901] NZPC 1; [1901] UKPC 18.
20. *Amondu Tijani v Secretary, Southern Nigeria* [1921] 1 AC 401 (PC) at 411.
21. Constitution Act 1867, 30 & 31 Vic, c 3 (UK).
22. *St Catherine's Milling and Lumber Co. v The Queen* [1888] UKPC 70, [1888] 14 AC 46.
23. Constitution Act 1867; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
24. *Calder et al. v Attorney-General of British Columbia* [1973] SCR 313; *Delgamuukw*, [1997] 3 SCR 1010 at 112 and 175; *Tsilhqot'in Nation v British Columbia* 2014 SCC 4.
25. *St Catherine's Milling*, [1888] 14 AC at 58-59.
26. *St Catherine's Milling*, [1888] 14 AC at 58-59; *Delgamuukw*, [1997] 3 SCR 1010 at 175-180.
27. *Delgamuukw*, [1997] 3 SCR 1010 at 175-180.
28. *Calder*, [1973] SCR 313 at 346.
29. An Act Respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion CB 1884, c 6.
30. *Delgamuukw*, [1997] 3 SCR 1010 at 145 and 113.
31. *Guerin v The Queen* [1984] 2 SCR 335; *Mitchell*, 2001 SCC 33. But see *Wewaykum Indian Band v Canada*, 2002 SCC 79, which narrows the scope of the fiduciary relationship to situations where the Crown has assumed discretionary control over cognizable Aboriginal interests.
32. Royal Proclamation 1763 3 Geo. III.
33. *Tsilhqot'in Nation*, 2014 SCC 4 at 69.
34. Hul'qumi'num Treaty Group, Inter-Am CHR Report No. 105/09.
35. *Timberwest v Deputy Administrator (2003) 2002-PES-008(a)* Environmental Appeal Board:  
<http://www.eab.gov.bc.ca/pest/2002pes008a.pdf>.
36. Constitution Act 1982 (Canada Act 1982 c 11, Schedule B (UK)).

37. Haida Nation v British Columbia (Minister of Forests) 2004 SCC 73 at 16; Taku River Tlingit First Nation v British Columbia (Project Assessment Director) 2004 SCC 74 at 24.
38. Haida Nation, 2004 SCC 73 at 27; Taku River, 2004 SCC 74 at 24.
39. Mikisew Cree First Nation v Canada (Minister of Canadian Heritage) 2005 SCC 69 at 67.
40. Haida Nation, 2004 SCC 73 at 35 and 37; Taku River, 2004 SCC 74 at 25.
41. Hupačasath, 2005 BCSC 1712; Ke-Kin-Is-Uqs 2008 BCSC 1505.
42. Hupačasath, 2005 BCSC 1712; Ke-Kin-Is-Uqs 2008 BCSC 1505; Chippewas of Sarnia Band v Canada (Attorney General) [2000] 51 OR (3d) 641 (ON CA).
43. Hupačasath, 2005 BCSC 1712 at 165; R v Badger [1996] SCR 771, 66; R v Alphonse (1993) 80 BCLR (2d) 17 (CA).
44. Hupačasath, 2005 BCSC 1712 at 200.
45. Hupačasath, 2005 BCSC 1712 at 249.
46. Ke-Kin-Is-Uqs, 2008 BCSC 1505 at 120.
47. Hupačasath, 2005 BCSC 1712 at 311.
48. Ke-Kin-Is-Uqs, 2008 BCSC 1505 at 311 and 314.
49. Campbell et al v AG BC/AG Cda and Nisga'a Nation et al 2000 BCSC 1123.
50. Delgamuukw, [1997] 3 SCR 1010 at 186.

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