FROM "PRIVATE" MANAGED FOREST LANDS TO STS'LUNUTS'AMAT FOREST RELATIONS: INDIGENOUS JURISDICTION, ECOLOGICAL INTEGRITY, AND FEE SIMPLE TITLE ON VANCOUVER ISLAND

Sarah Morales, Estair Van Wagner, and Michael Ekers

In 2003, British Columbia introduced the *Private Managed Forest Land Act* (PMFLA) — a new regulatory framework for forest lands held in fee simple title. The legislation deregulated forestry operations for companies that own and manage (harvest and reforest) private forest lands. An intensive harvesting regime was introduced through removing limits to the annual allowable cut, streamlining planning processes, and greatly reducing oversight and enforcement of forest practices. The Act failed to recognize and protect cultural values on private land, and no language was included to uphold constitutionally protected Indigenous title and rights. The PMFLA has been critiqued in policy circles, and a small number of academic articles have touched upon the legislation, yet at this time, we lack a sustained evaluation of the legislation and its implications for forest management, Indigenous jurisdiction, rights and title, and the settler public. This article seeks to provide a detailed analysis of the regime and show how significant regulatory gaps in the PMFLA and outstanding questions of access, consultation, jurisdiction, and title continue to profoundly impact the territories, economies, and social and cultural rights of Indigenous nations with private forest lands within their territories. Finally, we set out an agenda for strategic and interim reform to account for Indigenous law and jurisdiction and consider the broader question of redress that should be central to any reconsideration of the regulatory regime for private forest lands.

FROM "PRIVATE" MANAGED FOREST LANDS TO STS'LUNUTS'AMAT FOREST RELATIONS: INDIGENOUS JURISDICTION, ECOLOGICAL INTEGRITY, AND FEE SIMPLE TITLE ON VANCOUVER ISLAND

Sarah Morales,[*] Estair Van Wagner,[**] and Michael Ekers[***]

A. Introduction

Quiet, yet protracted, conflicts over private forest lands on Vancouver Island represent one of the most important, complicated, and yet largely unknown forestry issues in British Columbia, and perhaps across Canada. Most forestry companies in Canada operate on land formally deemed "Crown" land that is simultaneously subject to pre-existing Indigenous interests. Well-known iconic struggles to protect old growth forests from industrial harvesting have taken place on Crown land controlled by private forestry companies through long term licenses.[1] Decades after Indigenous Peoples blockaded logging

* Sarah Morales (Su-taxwiye) is Coast Salish and a member of Cowichan Tribes. She is an Associate Professor at the University of Victoria, Faculty of Law, where she teaches torts, transsystemic torts, Coast Salish law and languages, legal research, and writing and field schools. Sarah's research centres on Indigenous legal traditions, specifically the traditions of the Coast Salish people, Aboriginal law, and human rights.

** Professor Estair Van Wagner researches and teaches in the areas of natural resource law and property law at Osgoode Hall Law School and is co-director of Osgoode's Environmental Justice and Sustainability Clinic. Her work explores how law is used to structure relations with the environment.

*** Michael Ekers is an Associate Professor in the Department of Human Geography at the University of Toronto, Scarborough. He has been researching the BC forestry sector for more than fifteen years and, before that, worked in the reforestation sector for nearly a decade. His work is published mainly in geography and agrarian studies journals. He continues to be preoccupied with unpacking the legacies of the Esquimalt and Nanaimo land grants.

1 Darron Kloster, "Pacheedaht First Nation Says Old-Growth Activists 'Not Welcome' in Fairy Creek Area" *Times Colonist* (12 April 2021), online: www.timescolonist.com/local-news/pacheedaht-first-nation-says-old-growth-activists-not-welcome-in-fairy-creek-area-4688651.

roads to assert rights and title and protest logging throughout the province,[2] most iconically illustrated in Clayoquot Sound,[3] news cycles are once again dominated by old-growth conflicts in British Columbia. Media accounts of violent arrests, criticisms of the government's responses by Indigenous leaders and scientists, and divisions between hereditary and elected leadership highlight the high stakes of these disputes.[4] Yet, the battle to save the old growth is not the only longstanding "war in the woods." A deregulated harvesting regime specific to private forest lands has left vast swathes of Indigenous forest territory enclosed and managed for private profit, with minimal oversight and almost no enforceable standards, all the while being effectively excluded from the treaty table.[5]

In 2003, the provincial Liberal government introduced the *Private Managed Forest Land Act* (PMFLA) — a new regulatory framework for forest lands held in fee simple title.[6] The legislation deregulated forestry operations for companies that own and manage (harvest and reforest) private forest lands. An intensive harvesting regime was introduced through removing limits to the annual allowable cut, streamlining planning processes, and greatly reducing oversight and enforcement of forest practices.[7] The Act failed to recognize and protect cultural values on private land and no language was included to uphold constitutionally protected Indigenous title and rights.

In contrast, legislation governing forestry companies operating on Crown land imposes a much more detailed regulatory scheme to control harvesting and infrastructure and subjects forestry operations to ministerial oversight. Amendments in 2021 and 2022 also attempt to align the regime with provincial commitments to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.[8] While this reformed regime remains the subject of

2 Nicholas Blomley, "'Shut the Province Down': First Nations Blockades in British Columbia" (1996) BC *Studies III* 121–41.

3 Warren Magnusson & Karena Shaw, *A Political Space: Reading the Global through Clayoquot Sound* (Minneapolis: University of Minnesota Press, 2003).

4 Zoe Yunker, "A Judge Rebuked Illegal RCMP Tactics at Fairy Creek. They continue" *The Tyee* (16 August 2021), online: https://thetyee.ca/News/2021/08/16/Judge-Rebuked-Illegal-RCMP-Tactics/.

5 The BC Treaty Commission website states, "The BC treaty process has always been guided by the principle that private property (fee simple land) is not on the negotiation table, except on a willing-buyer, willing-seller basis. . . . In most cases, it will be Crown lands and resources transferred under treaties." See BC Treaty Commission, "Land and Resources" tab, online: https://bctreaty.ca/negotiations/why-treaties/.

6 SBC 2003, c 80 [PMFLA].

7 Ben Parfitt, *Restoring the Public Good on Private Forestlands* (Victoria: Canadian Centre for Policy Alternatives, 2008), online: www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2018/01/CCPA-BC_RestoringForestry_web.pdf.

8 Bill 23 *Forests Statutes Amendment Act, 2021*, 2nd Session, 43rd Leg, British Columbia, 2021 (as passed third reading on 23 November 2021) [Bill 23]; Bill 28, *Forest*

critique,[9] the PMFLA is much weaker. It has been critiqued in policy circles, and a small number of academic articles have touched upon the legislation, but at this time, we lack a sustained evaluation of the PMFLA and its implications for forest management, Indigenous jurisdiction, rights and title, and the settler public.[10] This article builds on our prior work investigating the ongoing impact of a series of historic land grants and the operation of the PMFLA on the ground by focusing on the context and structure of the contemporary legislative regime.

The impact of the PMFLA is place-specific. The legislation structures how 818,000 hectares of private forest land in British Columbia are managed, most of which is located on Vancouver Island (see Figure 1). Of the total, 585,678 hectares are owned by Island Timberlands and TimberWest, almost all of which is located in a thirty-two-kilometre-wide belt of land running from the southern tip of Vancouver Island, north to the community of Campbell River. This massive tract of fee simple land was established through land grants made by the Dominion government in 1887 to the Esquimalt & Nanaimo Railway Company and is commonly referred to as "E&N land."[11] Under settler law, the land was transformed from Indigenous territory into private property as payment for a short 115 km railway running from Esquimalt to Nanaimo.[12] Notably, Island Timberland and TimberWest are now owned by three Canadian public sector pension plans and are jointly managed by Mosaic Forest Management (Mosaic) on behalf of the pension plans.

Amendment Act, 2021 (as passed third reading on 25 November 2021 [Bill 28]); *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [DRIPA]; *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, UN GA A/Res/61/295 [UNDRIP].

9 See, generally, Yves Mayrand, "A Critical Overview of Bill 23 Amendments to the *Forest Act* and the *Forest and Range Practices Act*" *Evergreen Alliance* (9 January 2022), online: www.evergreenalliance.ca/journalism-the-need-to-reform-bc-forest-legislation/7/; Zoë Yunker, "A New Bill Could Put BC 'Back in the Driver's Seat' for Forestry" *The Tyee* (29 October 2021), online: https://thetyee.ca/News/2021/10/29/New-Bill-BC-Drivers-Seat-Forestry/.

10 Parfitt, above note 7; Emilie Benoit, Lola Churchman & Calvin Sanborn, *The Need to Reform BC's Private Managed Forest Land Act* (Victoria: Environmental Law Centre, 2019), online: https://elc.uvic.ca/wordpress/wp-content/uploads/2019/08/Private-Managed-Forest-Land-Act-Reform.pdf.

11 W Taylor, *Crown Land Grants: A History of the Esquimalt and Nanaimo Railway Land Grants, the Railway Belt, and the Peace River Block* (Victoria: BC Crown Registry Services), online (pdf) https://ltsa.ca/wp-content/uploads/2020/10/Crown-Land-Grants-A-History-of-the-E-and-N.pdf.

12 Robert Morales, Brian Egan & Brian Thom, "The Great Land Grab: Colonialism and the Esquimalt & Nanaimo Railway Land Grant in Hul'qumi'num Territory" (Ladysmith: Hul'qumi'num Treaty Group, 2007), online: www.hulquminum.bc.ca/pubs/HTGRailwayBookSpreads.pdf?lbisphpreq=1.

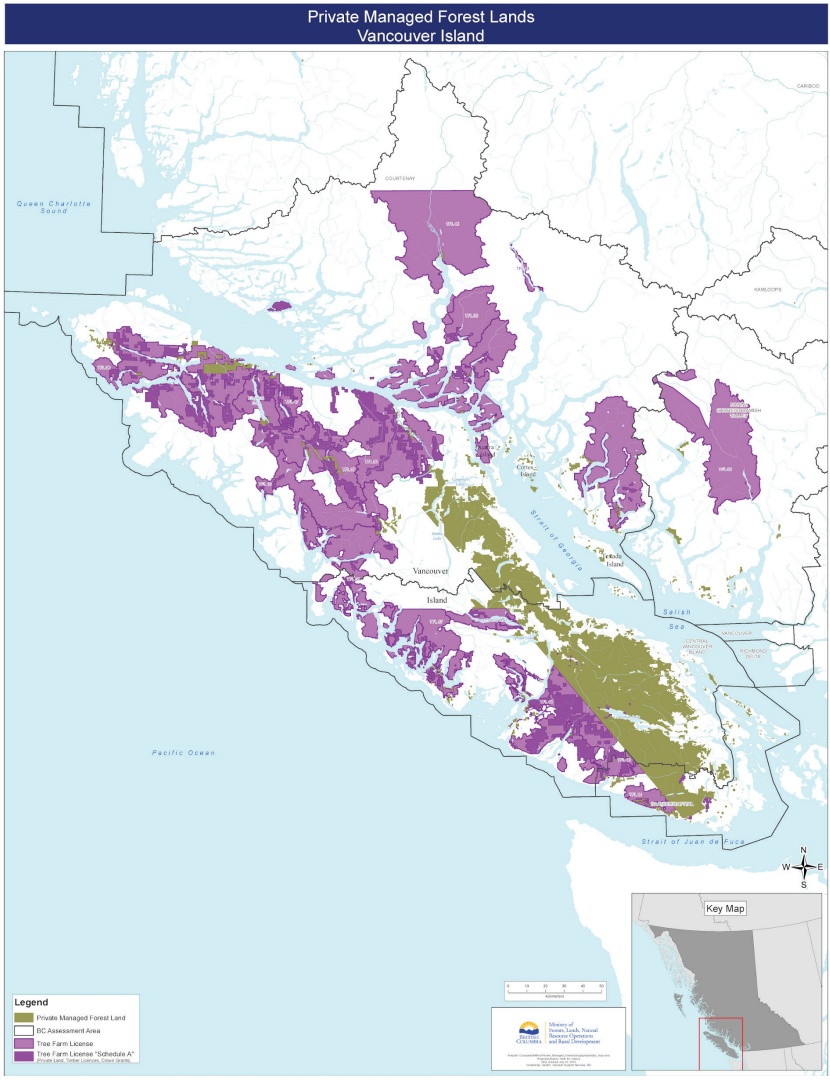

Figure 1: Map of Private Managed Forest Lands Vancouver Island. The land in green represents the private land predominately owned by TimberWest and Island Timberlands. Created on 30 July 2018 by the British Columbia Ministry of Forests, Lands, Natural Resource Operations, and Rural Development (GeoBC, Division Support Services, RD). Copyright (c) Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.

The so-called private land created through the E&N grants, and now controlled by Mosaic, is Indigenous land.[13] The vast majority was never subject to any treaty between the Crown and Indigenous owners, and the Vancouver

13 *Ibid.*

Island (or Douglas) treaties covering the remainder are the subject of considerable critique and differing interpretations.[14] In this paper, we are particularly focused on the territory of the Hul'qumi'num Treaty Group (HTG) Nations, which makes up roughly 60 percent of the granted lands and is the home territory of one of the authors. The land grants privatized 85 percent of HTG nations' territory without consultation or consent, much of which was converted to industrial forest land. The regime put in place through the PMFLA has accelerated the rapid deforestation of HTG territory and facilitates the ongoing extraction of value for private benefit.[15] Indigenous nations have been excluded from decision-making about vast areas of territory and have lost access to harvesting and spiritual sites and culturally and economically significant resources.[16] The fee simple title has also proven to be a significant obstacle in ongoing treaty negotiations. Indeed, the HTG successfully petitioned for a hearing on the merits before the Inter-American Commission on Human Rights based on the lack of domestic mechanisms to pursue their right to property and compensation.[17]

Below, we provide a close reading of the PMFLA to demonstrate how the regime has enabled intensive harvesting on private lands, provided inadequate oversight and enforcement for the protection of environmental values, and failed to recognize and protect the inherent jurisdiction and constitutional rights and title of Indigenous Peoples. We show how significant regulatory gaps in the PMFLA and outstanding questions of access, consultation, jurisdiction, and title continue to profoundly impact the territories, economies, and social and cultural rights of Indigenous nations with private forest lands within their territories. We demonstrate how the regime is inconsistent with, and in violation of, the Coast Salish laws applicable to the majority of

14 Peter Cook et al, eds, *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021); Brian Thom, "Addressing the Challenge of Overlapping Claims in Implementing the Vancouver Island (Douglas) Treaties" (2020) 62:2 *Anthropologica* 295.

15 Michael Ekers et al, "The Coloniality of Private Forest Lands: Harvesting Levels, Land Grants and Neoliberalism on Vancouver Island" (2021) 65:2 *The Canadian Geographer* 166 at 183.

16 Sarah Morales & Brian Thom, "The Principle of Sharing and the Shadow of Canadian Property Law" in Angela Cameron et al, eds, *Creating Indigenous Property: Power, Rights, and Relationship*s (Toronto: University of Toronto Press, 2020) 120; *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II [*HTG v Canada*].

17 Robert A Williams Jr et al, *Petition to the Inter-American Commission on Human Rights submitted by the Hul'qumi'num Treaty Group against Canada* (Ladysmith, BC: Hul'qumi'num Treaty Group, 2007), online: https://law.arizona.edu/sites/default/files/Hul%E2%80%99qumi%E2%80%99num%20Treaty%20Group%20Petition.pdf [*IACHR Petition*].

private forest lands. Our goal in this paper is to set out an agenda for strategic reform as a first, and interim, step in addressing the underlying injustices of private forest lands in British Columbia. Our detailed examination of the PMFLA is meant to serve as a resource for the First Nations and members of the setter public who have long been concerned with the harvesting regime enabled on so-called private forest lands. Addressing the limitations of the PMFLA and the underlying injustices on which it is founded requires more than tinkering around the edges of the current regime. We aim to contribute to this transformative work.

At the time of writing, the British Columbia government, led by the New Democratic Party, is engaged in a broad effort to "modernize" forest policy in the province. This has involved modest changes to the *Forest and Range Practices Act*, the Old Growth Strategic Review, the Interior Forestry Sector Renewal, and the Coast Forest Sector Revitalization. Under the umbrella of the latter initiative, the government is completing a legislative review of the Private Managed Forest Land Program. Though the review was initiated in 2019, no changes have been contemplated to the private forest land regime even as reforms have been introduced regarding old growth deferrals and the *Forest Act* and *Forest and Range Practices Act*.[18] These Crown land amendments included changes aimed at aligning the legislation with the *United Nations Declaration on the Rights of Indigenous Peoples*.[19] Thus, the review of the private forest land program lags behind other, albeit modest, policy changes in the forestry sector.

As we argue below, the transformative change to forestry governance in Island Hul'qumi'num territories must be guided by the Coast Salish legal principles that ground Island Hul'qumi'num people-place relations. The principle of sts'lunuts'amat (kinship) would require land use governance that fosters good relationships with others in order to "produce harmony" within and beyond the immediate, physical world, including with ancestors and future generations.[20] In addition to existing in relation to one another as human beings, sts'lunuts'amat (kinship) encourages people "not to disrupt the natural order"[21] and requires decision-making that always involves observation of, and communication with, the natural world, demonstrating respect

18 Bill 23 and Bill 28, above note 8.

19 In 2019, the province passed the *Declaration on the Rights of Indigenous Peoples Act*, above note 8, and committed to implementing the UNDRIP, including through legislative alignment.

20 Morales & Thom, above note 16 at 108.

21 Rachel Joyce Flowers, *Xwnuts'aluwum: T'aat'ka'Kin Relations and the Apocryphal Slave* (MA Dissertation, University of Victoria, 2014) [unpublished] at 4.

for agreements made with the natural world.[22] Renewed forest relations would be shaped by the principle of si'emstuhw (respect), which encourages individuals to consider how their decisions might impact those who may be affected by them in the future, including the more-than-human world.[23] Si'emstuhw emphasizes the importance of caring for ancestors' final resting places and ensuring they remain undisturbed.[24] It is long past time that Coast Salish law be recognized and implemented in the structure of forest relations on Vancouver Island.

The remainder of the article is organized as follows. Part B grounds our discussion in the Coast Salish territory of Vancouver Island through a brief discussion of the Hul'qumi'num Treaty Group nations' relationship to territory and the E&N land grants. In Part C, we unpack how the PMFLA has structured forestry operations on private land. We offer a close and critical reading of the legislation and compare it to regulations centred on "Crown" land, as well as to key Hul'qumi'num and Coast Salish legal principles. In Part D, we consider the constitutional context in which the PMFLA is operating and provide a critical analysis of its legal shortcomings. We conclude by offering a number of short-term policy recommendations and considering the broader question of redress that should be central to any reconsideration of the regulatory regime for private forest lands.

B. The Hul'qumi'num Treaty Group and the E&N

Any discussion of the PMFLA must be grounded in the context of the land and communities it impacts. As noted above, this article focuses on the Hul'qumi'num Treaty Group (HTG) territory, both because this research is being undertaken in partnership with the HTG and because of the disproportionate impact of the regime on Hul'qumi'num lands. The HTG is a political organization formed in 1993 to engage in comprehensive negotiations with the federal and provincial governments for the recognition of Hul'qumi'num peoples' rights, title, and governance.[25] The five First Nation members of this organization include Cowichan Tribes, Penelakut Tribe, Lyackson First Nation, Halalt First Nation, and Ts'uubaa-asatx (Lake Cowichan) First Nation. While

22 Interview with Ernie Victor, cited in Jeanette Armstrong & Gerry William, eds, *River of Salmon Peoples*, (Penticton, BC: Theytus Books, 2015) at 117–18.

23 *Ibid* at 113.

24 Sarah Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 50 [Morales, *Snuw'uyulh*].

25 The HTG is a formal partner in this research and Chief Negotiator Robert Morales is a co-applicant on the SSHRC grant funding our work.

not all Island Hul'qumi'num communities are members of the HTG, these five communities have together articulated a clear vision for the recognition of their title, rights, and governance.[26] These member First Nations represent a community of approximately 7,500 people living in and around the southeast coast of Vancouver Island. Culturally and linguistically, they are Coast Salish peoples who have lived in this area since time immemorial, with archaeological sites in the area showing continuous occupation for at least 5,000 years.

When settlers arrived, people-place and inter-personal relationships were already governed by an existing legal tradition that actively shaped and managed lands and resources within the territory.[27] For Island Hul'qumi'num Peoples, this system of land management was grounded in the seven fundamental teachings that produce or maintain the state of snuw'uyulh ("living a good life") within the Coast Salish legal world. While a thorough discussion of snuw'uyulh is beyond the scope of this article, the following concepts are particularly relevant to our discussion of the PMFLA and inform our analysis below: Sts'lhnuts'amat ("Kinship/Family"); Si'emstuhw ("Respect"); Thu'it ("Trust"); and Sh-tiiwun ("Responsibility").[28]

The 1887 E&N land grant purported to turn the majority of Hul'qumi'num peoples' lands on Vancouver Island into land privately owned in fee simple by settlers overnight.[29] The grant included title to over 800,000 hectares of land, timber, and subsurface rights, including over 280,000 hectares in Hul'qumi'num territory (see Figure 2). In the simplest terms, 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

26 Snunemymuxw First Nation is negotiating independently. Snaw-naw-as First Nation is negotiating as part of the Te'mexw Treaty Association.

27 Morales, *Snuw'uyulh*, above note 24 at 154; Hul'qumi'num Treaty Group, *Getting to 100%* (Ladysmith, BC: Hul'qumi'num Treaty Group, 2007) [HTG, "Getting to 100%"].

28 Morales, *Snuw'uyulh*, above note 24 at 221–22. While the HTG has been documenting Hul'qumi'num law through internal processes for decades, much of this research is undertaken as part of treaty negotiations and subject to confidentiality requirements or is not appropriate for publication according to community protocols. We are working directly with the HTG as part of this project; however, internal materials are not referenced to respect confidentiality and the sensitivity of ongoing legal and political processes.

29 Brian Egan, "Sharing the Colonial Burden: Treaty-Making and Reconciliation in Hul'qumi'num Territory" (2012) 56:4 *The Canadian Geographer* 398 [Egan, "Sharing the Colonial Burden"]; Brian Egan, "Towards Shared Ownership: Property, Geography, and Treaty Making in British Columbia" (2013) 95:1 *Geografiska Annaler: Series B* 33; Brian Thom, "Reframing Indigenous Territories" (2014) 38:4 *American Indian Culture and Research Journal* 3; Morales, Egan & Thom, above note 12.

government to satisfy the Terms of the Union under which the province came into confederation in 1871.[30] 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. None of the governments of the day consulted, accommodated, or compensated First Nations for the E&N land grant or subsequent land sales.[31] Even the right-of-way of the railway line itself, where it passed through Hul'qumi'num Reserves, was acquired through expropriation with little or no consultation with the leadership of the day.[32]

Colonial processes of land dispossession, including the E&N land grant, mean that the First Nations of the HTG now live in and around 5,790 hectares of reserve lands. Their communities are divided into over twenty-three individual Indian Reserves located at ancestral village sites of the Hul'qumi'num peoples. While these remain significant places to HTG communities, they represent only a tiny fraction (roughly 2 percent) of Hul'qumi'num Territory.[33] Not all ancestral sites were made into Reserves and most of the broader territory of familial or communally held land was privatized, enclosing many sites of economic, cultural, and spiritual significance.[34] In contrast, and as noted in the introduction, 84 percent of the territory is owned in fee simple, principally by two forestry companies (Island Timberlands and TimberWest, operating as Mosaic).[35]

Island Hul'qumi'num Nations have consistently asserted their title and jurisdiction with regard to their territory both prior to and since the time of the grants.[36] Early colonial incursions were met with resistance from the

30 *British Columbia Terms of Union (UK) 1871*, RSC 1985, App II, no 10, the original title being "Order of Her Majesty in Council admitting British Columbia into the Union," dated 16 May 1871, changed by the *Canada Act 1982* (UK), 1982, c 11, s 53, Schedule, item 4.

31 Egan, "Sharing the Colonial Burden," above note 29; Morales, Egan & Thom above note 12.

32 Brian Egan, *From Dispossession to Decolonization: Towards a Critical Indigenous Geography of Hul'qumi'num Territory* (PhD Dissertation, Carleton University, 2008) [unpublished].

33 HTG, "Getting to 100%," above note 27.

34 For an introduction to Hul'qumi'num systems of property relations, see Morales & Thom, above note 16.

35 A third forestry company, Hancock Timber Resource Group, is a smaller player in terms of their holdings in HTG territory.

36 HTG, "Getting to 100%," above note 27; Chris Arnett, *Terror of the Coast Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849–1863* (Burnaby, BC: Talonbooks, 1999); Hamar Foster, "Letting Go the Bone: The Idea of Indian Title In British Columbia, 1849–1927" in *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1995); John Sutton Lutz, "The Rutters Impasse and the End of Treaty Making on Vancouver Island" in Peter Cook et al, eds, *To Share,*

removal of survey stakes, to deputations to colonial authorities, to the invocation of trespass laws and the strategic use of colonial law.[37] A 1909 Petition to the King invoked the Royal Proclamation of 1763 to protect Hul'qumi'num possession and occupation of their territory.[38] Since 1994, the HTG has continued to pursue a negotiated settlement with the Crown. One of the key goals of treaty negotiations for the HTG is "getting to 100%" recognition of title in order to regain a territorial land base. The HTG position is that 100 percent does not mean getting complete ownership of the land back, given the practical constraints of third party interests. Rather, "Hul'qumi'num people should benefit from and have a meaningful say on 100% of the territory that belonged to our ancestors," through a combination of restoration of ownership, recognition of jurisdiction, and law-making authority (both sovereign and shared where appropriate), harvesting and access rights, cultural and heritage protection, and compensation.[39] However, the concentration of private lands has remained an intractable roadblock to a negotiated solution. All the member Nations filed writs for Aboriginal title claims in Canadian courts in 2003; however, these are in abeyance.[40] The Crown has pursued a "litigate or negotiate policy" whereby the process could be terminated if the Nations pursue litigation about the treaty lands individually or collectively and until recently the Nations have been required to repay the state funding allocated to the negotiations.[41] This "catch-22" means that the Crown can continue to

Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia (Vancouver, BC: UBC Press, 2021) 220; Brian Thom, "Leveraging International Power: Private Property and the Human Rights of Indigenous Peoples in Canada" in Irene Bellier & Jennifer Hays, eds, *Scales of Governance and Indigenous Peoples' Rights* (Routledge, 2019) [Thom, "Leveraging International Power"].

37 Arnett, above note 36; Douglas C Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).

38 Hamar Foster, Benjamin L Berger & AR Buck, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008).

39 HTG, "Getting to 100%," above note 27; Thom, "Leveraging International Power," above note 36 at 187.

40 *Ibid* at 186; Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Dissertation, McGill University, 2005) [unpublished] [Thom, "Coast Salish Senses of Place"] at 229, noting one writ was filed by Cowichan Tribes and another by the other five nations who were members of the HTG at that time.

41 While the wider title claims are in abeyance, the Cowichan Nation Alliance, made up of the Cowichan Tribes, Stz'uminus First Nation, Halalt First Nation and Penelakut Tribe, is pursuing a spot title claim for a village site on the lower Fraser River in an area the Crown has excluded from the treaty negotiations: see *Cowichan Tribes v Canada (AG)*, 2016 BCSC 420; Tristan Hopper, "The Cowichan Nation's Lost Salish Sea

claim that HTG title remains "asserted" rather than legally established, even though the Crown's own policy makes it practically impossible to pursue a judicial declaration of title.[42]

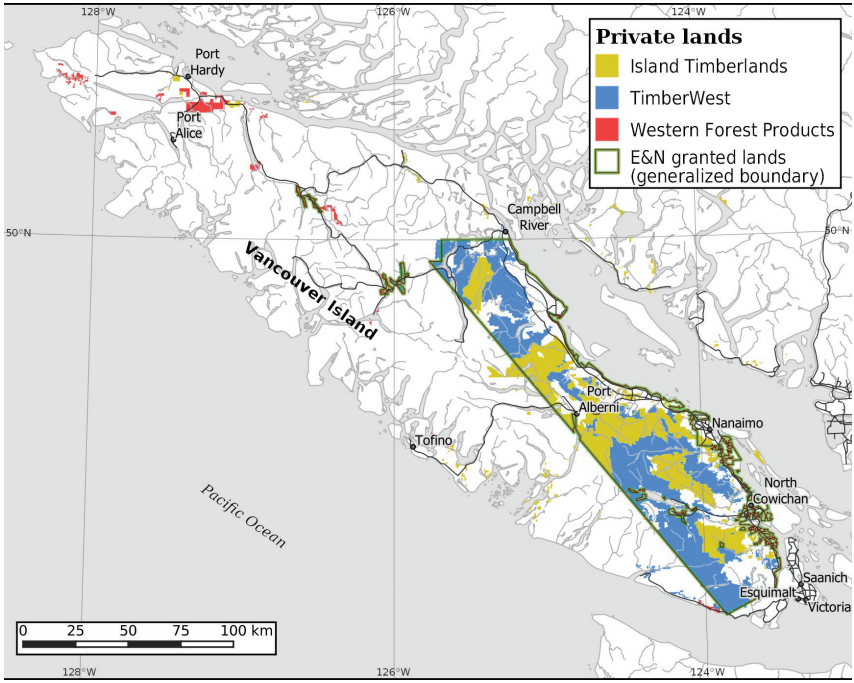

Figure 2: Map depicting private land ownership of Island Timberlands, TimberWest, and Western Forest Products and E&N land grants. Source: Ekers et al, above note 15. Special credit to Glenn Brauen, Tian Lin & Saman Goudarzi for their work in creating this map.

Given the profound limitations of the negotiation process, the HTG has sought to leverage international law to push for a resolution.[43] In 2007, the HTG filed a petition to the Inter-American Commission of Human Rights claiming that the failure to recognize and address their rights vis a vis privately-held lands in their territory is a violation of human rights, including the right to property and the right to equality before the law.[44] Despite HTG

Empire" *Capital Daily* (15 October 2019), online: www.capitaldaily.ca/news/cowichan-lulu-island-claim-richmond-lawsuit.

42 *IACHR Petition*, above note 17 at para 85; British Columbia Treaty Commission, *Treaty Commission Annual Report* (2004), online: https://bctreaty.ca/wp-content/uploads/2016/09/Annual_Report_04.pdf at 2.

43 Thom, "Leveraging International Power," above note 36.

44 *IACHR Petition*, above note 17. The HTG Petition alleged violations of the *American Declaration of the Rights and Duties of Man*, specifically Articles II (right to equality before the law), III (right to profess, manifest and practice a religious faith), XIII (right

having presented the merits of its case in 2011, no decision on the merits has been issued.[45] Nonetheless, the Commission's admissibility decision starkly illustrates the challenges faced by the Nations in their struggle to use colonial legal tools to seek justice.[46] Noting the limitations of the modern treaty process and the barriers to any legal remedies through the courts, the commission found these were not "effective mechanisms" to protect the rights of the HTG Nations.[47]

The dispossession, disconnection, and ongoing destruction of territory has caused immense emotional suffering, mental anguish, stress and anxiety for the Hul'qumi'num peoples,[48] who fear that their culture and way of life upon these lands will soon become extinct.[49] The loss of forestlands has a profoundly negative effect on the ability of the Hul'qumi'num people to practice and transmit their laws and way of life.[50] The forest resources of Hul'qumi'num traditional lands, while layered with fee simple title, continue to be a necessary source of vital sustenance for Hul'qumi'num people:

> The forests continue to be used by the Hul'qumi'num for hunting and for gathering medicinal plants. Alongside providing materials for the construction of traditional longhouses and other dwellings and tools, such as fishing spears, the forests sustain traditional Hul'qumi'num art forms like cedar weaving, carving and canoe building. Forest resources provide the unique materials necessary for Indigenous artists and carvers to capture and preserve the history and traditions of the Hul'qumi'num

to culture), and XXII (right to property). While Canada has signed both the *Charter of the Organization of American States* and the *Declaration*, it has not bound itself to the Inter-American Court. Only the court can enforce decisions. Therefore, claims regarding Canada are limited to the Commission, which has advisory jurisdiction to make non-binding decisions. See Thom, "Leveraging International Power," above note 36 for further discussion on the limitations of the international human rights regime for Indigenous nations in Canada.

45 The Inter-American Commission on Human Rights YouTube channel hosts an online video of the merits hearing: www.youtube.com/@humanrightsHTG/videos.

46 *HTG v Canada*, above note 16.

47 *Ibid* at paras 38 and 42.

48 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavit of Joey Caro).

49 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavit of Tim Kulchyski) [Kulchyski Affadavit].

50 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavit of Martina Joe).

> peoples in their works and to perpetuate, enjoy and share their culture and heritage.[51]

Throughout the traditional territory of the Hul'qumi'num, state "privatization" and the 150 years of intensive logging that has flowed from this has irretrievably damaged forests and essential water supplies, straining plant and wildlife populations and threatening access to and use of Hul'qumi'num natural resources and sacred sites.[52] Pollution and noise from private logging operations and commercial and residential developments adversely affect and interfere with Hul'qumi'num hunting, fishing, and plant management, as well as ceremonial practices, all of which are essential to Hul'qumi'num cultural and physical survival.[53] HTG nations have repeatedly been subject to boil water advisories and gone without clean water on reserve.[54] One Hul'qumi'num Elder, the late Wesley Modeste, explained his feelings about the situation in his affidavit to the Inter-American Commission on Human Rights: "To have our forests in the hands of private forest companies takes away the ability of our community to keep our forests sustainable." He described how large corporate entities have come into the territory and indiscriminately clear-cut the forests in a very short period, stripping off all of "the resources the forest sustains, including animals and fish."[55] Modeste, along

51 *IACHR Petition*, above note 17 at para 27.

52 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavits of Wesley Modeste, Richard Thomas, Lydia Hwitsum & Chad Harris). See also Karen Fediuk, *Hul'qumi'num Treaty Group Harvest Study 2001* (Ladysmith, BC: Hul'qumi'num Treaty Group, 2001). For a discussion of the arc of forestry regimes from initial land grant to the present moment, see Michael Ekers "Land Grabbing on the Edge of Empire: The Longue Durée of Fee-Simple Forest Lands and Indigenous Resistance in British Columbia" (2023) *Journal of Peasant Studies* 1; Michael Ekers, "Financiers in the Forests on Vancouver Island: On Fixes and Colonial Enclosures" (2019) 19:2 *Journal of Agrarian Change* 270.

53 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavits of Edward Joe, Florence James, Lydia Hwitsum, Charles Seymour & Chad Harris).

54 Skye Ryan, "Clean Water Starts Flowing from Cowichan Taps After 30 Year Wait" *CHECK News* (23 September 2018), online: www.cheknews.ca/clean-water-starts-flowing-from-cowichan-taps-after-30-year-wait-491377/; Cowichan Tribes, "Water Act Modernization Initiative" Submission to the Ministry of Environment, Water Stewardship Division Government of British Columbia (27 May 2010).

55 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavit of Wesley Modeste) [Modeste Affidavit].

with other Hul'quimin'um Elders, described to the Commission how settlers have made Hul'qumi'num Peoples trespassers on their own lands.[56]

The cultural practices and traditions Hul'qumi'num peoples are fighting to sustain are means of transmitting cultural knowledge and teachings.[57] As use of and access to forest products have diminished, this knowledge and teachings, and the laws accompanying them, have also been threatened.[58] Imperative in Coast Salish law is the need to build and maintain good relationships and "produce harmony"[59] not only with human kin (family and community members)[60] and non-kin (strangers),[61] but also with the natural world,[62] as well as ancestors and future generations.[63] Respecting the agency of more-than-human entities is a core aspect of the Coast Salish worldview.[64] The maintenance of good relations relies on access to the forest as a crucial site of connection to the more-than-human world through ceremony and encounters with spirit power.[65] As the connection to the forest is threatened, so too is the connection of the Hul'qumi'num Peoples to their ancestors and spirituality.

C. Unpacking the Private Managed Forest Land Act

The structure of the PMFLA entrenches private property rights and perpetuates the dispossession and destruction of Hul'qumi'num territory. Throughout the 1990s, the social democratic New Democratic Party government introduced significant changes to forestry legislation to more carefully

56 *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavit of Chad Harris); *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II (Affidavit of Arvid Charlie).

57 *IACHR Petition*, above note 17; Morales, *Snuw'uyulh*, above note 24.

58 Kulchyski Affadavit, above note 49.

59 Morales, *Snuw'uyulh*, above note 24 at 108.

60 *Ibid* at 107.

61 *Ibid* at 233.

62 *Ibid* at 130.

63 *Ibid* at 98–99 and 113.

64 Thom, "Coast Salish Senses of Place," above note 40 at 136 and 146; Tim Ingold, "Hunting and Gathering as Ways of Perceiving the Environment, in Katsuyoshi Fukui and Roy Ellen, eds, *Redefining Nature* (London: Routledge, 1996) 177 at 131; Wayne Suttles, "Affinial Ties, Subsistence, and Prestige Among the Coast Salish" (1960) 62:2 *American Anthropologist* 296.

65 Thom, "Coast Salish Senses of Place," above note 40; Morales & Thom, above note 16.

regulate the sector and calm the factious "war in the woods."[66] The *Forest Land Reserve Act*, introduced in 1994, was the legislation most focused on private forest land and was a major irritant to companies that owned forest lands in fee simple title.[67] It mimicked the more well-known Agricultural Land Reserve and placed strict limits on the sale and conversion of forest lands to other uses.[68] Owners of fee simple forest lands saw the legislation as an egregious overstep of government that impinged on private property rights.[69]

When the subsequent Liberal government assumed office in 2001, it conducted a "core-services review" that resulted in a roll back of the limits on companies operating on private forest lands. The government's first move in 2002 was to repeal the *Forest Land Reserve Act* and thus the restrictions on conversion of private forestry land to other uses. The second move was to introduce the PMFLA in 2003. When introducing the bill in the British Columbia Legislative Assembly, Stan Hagen, then Minister of Sustainable Resource Management, explained: "this bill is consistent with the government's new era commitments and deregulation initiative. The bill also underscores the government's goals of operating more efficiently and responsibly in managing the province's natural resources."[70] The PMFLA scheme described below is consistent with the broader trend of environmental deregulation in the 1990s and 2000s in Canada, including in British Columbia. So-called results-based regulatory regimes were put in place to reduce "red tape" and improve "efficiency," resulting in less gover[n]ment oversight, less stringent standards, and minimal or ineffective enforcement and compliance mechanisms.[71]

---

66 Trevor Barnes & Roger Hayter, eds, *Trouble in the Rainforest: British Columbia's Forest Economy in Transition* (Victoria: Western Geographical Press, 1997); Bruce Braun, "Buried Epistemologies: The Politics of Nature in (Post)Colonial British Columbia" (1997) 87:1 *Annals of the American Association of Geographers* 3; Magnusson & Shaw, above note 3.

67 RSBC 1996, c 158.

68 *Ibid*, ss 19–24.

69 Ministry of Forests, *New Private Land Regulation Model to Books Investment Key Environmental Values, Property Rights Protected* (Victoria: Ministry of Forests, 2001), online: https://archive.news.gov.bc.ca/releases/archive/pre2001/1999/1999nr/1999001.asp; Ministry of Forests, *Forest Land Commission to Oversee Private Land Logging: New Rules will Balance Public Values with Private Property Rights* (Victoria: Ministry of Forests, 1999), online: https://archive.news.gov.bc.ca/releases/archive/pre2001/1999/1999nr/1999066.asp.

70 Hagen, as quoted in British Columbia, *Debates of the British Columbia Legislative Assembly (Hansard)*, 37th Parl, 4th Session, Vol 17, No 2 (20 October 2003) at 7746 (Hon S Hagen).

71 Stepan Wood et al, "What Ever Happened to Canadian Environmental Law" (2010) 37 *Ecology Law Quarterly* 981.

Historically, much of the private forest land in British Columbia was managed in concert with Crown land. Two Royal Commissions led by Sloan J, the first in 1945, the second in 1956, highlighted the abhorrent forestry practices on private land holdings, and specifically within the E&N belt. The resulting legislation sought to bring forestry operations on private land under the umbrella of government regulations. Since the late 1940s, "Forest Management Licences," later renamed "Tree Farm Licences," have been the main regulatory means for managing both fee simple and "public" land. Forestry companies have been given large and inexpensive access to Crown forests in return for managing their private land under the same regulatory framework.[72] Thus, in practice, private forest land was treated "as if it was Crown land" insofar as it was bundled together with "public" land in TFLs and regulated through different iterations of the *Forest Act* and the *Forest Practices Code of British Columbia*,[73] the precursor to the current *Forest and Range Practices Act*.[74] The PMFLA drastically changed this uniform regulatory approach. In order for the PMFLA to work, private forest land had to be "separated" or "removed" from the system of Crown forest tenures. While landowners could seek approval of the Minister of Forests to remove their fee simple holdings from their TFLs under the prior regime, it was not until enactment of the considerably leaner and more industry-friendly PMFLA that forestry companies had an incentive to do so. As Smith J concluded in *Hupačasath v British Columbia (Minister of Forests)*, the application of the PMFLA intentionally resulted in "reduced level of forest management and a lesser degree of environmental oversight."[75]

1. The Act: (De)regulation by Omission

With this brief background in mind, we turn to the structure and operation of the Act. The PMFLA has fostered an extractive forestry regime on private forest lands, with limited oversight and a complete lack of recognition of, and

72 Tree farm licences are currently set out in ss 33–39.1 of the *Forest Act*, RSBC 1996, c 157.

73 RSBC 1996, c 159.

74 SBC 2002, c 69. See also Ministry of Forests, *British Columbia Forest Service Briefing Note: Deletion of Weyerhaeuser's Private Land from Tree Farm Licenses 39 and 46* (Victoria: Ministry of Forests, 2004), online: www.elc.uvic.ca/wordpress/wp-content/uploads/2014/08/Appendix-C1.pdf. While we refer above and below to the Crown land regime set out in the *Forest Act* and *Forest and Range Practices Act* as setting higher standards, we note that there are nonetheless serious concerns about the adequacy of the Crown land forestry regime to protect Indigenous rights and interests and ecological integrity.

75 *Hupačasath First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1712 at para 223 [*Hupačasath*].

respect for, Indigenous rights, title, and jurisdiction. As a minimal regulatory scheme focused on facilitating extractive timber harvesting on private land, it is an incentive-based scheme under which the owners of private forest land can apply for designation as "private managed forest land," which results in a substantial tax benefit under the provincial *Assessment Act*.[76] To obtain and maintain the designation, landowners are required to comply with five vague and broadly described objectives with respect to soil conservation, water quality, fish habitat, critical wildlife habitat, and reforestation. Consistent with the hands-off regulatory approach, the Act has just forty-six sections and provides for almost no direct government involvement in the operation of the scheme. Instead, the Act establishes the Private Managed Forest Council.

2. The Private Managed Forest Council

The regime relies on the Managed Forest Land Council (now referred to as the "Managed Forest Council") to implement the Act. The objective of the council is to "encourage forest management practices on private managed forest land, taking into account the social, environmental and economic benefits of those practices."[77] The concept of "benefits" is therefore central to the operation of the Act; yet it is left undefined. The operative sections discussed in detail below reveal a narrow and extractivist understanding of benefits, privileging private property rights and economic profit. As we discuss in more detail in the final section, benefits would be defined very differently if informed by a Coast Salish legal perspective. Interpreted relationally through the fundamental principles of snuw'uyulh, benefits would uphold sts'lunuts'amat (kinship), si'emstuhw (respect), and sh-tiiwun (responsibility) with both the humans and more-than-humans impacted by the Act.

The structure of the council is also significant. The council is made up of five members: two members are government-appointed representatives and two are elected by the owners of private managed forest land.[78] The nominated four members select a fifth member to serve as the chair. There is no requirement for Indigenous representation and there has never been an Indigenous member of the council. There is also no requirement for municipal representation on the council, though knowledge of forestry practices or local government is one of two possible criteria for government appointees

76 RSBC 1996, c 20 [*Assessment Act*].

77 PMFLA, above note 6, s 5.

78 *Ibid*, ss 4 and 6(1) & (2).

set out in the Act.[79] There are no statutory criteria for the selection of owner members.[80]

The council's Governance Policy characterizes its role as protecting both "key environmental values on private Managed Forest class land" and "landowners' right to harvest."[81] This sets up an inevitable conflict at the heart of the council's mandate. It also fails to address Indigenous rights and interests with respect to private managed forest lands. While Indigenous Peoples may have concerns about the impact of forestry activities on the environment, the concept of "environmental values" cannot encapsulate Indigenous interests and values in relation to private managed forest land. As the Supreme Court has noted, consideration of environmental impacts is not sufficient to discharge constitutional obligations to Indigenous Peoples, thus the regime fails to uphold the Crown's obligations, as discussed below.[82] These gaps and conflicts are compounded by the regime's sole source of funding being the owners it is tasked with regulating.[83] The council is funded solely by a levy on private forest landowners calculated as a percentage of their land value. The 2009 Five Year Review of the council noted the funding issue and raised the possibility of public funding of investigations as "they involve public values" and often impact public lands and resources.[84] This has not been addressed by the council or the government. The reliance on self-regulation is also evident in the lack of reporting and transparency requirements under the Act.

3. Information and Planning Requirements and Standards

The PMFLA contains few requirements for landowners to provide information to any government bodies or the public about their land and operations. What

79 *Ibid*, s 6(4). Notably, there is currently a municipal councillor and member of the Union of British Columbia Municipalities sitting in one of the government-appointed positions.

80 The council's Governance Policy includes additional criteria for the Chair and members, one of which is "familiarity with forestry, First Nation, and other stakeholder issues." However, experience working with First Nations is not one of the listed areas of experience in the Policy. See the Managed Forest Council, *Governance Policy* (February 2016), online: www.mfcouncil.ca/wp-content/uploads/2014/08/Governance-Policy-February-2016.pdf at 13.

81 The council's object according to the PMFLA is "to encourage forest management practices on private managed forest land, taking into account the social, environmental and economic benefits of those practices." See PMFLA, above note 6, s 5.

82 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 45.

83 PMFLA, above note 6, s 9(2).

84 Jon Davies, *Private Managed Forest Land Council Five Year Review* (November 2009) at 9.

is required is largely submitted only to the council. In order to gain a "private managed forest land" classification under the Act, the owner must submit a management commitment to the council.[85] It must include a commitment to use the land for the production and harvesting of timber, long term forest management objectives and strategies for achieving them, reforestation information, and a soil quality assessment.[86] There is no requirement to provide any information with respect to non-timber resources or biodiversity and species habitat on the property. Landowners must also submit an annual declaration to the council detailing the location and size of harvesting areas, the amount of timber harvested, and the locations of roads, though notably not the locations of reforested areas.[87] In addition to what must be reported to the council, owners must also submit a Timber Harvest Return to BC Assessment setting out the volume of scaled and unscaled harvested timber for the purposes of assessing the PMFLA levy.[88]

None of this information is publicly available. Nor is it available to relevant First Nations governments or municipalities. More tellingly, from our understanding, the ministry does not monitor harvesting volumes on private land. While the Managed Forest Council may possess information on annual harvesting volumes, it is not clear what it does with this information, if anything, given that there are no limits on harvesting volumes on private land, as we discuss below. Additionally, there is no indication that the information submitted to BC Assessment is used to assess and enforce sustainable management of private forest land.

Information and planning requirements are stronger under the *Forest and Range Practices Act* (FRPA), which requires a Forest Stewardship Plan, now to be replaced by Forest Landscape Plans (FLPs) per the 2021 amendments in Bill 23.[89] Indeed, the introduction of FLPs is one of the amendments intended to address UNDRIP alignment, as these plans require prior consultation and cooperation with affected Indigenous Peoples and include mandatory consideration of "values placed on forest ecosystems by Indigenous [P]eoples."[90] Amendments in Bill 23 strengthen information and planning requirements by making information-sharing obligatory for rights-holders within FLPs. For example, amended subsection 2.31(1) of FRPA empowers the chief forester to order rights-holders to produce a broad array of information in the interest of producing FLP reports every five years.[91] The amendments establish both

85 PMFLA, above note 6, s 17(1).

86 BC Reg 182/2007, s 9(1)(b) [Reg 182].

87 PMFLA, above note 6, s 20; Reg 182, s 12(a) & (b).

88 BC Reg 280/2018, s 3.

89 *Forest and Range Practices Act*, SBC 2002, c 69, s 3(1) [FRPA].

90 Bill 23, above note 8, cl 33, amendments to FRPA, *ibid*, s 2.22.

91 *Ibid*, cl 33, amendments to *Forest and Range Practices Act*, s 2.31(1).

reactive obligations to respond to orders of the chief forester and default obligations to report the locations of intended cutblocks and road construction before 31 December each year.[92]

The *Forest Act* also requires the holder to provide the chief forester of the province with a management plan and empowers the chief forester to require inventories to manage the "forest, recreational and cultural heritage resources" in the licence area prior to approval.[93] Bill 28 amendments expanded the government's power to order the production of information from license-holders.[94] License-holders are obliged to produce and maintain forest resource inventories, with updates required at least once every ten years.[95] Crucially, forest resource inventories are subject to random inspection by inventory officials, who are authorized to both order information production and physically enter lands.[96] Moreover, companies must prepare publicly available site plans wherever they will be constructing roads or harvesting timber from a cutblock.[97] Amendments adopted in 2021 require approval of a Forest Operations Plan locating and describing both existing and proposed roads and cutblocks, and applicants must demonstrate "reasonable efforts to engage with Indigenous nations."[98] In addition to an analysis of the short and long term viability of the timber resources in the area, the plan must also include inventories of the "forest cover, terrain stability, recreation, visually sensitive areas, lakes, wetland and stream riparian zones, ungulate winter ranges, wildlife habitat areas, old growth management areas, community watersheds, cultural heritage resources and archaeological sites."[99] The chief forester can require the holder of a Tree Farm Licence to provide whatever information considered necessary to calculate the maximum allowable cut.[100] Thus, activities on PMFLA lands are subject to drastically lower reporting and planning requirements, leaving impacted First Nations, local governments, and members of the public without crucial information to understand and assess impacts on their social, economic, and ecological interests. This compounds the lack of regulatory oversight in the PMFLA, particularly with respect to biodiversity, waterways and fisheries, and culture and heritage protection.

92 *Ibid*, cl 33, amendments to *Forest and Range Practices Act*, ss 2.32 and 2.46(1).
93 *Forest Act*, RSBC 1996, c 157, ss 35.2 and 35.1(5)(c).
94 Bill 28, above note 8, cl 46, amendments to *Forest Act*, Part 6.1, ss 244, 260, and 267.
95 *Ibid*, cl 46, amendments to *Forest Act*, s 102.5.
96 *Ibid*, cl 46, amendments to *Forest Act*, s 102.9.
97 *Forest and Range Practices Act*, above note 89, ss 10–11.
98 Bill 23, above note 8, cl 33, amendments to FRPA, ss 2.37(1) and 2.38(1).
99 BC Reg 280/2009, s 5(d) & (e).
100 *Forest Act*, above note 93, s 9(2).

4. Biodiversity Protection

With the highest biodiversity of any province or territory in Canada, and the highest number of species at risk, British Columbia is at the centre of the global biodiversity crisis.[101] This biodiversity is essential to maintaining ecosystem services such as food, medicine, and clean air and water.[102] It is also integral to sustaining Indigenous communities, economies, and cultures, including the HTG Nations.[103]

The 2019 United Nations Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services report specifically identified land use change as the single most important driver of biodiversity loss.[104] Yet the PMFLA and its regulations do not contain any reference to biodiversity, including no protection for old growth forest and the Coastal Douglas Fir (CDF) ecosystem, despite the concentration of PMFLA land in this ecosystem. While much of the E&N land has been highly disturbed by industrial forestry operations, remaining pockets of intact landscapes are of critical importance to HTG communities, as is the restoration of disturbed areas. Further, Hul'qumi'num legal obligations may require positive action to protect and restore damaged landscapes and the well-being of other more-than-human entities in order to uphold reciprocal obligations.[105]

Sustainable long-term management of forests for ecological, cultural, social, and economic values requires clear, prescribed, and enforceable standards. At present, the PMFLA falls well short of this. Rather than prescribing

---

101 Syd Cannings et al, *Our Home and Native Land: Canadian Species of Global Conservation Concern* (Ottawa: NatureServe Canada, 2005); Matt Austin, eds, *Taking Nature's Pulse: The Status of Biodiversity in British Columbia* (Victoria: Biodiversity BC, 2008); John Doyle, *An Audit of Biodiversity in BC: Assessing the Effectiveness of Key Tools* (Victoria: Office of the Auditor General of British Columbia, 2013). For an inventory of species at risk see, BC Conservation Data Centre (2018), "Red and Blue List," online: 100.gov.bc.ca/pub/eswp/.

102 Ontario Biodiversity Council, *Ontario's Biodiversity Strategy 2011: Protecting What Sustains Us* (Peterborough: Ontario Biodiversity Council, 2011), online: http://ontariobiodiversitycouncil.ca/wp-content/uploads/Ontarios-Biodiversity-Strategy-2011-accessible.pdf at 1–3.

103 *IACHR Petition*, above note 17; Frank Brown & Y Kathy Brown, *Staying the Course, Staying Alive: Biodiversity, Stewardship and Sustainability* (Victoria: Biodiversity BC, 2009).

104 Eduardo Brondizio, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, 2019), online: https://ipbes.net/global-assessment at 3.

105 Morales & Thom, above note 16 at 90.

standards, the Act sets out five limited and broadly defined objectives for private managed forest land: 1) protection of soil productivity;[106] 2) protection of human drinking water;[107] 3) protection of fish habitat through retention of sufficient riparian vegetation;[108] 4) long term protection of critical wildlife habitat;[109] and 5) reforestation with healthy, commercially valuable timber stands.[110] The legislation and accompanying regulations prescribe very loose protective measures, and it is largely up to landowners to determine how to meet these environmental objectives. The legislation is results-based, rather than prescriptive, which can result in irreversible effects only measurable post-harvest. This has particular implications for species at risk.

In contrast to the PMFLA, the FRPA contains several objectives for biodiversity in different ecological areas (riparian areas and at the landscape and stand level for forests).[111] There are specific limitations relating to biodiversity. For example, there are limits on cutblock sizes in different management areas for major tenure holders;[112] wildlife trees must be retained in cutblocks;[113] and specific amounts of coarse, woody debris must be left behind after harvesting activities in cutblocks.[114] Biodiversity factors must be considered in forest stewardship plans, including remaining trees suitable for wildlife habitat and for the ecological requirements of the biodiversity of the area.[115] Nonetheless, it is important to acknowledge that the FRPA also falls short and that biodiversity protection for all forest lands should be strengthened as a result of the ongoing reviews and proposed amendments. As recognized by article 8(j) of the Convention on Biological Diversity, this should include incorporation, protection, and maintenance of Indigenous knowledge and practices.[116] Amendments in Bill 23 did not directly alter biodiversity protections for Crown land forestry, but they may do so indirectly through the prioritization of Indigenous values in FLPs where these values align.

106 PMFLA, above note 6, s 12.
107 *Ibid*, s 13(1).
108 *Ibid*, s 14(1).
109 *Ibid*, s 15.
110 *Ibid*, s 16.
111 BC Reg 14/2004, ss 8 & 9–9.1 [Reg 14].
112 *Ibid*, s 64.
113 *Ibid*, s 66.
114 *Ibid*, s 68.
115 *Ibid*, Sched 1, s 3(2).
116 *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993, ratification by Canada 4 December 1992).

5. Riparian and Fisheries Habitat Protections

The PMFLA provides limited protection of riparian zones and fish habitat. While it does prescribe tree retention adjacent to some streams, the term "stream" is not defined in the PMFLA. An interpretive clause in the associated regulations refers to the *Water Sustainability Act*, in which a stream is defined as virtually any body of water other than an ocean or an aquifer.[117] However, it is not clear whether owners apply the broader definition of "stream" in practice. The 2009 Private Managed Forest Council Review noted there were rules for streams but not for lakes or wetlands.[118]

The regulations prohibit, with exceptions, the construction of roads within certain distances of streams to prevent sediment delivery and to preserve sufficient stream-side vegetation for habitability for relevant species of fish.[119] Private owners are also prohibited from undertaking activities in riparian zones that will have a "material adverse effect" on streams that provide fish habitat or human drinking water.[120] These requirements involve retaining specified numbers of trees and undergrowth within specified distances of the certain classes of streams in order to provide shade and water temperature variation in fish habitat.[121] This discretionary "material adverse effect" standard leaves it to private owners to determine what kinds of activities will have a material adverse effect and how to avoid damage. Compliance is managed by complaints and the potential of a council audit. Given the limited access of the public to private land, a complaints-based system means that impacts will generally have already occurred and been identified on adjacent land before any investigation or enforcement takes place. Notably, a 2012 Audit Report of the council cautioned that the minimal PMFLA requirements could compromise the long-term stability of some streams and downstream resources.[122]

Activities on Crown lands face more prescriptive standards. The government sets both general objectives and detailed practice requirements

117 *Water Sustainability Act*, SBC 2014, c 15, s 1(1). The *Water Act* and its successor, the *Water Users' Communities Act*, RSBC 1996, c 483, defined "stream" slightly more narrowly. The latter has been amended to use the *Water Sustainability Act* definitions.

118 Davies, above note 84 at 9.

119 Reg 182, above note 86, ss 14 and 16.

120 *Ibid*, ss 15 and 17.

121 For detailed requirements, see *ibid*, ss 27–30.

122 Private Managed Forest Land Council, *Managed Forest Program: Effectiveness of the Council Regulation in Achieving the Forest Management Objectives of the Private Managed Forest Land Act* (2013), online: https://mfcouncil.ca/wp-content/uploads/2014/09/pmflc_audit_report_2013_final_web.pdf at 16.

for working in riparian areas.[123] Regulations under the FRPA contain detailed classifications of streams, lakes, and wetlands, as well as establishing riparian zones, including restricted riparian reserve zones.[124] Specific protections are prescribed for vegetation by class of riparian area (presumably due to the particular sensitivities of different kinds of water bodies). The regulations give specific guidance regarding how much basal area must be preserved in riparian areas after harvesting timber from a cutblock.[125] They also prescribe detailed standards relating to the output of even small streams, particularly where fish and aquaculture is concerned.[126] Notably, Bill 28 Amendments require forest resource inventories to report lakes, streams, wetlands, and riparian areas under the *Forest Act*.[127] Overall, the standards under the FRPA are more rigorous and apply both more broadly and with greater specificity.

6. Habitat & Wildlife Protections

Wildlife and habitat protections are even less defined under the private land regime. The PMFLA relies on voluntary agreements between government and private landowners for the protection of critical wildlife habitat.[128] The wildlife Minister may establish an area of private land as critical habitat when at-risk species require that land and when there is no suitable Crown land in the ecological region.[129] Private owners and operators theoretically face restrictions on timber harvesting and road building activities within declared critical habitat areas.[130] The PMFLA does allow government representatives to enter private land for any purpose relating specifically to critical wildlife habitat.[131] However, without the consent of the landowner, the minister cannot designate more than 1 percent of the private land as critical habitat, and any such designation has a time limit of one year.[132] No such designation has ever been made. Considering the size of the E&N belt concentrated on Vancouver Island, and the 585,678 hectares owned by Island Timberlands and Timberland, there is little the minister can do to establish a contiguous land-base to protect wildlife, even where at-risk species require it.

123 Reg 14, above note 111, ss 8 and 47–58, respectively.
124 *Ibid*, ss 47–49.
125 *Ibid*, ss 50–52.
126 *Ibid*, s 52(2).
127 Bill 28, above note 8, cl 46, amendments to *Forest Act*, s 102.2(1).
128 PMFLA, above note 6, s 15(b).
129 BC Reg 371/2004, s 5(1) [Reg 371].
130 *Ibid*, s 5(2).
131 PMFLA, above note 6, s 24(3).
132 Reg 371, above note 129, s 7(2).

On Crown land, the *Government Actions Regulation* under the *FRPA* enables the minister to establish wildlife habitat areas and special wildlife measures to manage those areas.[133] Wildlife habitat areas need to meet the requirements of either at risk species or regionally important species, including requirements for harvests to resemble natural disturbance patterns and to retain wildlife trees.[134] Bill 28 Amendments to the FA require forest resource inventories to report on the status of wildlife in FLAs.[135]

The protection of at-risk and regionally important wildlife cannot rely on voluntary agreements with landowners whose interests may conflict with the habitat needs of at-risk species. Critical habitat for a species should be identified based on independent objective criteria and managed in accordance with independent objectives and standards informed by science and Indigenous knowledge for the survival of the species. Weak habitat and wildlife regulations have a direct effect on Indigenous nations for whom private forest lands double as traditional territory and specifically on the exercise of section 35 rights and title. Deer, elk, and bears were the primary land mammals hunted by HTG Nations.[136] These animals continue to be important for HTG people for reasons of both sustenance and spiritual practices.[137] In a study conducted by HTG, 58 percent of all Hul'qumi'num households interviewed considered current levels of white tail deer inadequate for their needs, followed by black tail deer (44 percent), elk (45 percent), moose (44 percent), mountain goat (14 percent), black bear (13 percent), and rabbit (9 percent). The most important animal species for households in HTG nations are white tail deer (63 percent), elk (48 percent), black tail deer (47 percent), moose (46 percent), black bear (14 percent), mountain goat (14 percent), rabbit (9 percent), cougar (6 percent), and wolf (5 percent).[138] The significant amount of HTG territory that is held as private land, and the intensive harvesting taking place on this land, threatens wildlife and jeopardizes the exercise of constitutionally protected Indigenous rights and the fulfillment of stewardship obligations to particular species and places under Hul'qumi'num law.

133 BC Reg 582/2004, ss 9–10.

134 *Ibid*, s 10(1). "Regionally important wildlife" is defined at s 13(2).

135 Bill 28, above note 8, cl 46, amendments to *Forest Act*, s 102.2(1)(d).

136 Wayne Suttles, "Central Coast Salish" in Wayne Suttles, ed, *Handbook of North American Indians Volume 7, Northwest Coast* (Washington: Smithsonian Institution Press, 1990) at 458–59; Martha Douglas Harris, *History and Folklore of the Cowichan Indians* (Victoria: The Colonist Printing and Publishing Co, 1901) at 33–40.

137 *TimberWest v Deputy Administrator, Pesticide Control Act*, Environmental Appeal Board, Appeal No 2002-PES-008(a) at 5 [*TimberWest*].

138 Karen Fediuk, *Hul'qumi'num Treaty Group Harvest Study* (Ladysmith, BC: Hul'qumi'num Treaty Group, 2001).

7. Watershed Protections

A number of communities adjacent to or impacted by private managed forest land have identified serious water quality and watershed issues.[139] Climate change is amplifying these issues, and it is itself exacerbated by deforestation. Increasing temperatures are changing precipitation patterns and resulting in extreme weather events affecting HTG territory. In 2022 drought, conditions extended well into October, with most water systems in the region moving to the most extreme water conservation restrictions in regional history.[140] As noted by the Cowichan Valley Regional District (CVRD), "[s]ummer drought is the 'new normal' in the Cowichan Valley." In early June 2019, the CVRD had already announced "significant concerns" about low lake and river levels, as well as record low levels in some wells and impacts on groundwater aquifers. The situation was "especially critical in the Cowichan watershed" in which lake and river tributaries were already drying up.[141] Deforestation also contributes to flooding and the Cowichan Valley has been heavily impacted by extreme flooding events in recent years, including the November 2021 floods, which caused dangerous mudslides, closed roads, and resulted in property damage and boil water advisories for communities on reserve.[142] The Cowichan Valley Regional District declared a state of emergency for flooding in both 2020 and 2021, and in 2021 added an additional level of water restriction, which were implemented again in 2022.[143]

139 Elk Valley Cumulative Effects Management Framework Working Group, *Elk Valley Cumulative Effects Assessment and Management Report* (2018), online: www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/draft_elk_valley_ceam_12122018.pdf; Mary Desmond, "Clearcut Logging Diminishes Shawnigan Lake Watershed" *Watershed Sentinel* (2012), online: https://watershed-sentinel.ca/articles/clearcut-logging-deminishes-shawnigan-lake-watershed/; Quentin Dodd, "New War in Woods? Battle Front Shifts" *The Tyee* (2006), online: https://thetyee.ca/News/2006/08/16/NewWar/print.html; Andrew Findlay, "Private Forests: One Town's Clearcut Dilemma" *The Tyee* (2005), online: https://thetyee.ca/News/2005/01/10/PrivateForestDilemma/print.html.

140 Cowichan Valley Regional District, *Climate Projections for the Cowichan Valley Regional District* (2017), online: www.cvrd.bc.ca/DocumentCenter/View/81884/Climate-Projections-Report. Cowichan News Staff, "Cowichan Moves to Most Extreme Water Restrictions Ever" (19 October 2022) *Vancouver Island Free Press*.

141 Cowichan Valley Regional District, "Record Low Water Levels Increase Drought Level Across Cowichan Valley" (2019), online: www.cvrd.bc.ca/DocumentCenter/View/93326/News-Release---Drought-Level-Update.

142 Ken Rothbauer, "Cowichan Tribes Opens Flood Support Centre" (17 November 2021) *Cowichan Valley Citizen*, online: www.cowichanvalleycitizen.com/news/cowichan-tribes-opens-flood-support-centre/.

143 Don Bodger, "Rain Finally Subsides, but Flood Damage Extensive in Cowichan" (15 November 2021)*Nanaimo News Bulletin*, online: www.nanaimobulletin.com/news/

The PMFLA requires that human drinking water be protected from contamination by timber harvesting activities and road construction.[144] The associated regulations are concerned with contamination by sediment, debris, and fertilizer.[145] There are particular limitations on road construction near streams and upslope from licensed waterworks intakes, and, as of July 2019, on individual waterworks intakes.[146] Private landowners or their agents are required to investigate and rectify the causes of declines in water quality when contacted by licenced waterworks intake operators who have reasonable cause to believe that activities on private land have caused declines in water quality.[147] Private owners are also required to avoid interrupting the flow of water to those intakes by maintaining natural surface drainage patterns.[148] However, regulation of fertilizer upslope of a licenced waterworks intake has important limitations. While the Wildlife Minister can establish water quality objectives for streams that are upslope of the intake with respect to broadly cast applications of fertilizer, they must consult with affected landowners and any new objectives are delayed for six months after the minister has notified the Managed Forest Council of the objective.[149]

As with fisheries and wildlife impacts, a complaints-driven system for drinking water issues is particularly problematic on private land as the public does not have access to harvesting areas and issues are therefore identified only once problems have occurred and are potentially irreversible or difficult to remedy. Establishing a "reasonable cause to believe" in the context of private land and complex watershed dynamics may be difficult for waterworks intake holders. Drinking water contamination should be prevented at its source rather than remedied after the fact.[150] Further, watershed protection has particular cultural and spiritual implications for Hul'qumi'num Peoples.

---

rain-finally-subsides-but-flood-damage-extensive-in-cowichan-region/; Cowichan News Staff, "Cowichan Moves to Most Extreme Water Restrictions Ever" (19 October 2022) *Vancouver Island Free Press*, online: www.vancouverislandfreedaily.com/news/cowichan-moves-to-most-extreme-water-restrictions-ever/.

144 PMFLA, above note 6, s 13(1).

145 Reg 182, above note 86, ss 15–24.

146 *Ibid*, ss 16 and 20(2), respectively.

147 *Ibid*, s 25.

148 *Ibid*, s 18(1).

149 BC Reg 372/2004, s 2.

150 Health Canada, "Drinking Water Quality in Canada" (12 March 2019), online: www.canada.ca/en/health-canada/services/environmental-workplace-health/water-quality/drinking-water.html; World Health Organization, Guidelines for Drinking-Water Quality, 4th ed (Geneva: World Health Organization, 2022).

8. Cultural and Spiritual Values Protections

The PMFLA currently contains no requirements for cultural heritage or values and no protection for access to culturally and spiritually significant sites.[151] In contrast, a stated objective of the FRPA is the conservation of resources used by and important to Indigenous peoples and any cultural resources that are not covered by the *Heritage Conservation Act*.[152] This gap in protection is particularly striking given the history of Indigenous relations with PMFLA land outlined above and the ongoing consequences of the E&N railway grant on HTG Nations.

There are 1,052 recorded archeological sites in Hul'qumi'num core traditional territory (see Figure 3). Eight hundred and thirty-nine of these sites are found within private land. Figure 3 below depicts "Known First Nations Archeological Sites" and an "Archeological Potential Model" indicating the potential for further identification within HTG territory. While many of the recorded sites are along the coast and are not held within private forest lands, much of the land associated with the "Potential Model" is owned by Island Timberlands and TimberWest.[153] The Environmental Appeal Board specifically noted the use of private forest land for spiritual and ceremonial purposes by Cowichan Tribes, including "meditating, visiting birth sites, and taking part in ritual bathing and cleansing ceremonies for the purpose of physical, emotional and spiritual purification."[154] As noted earlier in the paper, the destruction of many of these sites has been compounded by the lack of access to remaining areas and the incompatibility of these activities with industrial resource extraction.[155] HTG members seeking to use ancestral sites are met with locked gates and trespassing signs, as described by the late Wesley Modeste: "Our territory is filled with modern gates, blocking our trails, and affecting our people's freedom of movement over all parts of our territory."[156]

Notably, while the *Heritage Conservation Act* allows the Lieutenant Governor in Council to designate any land as a Provincial Heritage Site, including

151 PMFLA, above note 6, s 5, which mentions "social benefits."

152 Reg 14, above note 111, s 10.

153 Thom, "Coast Salish Senses of Place," above note 40 at 68.

154 *TimberWest*, above note 137 at 158.

155 Kulchyski Affadavit, above note 49 at para 34; *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II/Doc 51 (Affidavit of Martina Joe) at para 12; *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II/Doc 51 (Affidavit of Wayne Charlie) at paras 15–16; *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission: 2009, OEA/Ser.L/V/II/Doc 51 (Affidavit of Chad Harris) at para 7.

156 Modeste Affidavit, above note 55 at para 27.

private managed forest land, the Act is not noted on the council's website as "key relevant legislation."[157] Nor does the council have a policy or practice guideline relevant to cultural heritage. Further, the Act itself fails to provide adequate protection to Indigenous heritage values and does not require shared decision or even acknowledge the need for consultation with First Nations.[158] Thus, the lack of attention to cultural heritage in the PMFLA magnifies the need for broader reforms to ensure the meaningful participation of Indigenous Nations in cultural heritage protection, particularly on private land.[159]

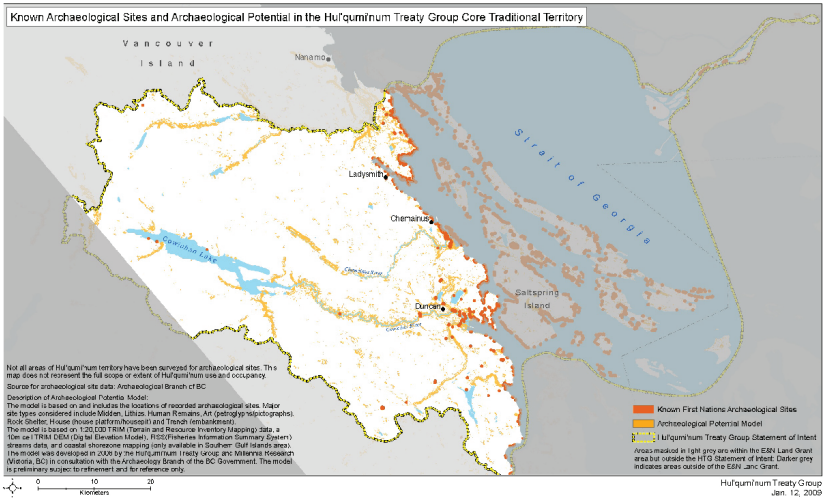

Figure 3: Known Archeological Sites and Archeological Potential in the Hul'qumi'num Treaty Group Traditional Territory, 2009. SOURCE: Hul'qumi'num Treaty Group

9. Freedom to Manage or Enabling Extraction?

The PMFLA contains no language regarding the maximum annual cut on private land and there are no regulations under the PMFLA that place any limits on the rate of harvest. Neither the Managed Forest Council nor the ministry

157 *Heritage Conservation Act*, RSBC 1996, c 187, s 9 [HCA].

158 Michael A Klassen, "First Nations, the Heritage Conservation Act, and the Ethics of Heritage Stewardship" (2008) 40:4 *The Midden* 8 at 11; *Mackay v British Columbia*, 2013 BCSC 945.

159 The Environmental Law Centre Society, "Protecting Cultural Heritage Resources on Private Land: Potential Strategies and Tools for Nations, Recommendations for Provincial and Local Government Reform" (Victoria: Environmental Law Centre Society, 2023), online: https://elc.uvic.ca/wordpress/wp-content/uploads/2023/01/Protecting-Indigenous-Cultural-Heritage-Resources-on-Private-Land.pdf.

determines the annual allowable cut on private lands. Given the large private forest land base on Vancouver Island, the inability of regulatory bodies to determine and enforce sustainable harvesting levels is of particular concern. The liquidation of timber on private land is a direct product of the PMFLA eliminating restrictions on harvesting volumes. Moreover, without harvesting limits and oversight, it is extremely difficult to see how the PMFLA could achieve its own management objectives (protecting water quality, fish habitat, critical wildlife habitat, and soil conservation) and the broader objectives we discuss above.

In contrast, under the *Forest Act* the timber on a Tree Farm Licence is subject to a maximum allowable cut every year (the Annual Allowable Cut (AAC)). The amount is determined by the province's chief forester, who must make the determination once every ten years.[160] When determining the maximum allowable cut, the chief forester must consider a number of factors, including natural factors like the rate of growth of the forest,[161] the use of the area for activities other than timber harvesting,[162] different kinds of licences and agreements, and the "economic and social objectives of the government…for the general region of British Columbia."[163] With this goal in mind, the ministry seeks to ensure a "sustained yield" within Tree Farm Licences and within Timber Supply Areas. The objectives of establishing an annual allowable cut are to maintain a productive forest land base and to manage for broader cultural, economic, employment, and ecological values. We note that even under the *Forest Act* regime there are ongoing concerns about the lack of involvement of First Nations in determining the AAC on public lands, and a shift towards collaborative forest management is urgently required on both public and private lands.[164] The amended Act does contemplate joint-forest management with First Nations on Crown land, and prior government-to-government agreements have created opportunities for collaborative decision-making and revenue sharing in the forest sector.[165] Such shared decision-making

160 *Forest Act,* RSBC 1996, c 157, ss 8(1) and 8(3.1)(a).

161 *Ibid*, s 8(8)(a)(i).

162 *Ibid*, s 8(8)(a)(v).

163 *Ibid*, ss 8(1)(a) and 8(8)(d).

164 Monique Passelac-Ross & Peggy Smith, *Accommodation of Aboriginal Rights: The Need for Aboriginal Forest Tenure* (Edmonton: Sustainable Forest Management Network, 2002); DB Tindall, Ronald Trosper & Pamela Perreault, *Aboriginal Peoples and Forest Lands in Canada* (UBC Press, 2013).

165 *Collaboration Agreement between Her Majesty the Queen in Right of the Province of British Columbia and Nadleh Whuten, Nak'azdli, Saik'uz First Nation, Stellat'en First Nation, Takla Lake First Nation, Tl'azt'en Nation, and Ts'il Kaz Koh First Nation, and Carrier Sekani Tribal Council* (2 April 2015), online: https://www2.gov.bc.ca/assets/

structures have resulted in significant reductions in harvesting rates.[166] Bill 28 amendments provide for the designation of "special purpose areas" for the fulfillment of non-timber harvesting objectives. This includes the power to authorize the disposition of Crown land to a First Nation to implement or further an agreement respecting treaty-related measures, interim measures, or economic measures.[167] These measures aim to facilitate the restructuring of the forest industry from large corporate holdings to small companies and First Nations. The system provides for a detailed compensation scheme where third party interests are influenced through resulting reductions to the AAC.[168] However, no similar shared decision-making or redistribution reforms have been suggested or implemented for the PMFLA.

Compounding the absence of limits to the rate of harvest, the PMLA contains no language limiting the size of cutblocks. Without limits on the size of cutblocks, the PMFLA remains an ineffective and fatally flawed regime with respect to the objectives for soil conservation, water quality, fish habitat, and wildlife habitat. The council does not provide any oversight about the size and location of cutblocks, either. The Management Commitment required to join the Managed Forest Land Program does not require a description of the location or size of cuts. While the Annual Declaration that owners submit to the Managed Forest Council requires information regarding how many hectares were harvested and the volume (m3) harvested, this information is highly generalized, especially when you consider that a single entity, Mosaic Forest Management, manages 71 percent of the private forest land in the province. The map included with the Annual Declaration does not require a representation of the location and area of harvesting activities. Therefore, the council does not have any means of scrutinizing the size of cutblocks.

In contrast, the FRPA requires holders of a forest stewardship plan to create a site plan, now a Forestry Operations Plan, for any construction of any road and cutblock. As discussed above, the site plan must identify the location of cutblocks and be in accordance with the plan itself and the regulations

gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/cstc_-_collaboration_agreement_-_signed_april_2015.pdf.

166 Diane Nicholls, *Prince George Rationale for Allowable Annual Cut (AAC) Determination* (Victoria, BC: Ministry of Forests, Lands, Natural Resource Operations and Rural Development, effective 11 October 2017); Natasha Caverley et al, "Articulating Indigenous Rights Within the Inclusive Development Framework: An Assessment of Forest Stewardship Policies and Practices in British Columbia, Canada" (2020) 33:1 *Society and Natural Resources* 25.

167 Bill 28, above note 8, cl 62 amending s 182. Special purposes designation can be up to six years.

168 *Ibid*, cl 203–7.

detailed in the FRPA.[169] Given the more prescriptive legislation regulating TFLs, there are far more limits placed on the size of cut blocks under the Crown land regime. The government can enact regulations regarding cutblocks prescribing: "(a) the size, including the maximum allowable size of a cutblock; (b) the shape of a cutblock, and; (c) the spatial distribution of cutblocks, including green-up."[170] Thus, while environmental concerns about forestry practices remain significant under the Crown land regime, the PMFLA fails to even monitor, never mind regulate, harvesting levels on private land.

10. Inclusion and Protection: Voluntary Inclusion, Land Removals, and Land Use Conversion

Prior to the enactment of the PMFLA, land assessed as private forest land had been largely automatically included in the Forest Land Reserve since the enactment of the *Forest Land Reserve Act* (FLR) in 1994. The FLR restricted what forest land could be used for, including prohibiting subdivision and the withdrawal of land without approval of the administrator of the Reserve, the Land Reserve Commission.[171] The purpose of the FLR was to "minimize the impact of urban development and rural area settlement on forest reserve land."[172] Before it was repealed, 920,000 hectares of private land were included under the FLR, in addition to designated public lands. We note that the inclusion of private forest land in the FLR was not compensable, and it is our view that it would continue to be non-compensable today should the FLR be reinstated, as discussed below.

In contrast, private managed forest lands program is voluntary to join and there are weak incentives to discourage land removals. Currently, private land owners may withdraw management commitments for their lands, and the land is then reclassified under the *Assessment Act*. In most circumstances, when an owner withdraws the commitment, they must pay an exit fee to the Managed Forest Council.[173] The fee is set by regulation on a sliding scale. If the land has been under a management commitment for five years or less, then the fee is equal to the difference between the property taxes that were paid under the preferential treatment of private managed forest land and the property taxes that would have been paid if the land had not received preferential tax treatment for the time it has been managed.[174] If the land has been

169 FRPA, above note 89, s 10(1), (2) & (3).

170 *Ibid*, s 160(a), (b) & (c).

171 *Forest Land Reserve Act*, RSBC 1996, c 158, ss 13 and 16.

172 *Ibid*, s 4.

173 *Ibid*, s 19(1).

174 Reg 371, above note 129, s 2(3).

held for between six and fifteen years, then the exit fee is calculated as above and then multiplied by an adjustment factor. The factor varies inversely with the number of years that the land has been managed.[175] No exit fee is payable for land held as private managed forest land for more than fifteen years.[176]

The fifteen-year "management commitment" under the PMFLA is far too short to encourage sustainable forestry and to dissuade land conversions. This short-term commitment to retaining forest land exacerbates the lack of environmental standards. Private land owners are able to benefit from tax incentives while being subject to weak regulatory standards and enforcement capacity and then remove their lands without penalty prior to even one cycle of reforestation. Landowners are also under no obligation to harvest trees within the fifteen-year commitment, which means they can enjoy the substantial tax benefits associated with a managed forest land assessment, remove their land from the program in year sixteen, and proceed to cut the timber outside of *any* regulatory framework. This short-term and voluntary commitment undermines the public interest, the interest of First Nations within whose territory this land is situated, and the planning capacity of local municipalities.

As the above discussion demonstrates, the PMFLA is an inadequate regime even when measured against its potential to achieve its own minimal stated objectives. The regime operates to uphold the primacy of private property rights, particularly the power of private owners to self-regulate, and to profit from and alienate forest lands, over the protection of both constitutionally protected Indigenous rights and interests and the public interest in ecologically sustainable land governance. In doing so, it leaves privately-owned forest lands, and the Indigenous territories in which they are situated, to be managed to a drastically lower standard than those under the Crown land regime.

D. Aboriginal Title and Rights and Private Lands

The regime outlined above had serious constitutional implications in the context of the Hul'qumi'num Nations. Indigenous relations with land are grounded in place-based legal orders, which have been regulating the territories now making up Canada for millennia.[177] These enduring systems of governance continue to shape contemporary Hul'qumi'num relations to

175 *Ibid*, Sched B.

176 *Ibid*, s 2(5).

177 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Deborah McGregor, "Honouring our Relations: An Anishnaabe Perspective on Environmental Justice" in Julian Agyeman et al, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2010) 27.

the forests of their territory.[178] At the same time, they have been entangled with the E&N land grants, colonial Canadian law, and, most recently, the PMFLA. In this section, we consider the settler-colonial legal context in which Hul'qumi'num forest relations endure.

Section 35 of the Canadian Constitution formally recognizes and protects Aboriginal rights and land title in settler law.[179] The purpose of section 35 is the "reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown."[180] This underlying goal of reconciliation extends to the relationship between private property and Aboriginal title and rights. However, the relationship between fee simple private property rights and Aboriginal rights and title is not settled in Canadian law.[181] In his 2018 survey of Aboriginal law in Canada, Jim Reynolds stated that the relationship between private property and Aboriginal title is "probably the most important" issue for Indigenous-settler relations in British Columbia. Over twenty years ago, Southin J of the BC Court of Appeal called the lack of certainty about it "a cloud . . . over the whole of the Province" outside treatied territories.[182] In the early stages of the *Tsilhqot'in v British Columbia* litigation, Vickers J also acknowledged the significance of this relationship: "Any tenure holder's interest derives from the interest of British Columbia. If the plaintiff's aboriginal rights and title affect the title and interest of British Columbia, then the interests of tenure holders are also affected."[183] At the time of writing, multiple cases involving fee simple lands and Aboriginal title were before the British Columbia courts, and title litigation about industrially owned lands in New Brunswick was underway.[184]

178 Bryan Evans, Julia Gardner & Brian Thom, *Shxunutun's Tu Suleluxwtst: In the Footsteps of our Ancestors* (Ladysmith, BC: Hul'qumi'num Treaty Group, 2005); Morales & Thom, above note 16.

179 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2014 CSC 44 [*Tsilhqot'in*].

180 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.

181 John Borrows, "Aboriginal Title and Private Property" (2015) 68 *Supreme Court Law Review* 91.

182 *Skeetchestn Indian Band and Secwepemc Aboriginal Nation v Registrar of Land Titles, Kamloops*, 2000 BCCA 525.

183 *William v Riverside Forest Products Limited*, 2002 BCSC 1199 at para 16.

184 See *Giesbrecht v British Columbia (Attorney General)*, [2020] BCSC 174 at para 31. This includes a spot title claim made by some of the HTG Nations to a fishing village site at the mouth of the Fraser River. Notably, this site is held in fee simple by the Crown, and therefore it does not present the same challenges as the E&N lands. See *Cowichan Tribes v The Attorney General of Canada and Island Corridor Foundation* (21 October 2016), BCSC (Notice of Civil Claim) and *Cowichan Tribes v Canada (Attorney General)*, 2019 BCSC 2199. In New Brunswick, see *Wolastoqey Nation v The Province of New Brunswick* (30 November 2021), Fredericton, NBQB (Notice of Action).

In this unsettled legal context, the history of the E&N land grants raises serious questions about British Columbia's title and interest in private forest lands. Therefore, the title and interests of contemporary third party tenure holders are also affected. As the HTG Nations have consistently asserted, and as we have argued elsewhere, the original land grants were constitutionally invalid.[185] No treaty was signed for the E&N lands in Hul'qumi'num territory. According to the Supreme Court, the province never had the power to extinguish Aboriginal title. Therefore any extinguishment had to come from the Dominion in "clear and plain" legislation.[186] However, the statute authorizing the transfer to the E&N corporate body expressly saves all existing rights.[187] In Canadian law, the Aboriginal title protected by section 35 was "crystallized at the time sovereignty was asserted" and therefore was an existing right at the time of the grant.[188] Thus, there is no legal basis for the extinguishment of Hul'qumi'num title and the creation of third party interests. This leaves significant questions about the contemporary status of private forest lands.

Following the Supreme Court decision in *Delgamuukw*, the HTG Nations filed legal claims for title in 1993.[189] However, as the Nations have also been in modern treaty negotiations with the federal and provincial governments, these claims have been in abeyance since that time. Because the modern treaty process is understood as an alternative to litigation, the processes do not run parallel.[190] Therefore, despite the significant legal deficiencies in the E&N land grants, and any subsequent interests created through them, the HTG Nations do not have a Canadian court declaration of Aboriginal title at the time of writing. Nonetheless, the acknowledged lack of a historic treaty or compensation for the E&N grants, and the ongoing modern treaty process, demonstrate the strength of Hul'qumi'num People's enduring relationship to the land in Canadian law. As the treaty process itself illustrates, the Crown

185 Estair Van Wagner, "The Legal Relations of 'Private' Forests: Making and Unmaking Private Forest Lands on Vancouver Island" (2021) 53:1 *Journal of Legal Pluralism and Unofficial Law* 103. See Foster, Berger & Buck, above note 38; *TimberWest* above note 137; *IACHR Petition*, above note 17.

186 Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001) 33:1 *Ottawa Law Review* 301 at 315.

187 *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, s 7(5).

188 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 145 and 113 [*Delgamuukw*].

189 Thom, "Reframing Indigenous Territories," above note 29.

190 Crown-Indigenous Relations and Northern Affairs Canada, *2019 Crown-Indigenous Relations Ministerial Transition Binder* (Ottawa: CIRNAC, 2019) online: rcaanc-cirnac.gc.ca; *IACHR Petition*, above note 17. We note that the spot title claim mentioned above is outside the area the Crown has recognized for the HTG treaty table and thus does not impact the negotiations.

does not require a court declaration to recognize Aboriginal title and jurisdiction. Indeed, the courts have strongly encouraged the parties to pursue negotiated solutions to title disputes.[191] In the words of Vickers J in the trial decision in *Tsilhqot'in*, the parties must work together to answer the "real question" about the consequences of acknowledging Indigenous possession and governance of their territories.[192] Thus, while we acknowledge the lack of a specific judicial determination of the scope of Hul'qumi'num title in Canadian law, we maintain that the continuity of that title is not in question. What remains uncertain is how Canadian law will be used to take up the "real question" of what consequences flow from acknowledging the relationship between Indigenous title and subsequent third party interests in the context of so-called fee simple lands.

As we noted above, Indigenous title and jurisdiction in relation to traditional territory are grounded in Indigenous laws and systems of property relations. Thus, they are not equivalent, nor reducible, to fee simple title. Indeed, even the colonial construct of Aboriginal title in Canadian law recognizes that Indigenous relations with land are distinct, in part because they are collective in nature.[193] One of the characteristics of Aboriginal title is a jurisdictional or governance power rooted in pre-existing sovereignty and Indigenous systems of law and governance.[194] This collectively held right to control the land conferred by Aboriginal title means that the governments and others seeking to use the land are required to obtain the consent of the Aboriginal title holders as a nation, not as individual title-holders.[195] Aboriginal title also includes intergenerational collective obligations to care for the land.[196] The Crown is bound by these obligations, and the inherent limit restricting uses of land is incompatible with the Indigenous relationship to the land.[197] Therefore, in our view, the legal status of the private forest lands in Hul'qumi'num territory should nonetheless be understood as subject to the jurisdictional elements

191 *Delgamuukw*, above note 188.

192 *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 1373.

193 *Delgamuukw*, above note 188; see also *Tsilhqot'in*, above note 178 at para 74. Kent McNeil, "Judicial Approaches to Self-Government Since *Calder*" in Hamar Foster, Heather Raven, Jeremy Webber, eds, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) at 41.

194 *Tsilhqot'in*, above note 178; John Borrows et al, eds., *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019); *Campbell et al v British Columbia (AG) & Canada (AG) & Nisga'a Nation et al*, 2000 BCSC 1123.

195 *Tsilhqot'in*, above note 178 at para 76.

196 *Ibid* at para 74.

197 *Ibid* at para 86.

of Aboriginal title, as they correspond with the Hul'qumi'num articulations of the relationship to territory.

This unique jurisdictional content of Aboriginal title is not dependent on the contemporary tenure of the land in Canadian law: it is equally relevant to land deemed Crown land and fee simple land. Fee simple title has no equivalent to the collectively held authority or obligations of Aboriginal title.[198] Thus, these governance dimensions could not be subsumed by subsequent individual private ownership. The material reality of the lands and thus the nature of fee simple ownership are necessarily shaped by how the underlying Indigenous legal order frames people-place relations. Even if we assume the jurisdictional element of Indigenous title could have been presumptively transferred to and is now being lawfully exercised by the Crown, this means jurisdiction could be restored to Indigenous title holders without unsettling third party interests. Thus, without assuming where and when it would be appropriate to maintain specific fee simple relations, we can nonetheless understand them as subject to Indigenous systems of governance and land use law. The restoration of a broad range of environmental and land use decision-making with respect to lands overlaid with fee simple grants would enable Indigenous nations to better uphold relationships with, and responsibilities to, each other, the lands, the waters, and other beings. Therefore, while the return of wrongly alienated lands is a crucial element of justice for Indigenous Peoples, there are a range of potential approaches to reconciling subsequent settler-colonial interests to pre-existing Indigenous title and jurisdiction. Indeed, as discussed in the final section, different approaches may be appropriate as strategic interim interventions while Nations and colonial governments grapple with the underlying questions outlined above. As we detail in the final section, a reimagined framework for so-called private forest lands could be designed on this foundation.

1. The Duty to Consult and Accommodate Applies Prior to a Declaration of Title

While in our view the Crown's obligation to account for the jurisdictional content of Aboriginal title should shape land use governance in HTG territories regardless of a judicial declaration about the scope of that title in Canadian law, the duty to consult and accommodate does specifically constrain the Crown's treatment of private forest lands prior to such a declaration. Thus, in the context of the underlying title claim and ongoing treaty negotiations, the Crown owes a prospective duty to consult and accommodate Indigenous

198 McNeil, above note 193 at 141.

nations when it acts in a manner that may adversely affect Aboriginal or treaty rights guaranteed by section 35 of the *Constitution Act, 1982*.[199] Grounded in the honour of the Crown and the fiduciary relationship between Indigenous Peoples and the Crown, the duty 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 all of its dealings with Indigenous Peoples.[200] Because the duty applies prior to any court declaration of Aboriginal rights or title, these must only be credibly asserted.[201] Adverse impacts include both physical impacts and high level strategic decisions that may affect rights or title; however, the duty is not triggered by past wrongs and the claimant must show a "causal relationship" between the impugned Crown conduct and any pending claims and rights.[202] Given the long and expensive processes for establishing title through litigation and modern treaty making, the duty has become a primary window through which assertions of Indigenous relations with land and resources are mediated in the Canadian legal system.[203] Therefore, while the courts have interpreted the duty as largely procedural, and it thus falls short of free, prior, and informed consent, it remains one important concept informing our call for the transformation of the PMFLA.[204]

In articulating the duty in *Haida Nation v British Columbia*, the Supreme Court concluded that third parties did not owe a duty to consult and accommodate to Indigenous parties. In overturning the Court of Appeal on this issue, the Supreme Court held that the duty sits with the government alone, as it flows from the assumption of sovereignty and is rooted in the honour of

199 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 35 [*Haida*].

200 *Ibid* at para 27; *Tsilhqot'in*, above note 178 at para 78; *Taku River Tlingit First Nation v British Columbia* [*Project Assessment Director*], 2004 SCC 74 at para 24.

201 *Haida*, above note 199 at para 37.

202 *Ibid* at para 47; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

203 Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at 197.

204 Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: Mikisew Cree First Nation v Canada and the Colonial Constitution" (2020) 70:3 *University of Toronto Law Journal* 341; Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 *Alberta Law Review* 729; Estair Van Wagner, "Extracting Indigenous Jurisdiction on Private Land: The Duty to Consult and Indigenous Relations with Place in Canadian Law" in Robyn Bartel & Jennifer Carter, eds, *Handbook on Space, Place and Law* (2021); Chris Sanderson, Keith Buergner & Michelle Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty Administrative and Regulatory Law" (2011) 49:4 *Alberta Law Review* 821.

the Crown.[205] The government, they note, retains a number of tools to regulate third parties: "The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations."[206] Thus, while private parties do not owe a duty to consult and accommodate, third party interests are nonetheless necessarily subject to the Crown's duty in its role as a regulator and decision-maker. This includes private lands, which are not excluded from the duty to consult and accommodate.[207] The Crown retains jurisdiction to regulate land use on privately held lands in a variety of ways, and as a result, it has duties and obligations to Indigenous nations. Therefore, while the Crown and fee simple title holders have argued the duty to consult and accommodate simply does not apply on fee simple lands governed by the PMFLA,[208] courts and tribunals have specifically recognized the ongoing relationship of Indigenous nations with private forest lands, including on Vancouver Island, and thus the application of the duty to consult.[209]

Indeed, the British Columbia Environmental Appeals Board explicitly upheld the Crown's duty to consult Cowichan Tribes in the context of an application by TimberWest to apply pesticides on land owned in fee simple by virtue of the E&N grants.[210] As a constitutional duty, the duty to consult and accommodate exists upstream of legislation and administrative decisions. Therefore, the absence of Crown discretion in a statutory regime does not absolve the Crown of the duty.[211] Indeed, the absence of discretion may be the source of a section 35 breach.[212] As the Yukon Court of Appeal held in *Ross River Dene v Government of Yukon*, "[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means

205 *Haida*, above note 199 at para 53.

206 *Ibid* at para 55.

207 *Hupačasath*, above note 75 at para 199; *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, 2008 BCSC 1505 at paras 246–49 [*Ke-Kin-Is-Uqs*]; *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at para 22 [*Saugeen*]. But see *Paul First Nation v Parkland (County)*, 2006 ABCA 128 [*Paul*] where the Alberta Court of Appeal accepted without authority or detailed reasons that the duty did not apply to fee simple lands.

208 *Hupačasath*, above note 75 at para 165; *Saugeen*, above note 205 at paras 30 and 63; *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations*), 2015 BCCA 345 [*Chartrand*].

209 *Hupačasath*, above note 75; *Ke-Kin-Is-Uqs*, above note 205; *TimberWest*, above note 136; *Saugeen*, above note 205 at paras 30 and 63; *Chartrand*, above note 208.

210 *TimberWest*, above note 137.

211 *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 49.

212 *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 at paras 36–38, leave to appeal to SCC refused 2013 CanLII 59890 (SCC); *Mikisew Cree First Nation v Canada*, 2018 SCC 40 at para 46, per Karakatsanis J.

to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist."[213] In other words, the removal of Crown decision-making power from land management decisions under the PMFLA does not relieve the Crown of the duty to consult and accommodate in the operation of the statutory regime. In *Hupačasath First Nation v British Colombia*, a Nuu-chah-nulth Nation whose territory sits at the northwest corner of the E&N lands in central Vancouver Island challenged the removal of their territory from the public forestry regime and its transfer to the PMFLA on the basis that the Crown had not undertaken proper consultation. The Court rejected the Crown and private owner's arguments that the duty could not apply on private land.[214] Thus, while governments may choose to limit the exercise of their regulatory power over private land, they cannot legislate the duty away.

Further, the United Nations Declaration on the Rights of Indigenous People (UNDRIP) requires free, prior, and informed consent for activities affecting ancestral lands, territories, and natural resources. British Columbia has committed to implementing the Declaration through the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), including taking all measures necessary to ensure legislation is compliant.[215] Section 7 of the DRIPA provides for negotiated decision-making agreements that can authorize either or both a joint decision-making process and consent requirements for the exercise of statutory powers by Crown. There is no legal or policy basis for excluding private managed forest lands from the implementation of the obligations under UNDRIP, an issue we return to in the penultimate section of this paper. Indeed, 2021 amendments to the *Interpretation Act* require legislation and regulations be construed as "upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous [P]eoples as recognized and affirmed by section 35" and as "being consistent with the Declaration."[216]

The above discussion demonstrates the unsettled relationship between private property and Aboriginal title in Canadian law. As we discuss in the context of the PMFLA below, meaningfully addressing this requires serious and substantive engagement with Indigenous legal frameworks and new models for land use governance.[217]

2. Redress in the Context of Private Forest Lands

Any re-envisioning of the PMFLA must be undertaken in concert with meaningful redress for the legacies of the E&N land grants. These lands comprise the

213 *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 at para 37.

214 *Hupačasath*, above note 75 at paras 199–200.

215 DRIPA, above note 8, s 3.

216 *Interpretation Act*, RSBC 1996, c 238, s 8.1(2)–(3).

217 Sarah Morales, "'A 'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37 *National Journal of Constitutional Law* 145.

majority of private forest lands in the province and represent one of the most egregious land grabs in Canadian history.[218] The granting of Hul'qumi'num traditional territory and property rights without any form of restitution and without any form of meaningful consultation has led to the wholesale destruction and spoilation of valuable forest lands, streams, and ecosystems. Many of these forests and streams are no longer usable by Hul'qumi'num communities. Accordingly, Hul'qumi'num Peoples have lost opportunities to practice, and prosper from, their traditional ways of life on their traditional lands. As Wayne Charlie, a Hul'qumi'num Elder, stated in his affidavit, "Our children don't have the opportunity to hunt in our territory today. . . . Today we don't have the opportunity to teach this because gates are locked and we're only allowed in and out at certain times on the weekends." This was echoed by Hul'qumi'num member Tim Kulchyski, who stated, "The private lands within our territory is one of the single largest impediments to our long term existence. Our ability to learn is being restricted because we can't transfer knowledge from generation to generation, especially our place names and language because of our inability to access our territory" (See Figure 4). At a broader level, the First Nations Forestry Council explained in 2008 that the removal of private land from TFLs and the management of the land under the PMFLA has "resulted in dramatic increases in logging rates, with often little benefit to us, and a dramatic increase in sales of land for purposes of real estate development—an outcome that completely alienates such lands from their usage as forestlands and that further complicates resolution of outstanding rights and title issues."[219]

Figure 4: Example of an Island Timberlands gate found on private forest land created out of the E&N land grants that prevents Indigenous access to land and territory. Image credit: Michael Ekers.

218 Morales, Egan & Thom, above note 12.

219 First Nations Forestry Council, *Land Privatization: The Potential Impacts on First Nations Rights and Title in BC* (Nanaimo: First Nations Forestry Council, 2008).

The UNDRIP, and international human rights law more generally, has recognized that the issues of land, territory, and access to natural resources remain central to observing the human rights and fundamental freedoms of Indigenous peoples. The nature and importance of those relationships is fundamental for both the material subsistence and the cultural integrity of many Indigenous Peoples,[220] including the Hul'qumi'num Peoples, as evidenced by the statements above. The failure to deal with redress in the context of private forest lands is in direct violation of Canada's obligations under the Declaration on the Rights of Indigenous People.

On 21 June 2021, Canada formalized its intention to adopt and implement the Declaration when *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*[221] received Royal Assent. The purpose of the Act is to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law. It also provides a framework to advance the implementation of the Declaration at the federal level. It requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to do the following: 1) take all measures necessary to ensure the laws of Canada are consistent with the Declaration; 2) prepare and implement an action plan to achieve the Declaration's objectives; and 3) table an annual report on progress to align the laws of Canada on the action plan. Prior to the federal legislation coming into force, in November 2019, British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* into law. Similarly, the provincial legislation sets out a process to align British Columbia's laws with the Declaration. It mandates that the government bring provincial laws into harmony with the Declaration and requires the development of an action plan to achieve this alignment over time — requiring transparency and accountability. Therefore, British Columbia is not only obligated to review the PMFLA for compliance with UNDRIP, but also required to address the right to redress for the harms caused by its application and for the underlying E&N land grants.

The *Declaration on the Rights of Indigenous Peoples Act* provides broad recognition of the rights of Indigenous peoples to land, territories, and natural resources, including: the right to strengthen their distinctive spiritual relations with lands and resources (article 25); the right to own, use, develop, and control the lands, territories, and resources that Indigenous Peoples possess by reason of traditional ownership (article 26); the right to redress, by means that can include restitution or, when this is not possible, just, fair,

220 Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 2009 at para 56.

221 DRIPA, above note 8.

and equitable compensation, for the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used, or damaged without their free, prior, and informed consent (article 28); the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (article 29); and the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources (article 32). It also requires states to take measures to uphold and promote the rights of Indigenous Peoples relating to lands, territories, and resources.

Two of the primary constraints on the full and free enjoyment of Indigenous Peoples' rights to lands, territories, and resources relate to either the failure of states to recognize the existence of Indigenous use, occupancy, and ownership, or the failure of states to accord appropriate legal status, juridical capacity, and other legal rights in connection with Indigenous Peoples' ownership of land.[222] These issues are further complicated where domestic law has developed without recognition or protection for Indigenous peoples' rights to lands, territories, and natural resources. Under the Declaration, the scope of the lands, resources, or territory of a particular Indigenous People will depend on the specific circumstances of the community in question. However, the Declaration clearly recognizes rights to those lands, territories, and resources traditionally held by Indigenous Peoples but now controlled by others as a matter of fact and law. Thus, private third party ownership does not exclude the application of UNDRIP from Indigenous territory.

Article 28 is of particular importance to the situation of the Hul'qumi'num Peoples. It details the rights of Indigenous Peoples for redress and compensation where their lands, territories, and resources have been taken, used, or damaged without consent. This right provides a remedy for Indigenous Peoples who no longer possess their lands and territories, such as the Hul'qumi'num communities. Where possible, lands, territories, and resources that Indigenous Peoples no longer possess should be returned; alternatively, fair compensation should be paid, which could include the provision of other lands, territories, and resources, monetary compensation, or development opportunities.[223] The Committee on the Elimination of Racial Discrimination has held that restitution of lands and territories is to be the primary means of redress. Only when restitution is not possible should other forms of redress

222 E/CN.4/Sub.2/2001/21 at para 34.

223 Luis Rodriguez-Pinero, "The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (London: Hart Publishing, 2011) 457 at 467.

and compensation be explored.[224] These alternative forms of redress need to be considered in the context of the long history of unlawful land alienation of Hul'qumi'num lands and resources. For example, this could include meaningful revenue sharing, which the PMFLA currently does not contemplate, but should not be limited to such existing models. Alternatives must be appropriate to Hul'qumi'num people-place relations and the laws that uphold them.

E. Transforming Governance: An Agenda for Interim Reform and Call for Long Term Change

The PMFLA is only the most recent manifestation of the intergenerational injustice of the E&N land grants. Yet, its entrenchment of the power of private ownership nonetheless requires specific and urgent attention. Reform of the statutory regime is thus necessary but not sufficient to address the concerns set out above and continually asserted by Hul'qumi'num and other Indigenous communities whose territory has been impacted by forestry operations on private land. Land unlawfully taken must be returned, jurisdiction must be recognized, and compensation must address the irreversible loss of ecosystems and species in the territory. As we work towards these broader goals, we recognize that a regulatory regime for private forest lands will likely be maintained in British Columbia. Therefore, in this final section we set out an agenda for strategic and interim reform to account for Indigenous law and jurisdiction and to ensure meaningful oversight and enforcement in the public interest.

While we anticipate that landowners will resist legislative reforms on the basis that they constitute an encroachment of "their" private property rights, fee simple holdings are always regulated for a variety of public purposes and in a diversity of ways.[225] As noted above, historically private forest land has been regulated through the TFL system and/or the FLR. Thus, we see the following recommendations for changes to the PMFLA structure as consistent with the need to include fee simple lands in broader strategies to recognize Indigenous jurisdiction, rights, and title, and address the urgent and

224 See also Jérémie Gilbert & Cathal Doyle, "A New Dawn over the Land: Shedding Light on Collective Ownership and Consent" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (London: Hart Publishing, 2011) 289 at 299.

225 Marcia Valiante & Anneke Smit, "Introduction" in *Public Interest, Private Property: Law and Planning Policy in Canada*, ed by Marcia Valiante & Anneke Smit (Vancouver: UBC Press, 2016) 1; Malcolm Lavoie, "Subsidiarity and the Structure of Property Law" 74:2 *University of Toronto Law Journal*, online: https://papers.ssrn.com/abstract=4430459 [forthcoming].

compounding crises of biodiversity loss and climate change. We offer these proposals as an interim and necessarily partial intervention in the longer-term path towards redress.

1. Meaningful Collaborative Oversight & Reporting Requirements

Structural change requires a new approach to governance. We recommend the establishment of a new, collaborative oversight body for the management of private forest lands in accordance with the standards outlined in our further recommendations below. Given the historical context and the disproportionate impact on the territory of specific First Nations, particularly the HTG, the new body should be designed in full partnership with the Nations affected by private forest land within their territory. It should include guaranteed representation for the impacted First Nations, including direct decision-making power with respect to any delegated management and enforcement decisions. This is not only consistent with Canadian legal principles under section 35 and the requirements of UNDRIP, but is also, in the context of HTG territories, required by Coast Salish law. The principle of thu'it (trust) emphasizes the importance of effective leaders gaining the trust of those on whose behalf they make decisions in order for impacted individuals to recognize and respect the validity of the decision-making process itself.[226] The principle of si'emstuhw (respect) suggests that an important aspect of leadership within the Coast Salish world is the ability to cultivate respectful relationships with, and gain the respect of, those who are impacted by the leader's decision-making.[227] These principles highlight how important it is for all parties who are significantly impacted by the governing body's decisions to be represented in order for them to be able to recognize that it has any valid authority at all, and then to be able to respect its decisions.

Representation alone is not sufficient to ensure Coast Salish legal perspectives are heard and accounted for within private forest land management. Indigenous legal concepts and practices need to shape the form and conduct of governance. Within the Coast Salish world, the idea of nil ow' sthuthi' ni' 'utun shqualuwun (consensus) is considered a key aspect of dispute resolution because it embodies the principle of sts'lunuts'amat (kinship), promoting healthy relationships and fostering harmony within the community.[228] Parties involved in a dispute, along with respected individuals who have relevant knowledge on the subject matter, discuss a matter until they arrive at

226 Morales, *Snuw'uyulh*, above note 24 at 237.

227 *Ibid* at 228–29.

228 *Ibid* at 270.

a resolution that is acceptable to everyone.[229] Those impacted by decisions, whether they be fee simple private land owners, Coast Salish community leadership, or specific Coast Salish families with connections to certain lands, could all participate in the process on an equal footing. Individuals with relevant knowledge, whether from a Coast Salish legal/cultural perspective or a Western science perspective, could also be invited to join in the process, to help inform everyone involved on particular issues. Incorporating the idea of nil ow' sthuthi' ni' 'utun shqualuwun (consensus) would not only uphold the principle of sts'lunuts'amat (kinship), but it would also promote thu'it (trust) and si'emstuhw (respect) for the overall decision-making process.

We recognize that consensus-building is not possible in all circumstances, and the governance framework would need to account for that. Within the Coast Salish world, individuals or groups in conflict may choose to call upon an arbitrator — Si'em, or respected leaders — when consensus cannot be reached. Si'em must be identified and approached through consensus of the parties involved.[230] In addition to consensus-seeking processes, the incorporation of Coast Salish Big House practices, such as the use of speakers and witnesses, could be considered in order to foster accountability for council members and promote trust and respect for their decision-making. Speakers are individuals who are highly trained in the background, history, language, and culture of the people they represent, and who are respected and trusted for their judgement in terms of the words they choose to use.[231] Witnesses are responsible for listening and observing what goes on and remembering it in the future to ensure that all parties are held to their word and that they can trust others will be as well.[232] Incorporating these practices alongside collaborative decision-making with Indigenous peoples could help rebuild trust and respect between the parties so that they can manage the territories together, and in a good way.

The necessary structural changes would also require redrafting the section 4 objective to define "benefits" both more clearly and more holistically and to shift away from the weak discretionary language such as "encourage" and "taking into account." From a Coast Salish perspective, the objective would be grounded in the principles of snuw'uyulh, with an understanding of how those guiding principles influence obligations owed to all beings, animate or inanimate, within the Coast Salish world. Thus, in line with the

229 *Ibid* at 305.

230 *Ibid* at 305 and 308.

231 Sarah Morales, "Speakers, Witnesses and Blanketing: The Need to Look Beyond the Courts to Achieve Reconciliation" (2017) 78 *Supreme Court Law Review* 139 at 155 [Morales, "Speakers, Witnesses and Blanketing"].

232 *Ibid* at 156–57.

principles of sts'lunuts'amat (kinship) and sh-tiiwun (responsibility), building and maintaining good and respectful relations and fulfilling reciprocal obligations to kin, broader society, and the more-than-human world would be central.[233] The role of decision-makers would necessarily expand and shift to a stewardship role, requiring not only a conceptual understanding of what it means to be in relationship with particular places governed by the regime, but to also be on the land observing, communicating, and interacting with it. In this way, consensus-seeking processes would better incorporate the full network of kin-relations that decision-makers are responsible to uphold. For example, decision-making would need to consider how forestry practices might specifically impact the ability of Coast Salish Peoples to care for their ancestors and their resting places, as well as any future generations who will depend on those lands and resources. Rather than focusing on the needs of human actors and implementing blanket criteria for environmental sustainability or protection, the beings of the more-than-human world would be understood as actors with whom relationships must be fostered and nurtured on an ongoing basis in particular places. While economic benefits are generally associated with financial gain, from a Coast Salish perspective the overall net effect of decisions on relationships may be most important. Thus social, environmental, and economic benefits could be considered holistically in assessing overall effects.

Changes to the governance of private managed forest land also requires decision-makers and impacted communities to have access to information about forestry practices and impacts on the more-than-human world. Therefore, lands under the regime must be subject to at least the public reporting requirements applicable to Crown land. We recommend that information about location and size of harvesting areas, volume of timber being harvested, and monitoring of environmental, cultural, recreational, and social values on both private and Crown forest lands be publicly available, and in particular that it be reported directly to Indigenous governments whose territory private forest lands are located within. Further, reporting should be expanded to include the impacts of harvesting on a variety of social, economic, and ecological values.

The regime could also expressly require that section 17 management commitments by owners reflect an understanding of relevant Indigenous laws. Access to Coast Salish territories has generally been limited to people who understand the law, including the significance of principles of snuw'uyulh, such as sts'lunuts'amat (kinship), si'emstuhw (respect), and sh-tiiwun (responsibility).[234] Requiring a demonstrated and publicly avail-

233 *Ibid* at 49.

234 Morales, *Snuw'uyulh*, above note 24 at 284.

able commitment to learning about, and adhering to, Coast Salish laws and practices within management commitments would promote thu'it (trust) and si'emstuhw (respect) between the parties involved in decisions and operations. A revised regime must also include adequate independent funding for this restructured governance body to uphold any monitoring and enforcement responsibilities. We recommend existing government authority and enforcement capacity be expanded to ensure accountability and transparency on private managed forest lands, also in full partnership with impacted Indigenous Nations.

2. Improved Objectives and Mandatory Standards

A revised set of values and defined and enforceable standards must be developed in full collaboration with Indigenous Nations in order to expand and strengthen the objectives of the regime, including but not limited to the following areas: riparian, watershed and wildlife protections, biodiversity, sustainable harvesting limits, and protocols for cultural heritage access and protections for cultural and spiritual values. Clear, prescribed standards in relation to each of these objectives should be applied to private forest lands to ensure the protection of the land base and to facilitate enforcement of the collaboratively developed environmental, social, and cultural objectives. From a Coast Salish perspective, the onus should be on the supervisory body responsible for the management of private managed forest lands to actively manage owners, with the goal of avoiding ecological stress and promoting sustainable growth and prosperity. Thus, the revised regime would shift from a complaints driven, self-regulation model towards a framework based on the active relationship building and maintenance required to sustain good and harmonious relations. Resource management is, under Coast Salish law, "primarily the management of the *users* and not the resource."[235] This conceptual shift echoes movements towards transformative environmental governance in other jurisdictions. For example, the introduction to *Te Kawa o Te Urewera*, the policy document for a former national park in Aotearoa New Zealand that is now a legal entity governed by a Maori-led co-management board, states, "Te Kawa is about the management of people for the benefit of the land — it is not about land management."[236]

235 Dorothy Irene Kennedy, *Threads to the Past: The Construction and Transformation of Kinship in the Coast Salish Social Network* (PhD Dissertation, University of Oxford, 2000) [unpublished] at 228.

236 Te Urewara Board, "Te Kawa o Te Urewara" (accessed 11 July 2023), online: ngaituhoe.iwi.nz/te-kawa-o-te-urewera at 7.

A central element of such a reorientation is the incorporation of meaningful biodiversity protections in all forest management. This would be developed as part of broader collaborative landscape level planning to ensure ecosystem resilience and connectivity and to respect Indigenous jurisdiction, rights, and title. As outlined above, we see movements towards this in the context of other forest lands in the province. In the context of private forest land, this work can build on existing work already being undertaken by HTG Nations and other impacted Indigenous communities. Biodiversity protections should incorporate the precautionary principle, Article 8(j) of the Convention on Biological Diversity, and must consider cumulative effects.[237] They should also reflect relevant Indigenous legal principles for impacted territories, such as recognition of the interconnectedness of all beings and the idea that every action has a subsequent effect on those surrounding it in accordance with snuw'uyulh. Coast Salish people-place relations involved individuals being publicly recognized as authorities who were tasked with monitoring ecological stress by ensuring resources were not overharvested.[238] Thus, rather than simply identifying individual environmental concerns and responding in isolation, decisions about the actions of land owners in a revised regime would begin by proactively asking questions informed by the stewardship objective: *How will this decision or action affect the soil, water, fish, and other beings and their relations and obligations? What is needed to respond to any concerns and to ensure all of these beings continue to thrive and are able to fulfill their own responsibilities and maintain good relations?* The process of answering these questions would then be ongoing and collective in order to respond to the needs of the territory as it changes over time.

These kinds of guiding questions could inform the development of clear and publicly available mandatory standards for the protection of riparian zones and fisheries habitat, the protection of wildlife and wildlife habitat, including ungulates and grizzly bears, and the protection of cultural values and resources. Standards would be developed based on independent scientific and Indigenous expert advice and should be enforced at least to the standard applied on Crown land and in a manner developed with impacted First Nations. Harvesting that could result in placing species at risk, or further endangering them or their habitat, should not be permitted on private managed forest land. However, restrictions could be coupled with incentives

237 *Convention on Biological Diversity*, 5 June 1982, 1760 UNTS 79; *Yahey v British Columbia*, 2021 BCSC 1287; Riki Thérivel, Jill Blakley & Jo Treweek, "Mitigating Cumulative Biodiversity Impacts" in Jill Blakley, Daniel Franks, eds, *Handbook of Cumulative Impact Assessment* (Edward Elgar Publishing, 2021); Jose Felix Pinto-Bazurco, *The Precautionary Principle* (International Institute for Sustainable Development, 2020).

238 Kennedy, above note 235 at 223–24.

and stewardship programs to address the challenges faced by landowners with species and habitat present on their land. In addition, water quality and flow issues should be given priority in forest management decisions on private land, with impacts beyond human needs expressly considered. Revised standards should expressly aim to prevent watershed impacts rather than mitigate them after the fact.

An annual allowable cut for private land is necessary to maintain economic, cultural, and environmental values. Harvesting limits should be developed jointly by the ministry and impacted First Nations, with Indigenous knowledge as a mandatory and equal consideration. The annual allowable cut on private land holdings must protect the ongoing exercise of Indigenous rights and the determination of outstanding title claims. The location, size, and shape of cut blocks, as well as their spatial distribution, should also be regulated in collaboration with First Nations with private forest land in their territory, in accordance with relevant principles of Indigenous law.

3. Long-Term Protections for Forest Lands

Finally, we recommend a new Forest Land Reserve be created in partnership with Indigenous Nations within whose territory PMFLA land is situated. Private forest lands not returned to Nations as part of their redress should be independently assessed as managed forest lands and mandatorily included in a reinstated and collaboratively managed Forest Land Reserve. A collaborative governance structure with representation from First Nations with private forest lands within their territories would be essential to ensuring land designations respect Indigenous title and rights. This would mean land assessed as private forest land could be protected as forest land in perpetuity, subject to treaty and redress measures. If removals are allowed, there should be clear mandatory criteria for a limited set of circumstances. All removal decisions should be made jointly with relevant First Nations, with public and municipal consultation, and substantial penalties should apply for land withdrawals.

A new regime incorporating the changes outlined above should be proactively enforced by the province, in collaboration with impacted Indigenous Nations, to avoid the current conflict of interest at the heart of the council's mandate. It will be crucial to ensure enforcement include monitoring rather than reliance on a complaint-based or industry self-reporting system. Further, penalties for non-compliance must be increased to at least the standard of FRPA and the former FLRA. Finally, the province should fund monitoring and enforcement at levels sufficient to ensure compliance and regular monitoring on private forest lands.

F. Conclusion

These changes will face strong resistance from owners of private forest lands. Those owners will undoubtedly say they are entitled to the enjoyment and benefit of their private property. In our view, such resistance only demonstrates how imbalanced the current PMFLA is. Owners, which primarily means three large public sector pension plans, have benefited enormously from the deregulated environment they have operated within since the enactment of the PMFLA.

Prior to being incorporated into the TFL regime, private forest lands were managed to a much lower standard than Crown land. The devastating effects informed the Sloan Report recommendation in 1945 that private land be folded into the public regime. Thus, rather than being unprecedented, the PMFLA reforms restore appropriate oversight suitable to an industrial extractive industry with widespread and potentially irreversible impacts on the landscape. In the contemporary context, it is essential that they also recognize and restore Indigenous jurisdiction and interests in private forest lands.

Indeed, Sloan went further in 1955, recommending the Crown purchase the E&N lands from then-owner Canadian Pacific Railway, seeing the importance of these lands to long term management of forestry on Vancouver Island. The NDP's FLR was one of the few attempts since to try to ensure that private forest lands are managed sustainably and in a fashion that upholds Indigenous rights and title. Indeed, one of the drivers of its implementation was to ensure lands were available for treaty negotiations.[239] Those negotiations persist, in large part because of the obstacles the E&N lands continue to present to achieving a fair settlement.

As we've noted above, in aligning regulations pertaining to private land with legislation governing forestry operations on Crown land, these recommendations are only one interim measure in the road towards redress for the Indigenous Nations dispossessed by the E&N grants. The emphasis on collaboration and co-governance with affected Nations reflect recent amendments to the FA and FRPA, as well as ongoing UNDRIP alignment processes. Such strategic but interim interventions are crucial and urgent, if insufficient, to protect Indigenous rights and title on land held in fee simple title. For the HTG Nations, the necessary next stages of getting to 100 percent must include a combination of returning the land and the fulsome recognition of Indigenous jurisdiction rooted in collectively held title and place-based systems of law in relation to fee simple lands.

239 George West, Discussion Paper on Privately Owned Managed Forest Land in BC (1992) [unpublished].