

Legal Entanglements in Place:  
Hul'q'umi'num' law, provincial jurisdiction and the protection of *Hw'teshutsun*, a  
Hul'q'umi'num' cultural landscape

by

Jennifer Argan

Bachelor of Arts, University of Alberta, 2017

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## Abstract

In 2001, Cowichan Tribes successfully negotiated the protection of an important cultural landscape, preventing imminent logging and development through a treaty-related measures (TRM) agreement with British Columbia (BC), Canada and the Hul'qumi'num Treaty Group (HTG). This was the first land protection TRM in BC which protected 1700 hectares at *Hw'teshutsun*, located in the Cowichan Valley on southeast Vancouver Island, BC. The TRM followed the declaration of a "tribal preserve" by Cowichan Tribes (Cowichan Tribes, 2000a) and a ceremony between five Hul'qumi'num'-speaking communities to share, "protect, preserve and maintain Hw'te shutsun for the use and benefit of present and future generations" (Cowichan Tribes, Stz'uminus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe 2000). This protection TRM is notable as it is an exercise of provincial jurisdiction which attends to the cultural, rather than ecological, value of *Hw'teshutsun*: legislative actions undertaken through the TRM protect *Hw'teshutsun* in accordance with Hul'qumi'num' teachings. In effect, the TRM is an entanglement of Hul'qumi'num' and Canadian law which has resulted in the protection of an off-reserve Hul'qumi'num' cultural landscape – a green, forested area observable in satellite imagery amidst a territory that is over 85% privately owned and devastated by logging and urban development. In such a context, the work done by Cowichan Tribes leadership is a significant achievement, a successful assertion of their jurisdiction to protect a Hul'qumi'num' cultural landscape in accordance with their teachings.

This thesis documents the work done by Cowichan Tribes in asserting their authority and jurisdiction at *Hw'teshutsun* through both their own legal pathways and in relation to municipal, provincial and federal governments to prevent logging and the construction of a dump and a race car track. Teachings shared by Cowichan Elders and knowledge keepers about *Hw'teshutsun* stem from an intimate knowledge of "place" (for examples of intimate relationships with place, see

Basso 1996; Mohs 1994; Thom 2017; Charlton 2018; Thornton 2008), which is reflected in Hul'q'umi'num' law (Morales 2014; McLay et al. 2008; Morales and Thom 2020). Through extensive work by Cowichan Tribes leadership, teachings about the integrity of the landscape – particularly quiet and seclusion around places within *Hw'teshutsun* – shaped exercises of provincial jurisdiction, protecting a large area through rather than typical mitigation strategies that seek to shrink Indigenous peoples' relationships with the land to tiny, isolated sites. Understanding these legal entanglements opens possibilities for innovative governance that attends to Indigenous peoples' teachings of places and their enactments of their own laws shaping the governance of shared landscapes.

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\*\*\*

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## **Preface: A note on engaging with this thesis**

This thesis inquires into the protection of *Hw'teshutsun* by Cowichan Tribes in the late 1990s-early 2000s. While I initially set out to tell the story of how *Hw'teshutsun* was protected, this goal was expanded to ask broader (and more anthropological) questions raised by knowledgeable staff at Cowichan Tribes and the Hul'q'umi'num' Treaty Group (a process discussed further in the Chapter 1: Methods and Process). The main chapters of this thesis therefore address my two main questions: how did the protection of *Hw'teshutsun* reflect Hul'q'umi'num' teachings about the interconnectivity and importance of maintaining the integrity throughout the entire cultural landscape (Chapters 2 and 3) and how did Hul'q'umi'num' and provincial law become entangled through the Treaty Related Measures (TRM) agreement that prevented development through 1700 ha at *Hw'teshutsun* through an exercise of provincial jurisdiction (Chapters 3 and 4)? These main chapters were written with the intention of publishing them individually. A detailed description of the process of protecting *Hw'teshutsun* is provided in Appendix A. This appendix was written as a readable historical record to be shared with the Hul'q'umi'num' communities. Its inclusion in this thesis is as background data to support my anthropological inquiries in the main chapters. As such, I sought to avoid anthropological analysis in the appendix. Appendix B includes some documents of particular importance to this story and to my main points. They are intended solely as reference material.

The order in which a reader may choose to engage with this story will likely depend on their interests. Appendix A provides a linear description of the story of protecting *Hw'teshutsun* and may be a place to begin reading for a background in the historical facts. Starting with Chapters 2 and 3 would provide an introduction into some of the teachings enplaced at *Hw'teshutsun*, a backdrop upon which recent political and historical dimensions (Chapter 4 and Appendix A) may

then be understood. Should you actually wish to know something of *Hw'teshutsun*, you might visit the area first, taking care not to go too deep into the forest and to respect the quiet of the landscape and the people who come to this area. If your interest is in envisioning ways to protect cultural landscapes as Indigenous Protected and Conserved Areas (IPCAs), you might start by reading the introduction and conclusion to understand how I approach this potential throughout the thesis. Written stories allow the reader the flexibility to engage in a way meaningful to them, as each reader may have different background knowledge on the subject. The entire thesis seeks to bring together the above, and other, elements of some of the stories emplaced at *Hw'teshutsun*.

I have tried to highlight the words of Cowichan Elders and people knowledgeable about *Hw'teshutsun* throughout the thesis, including long quotes which hopefully maintain the flow, integrity and intentions of the speakers. Quite often, the speakers contextualize their own teachings with more knowledge and grace than I could. Connecting the words shared with me with the work of previous ethnographers, I hope to indicate that these teachings about the land and discussions about how to best care for cultural landscapes in colonial contexts are not new. While there may be a tendency within academia to reject the work of ethnographers such as Franz Boas and Wayne Suttles, within Indigenous communities these works are widely considered to contain useful historical information (a cursory look over any traditional use study will provide evidence of this). Certainly, Cowichan Elders are very aware of these lineages of dialogue and looking in archival records is not the only method of understanding and contextualizing ongoing issues. However, outsider researchers, such as myself, may be expected to have some knowledge of the oral histories and cultural practices of the people we are working with (see, for example, Thom 2005, 89<sup>1</sup>). Through reading old ethnographies, we may become more aware of threads of dialogue and

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<sup>1</sup> I have also had conversations where I was expected to know about particular Cowichan places, oral histories and spirit power.

interaction that have long been entangled, providing insight into concerns and teachings that are more broad than present day politics. While I focus on the words of Cowichan Elders and knowledgeable people I have spoken with and those contained within traditional use studies on *Hw'teshutsun* – teachings specific to place – I find it important to connect this story about *Hw'teshutsun* with earlier conversations on specific teachings about cultural landscapes and difficulties faced in protecting these important areas (such as Suttles 1981; Moss 1986; Mohs 1994; Glavin 1994).

As the intention for Appendix A was to construct the story of protecting *Hw'teshutsun* as a community-facing document, some quotes and historical details are included in both the Appendix and the main chapters. Themes and descriptions throughout the thesis may overlap and those temporarily set aside may be returned to. This repetition is not only practical, but useful in understanding the words of knowledgeable Cowichan people in different contexts. Some of the words and ideas shared with me took considerable time for me to unpack as they have huge significance in densely interwoven issues (for example, Lydia Hwitsum's words explaining the *Hw'teshutsun* protocol between the Hul'q'umi'num'-speaking communities). Bringing out these important ideas in numerous sections of this thesis emphasizes their multifaceted significance. It is a strength of anthropology to delve into these different contextual layers in which words are uttered and actions are undertaken. We may examine a particularly significant moment – such as the *Hw'teshutsun* ceremony and protocol – through multiple contextual lenses, giving attention to the various threads entangled (see Dussart and Poirier 2017; Borrows 2017) in that moment, what Clifford Geertz would call a “thick description” (1973, especially pages 9-10).

Moreover, these quotes and descriptions are part of a story, which take on particular meanings in particular contexts. Métis anthropologist Zoe Todd takes on conventions in academia

whereby one should not retell the same stories and what is worth publishing is what is new (2018, see especially page 62 footnote 2). In contrast, Todd turns to Leroy Little Bear's words: that "in Native ways, we always retell our stories, we repeat them. That's how they sink in and become embodied in students and in the people" (in Todd 2016, 62). Todd and Little Bear are speaking to a type of methodology which focuses on going deeply into a story, understanding its nuance and teachings in different lenses and contexts (see also historian Paige Raibmon's introduction in Paul 2014). The protection of *Hw'teshutsun* is a story entangled with Hul'q'umi'num' teachings about the landscape, about kinship between the communities and with Hul'q'umi'num' law. The teachings shared by knowledgeable Cowichan people such as Lydia Hwitsum, Tim Kulchyski or Jared Qwustenuxun Williams cannot be viewed from only one angle outside of the constellation of relations in which they are entangled and which they speak to. However, I certainly do not claim to fully understand the significance of what was shared with me nor have I attempted to delve into all the entangled layers to which they spoke.

What I hope to do throughout this thesis is emphasize that the teachings and stories about *Hw'teshutsun* can be understood – to an extent – within various social, political, historical and spiritual contexts. Analyzing the protection of *Hw'teshutsun* as, for example, a political struggle misses all of the teachings, actions and stories away from those political relations, which in any case are not solely confined to Indigenous-state relations. I hope that the ways in which I have positioned the powerful words of knowledgeable people does not constrain their meanings, which are not limited to the contexts in which I have used them.

This is one story that can be told about *Hw'teshutsun*; there are many more.

## Introduction:

In 2001, Cowichan Tribes, a Hul'q'umi'num'-speaking<sup>2</sup> First Nation whose territory extends across southeast Vancouver Island and the Gulf Islands of British Columbia, Canada, came to an agreement with the Government of British Columbia (BC) to protect 1700 hectares at *Hw'teshutsun*,<sup>3</sup> an off-reserve Cowichan cultural landscape, through a treaty-related measures agreement (TRM). This protection was driven by Cowichan Tribes leadership through multiple assertions of their jurisdiction and authority to their territory, including a traditional ceremony and protocol between five Hul'q'umi'num' communities<sup>4</sup> and the subsequent declaration of the area as a “tribal preserve” (Cowichan Tribes 2000a). These strategies resulted in the prevention of the construction of a dump, a motorsport racetrack and clear-cut logging at *Hw'teshutsun*. The TRM has at its center teachings shared by Cowichan Elders about the importance of quiet and seclusion for cultural practices at *Hw'teshutsun* which include hunting, harvesting berries and medicines and, importantly, *kw'aythut* – spiritual bathing in cold water to make oneself strong (Thom 2005, 152-9; Suttles 1981). This was the first land protection TRM in BC, an agreement to protect land

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<sup>2</sup> I use the spelling *Hul'q'umi'num'* when referring to the language and the communities which speak that language and who were part of the Hul'q'umi'num' protocol to protect *Hw'teshutsun* (Cowichan Tribes, Stz'uminus First Nation, Lyackson First Nation, Penelakut Tribe and Halalt First Nation). Today these communities are working together as the “Quw'utsun Nation” or “Cowichan Nation Alliance” as descendants of the historic Cowichan Nation. *Hul'qumi'num* is the spelling used when speaking about the Hul'qumi'num Treaty Group (HTG) which, at the time of protection, included the five communities involved in the protocol as well as Lake Cowichan, now called Ts'uubaa-asatx. Stz'uminus First Nation has since left the Treaty Group.

<sup>3</sup> Hul'q'umi'num' orthography has changed since the early 2000s. I use the standard Cowichan Hul'q'umi'num' orthography – *Hw'teshutsun* – unless quoting a historical document where the old orthography was used (*Hw'teshutsun*; *Hul'qumi'num*). Likewise, I use write the word *Hul'q'umi'num'* using the modern orthography, though in the past it was written *Hul'qumi'num* or *Hul'qumi'num*. In 20<sup>th</sup> century ethnography, these communities have often been called the Island Halkomelem which also includes Snuneymuxw First Nation, another Hul'q'umi'num'-speaking First Nation, not part of the Hul'qumi'num Treaty Group or the *Hw'teshutsun* protocol (for example, see Rozen 1985).

<sup>4</sup> As noted in a previous footnote, five Hul'q'umi'num'-speaking communities - Cowichan Tribes, Stz'uminus First Nation, Lyackson First Nation, Penelakut Tribe and Halalt First Nation – are currently working together as the “Quw'utsun Nation”, descendants of the historic Cowichan Nation. During the protection of *Hw'teshutsun*, these communities were working collaboratively as “Island Hul'q'umi'num'” communities, reflecting in the name of the Hul'qumi'num Treaty Group. I have chosen to refer to them as the Hul'q'umi'num' communities, though there are other Hul'q'umi'num'-speaking people, referring to the language of the time. However, this is not intended to prejudice any understandings of their nationhood and rights and title.

through an innovative application of provincial legislation aligned with Hul'q'umi'num' teachings, values and legal principles of and from the land. I argue that Cowichan Tribes' actions entangled Hul'q'umi'num' law with exercises of provincial jurisdiction at *Hw'teshutsun*, directing the province to act in accordance with Hul'q'umi'num' legal traditions. Through Cowichan Tribes leadership's use of the *nuts'a'maat* principle, they also employed Hul'q'umi'num' legal traditions outside provincial and federal legal and political structures, including the *Indian Act*. *Hw'teshutsun* provides a powerful example of how Indigenous law was employed to protect an Indigenous cultural landscape, a precursor to Indigenous Protected and Conserved Areas (IPCAs) which are heralded today as mechanisms to recognize Indigenous jurisdiction and to care for the land (Artelle et al. 2019a; Tran, Ban, and Bhattacharyya 2020; Zurba et al. 2019a).

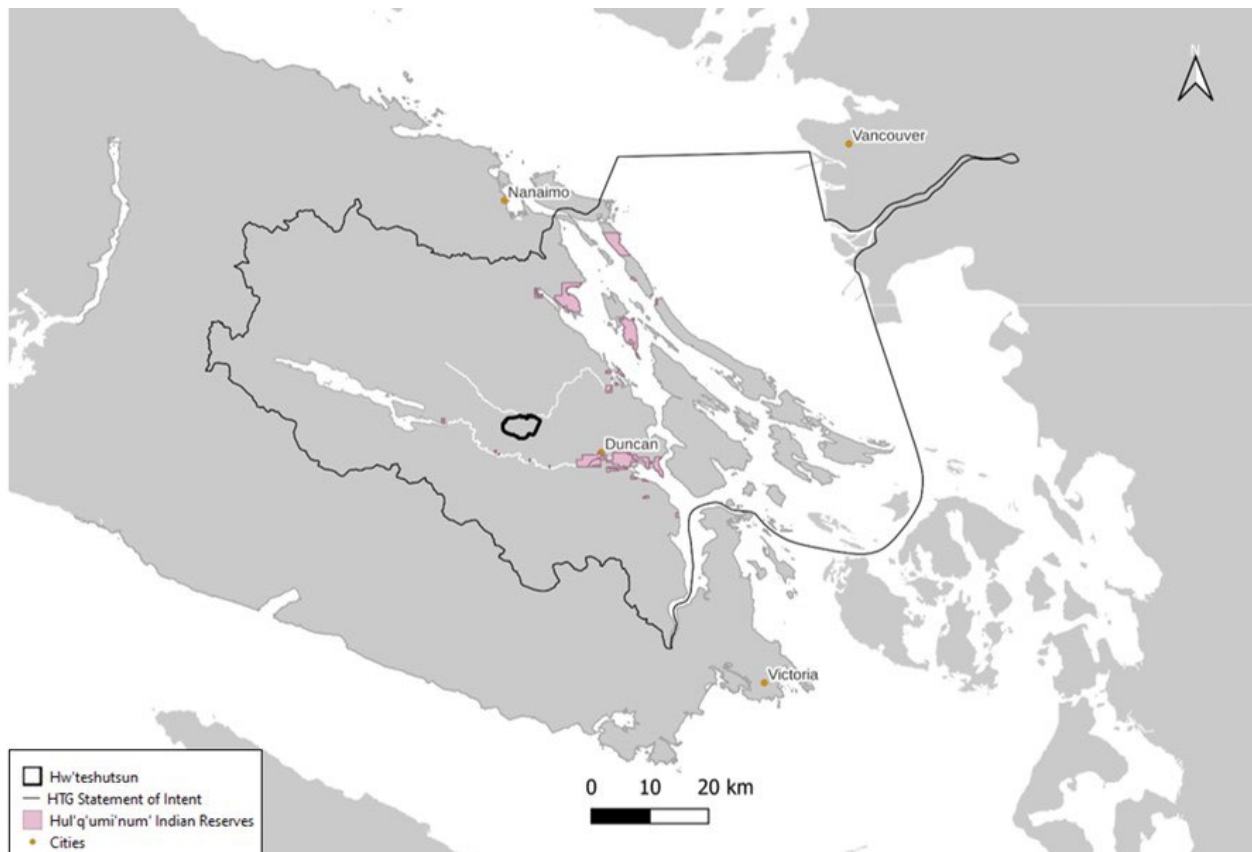


Figure 1: *Hw'teshutsun* is located in the Cowichan Valley on southeast Vancouver Island, BC within Hul'q'umi'num' traditional territory, as shown by the Hul'q'umi'num' Treaty Group's Statement of Intent area.

Land protection in settler colonial countries such as Canada tends to reflect the values and perspectives of non-indigenous society, such as ecological or heritage value, rather than the teachings and laws of Indigenous peoples (Ziff and Hope 2009; Artelle et al. 2019; ICE 2018). Indigenous cultural places are frequently destroyed in BC (Dianne Hinkley personal comm. Feb. 2021; Mohs 1994; McLay et al. 2008; Bannister and Nicholas 2014), particularly those without archaeological evidence of significance. While Indigenous nations<sup>5</sup> are exercising their authority and jurisdiction over their territories and within their communities, their actions are often constrained by state law (S. Morales and Thom 2020). In such a context, and in Hul'q'umi'num' territory where over 85% of the land is privately owned (R. Morales, Thom and Egan 2007), exercises of provincial jurisdiction that respected Hul'q'umi'num' teachings and values is noteworthy.

This research aims to tell the story of the protection of *Hw'teshutsun* by weaving together stories and teachings shared by Cowichan Elders, community members and government negotiators and archived documentation shared with me by provincial and municipal governments and Cowichan Tribes. I focus on questions and concerns raised by Cowichan community members: the importance of documenting and celebrating the successful protection of a cultural landscape, highlighting the importance of Hul'q'umi'num' teachings and law in land governance and examining entanglements between Indigenous law and provincial jurisdiction.

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<sup>5</sup> I use “Indigenous nation” to refer to Cowichan and other nations to recognize that their authority and relationships do not derive from the *Indian Act* but from their existence as self-determining nations. However, as Cowichan Tribes is a First Nation under the *Indian Act*, I refer to the band government as a First Nation because it was in that format that they negotiated with BC.

### *Hw'teshutsun* Overview Timeline

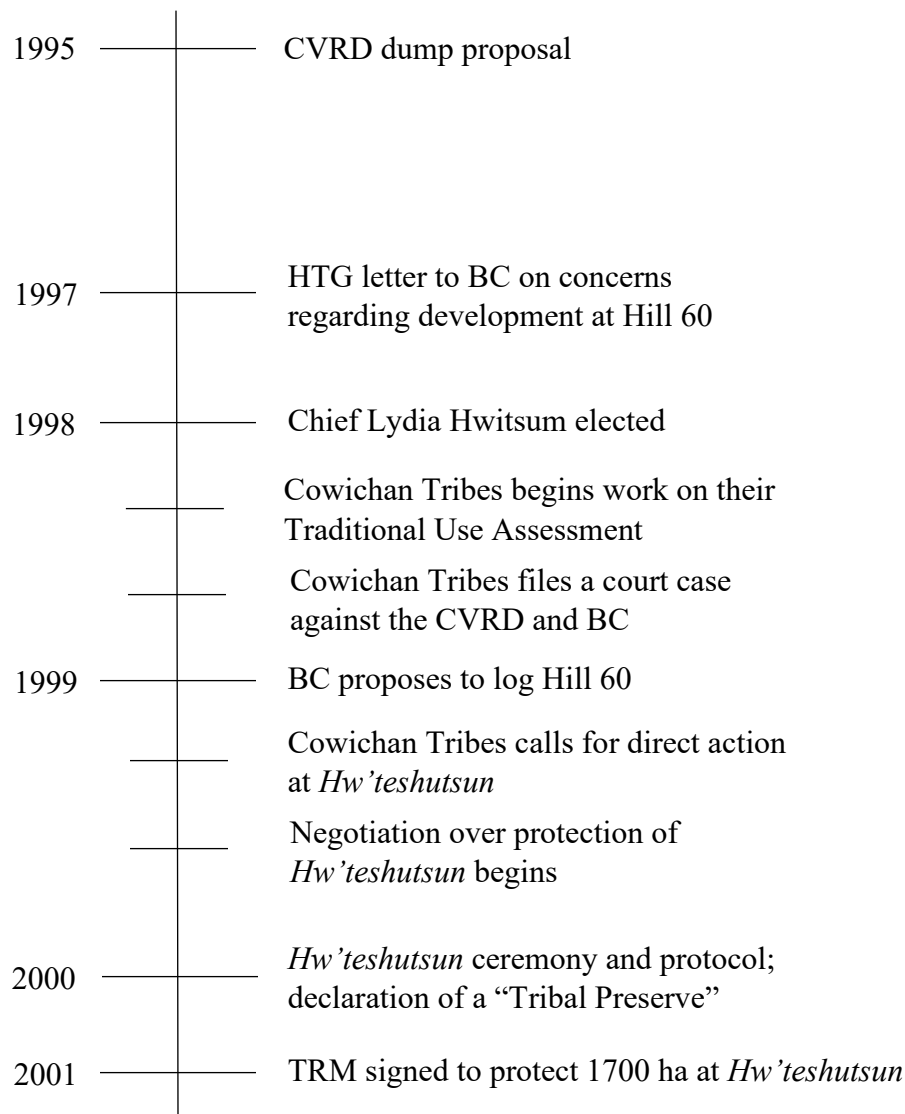


Figure 2: This timeline highlights some of the most significant moments throughout the protection of *Hw'teshutsun* which will be discussed in this thesis. Many details are not included in this timeline.

This story is a significant example of Cowichan self-determination in and of itself, but it may also hold relevance and provide possibilities for Cowichan and other Indigenous nations aiming to protect important cultural places – to care for these places and landscapes in accordance with their own teachings and laws. In recent years, critiques of conservation regimes that uphold *terra nullius*, displacing Indigenous peoples from their lands in the name of ecological

conservation, have extended beyond the academy and have caused conservation organizations, including ENGOs and governmental organizations such as Parks Canada, to rethink their relationships with Indigenous peoples (Artelle et al. 2019; Zurba et al. 2019; Langdon, Prosper, and Gagnon 2010; Dearden and Langdon 2009; Parks 2015). The Indigenous Protected and Conserved Areas (IPCAs) framework, developed in a 2018 report by an Indigenous Council of Experts (ICE) from across Canada, has been influential in reconfiguring land protection to reflect Indigenous governance (ICE 2018). As a member of the Conservation through Reconciliation Partnership (CRP)<sup>6</sup>, I have been part of discussions which have highlighted the need for Indigenous nations to learn from each other's experience creating IPCAs and asserting their jurisdiction through creative strategies beyond treaty negotiation or litigation that rely upon section 35 rights and title in the Canadian constitution. While *Hw'teshutsun* is not formally an IPCA – the framework was developed almost two decades after *Hw'teshutsun* was protected – it bears many of their hallmarks, namely centering Indigenous authority and law in land governance, leading to increased ecological wellbeing (ICE 2018). As *Hw'teshutsun* was declared a “tribal preserve” in an off-Reserve area where Cowichan title is not recognized by the Crown, it is, in many ways, a precursor to IPCAs.

In this introduction, I position *Hw'teshutsun* as an IPCA to consider the possibilities for land protection that this story offers, of particular relevance for Indigenous nations looking to protect land in semi-urban or largely privatized territories. Though IPCAs are just one strategy available for Indigenous nations, the flexibility of this framework with the intention of exercising Indigenous jurisdiction alongside the commitment by BC and Canadian governments to implement UNDRIP in 2019 and 2021 respectively provides a hopeful context in which Indigenous law and

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<sup>6</sup> I have received generous funding for my research through a SSHRC grant obtained by CRP.

land governance may be more widely recognized and respected. The example of *Hw'teshutsun* emphasizes the strong leadership of Cowichan Tribes in asserting their unextinguished rights, title and relationships with *Hw'teshutsun* and the flexibility of provincial legislation to be shaped by Indigenous law. I hope that the specifics of this story will provide insight for Cowichan and other nations seeking to protect important places and for the wellbeing of present and future generations.

***Motivation and research questions:***

The motivation for this research came from discussions that my supervisor, Dr. Brian Thom, has been part of during his work with the Hul'q'umi'num' communities over the past 25 years. These discussions revealed Cowichan community members' interest in documenting and celebrating the work done by Cowichan Tribes leadership to protect *Hw'teshutsun* in an innovative way that recognized and reflected the cultural significance of the area. This project also came from the understanding that the work of protecting cultural places is far from finished and requires urgent attention as devastation of Hul'q'umi'num' territories, and those of other Indigenous nations, continues in earnest. This story is a way to think through possible strategies for further protection of important Indigenous places and cultural landscapes. I do this through conceptualizing *Hw'teshutsun* as an IPCA and through highlighting the role of Hul'q'umi'num' legal processes and principles, such as *nuts'a'maat*, in the process of protection. Throughout this thesis, I have tried to center the perspectives and concerns of the people I spoke with and late Elders whose words I have read. Nevertheless, this thesis reflects my understanding of the protection of *Hw'teshutsun* and has been framed in ways that I see as relevant and useful.

The main goal of this research was to document how *Hw'teshutsun* was protected through interviews and archival research, an objective clearly expressed by Chief Lydia Hwitsum:<sup>7</sup>

This is a really important piece, the work I did for my peoples. To have us have this engagement, for you to be doing this work and have it captured in a way..., I feel honoured that that's happening. I kept saying to my son, "[Remember] all that work we did to make that happen. I should capture it because we are going to have to do more of that." And then we'd talk about it. So, I just wanted to say that that's why I'm making time. I think it's an important piece of work and a large expression of assertion for Cowichan people to have done this" (personal comm. Sept 2021).

Not only did Chief Hwitsum want to document this significant protection measure, she also noted that *Hw'teshutsun* is far from the only culturally significant area urgently requiring protection – in the sense that Hul'q'umi'num' values and teachings guide the governance of place. This thesis attempts to unravel some of the mechanics of protecting *Hw'teshutsun* and connects this protection measure with IPCAs as a possible framework for further protection of Indigenous places and cultural landscapes. In so doing, I have been able to pull out some of the ways in which Hul'q'umi'num' legal traditions were put to work to protect *Hw'teshutsun*.

In my initial meeting with staff in Cowichan Tribes' Lands Department in October 2020, concerns were again raised around the general lack of protection of cultural places in Hul'q'umi'num' territory and the lack of awareness within the Cowichan community about Cowichan Tribes' protection of *Hw'teshutsun*. For Tim Kulchyski, one of the key knowledge holders who shared his insight with me during this project, telling the story of protecting *Hw'teshutsun* and talking about the cultural values and teachings is an opportunity to consider "how we conduct ourselves in the [Cowichan] Valley" and throughout Hul'q'umi'num' territory (personal comm. June 4, 2021). This concern speaks broadly to the need for everyone living in

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<sup>7</sup> Chief Lydia Hwitsum was the Cowichan Chief during the protection of *Hw'teshutsun* and was again re-elected Chief of Cowichan Tribes in February 2022.

Hul'q'umi'num' territory to consider how we act in relation to the territory and how our actions can be guided by Hul'q'umi'num' teachings about places (see also McLay et al. 2008; Thom 2017). Telling stories about Hul'q'umi'num' cultural landscapes and places is one step in reconfiguring everyday actions of people living on Hul'q'umi'num' territories to bring them into greater accord with Hul'q'umi'num' teachings and law.

The importance of centering Hul'q'umi'num' teachings, law and legal principles in land protection was emphasized by HTG chief negotiator Robert Morales and with Chief Hwitsum. Robert noted the challenge of envisioning Indigenous self-determination in accordance with Hul'q'umi'num' teachings when Canadian law has been enforced throughout Hul'q'umi'num' territory for over 150 years:

Trying to revive and breathe life back into Indigenous laws and Indigenous legal orders is part of the work that is just evolving because it's been denied for so many centuries. It's been 200 or some odd years or more that Indigenous legal orders have not been acknowledged in a greater [societal] context. So internally it still exists, but it's been superseded by non-First Nations laws.

The protection of *Hw'teshutsun* stemmed from attention to the teachings, the *snuw'uyulh*, about the land and about how to conduct oneself on the land. These teachings are part of the Hul'q'umi'num' legal tradition and evidence of the continued importance/relevance of Hul'q'umi'num' law in people's daily lives. Cowichan Tribes' work to prevent development at *Hw'teshutsun* was an assertion of the teachings, a utilization of Hul'q'umi'num' law that shaped provincial legislation. Cowichan Tribes leadership employed the Hul'q'umi'num' principle of *nuts'a'maat* to guide the Hul'q'umi'num' communities to work together (Hwitsum personal comm. Sept. 2021). Hul'q'umi'num' legal traditions,<sup>8</sup> teachings and principles provide instruction

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<sup>8</sup> The terms "law", "legal tradition" and "legal order" will be discussed further in depth in Chapters 2 and 3. However, I will make a brief note of my usage here for clarity throughout. I have chosen to use the term "Indigenous legal traditions" to emphasize that all bodies of law are cultural and are rooted in a tradition (Borrows 2010). This term refers to the entire collection of teachings and values which underlie permissible behaviour. Napoleon (2007) has

not only on the work that needed to be done to care for *Hw'teshutsun*, and in doing so caring for the community, but also on *how* to engage, both between the Hul'q'umi'num' communities and in relationships with provincial and federal governments (see Morales 2017b). The story of *Hw'teshutsun* provides an example of how Indigenous principles were used to guide the engagement between Indigenous nations and government. The story about this protection can bring insight into how Hul'q'umi'num' legal traditions are employed and thus entangled with other land protection measures and other acts of self-determination.

From these discussions, the importance of celebrating Cowichan Tribes' successful protection of *Hw'teshutsun* and learning from this story to protect other Indigenous cultural landscapes through the use of Indigenous nations' legal traditions emerged. The focus of my thesis is on the legal entanglements between Hul'q'umi'num' and provincial law emplaced at *Hw'teshutsun*. I ask: *what might governance of Indigenous cultural landscapes in Canada look like when guided by Indigenous teachings, legal principles and law?* To answer this, I inquire into the teachings specific to *Hw'teshutsun* as a cultural landscape and ask how Cowichan Tribes leadership upheld these teachings throughout the protection of *Hw'teshutsun*.

Chapter 1 discusses *Hw'teshutsun* as a Hul'q'umi'num' cultural landscape, bringing out the teachings that the *Hw'teshutsun* area extends beyond specific sites, connecting places within a broader landscape. For the integrity of these spiritual places to remain, the landscape must be cared

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distinguished between Indigenous legal orders and state legal systems. This is not a distinction that I find fruitful in my discussion (see Ch. 4 discussion on legal entanglements which nuance a discussion of the relationship between Indigenous and colonial law). I also find that "legal tradition" is a more intuitive term than "legal order" for someone who is not a legal scholar to make sense of. I am aware of the hazards of using the word "tradition" and I am by no means asserting that a "tradition" is frozen in the past. Rather, Indigenous legal traditions are living practices whereby people today consciously draw upon teachings and principles, altering them as needed in contemporary life (see Borrows 2005, 175).

Laws are actions that emanate from a legal tradition (Morales 2018; Borrows 2010; Napoleon 2007). Legal traditions may change, but, along with their underlying teachings, change much more slowly than laws.

for in accordance with the teachings, or *snuw'uyulh*. Indigenous cultural landscapes are frequently destroyed where attempts at mitigation focus on archaeological evidence and constrained locales. Indigenous cultural landscapes must be cared for in accordance with the teachings and values emplaced within.

Chapter 2 explores the teachings and legal traditions emplaced at *Hw'teshutsun*, which drove the protection of *Hw'teshutsun*. It pays particular attention to the teachings around quiet and seclusion and the connection of *Stutsun*, one of the Hul'q'umi'num' First Ancestors, with *Hw'teshutsun*. These teachings form part of the legal tradition in which assertions of Hul'q'umi'num' law and authority at *Hw'teshutsun* are rooted. Through conversations with Cowichan knowledge keepers, this chapter also reveals how land alienation and other colonial impacts constrain Hul'q'umi'num' people's ability to live out their laws and teachings.

Chapter 3 focuses on legal entanglements at *Hw'teshutsun*, arguing that Hul'q'umi'num' legal traditions discussed in Chapter 2 and the Hul'q'umi'num' principle of *nuts'a'maat* shaped the exercise of provincial jurisdiction at *Hw'teshutsun* in accordance with Hul'q'umi'num' law. This chapter emphasizes the potential for Indigenous peoples to shape the exercises of provincial jurisdiction in creative ways in accordance with their Indigenous legal traditions. It further demonstrates the entanglements between Indigenous and Canadian law, where one legal system is never operating in isolation from the other. Understanding entanglements between Indigenous and Canadian law and how to shape land management in accordance with Indigenous legal traditions has been a central legal and governance concern for Indigenous nations creating IPCAs. Connecting *Hw'teshutsun* with work done to create IPCAs allows me to emphasize aspects of this story which may be useful to other Indigenous nations thinking through how to care for their cultural landscapes.

### *Hw'teshutsun as an early IPCA:*<sup>9</sup>

The Indigenous Protected and Conservation Areas framework is useful beyond the formalization of areas as IPCAs. This framework lays out a standard of how environmental NGOs (ENGOS) and provincial and federal bodies, particularly Parks Canada and provincial and territorial parks, should engage with Indigenous nations centering Indigenous law and governance and recognizing Indigenous nations' jurisdiction and self-determining authority (ICE 2018; Artelle et al. 2019; Tran, Ban, and Bhattacharyya 2020; Zurba et al. 2019). What ethical engagement looks like will be specific to each Indigenous nation, as each nation has their own teachings, values and legal traditions. The wide utilization of the IPCA framework, in conjunction with BC and Canada's UNDRIP legislations, has set a standard whereby colonial fortress conservation without strong engagement with Indigenous nations is unacceptable. Indigenous nations have initiated use of the IPCA framework and UNDRIP legislation as a strategy to assert their jurisdiction and authority within their territories (Simmons 2021; SC'IANEW 2022; Ktunaxa 2010).

This section will briefly elaborate on the issues of colonial conservation, which have been thoroughly discussed for decades, and the ways in which IPCAs address colonial power relations that dominate conservation work.<sup>10</sup> I consider *Hw'teshutsun* an IPCA to explore possibilities for IPCAs to address the protection of Indigenous cultural landscapes which do not have the ecological

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<sup>9</sup> Canada and the International Union for the Conservation of Nature (IUCN) regard a "protected area" as "a clearly defined geographical space recognized, dedicated and managed... to achieve the long-term conservation of nature with associated ecosystem services and other cultural values" (Zurba et al. 2019, 153). This understanding of a protected area is replete with dominant Western thought on the nature/culture divide and based on ecological conservation as the primary value and standard for protection.

When I refer to Indigenous protected areas, I mean areas where the state has legally recognized and supports Indigenous teachings and legal traditions in care for and governance of an area. This understanding follows the vision outlined in the ICE report (2018). I understand that this view falls into Coulthard's (2007; 2014) challenge to recognition politics where power remains in the hands of the state, yet in the current political environment, state recognition of Indigenous authority is usually required to prevent development and destruction of Indigenous lands.

<sup>10</sup> Though there is a lot of exciting work in Canada aided by commitments to UNDRIP and the ICE report, IPCAs and land protection led by Indigenous nations is not the norm, particularly in the protection of smaller cultural landscapes without obvious ecological significance.

allure of old-growth forests – *Hw'teshutsun* is a second-growth forest – and has an area which does not contribute greatly to Canada's conservation targets due to a relatively small geographical size (about 1700ha). Through this introductory framing, I call attention to questions about the practical role of Indigenous governance and law in IPCAs. Chapter 2 and 3 delve into how the protection of *Hw'teshutsun* was guided by Hul'q'umi'num' teachings and principles which can provide insight into questions asked by other IPCA researchers.

In 2018, the “We Rise Together” Report developed a framework for Indigenous Protected and Conserved Areas in Canada. The Indigenous Council of Experts (ICE) who authored the report was tasked with examining how Canada's conservation targets could be met through the development of Indigenous-led conservation and taking into account the Truth and Reconciliation Calls to Action (Zurba et al. 2019). Canada Target 1 of the “The 2020 Biodiversity Goals and Targets for Canada” states that: “by 2020, at least 17 percent of terrestrial areas and inland water, and 10 percent of coastal and marine areas, are conserved through networks of protected areas and other effective area-based conservation measures” (Canada, n.d.' Zurba *et al.* 2019, 152). This target has been increased to protect 25% of land and oceans claimed by Canada by 2025 (Canada 2021). Canada Target 1 is a national commitment to the Aichi Target 11 which was established by members of the Convention on Biological Diversity (CBD) in 2010 to which Canada is a signatory (Zurba et al. 2019). The Aichi Targets were a response to increasing worldwide environmental degradation and climate change. Aichi Targets 14 and 18 recognized the importance of working with Indigenous communities for ecological stewardship (CBD 2018; (Tran et al. 2020; Tran, Ban, and Bhattacharyya 2020).

IPCAs are a national response to these targets which center Indigenous jurisdiction and governance of their lands to care for the land (ICE 2018; Tran, Ban, and Bhattacharyya 2020;

Artelle et al. 2019; Tran et al. 2020; Zurba et al. 2019; Artelle et al. 2021; Moola and Roth 2019). The IPCA framework is “a tool for [Indigenous nations] to address ongoing limitations of state protected area governance and management, to better reflect the Nation’s Indigenous rights and responsibilities, and to preserve cultural heritage and biological diversity while fostering sustainable economic opportunities” (Tran et al. 2020, 922). The ICE report acknowledges the importance of the flexibility in this framework to attend to the concerns, priorities and values of the Indigenous nation creating the IPCA and to stem from the teachings and legal traditions of each nation (2018). The report calls for IPCAs to be created through ethical space, Cree Elder Willie Ermine’s framework for engagement between societies with different worldviews, epistemologies and value systems to co-create a working space that is intelligible to all and reflective of diverse understandings and values (2007). By centering Indigenous nations’ teachings, values and legal traditions, IPCAs are examples of land governance that entangle Canadian and Indigenous epistemologies and law.

IPCAs are in direct opposition to colonial fortress conservation which, historically and in ongoing ways, dispossess Indigenous peoples of their land through use of *terra nullius* and the Doctrine of Discovery to create areas for recreation and to uphold the value of pristine wilderness (Dearden and Langdon 2009; Zurba et al. 2019; Moola and Roth 2019; ICE 2018; Kurnick 2019; Cronon 1996; Spence 1999). Conservation regimes that emphasize the protection of “nature” through the separation of nature and culture have been extensively critiqued as they uphold the erroneous idea that humans are necessarily detrimental to their environments and fail to consider the relationships that Indigenous peoples hold with their lands (ICE 2018; Kurnick 2019; Mann 2006; Cronon 1996). In conjunction with UNDRIP and the Truth and Reconciliation Commission Calls to Action, critiques of colonial conservation have resulted in efforts by ENGOs and Canadian

government conservation bodies across Canada to engage with Indigenous nations in meaningful ways (Artelle et al. 2019; Zurba et al. 2019; Langdon, Prosper and Gagnon 2010; Dearden and Langdon 2009; Parks 2015; Government of Canada and Haida Nation 1993; Canada and Dehcho 2018). However, significantly more work needs to be done to reconfigure conservation and land protection in Canada to stem from Indigenous nations' authority and center their teachings, values and legal traditions and to engage on a government-to-government basis (Youdelis et al. 2020; Tran et al. 2020; Artelle et al. 2019). The protection of *Hw'teshutsun* provides a particularly relevant critique of ecological conservation, which holds biodiversity as the ultimate value in conservation, as *Hw'teshutsun* was protected because of its cultural value though the protection measure has ancillary ecological benefits. Indigenous teachings and legal traditions were forefront in the protection of *Hw'teshutsun* almost twenty years before the IPCA framework was established and remains an innovative example of what land protection can encompass.

As a student member of the Conservation through Reconciliation Partnership (CRP) over the past three years, a research group which works to support Indigenous self-determination via the creation of IPCAs, I have had the opportunity to learn from researchers and professionals, Indigenous and non-Indigenous, across Canada. Through their work with Indigenous communities, many members of CRP highlighted the need for examples of IPCAs including the legal and governance mechanisms around their protection and ongoing management. Such examples may provide possibilities and instruction on ways in which federal, provincial, territorial, municipal and Indigenous governance systems are entangled and how Indigenous nations can more effectively align the governance of protected areas with their teachings, values and priorities.

While *Hw'teshutsun* is not an IPCA and was protected over 15 years before the framework was developed, it bears many hallmarks of an IPCA. In their review of IPCAs, Tran, Ban and

Bhattacharyya consider an IPCA any area where “Indigenous Peoples have asserted a leading role in decision-making (governance), establishment, and/or management that demonstrates their rights and responsibilities in the area” to which they have a strong cultural connection and where environmental well-being is facilitated regardless of whether that is an explicit goal (2019, 2). This inclusive description centers the importance of Indigenous peoples’ governance of their lands and allows for places such as *Hw’teshutsun* to provide possibilities for what IPCAs can look like and achieve.

While research on IPCAs often highlights vast landscapes, the story of *Hw’teshutsun* demonstrates the applicability of this framework in upholding Indigenous jurisdiction of cultural landscapes that do not contribute greatly to Canada’s area-based conservation targets. As a relatively small area compared with well-known IPCAs such as Thaidene Nëné National Park Reserve (>26 000 km<sup>2</sup>) or Edézhíe National Wildlife Area (14 218 km<sup>2</sup>), both in the Northwest Territories, *Hw’teshutsun* (17 km<sup>2</sup>) does not contribute greatly to Canada’s conservation target land mass. However, in urban and semi-urban landscapes marked by massive development, industrial use and private property – including the majority of Hul’q’umi’num’ territory – large-scale land protection is next to impossible. Similarly to *Hw’teshutsun*, SC’IANEW First Nation is currently researching the possibility of a 136 ha IPCA at Mary Hill on southern Vancouver Island to reclaim an area within their territory, also heavily marked by urban development. Partnering with a land trust, a local college and the municipality provides the potential opportunity for this important cultural area to be included in treaty settlement land (Te’mexw Treaty Association 2022). As a federally recognized framework, IPCAs have the flexibility to provide innovative solutions. Mary Hill is just one such example where the need for small-scale application of IPCAs may be useful for Indigenous nations aiming to care for and assert their jurisdiction to cultural

places. The protection of *Hw'teshutsun* may provide some insight in these situations in terms of the legislative pathways used and the ways in which Hul'q'umi'num' teachings were brought forward and legal traditions were enacted.

*Hw'teshutsun* also provides a notable example of ancillary ecological benefits though the impetus for preventing development were the teachings and cultural activities embedded within the area. As a second growth forest, *Hw'teshutsun* does not have the ecological allure of old-growth forests. However, as shown in Chapter 2, the forest stands out as a lush green zone against intensive industrial timber harvesting throughout the Cowichan Valley. It is important elk habitat amidst widespread ecological degradation (Larry George, personal comm. Jan. 2021). Care for culturally significant areas often entails enhancing the ecological well-being of the area, though as a previously logged area without the allure of an old-growth forest, biological and ecological indicators may not have highlighted *Hw'teshutsun* as an area worthy of environmental protection.

By framing *Hw'teshutsun* as an IPCA, I hope to forward the use of IPCAs as a tool to demand that Canadian governments at every level uphold and respect Indigenous peoples' teachings, laws and authority in the management or care for cultural landscapes even when those areas do not contribute greatly to Canada's conservation targets. Innovative tools are needed to protect cultural places in a wide variety of contexts as colonial power casts a shadow over the enactment of Indigenous peoples' teachings and legal traditions (Morales and Thom 2020). As demonstrated through this thesis, the protection of Indigenous cultural landscapes may be directed by Indigenous nations, but often involves engagement with Canadian governments. The protection of *Hw'teshutsun* reveals the ability of Indigenous nations to enact their laws to shape exercises of provincial (or federal) jurisdiction, thus bringing their legal traditions to bear on the management

and care for their cultural landscapes. I hope that this story about *Hw'teshutsun* will support future enactments of Indigenous self-determination to protect their cultural landscapes.

## **Chapter 1: Methods and process**

### ***Overview:***

For this research project, I conducted semi-structured interviews, reviewed archived documents and spent time on the land during several trips to *Hw'teshutsun* between December 2020 and January 2022. This project documents the process of protecting *Hw'teshutsun* from 1997-2001 which I was not witness to but which my supervisor, Dr. Brian Thom, participated in through his work with the Hul'qumi'num Treaty Group (HTG). Brian was able to introduce me to key people for me to work with at HTG and Cowichan Tribes, recommend people for me to interview, suggest pathways for archival research and guide me through an understanding of the events. I interviewed and had conversations with Cowichan Elders, community members, Cowichan Tribes staff and provincial negotiators. All but one of these interviews were virtual, due to COVID-19 restrictions. Documents and correspondence were shared with me by Cowichan Tribes, including their 1998 TUA, and were also obtained through Freedom of Information (FOI) requests to the Government of BC (BC) and the Cowichan Valley Regional District (CVRD). I went to *Hw'teshutsun* several times by myself and with friends throughout this period, and met Tim Kulchyski there in June 2021.

I had been hoping to move to Duncan in the summer of 2020 and find a community project to work on to build relationships with Cowichan people. This would have involved observant participation (Campbell and Lassiter 2015) as a method – learning through reflective participation in community life. However, this was the first summer of the COVID-19 pandemic. Safety recommendations changed frequently, concerns about disease transmission were extreme and obtaining permission to do in-person research through the university ethics board seemed next to impossible. At this point, the possibilities for in-person research were very limited which was

reasonable as Indigenous communities, including Cowichan Tribes, have vulnerable populations. After many revisions, I received permission from the University of Victoria Human Research Ethics Board to meet with one person face to face outdoors meeting safety requirements for masking and physical distance. While I am sure my research would have benefitted from more in-person meetings, particularly meeting with people on the land, everyone was doing the best to stay safe we could in such circumstances and online conversations I had were still highly informative.

***Getting started:***

Early in 2020, my supervisor Brian and I met with Robert Morales, Chief Negotiator of the Hul'qumi'num Treaty Group (HTG), Rosanne Daniels, Executive Assistant, and a few other staff from HTG three times to present our research idea and to ask for feedback and advice on how to proceed with this project. These meetings, along with my initial meeting with staff from the Cowichan Tribes Lands Department, were instrumental in developing my research questions and guiding the focus of my research. The use of emergent design was key in my research as it allows flexibility in the research design and questions throughout the research process to reflect the perspectives and questions of the people I was working with (Campbell and Lassiter 2015, 32). I emailed a formal research proposal request to the General Manager of Cowichan Tribes which was approved in October 2020. I was then directed to work with the Cowichan Tribes Lulumexun Lands and Self-Governance Department as my primary interest in this research was on the protection of cultural places and the manager and staff in the Lands Department were familiar with *Hw'teshutsun*. Brian and I met virtually with several members of the Lands Department in November 2020 who shared insight into the significance of this project and the connections between the protection of *Hw'teshutsun* and difficulties they are currently facing in protecting

other cultural places. I have done my best to emphasize the themes of my initial meetings with Cowichan Tribes and HTG throughout this thesis as these conversations highlighted key concerns for the community.

In those initial meetings, I did very little of the talking and did not fully understand the significance of what was discussed. In every meeting I was a part of and interview I conducted, I was very aware that, though I read voraciously, I lacked a clear grasp of the practical context of the protection of *Hw'teshutsun* and the experiences of the people who care about this place. The people I spoke with were clearly the experts, sharing insight with me so that I could piece together this story in a way that was comprehensible for the Cowichan community. These experiences caused me to question and nuance my understanding of anthropological discussions of power dynamics between researchers and the people we work with (which I would later rethink again as I was coding and writing) (see Kovach 2010). As is the case for any student researcher, I questioned my ability to adequately convey the significance and the depth of knowledge and experience that was shared with me. The guidance of my supervisor, a long-time researcher and former negotiator for the Hul'q'umi'num' communities, was essential in building my understanding of these issues and drawing my attention to the key themes and teachings shared with me by Cowichan Elders and knowledge keepers.

Prior to starting my master's degree, I had no relationships with Cowichan people. My ability to do this research was possible because of my connections with Brian and Sarah, my thesis committee. Brian has worked with the Hul'q'umi'num' communities for over 25 years. Sarah is a Cowichan law professor who has done extensive work in her community. Having been deeply embedded in the discussions and concerns that my research was a part of, their direction and guidance has been essential. Throughout my research, I introduced myself as a student of Brian

and Sarah. I felt as though these connections helped people to locate me in their own networks of relationships to see who I am accountable to. Some people who I interviewed commented on their work with my supervisor and committee member. Those connections were the foundation for any trust in me, an outside researcher from a discipline and a society that has an extensive history of harm towards Indigenous communities. That harm is perpetuated when research is not returned to the community.<sup>11</sup> I took this accountability towards Brian and Sarah seriously, and as I learned from Cowichan people who were so willing to share stories and teachings about *Hw'teshutsun*, I felt an increasing responsibility to the people who have shared with me to do this research well.

### ***Interviews and archival research:***

In my initial meeting with the Cowichan Lands Department, several Elders, knowledge keepers, and present and former Cowichan Tribes staff were identified as people knowledgeable about the protection of *Hw'teshutsun*. These people were contacted first by Cowichan Tribes staff to see if they were interested in speaking with me, and then I was put in contact with them. Through this pathway, I spoke with Ernie Elliott, who has been deeply involved in Cowichan Tribes governance for decades, another Cowichan member who asked not to be named and former (and present) Cowichan Chief Lydia Hwitsum who led actions to protect *Hw'teshutsun* whom I spoke with twice. I had hoped to speak with the late Ruby Peter, a highly respected Cowichan Elder with vast knowledge of protecting Cowichan places, who became sick and passed away before I was able to meet her. I was able to speak individually with Robert Morales, Larry George, Dianne Hinkley, and Tim Kulchyski, the latter three of whom work in the Lands Department at Cowichan

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<sup>11</sup> Throughout my research I asked several people at Cowichan Tribes about ways to disseminate this research to the community. Those conversations and that project are ongoing. Transcripts are being returned to interviewees and a complete compilation of the transcripts and the results of the FOI requests will be deposited with Cowichan Tribes and HTG.

Tribes and whom had been at my research initial meeting. I spoke with Tim once over the phone and met him once at *Hw'teshutsun*.

I also contacted Jared Qwustenuxun Williams, a Cowichan knowledge keeper and chef, who had written some articles for *The Discourse* discussing topics similar to my research interests and was in the press for his involvement in the continued protection of *Hw'teshutsun* in 2019 responding to proposals about expanding the nearby noise park. Brian introduced me to Jared through about another project I was working on mapping monumental boulders in Coast Salish oral histories. Jared and I met to talk about the maps, rocks, stories and to discuss *Hw'teshutsun*. Brian also put me in contact with his former colleague Robert Leece, a provincial negotiator who worked on *Hw'teshutsun* negotiations and in negotiations with HTG for many years. I was able to speak with Robert and Doug Caul, one of the key provincial chief negotiators in the protection of *Hw'teshutsun*.

At this point, I have not been able to speak with Luschiim, a knowledgeable Cowichan Elder who was instrumental in the protection of *Hw'teshutsun*. However, at the same time as my research, Brian and Sarah were doing their own fieldwork on cultural landscapes and Indigenous legal orders. They shared with me two short audio recordings from April 2021 where Luschiim recalled the work of preventing development at *Hw'teshutsun*. Luschiim was deeply involved in the protection of *Hw'teshutsun* and his recollections and teachings are provided an important perspective on this work. As Brian and Sarah were working under an ethical protocol that encouraged the dissemination of their research with credit, parts of these conversations have been included in this thesis.

I interviewed ten people, a few of whom I spoke with multiple times. Most of these were semi-structured interviews. I wrote out questions or key ideas to discuss that emerged from the

key themes of this project in early conversations with Cowichan Tribes and HTG and changed shape as my understanding of the protection of *Hw'teshutsun* and surrounding issues grew. Sometimes I did ask all the questions I had written out, other times I asked none of them but we conversed about the key ideas I was interested in. In a few conversations, we talked about teachings and events that I was previously unaware of and I tried to make my way through a conversation that I did not understand, thinking that I would make sense of it later. I recorded as many of these conversations as I could; Tim and Lydia each called me on my phone unexpectedly which I was not able to record, though I rapidly took notes through those conversations. I was able to record other conversations with both of them. I took a few notes during all of these conversations and wrote out thoughts, reflections and key ideas that emerged from the conversation afterwards. I transcribed these conversations and sent them to the respective people I had spoken with, asking if they had any concerns or would like parts of the transcription deleted. I made a few minor adjustments accordingly.

In some of the earlier interviews in particular, I think I failed to be as clear about my project and questions as I could have been. We began by briefly going over a consent form, which I had sent most people prior to our meeting, and I gave a short description of the project and my interests in talking to that specific person. Some people immediately started talking without much direction while others waited for me to ask specific questions. I could have more clearly directed people when the conversation strayed from *Hw'teshutsun* or other Cowichan places but in my desire to be open to whatever people wanted to talk about (Cruikshank 2005; 1998; Campbell and Lassiter 2015), I perhaps misjudged my role in directing the conversation.

I then began qualitatively coding the transcripts for common themes. I quickly created over 150 codes, far too many to be useful. I coded and re-coded as I read over the transcripts again and

looked back at my notes identifying my key themes. This turned into coding for block quotes to pull into chapters and I ended up with about 15-20 main codes.

I also sorted through thousands of pages of documents shared by Cowichan Tribes and obtained through provincial and municipal Freedom of Information (FOI) requests. I placed these requests in November 2020 and December 2020, respectively. After my initial meeting with the Cowichan Tribes Lands Department, I included in my FOI requests a letter from Cowichan Tribes stating their request that the government share with me any documentation related to *Hw'teshutsun*. This was an important piece of my request as the government could have easily denied my requests reasoning that they were protecting the First Nation with whom they are in ongoing negotiations (see Province of British Columbia FIPPA). After much consultation with BC and narrowing of my request, I received results of these requests between May 2021 and January 2022 from both the CVRD and BC. The CVRD sent me over 300 pages of documents while BC sent me around 3000 pages. Some of this information has been redacted for personal privacy reasons (s.22 of FOIPPA) or concern that the disclosure of information could harm heritage sites (s.18 FOIPPA).

Information shared by the province and the municipality includes, but is not limited to, reports, presentations, pamphlets, internal and external correspondence (emails and letters), press releases, personal notes and a Writ of Summons and Statement of Claim for Cowichan Tribes' court case against the CVRD and BC regarding construction of the dump. In addition to these documents, Cowichan Tribes shared some of their records with me, including, but not limited to their Traditional Use Assessment of *Hw'teshutsun* (1998), reports, correspondence with lawyers and the province and a copy of the *Hw'teshutsun* Protocol signed between the five Hul'q'umi'num' communities (which was not amongst the files shared by Cowichan Tribes but was located by

Brian Thom). Documents shared by all these bodies were essential records for understanding the details and mechanics of the process of protection, the language used in the agreements and some surrounding context of these events. These documents also contained useful maps, information that I redigitized and combined into the maps included in this thesis using Google Earth and QGIS.

As I coded the interviews and wrote my thesis, temporally and spatially distanced from “fieldwork” (Raibmon 2014, 11-12; Ingold 2014), I sometimes struggled to maintain a sense of the questions and perspectives shared with me which had become somewhat abstracted in this distance. When I began to get too theoretical, Brian asked me what I thought the significance of this project was. Every time I reread the transcripts of the interviews I conducted and notes from meetings with Cowichan Tribes or HTG, whenever I went to *Hw’teshutsun*, it was clear that the importance of this thesis is the story of the people and place. Sometimes I read and watched Jared Qwustenuxun Williams’ public posts and videos on Facebook about Cowichan places, Hul’q’umi’num’ words, stories and teachings from his daily life. All of these were useful reminders of the social, political and historical context in which I am writing and the questions I pose which are specifically in relation to *Hw’teshutsun*.

***Being in place:***

I made seven trips to *Hw’teshutsun* with my sisters, friends, by myself and once with Tim. Usually this meant walking around in the forest for a few hours, perhaps following barely visible paths trodden by humans or an old logging road but more often making our own path into the forest without a destination. Sometimes my companions and I looked for lithics in the knotted roots of fallen trees, stopped to sit in silence on a hillock or named the plants we passed by. Other than when I met with Tim, these experiences do not explicitly feature in the main chapters of my

thesis. However, they were an essential way of grounding this work and of growing in my understanding of the teachings and cultural significance of *Hw'teshutsun*. Being in place is essential to learning of and from a place (see for example Basso 1996; Simpson 2017; Budhwa and McCreary 2013; Thornton 2008; Thom 2005). Stories of and relationships with places come alive in particular ways in these places and are not well abstracted away from their locales (Charlton 2018). The quiet at *Hw'teshutsun* worked on me; I often felt jolted back into an uncomfortably loud and fast world once I emerged from a few hours walking and sitting in the forest onto the highway. This section points out a few key observations from my trips there which deepened my understanding of *Hw'teshutsun* as a cultural landscape beyond an intellectual level. I made jottings while at *Hw'teshutsun* and wrote up detailed field notes when I got home which I have referred to when writing this section.

Evident in Google Earth imagery, the boundaries of the protected area are also very distinctive on the ground. Approaching from the north side, a logging road runs parallel to the protected area at the bottom of a steep hill. A belt of blackberries, broom, rose bushes and a few nettles separates the road from the trees, marking the beginning of the protected 1700ha. From the south side, from which I've approached more often, I've parked just off the Cowichan Valley highway, walked about 1km up the hill through an active logging area where a few arbutus trees remain standing surrounded by young conifers and slash piles. This obvious boundary is an interesting demarcation of a cultural landscape made visible to outsiders through effects of legal decisions on the ground. These boundaries indicate that there is something different between the forest that has been allowed to grow and the clearcut area surrounding it.

There is no path when the steep logging road ends, but, on the south side, thickets of salal and other bushes extend for about 50m before you enter the forest. Stepping into the trees, the

quiet is immediately noticeable (unless a helicopter or plane is overhead). The sonic qualities described by Elders throughout their work to protect *Hw'teshutsun* are evident not far into the forest. Little marshy areas fill with water during the winter and spring and dry up by the end of the summer. There are many hillocks and not much flat ground, likely difficult for Elders to walk through. I've found it easier to walk through the forest in the winter than spring or summer when the salal sometimes grows so thickly it obscures places to find footing. The snow weighs down the bushes making them easier to step on and marks a trail so I can trace my way back. Once, when all the batteries I had brought for the GPS failed to work and there was no snow to mark the way my two younger sisters and I had come from, we walked slowly, mentally any marking distinctive trees, ponds or boulders to guide us back to the road.

I always stayed near the edges of the forest, partly because I didn't want to get lost, but also because I felt a bit uncomfortable "exploring" the area without guidance. I didn't get the impression that a few people trudging around the edges of *Hw'teshutsun* were likely to cause much harm, particularly in comparison to people who can frequently be seen quadding there or who leave garbage from forest parties behind, such as two plastic swimming pools adjacent to an old logging road a little way into the forest. However, it was clear from discussions and interviews I had had that bathing pools in particular should not be visited by outsiders.<sup>12</sup> I had no interest in going to any specific places that I might have been able to identify given the knowledge that had been shared with me of the area. It was clear that these places must be left alone by outsiders.

On these trips, I visited some other places to help orient myself in reference to some other important Hul'q'umi'num' places. Simultaneously to my thesis research, I was working as a

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<sup>12</sup> Thom 2005 quotes Cowichan Elder Angus Smith telling how he brought a government official to one of the creeks during Hill 60 negotiations (2005, 161). I don't know if there is a protocol about going to the creeks, but I wasn't able to go with anyone due to UVic's COVID-19 restrictions.

research assistant mapping monumental boulders in archived Coast Salish oral histories. This meant I had spent many hours pouring over literature and maps, trying to locate rocks and a few other places mentioned in these stories on Google Earth. I had read stories about many Hul'q'umi'num' places, but I had spent little time on the land in these places. When at or going to *Hw'teshutsun*, I often found I could not orient myself in reference to landmarks I felt I should know, like *Swuq'us*, Mt. Tzouhalem (*Pi'paam*) or Cowichan Bay. After going to *Hw'teshutsun*, I went to see the rocks at Saltair, Octopus Point and Paddy's Milestone thrown by the giant *Smakw'uts*. I did not end up actually seeing the latter two which are on private property (though Tim suggested afterwards that I ask the property owners if I could walk over to the rocks). I went to Cowichan Bay, mainly to get snacks from the bakery, walked along the *Quw'utsun Stalo* (Cowichan River), where I did previously know some of the good swimming places, and to *Swuq'us*, the mountain where one of the Hul'q'umi'num' First Ancestors fell from the sky (Marshall 1999). Going to these places was a way of beginning to orient myself in Cowichan territory, part of an experiential understanding of how *Hw'teshutsun* is not an isolated area but is known in relation to other places.

Cowichan territory has of course been heavily impacted by colonial relations through urban and industrial development and private property. Sections of the Cowichan River, one of the “arteries of our community” (Ernie Elliott personal comm. Dec. 2020), were blasted in the late 19<sup>th</sup>-early 20<sup>th</sup> century to facilitate log driving (Pike et al. 2017). Mt. Tzouhalem has become an affluent housing development and an area for hikers and mountain bikers, preventing Cowichan people's ability to hunt there (Tim personal comm. June 2021). Logging has devastated a large portion of Cowichan territory from the valley to the mountain tops, resulting in significant changes in the ecosystem since contact, including increased flooding. Learning about Cowichan places

involves seeing and experiencing how Cowichan people's stories and lives are entangled with ongoing impacts of colonial land grabs (Morales, Thom, and Egan 2007) and with the stories and lives of non-indigenous people living on Cowichan territories today. These places exist in relation to the political, social and historical conditions of Canadian society as well as through Cowichan people's perspective and relationships. Centering Cowichan teachings in land governance necessitates an understanding of the reality of these constraints. When I go to *Hw'teshutsun*, it is essential for me to see the recent clear cuts surrounding *Hw'teshutsun*, the man throwing wood scraps into his truck, people rumbling around old logging roads on ATVs and the broom blooming on throughout the valley. These are part of the context in which *Hw'teshutsun* exists today, not as isolated cultural place that will one day be treaty settlement land. *Hw'teshutsun* is experienced as a cultural area within the context of an extensive land grab (Morales, Thom and Egan 2007), development and inadequate engagement by colonial governments and private property owners with Hul'q'umi'num' people and their teachings of the land are evident throughout Hul'q'umi'num' territory. Being in place allowed me a glimpse of those entangled relations on the ground and was an important aspect of the research which was largely confined to my computer.

***Limited participation and collaboration:***

Participant observation is a staple ethnographic method where the ethnographer participates in daily life of the people they work with to understand how people live and generate meaning (Campbell and Lassiter 2015, 56-9). Recently in anthropology, the term has been flipped to observant participation, emphasizing the subjectivity and necessary reflexivity of the ethnographer (Campbell and Lassiter 2015, 64-5). This change in terminology explicitly foregrounds that the ethnographer's interpretation of the events they participated in have been

influenced by their own subjectivity (Campbell and Lassiter 2015, 64-5). I did not use the method of observant participation in my research as I was not witness to the protection of *Hw'teshutsun* 20 years ago and because COVID-19 restrictions while I was doing research prevented in-person interactions. Observant participation would have helped me to better understand the protection of *Hw'teshutsun* in reference to contemporary discussions and concerns specific to Cowichan Tribes. Spending more time in the community building relationships with people involved in this work would have facilitated more collaborative research. However, my supervisor has been deeply engaged in research, including observant participation, with Hul'q'umi'num' communities for over two decades. Insight that he shared with me throughout this project guided my research focus, demonstrative of how ethnographic insight can transcend an individual.

Being an observant participant does not stop when I am not formally “doing research”. Other work that I have been involved in over the past three years has also provided some opportunities for observant participation and has influenced how I have understood the issues, teachings and stories that I write about in this thesis. My thoughts and writing have been shaped not only by conversations and readings done under the heading “research”, but also through being an observant participant in my life. What could be called observant participation, though not directly related to this project, has included participating in a university course working with Cowichan Tribes to learn about and develop educational material about *Ye'yumnuts*, another Cowichan cultural landscape that has been protected. In 2019-2020, volunteered as an Educational Assistant at the WSÁNEĆ<sup>13</sup> ŁÁU, WELNEW Tribal School where I participated in daily morning protocol and had my patience tested by teenagers. I have spent some time over the past few months

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<sup>13</sup> As I live in Victoria, I have spent more time learning from and getting to know WSÁNEĆ people than Cowichan people. Both of these nations are Coast Salish peoples, a broad anthropological category based on similar languages, culture and social ties (Miller 2007).

helping to remove ivy from a forest on Tseycum reserve with W̱SÁNEĆ and non-indigenous people. Like many other people in Canada, I have witnessed Indigenous leaders speaking at ceremonies and participated in events organized by Indigenous people. I have sat at ŁÁU, WELNEW, the mountain to which W̱SÁNEĆ canoes were tied during the flood, contemplating the story of XÁLS throwing people into the water to create the Gulf Islands – TETÁĆES, relatives of the deep (Saanich Indian School Board 2008, 176; Claxton 2015, 43-4).

None of these are particularly unique experiences but they were times where I practiced being an observant participant. These are experiences where I have reflected on what has been shared with me about how to be a more responsible and respectful person living on W̱SÁNEĆ and Lekwungen land. The informal experiences – hanging out with W̱SÁNEĆ youth and pulling ivy at Tseycum – have been especially instructive. It is in these moments where the academic literature takes a backseat to the real-life interactions that the literature is supposed to situate and illuminate, where real life makes a mess of theoretical distinctions and where relationships are actually built.

While these experiences, and many others, are not directly related to *Hw'teshutsun* and thus do not appear in this thesis, these have been learning experiences and opportunities to build relationships with people and with the land. Observant participation is not a bracketed experience; it is not something that you are either doing – research – or not doing – regular life. It is a way of being in the world where you are constantly reflecting upon your relationships, knowledge and responsibilities. This is particularly true when the broader subject that my research is situated within is about relationships between Indigenous and non-indigenous people in places and responsibilities within those relationships. There is not a moment when those relationships cease to exist, when my role as a reflexive participant stops, when I am “out of the field” because I am always living on Indigenous peoples’ land.

However, reflection is not a stand-in for collaborative work or observation participation in the community I am working with on the project. My lack of observant participation in the Cowichan Valley is a limitation of this research. Observant participation would have provided a much deeper understanding of the issues around protecting Cowichan places and cultural landscapes and richer contextual writing. Other experiences, some of which have been noted above, have provided adjacent learning opportunities which have influenced how I have understood this story, particularly those experiences that have made a mess of theoretical frameworks and tidy arguments in articles I have read. While spending more time in the Cowichan community would have strengthened this thesis, the wealth of information shared with me through interviews and archival records had provided plenty of details about the protection of *Hw'teshutsun*. Despite these limitations, I feel that I have enough context to pull together the stories, teachings and perspectives shared with me by knowledgeable *Quw'utsun mustimuhw* about the protection of *Hw'teshutsun*.

Living in Duncan as an observant participant would have also provided an opportunity to build relationships with Cowichan people and to have worked more collaboratively. Throughout my research, I was concerned about the balance of my collaboration with members of Cowichan Tribes in the research design and in receiving feedback on my ideas. Though I had meetings with Cowichan Tribes, I did not have many informal conversations to discuss my thoughts and questions and to get feedback on my work throughout the process. However, the concerns and perspectives shared in my early meetings with HTG and Cowichan Tribes and expanded upon in interviews provided direction and feedback for my research. Listening to the questions and perspectives of the people we work with is essential so as not to fall into relations of extractive research and is part of working collaboratively (Raibmon 2014; Kovach 2010).

Through my research and the conversations I have had with other researchers over the past few years, I am learning about the messiness of research where the academic discussions and goals of collaborative research in all aspects of the project are not always possible. Sometimes people in the community are too busy to answer all of my questions. Sometimes there is work that needs to be done and people need to use their skills and take up the responsibility to do that work. In such circumstances, I find deep listening to be essential. Historian Paige Raibmon advocates transformational listening which is “active” and “open-ended”, listening “for difference rather than [succumbing] to a comforting but disproportional sense of commonality” (2014, 7). Transformational listening involves reflexivity and caution in our interpretations and assumptions as researchers. It is an iterative process. Through listening and acting as observant participants in our formal “research” and in our lives, we have the opportunity to reflect upon the work that we are being asked to do.

I am by no means trying to excuse myself from the responsibility of collaboration in its fullest sense; rather, I think that in practice working together comes in many forms. I received a lot of direction and guidance from Brian who shared his experience, knowledge and relational accountability with me. As I became more deeply involved in this work, my responsibilities have grown as has my own ability to judge how to act. Indigenous peoples cannot be saddled with the entire responsibility of dealing with colonial injustice and with guiding everyone else. In these situations where we have been given the responsibility to tell a story and all the factors for perfect collaboration have not come together, active, open-ended, reflexive listening is a useful tool and way of working. Transformational listening and subsequent action will likely be uncomfortable at times and will likely involve mistakes but that uncomfortability is not a reason to refuse to take up responsibilities that we, as humans, have to each other and to the places we live in. I am sure that

there are critiques easily levelled at my work and I hope that these critiques will help me to do better work in the future.

What follows in this thesis is what I know about *Hw'teshutsun* because of what has been shared with me through interviews, documentation and being at *Hw'teshutsun*. I include direct quotes from Cowichan Elders, knowledge keepers and community members wherever I can as their teachings extend beyond my own perception of their meanings. This story of *Hw'teshutsun* is told to celebrate the work done by Cowichan leadership to protect a cultural landscape and to add to discussions on ways of ensuring that Indigenous peoples' teachings about important places are respected. *Huy tseep q'u* to everyone who has shared their knowledge and perspectives for this project.

## **Chapter 2: Caring for a cultural landscape**

### **Introduction:**

The protection of *Hw'teshutsun*, a Hul'q'umi'num' cultural landscape on southeast Vancouver Island, was achieved in 2001 through actions led by Cowichan Tribes to prevent proposed logging and the construction of a dump and a motorsport race track. This protection allowed for continued engagement with *Hw'teshutsun* by Hul'q'umi'num'-speaking people as it is an important area for cultural practices including hunting, harvesting medicines and spiritual bathing. Teachings around these practices emphasize the importance of quiet and seclusion throughout the landscape, characteristics which are not compatible with industrial development. The protection of *Hw'teshutsun* was achieved through a treaty-related measures (TRM) agreement between Cowichan Tribes, the Hul'qumi'num Treaty Group (HTG) and the governments of British Columbia (BC) and Canada using an Order in Council by the Minister of Forests to prevent any industrial development at *Hw'teshutsun* (BC's MOF 2001), or Hill 60<sup>14</sup> as it is called by the municipality and local settlers. This agreement recognized that the exercise of Cowichan's aboriginal rights, guaranteed in Section 35 of the *Canadian Constitution*, requires the ability to continually engage with *Hw'teshutsun* in accordance with Cowichan teachings. While the protection measures have not formally recognized Cowichan jurisdiction to *Hw'teshutsun* and the land is still held as Crown land by BC in advance of future treaty settlement, Hul'q'umi'num' values and teachings shared by Elders informed exercises of provincial jurisdiction through the

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<sup>14</sup> I refer to the area as "*Hw'teshutsun*" when I am speaking about the Hul'q'umi'num' landscape and as "Hill 60" when I am referring to the CVRD and provincial designation. These names refer to the same physical area and are, in practice, entangled understandings of the land, as discussed throughout this chapter.

TRM. This mountain ridge is thus an area where Hul'q'umi'num' people's values and teachings are forefront in shaping the landscape.

Moving provincial authorities to exercise their jurisdictions to reflect Indigenous peoples' values and teachings across a landscape is a significant act of Indigenous political will. The protection of cultural areas off-reserve and outside recognized title lands is quite difficult under state legal and political systems which prioritize fee simple title holders and industrial development over the care for Indigenous cultural landscapes (see Bannister and Nicholas 2014; Nicholas 2009; Mohs 1994; McLay et al., 2008; Ziff and Hope 2009 for BC examples). Protection of Indigenous cultural landscapes is particularly difficult in Hul'q'umi'num' territory which was largely alienated through a series of 19<sup>th</sup> century land grabs resulting in the privatization, industrialization and resulting lack of access for Hul'q'umi'num' people to over 85% of their traditional territory<sup>15</sup> (Morales, Thom and Egan 2007; Thom 2014; Egan 2012; Ekers et al. 2021). While *Hw'teshutsun* was protected because of its cultural value rather than ecological value, in satellite images<sup>16</sup> it stands out as a green area amongst brown paths of clear-cut forests throughout the Cowichan Valley. Demonstrably, protection of Indigenous cultural landscapes may have ancillary ecological benefits though the primary goal is care for these lands in accordance with the Indigenous teachings and values emplaced there, which in turn facilitates continued Indigenous engagement with these lands (Lee 2016; Zurba et al. 2019; Artelle et al. 2019; CBD 2018; IUCN-WCPA 2019).

Difficulties that Cowichan Tribes, the Cowichan band government, face in protecting cultural landscapes and places – having their jurisdiction, teachings and values recognized by the Crown – have been expressed to both my supervisor, Dr. Brian Thom, and I by numerous

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<sup>15</sup> See Figure 4 page 66.

<sup>16</sup> A timelapse of this satellite imagery can be viewed online: <https://earthengine.google.com/timelapse#v=48.8319,-123.88453,10.439,latLng&t=0.73&ps=50&bt=19840101&et=20201231&startDwell=0&endDwell=0>

Cowichan members over the past 28 years in Dr. Thom's case, two years in mine. This chapter engages with this ongoing and urgent need for protection mechanisms that center local Indigenous people's knowledge, values, experiences and priorities throughout landscapes of interconnected places, emphasizing the significance and integrity of cultural areas beyond the scale of sites. A 'cultural landscape' emphasizes the integration of places within a larger landscape (Fowles 2010) and allows for the holistic description of an area as it is known and interacted with and in by a group of people with shared cultural practices, traditions, teachings and values. Currently, protection of Indigenous places under provincial authority is at best achieved through mitigation strategies for places under current threat of development. At times, mitigation may prevent the tangible destruction of isolated sites but rarely attends to the intangible qualities or Indigenous cultural values associated with cultural landscapes which are often misunderstood and ignored. This mitigation approach was rejected by Cowichan Tribes in their efforts to protect *Hw'teshutsun* in the late 1990s-early 2000s. While specific cultural places within the forest were identified, Cowichan cultural advisors highlighted valued qualities of seclusion and quiet that are necessary throughout the landscape for the integrity of the places within to remain (Traditions Consulting Services, Inc. 1998). Through stories and maps deployed through political and legal processes, they identified for protection a cultural landscape embedded across integrally connected places to ensure the ability of Hul'q'umi'num'-speaking people to continue cultural practices at *Hw'teshutsun*.

This chapter discusses how *Hw'teshutsun* was protected not only because it is a culturally significant area – with little material or archeological “evidence” of use – but in such way that the cultural values and teachings associated with the area, which express the importance of the integrity of the landscape beyond small locales, guided the scope of the protection TRM. It begins

with a discussion of some of the issues First Nations face in protecting culturally significant places. Centering the teachings shared about *Hw'teshutsun* by Cowichan Elders and knowledge keepers reveals the importance of maintaining the integrity of the landscape in accordance with Hul'q'umi'num' teachings. I situate these teachings in reference to academic discussions of cultural landscapes, providing a brief overview of some of the theory on cultural landscapes, a term extensively theorized in Geography, Anthropology and related disciplines (Head 2010; David and Thomas 2008; Fowles 2010; Brown, 2007; Tilley 1994; Basso 1996; Ingold 1993; Gregory et al. 2009). I find this term useful in its ability to inclusively communicate emplaced relationships, teachings and values throughout a broad area extending beyond a single 'place' or a 'sacred site' (Fowles 2010; Tilley 2008; Brown 2007; Basso 1996). I will then situate the work to protect *Hw'teshutsun* through the socio-political and historical context of colonial land privatization and industrialization of unceded Hul'q'umi'num' territory and provide an overview of the protection process.

*Hw'teshutsun* was protected in the optimistic atmosphere of the early BC Treaty Process when government mandates enabled negotiators to come up with novel solutions to immediate problems as a way of showing commitment to reaching an agreement under the treaty process. Cowichan leadership at the time argued that a modern-day treaty was unlikely to be signed in time to prevent destruction of the area through logging and development and an interim protection measure was thus required (Ratcliff & Co. letter to BC's MOF, October 27, 1999). Simultaneous with inter-governmental negotiations, Cowichan leadership emphasized kinship relations between Hul'q'umi'num' communities which transcend Indian Act designations of present-day bands, highlighting their shared connections with *Hw'teshutsun*.

Experiences of *Hw'teshutsun* shared with me highlight the importance of qualities of quiet and seclusion throughout *Hw'teshutsun*. These values are not shared in conceptions of Hill 60, the officially gazetted name widely used by the municipality for this mountain ridge, held by the municipality, the province or non-indigenous residents of the Cowichan Valley who often regard the area as a spot for economic or recreational activities or ecological value. A discussion of Cowichan values and a cultural landscape, which have been infringed upon by the state, the province, the municipality, industry and non-indigenous residents, emphasizes the need to pay more attention to Indigenous cultural landscapes, to learn to conduct ourselves in accordance with Indigenous teachings and to formally recognize enactments of Indigenous jurisdiction and authority within their territories, particularly to landscapes with significant cultural value.

### **Protection of cultural landscapes:**

This research emerged from a desire by Cowichan Tribes to document the story of the protection of *Hw'teshutsun* and to speak to broader problems that Cowichan Tribes, and other First Nations in BC, have in attaining recognition of their jurisdiction to places and cultural landscapes outside reserves and title lands (Larry George, Tim Kulchyski, Dianne Hinkley personal comm. Oct. 2020; Ziff and Hope 2009; Nicholas 2009; Mohs 1994; McLay *et al.* 2008). Where protection of Indigenous places and landscapes occurs at all, government-approved mitigation strategies are often based on postage stamp-sized protection of sites leaving the smallest area possible intact while the rest of the landscape may be decimated. 'Postage stamp' protection has been heavily criticized as it does not attend to Indigenous peoples' conceptions of and relationships with the land (Dianne Hinkley personal comm. April 2021; Thom 2014; Joly *et al.* 2018). Isolating sacred or private places can increase the risk of intentional destruction or harm to these places or to

Indigenous people at these places due to pervasive ignorant, uncaring, disrespectful attitudes among some non-indigenous people (Dianne Hinkley personal comm. April 2021; Qwustenuxun personal comm. April 2021; Glavin 1994; Mohs 1994). These issues point to the need for protection measures within federal, provincial and municipal legislation based on Indigenous peoples' own governance including conceptions of and relationships with their cultural landscapes, inclusive of the values, teachings and multiple types of engagement.

The concept of a cultural landscape becomes useful to reflect engagements throughout areas bigger than sites thus countering the inadequacies of postage stamp protection, to communicate in a holistic way the attributes, experiences, stories and values of an area implicit in a particular cultural framework without artificially segmenting nature and culture (Head 2010; Fowles 2010; Brown 2007; Strang 2008; Tilley 2008; Basso 1996; Ingold 1993; Gregory et al. 2009; Massey 2006; Taylor 2012; Head 2008). While the past hundred years of cultural landscape theory in Geography (Gregory et al. 2009; Head 2010; Cosgrove 1985; Massey 2006), archaeology (Tilley 1994; Fowles 2010; Brown 2007; David and Thomas 2008), anthropology (Basso 1996; Ingold 1993), human ecology (Miller and Davidson-Hunt 2010; Berkes and Davidson-Hunt 2006; Davidson-Hunt 2003) and related disciplines goes far beyond these practical applications, my use of 'cultural landscape' reflects difficulties that Cowichan Tribes faced in communicating the significance of *Hw'teshutsun* to the CVRD and BC, and issues faced by First Nations governments in protecting areas of significance more generally. I am using this term for its practical application rather than engaging deeply in the theorizations and critiques that it has endured. This broad definition of a cultural landscape allows for a term that can talk about a broad area regardless of the types of significance the land may hold, unlike a 'sacred site' or an area of ecological

sensitivity. Characterization of such an area will vary in accordance with the way it is known by the people who engage there.

My goal in speaking about *Hw'teshutsun* as a cultural landscape is to emphasize that care for the land – land management or stewardship as understood by Canadian society and BC government – must be highly attentive to Indigenous teachings about the land which contain deep knowledge of place and the relationships between places throughout their territories (see McLay *et al.* 2008). In this example, *Hw'teshutsun* can be characterized as a cultural landscape because of the integral connection between the spiritual power of places within and the surrounding landscape. Other places or cultural landscapes will contain different teachings and will thus require different sorts of care. Land protection that stems from Indigenous teachings and legal traditions will reflect the specific relationships and teachings of place.

In this section, I will begin with a discussion of the inadequacies of postage stamp protection of sites and areas. State mitigation strategies that are not based in an understanding of Indigenous teachings and legal traditions related to the specific place or cultural landscape in question will likely fail in caring for the land in a way that upholds the Indigenous teachings which have developed to care for people and land. I will then conceptualize *Hw'teshutsun* as a cultural landscape, rooted in the teachings that characterize *Hw'teshutsun* as extending beyond places identified within a particular small locale and emphasize the importance of maintaining the integrity of the entire landscape (Traditions Consulting Services, Inc. 1998; Fowles 2010). As this thesis focuses on the protection of an Indigenous cultural landscape, my interest in theorizing *Hw'teshutsun* as a cultural landscape is because that theory closely reflects the teachings shared by Elders about *Hw'teshutsun*. There is no one-size-fits-all solution to protecting Indigenous

places<sup>17</sup> and landscapes: “protection” of Indigenous cultural landscapes must attend to the teachings of and from the land. These teachings reveal the geographical scale (Head 2008), the actors who comprise the cultural landscape (Ingold 1993; Simpson 2017), stories and wisdom shared by this cultural landscape (Basso 1996) and how to care for the area, which is reflected in Indigenous law (Morales 2014; Clifford 2016b; McLay et al. 2008). While land “protection”, or care, is thus specific to values and teachings of a particular worldview or cultural framework, teachings and power from places have impacts beyond those who are aware of the power of a place (Thom 2017).

***Site protection and mitigation:***

BC’s postage stamp method to protect culturally significant sites, preventing destruction of an individual site while the landscape around it may be thoroughly altered, has been widely critiqued as it relies upon a piecemeal notion of Indigenous existence isolated to sites rather than the reality that people move across landscapes beyond isolated locales (Dianne personal comm. April 2021; Joly *et al.* 2018; Brown 2007; Thom, Colombi, and Degai 2016). “Postage stamp” protection does not reflect the connection between places and the integration of places within larger landscapes. It does not reflect the specificity of how places and landscapes are known and experienced. This site-level protection thus does not retain the integrity of larger ‘places’, such as *Hw’teshutsun* where the valued qualities of the landscape exist throughout a larger area and require the contiguous area to be cared for in accordance with Hul’q’umi’num’ teachings to maintain these valued qualities. Long-time Cowichan Tribes employee Dianne Hinkley explains that the BC

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<sup>17</sup> The same problem of postage stamp mitigation is faced in the protection of Indigenous peoples’ cultural places. The importance of attending to Indigenous teachings of places and landscapes in care for both is crucial, though I focus on cultural landscapes through the example of *Hw’teshutsun*.

government's proposed mitigation strategies to protect places like bathing pools<sup>18</sup> at *Hw'teshutsun* failed to attend to Hul'q'umi'num' people's concerns:

The BC government always want to put a little buffer around it, a 3m buffer with fence around it, and say "there you go, we saved that." And then they'll totally clear cut everything else around it. Well, just because you put a fence around it, doesn't mean it's not polluted anymore [by outsiders being in that area]. So this is part of the problem, is that, that these places, well you wouldn't believe how many have already been destroyed (personal comm. April 2021).

Dianne emphasizes that protection of a small site is not enough to ensure the spiritual qualities of the place, as the integrity of the place is interconnected within the larger landscape. Places for spiritual bathing, or *kw'aythut*, are located within *Hw'teshutsun*. Teachings about quiet and seclusion throughout the larger landscape during spiritual bathing, have been shared by Elders (Traditions Consulting Services, Inc. 1998; Cowichan Tribes 2000b) and those principles have been elaborated on elsewhere by Thom:

Physical engagement with these places [for cleansing, grieving or receiving strength] is essential for the experience of spirit power, and the important contributions it makes to a Coast Salish person's life. This power is always a potential, sometimes there, sometimes not and one needs to know the signs of having encountered such power when out on the land. People are taught specific times and configurations of landscape features to observe in order to be able to recognize where such experiences may be had. Like the bathing pools, these places may lose their potential to confer power if their seclusion is altered (2005, 158-9).

Powerful places where the integrity of the landscape is maintained are increasingly difficult to find within Hul'q'umi'num' territory due to destruction from intensive logging and housing developments (Thom 2005, 154-7). The postage stamp protection sometimes offered by the

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<sup>18</sup> *Kw'aythut* is a Coast Salish spiritual practice that involves bathing in cold water, usually in the early morning, to cleanse and to make oneself strong and might be part of obtaining spirit power (Thom 2005, Lane 1953; Suttles 1981). Practitioners are encouraged to fast and brush themselves down with cedar, fir or hemlock branches or with moss (Thom 2005, 153-4; Lane 1953, 23-4; Suttles 1981, 706-7). As detailed by Thom (2005, 153-165), *kw'aythut* is done in specific places with spirit power, many of which, in Hul'q'umi'num' territory, have been destroyed or are inaccessible. The importance of quiet, forested areas for *kw'aythut* and other practices will be discussed in greater detail in Chapter 3.

*Kw'aythut* is practiced by heroes in some highly important Hul'q'umi'num' oral histories including *Stutsun* (Marshall 1999) and *Q'iseq* (Curtis 1913, 168-9; Thom 2005, 123-130; Jenness 1935, 53).

province where the *Heritage Conservation Act* offers protection to archaeological sites is clearly not reflective of Hul'q'umi'num' teachings and principles.

Postage stamp protection can also draw attention to Indigenous cultural places in contradiction to cultural teachings that emphasize private knowledge and secrecy of places. Places for *kw'aythut* are especially secret: Cowichan knowledge keeper Jared Qwustenuxun Williams explains that people practicing *kw'aythut* and the places where they go should be “left alone at all costs” (Williams 2020). People going into the forest should not even be looked at (Morales 2017; Williams 2020). Where cultural practices are to occur away from every day life and important places are to be kept secret, a small buffer zone around bathing sites is not appropriate.

This cultural emphasis on secrecy and private family knowledge has been exacerbated by colonial practices such as land theft and the devaluation of Indigenous peoples and their knowledge including residential schools and the potlatch ban (Tim personal comm. June 2021; Qwustenuxun personal comm. April 2021; Williams 2020; Mohs 1994; Glavin 1994; McLay et al. 2008; Thom 2005). With many of their spiritual practices outlawed and cultural teachings banned, many Elders decided that the best way to protect important cultural places was through silence. This method of protection has been disputed by other Indigenous people who argue that without disclosing the locations of these places and landscapes, they will be unintentionally destroyed (Glavin 1994; Mohs 1994; Qwustenuxun personal comm. April 2021). While communities may choose to share information about important places confidentially with the Province, ongoing experiences of disrespect and lack of understanding by individuals and government officials are one of the reasons for a hesitancy by many Cowichan Elders to share the locations of cultural places and landscapes<sup>19</sup>

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<sup>19</sup> With respect to these teachings, I do not share the locations of any of the powerful places identified at *Hw'teshutsun* in this thesis, nor do I discuss the details of any of the cultural practices engaged in. Some detail has been provided in previous ethnographies (for example, see Lane 1953; Thom 2005 on *kw'aythut*). I did not ask about the details of these practices, though I was told that they are private to the people who practice them.

(Qwustenuxun personal comm. April 2021; Tim personal comm. June 2021; Glavin 1994; Mohs 1994; Morales 2017b).

In the present-day context of colonialism and racism, concern for keeping these places secret is also about privacy, dignity, practicality and safety. Dianne gave the example of non-indigenous people spying on Cowichan people during cultural practices.

Another issue is... that people find out where the bathing holes are, and they lay in wait, particularly perverted old men with cameras, to take pictures of women when they're doing their bathing. So it's gotten to the point where most women will take men along with them, to like guard the area while they're doing their bathing. The men can't be down right at the creek or the bathing hole. But they will actually guard the perimeter to keep jackasses away (personal comm. April 2021).

Dianne's comment illustrates a complete lack of respect by a few non-indigenous people for Hul'q'umi'num' people's privacy and dignity. Beyond cultural concerns that outsiders' presence will diminish spiritual qualities (Dianne personal comm. April 2021), Hul'q'umi'num' people's spiritual practices have been treated as a curiosity by unwelcome spectators (see also Glavin 1994). These experiences are emblematic of the disrespect, ignorance and racism that are pervasive in Coast Salish people's experiences of exercising title to their lands beyond just interactions with cultural landscapes and places.

Postage stamp protection would not have had the ability to protect the integrity of *Hw'teshutsun*, because it would not have attended to the teachings shared by Elders about how the spiritual qualities of these places is bound up with the integrity of the larger landscape. Mitigation of sites allows the state to proceed as normal without engaging with Indigenous peoples who assert their jurisdiction to their lands which includes enacting their teachings and legal traditions. Land

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These details are not relevant in any of my arguments; in fact, I point out that the details of the cultural practices and particularly powerful locales do not need to be known even by state decision makers. The character of the cultural landscape may be shared to extent necessary for their sufficient protection. As Chief Hwitsum noted, quoted in Chapter 3, decision makers need to ensure the space for Indigenous peoples to exercise their aboriginal rights (personal comm. Sept. 2021). They do not need to know the details of the cultural practices or private teachings.

governance strategies that do not stem from Indigenous cultural frameworks will likely be unable to attend to, and subsequently protect, Indigenous cultural landscapes. Caring for Indigenous cultural landscapes in accordance with these teachings is integral to the wellbeing of the people who engage there. The next section will discuss the broad way in which I am using the term ‘cultural landscape’ to address the above concerns with site-level protection and to reflect a variety of uses and ways of knowing landscapes.

***Listening to the emplaced teachings:***

As mentioned by Dianne in the previous section, government plans to prevent destruction of bathing places at *Hw'teshutsun* by creating a small buffer around them, similar to protection of riparian zones, was completely inadequate in maintaining the qualities of the places and for the safety, privacy and dignity of the people who go to these places. Cultural landscape protection was necessary to encompass the teachings that pertain to the entire *Hw'teshutsun* area. The late Cowichan Elder Abner Thorne described these teachings and was quoted in Cowichan Tribes' TRM presentation to BC (2000) detailing the cultural significance of *Hw'teshutsun* and their claims to aboriginal rights and title. Very aware that the audience of this report included government officials, as well as Cowichan Tribes members, Abner Thorne demonstrated his mastery of cultural translation and his experiential knowledge of *Hw'teshutsun* to explain how the presence of spiritual power at *Hw'teshutsun* would be disturbed by industrial activity or development in the area:

What helped make a place so special? The geography – the lay of the land. But it's also those things we've talked about – it's the forests, it's the mountains – which is geography. This morning we went to a place, it's got lots of good qualities. But two hundred meters this way is a clear cut, a hundred meters this way is another clear cut. Two hundred meters the other way, if I was standing in the middle, is a private property that has been cleared and there's a field there. And then two hundred

meters this way is a power line. That place is good alright, but there's no more quality to it, it's gone, because the surrounding area has been cleared for logging, cleared for making fields and cleared for the hydro line. So its value is lessened. A person can go there and bathe but there's nothing else there. To me, to many of us that place is empty. Now, what do I mean by empty? How do I explain it. We always talked about spirituality. But we can't see it. But maybe a flock of ducks, a flock of something to try to compare it with, if that flock is there, you know they're there. But if you go and disturb that are that flock of geese or ducks is gone. That place is empty. The spirits are gone. So when you disturb the mountains, the forests, the spiritual values that we go there for... if it's been logged, even commercially thinned, it's empty. So there might be a few values left in there but it would be pretty sparse. You might be able to find a few plants that you could use of you might be able to bathe if it's still there. But the quality is gone. Where there is a bath or a place to practice your voice or other things, [it] may be a place to sleep, a place to go to your vision quest. If it's been disturbed, the quality is gone (Cowichan Tribes 2000b, 28).

The teachings shared by Abner Thorne emphasize how places at *Hw'teshutsun* are integrated into the surrounding landscape and the importance of maintaining the integrity of the landscape in order for the power of the place to remain intact. The spiritual power of place exists in relationship with land and people who dwell there. The power of the place cannot be taken for granted; maintaining the good qualities of places within *Hw'teshutsun* requires particular care for the entire area to maintain the purity and spiritual power that are of central importance in this place.

Throughout the process of protecting *Hw'teshutsun*, Cowichan Elders and knowledge keepers indicated that though particular creeks and other places could be identified (88 traditional use sites were located in Cowichan Tribes' 1998 Traditional Use Assessment), qualities of quiet and seclusion throughout the entire landscape were necessary for the integrity of the places. Abner Thorne indicated that there are good places within *Hw'teshutsun*, relationships that are more specific than connection throughout the landscape. Late Elder Angus Smith described a particularly powerful place at *Hw'teshutsun* which he had been taught to care for, discussing the power in that place for winter dancers in the Big House (Thom 2005, 161-3). Elder Luschiim (Arvid Charlie) also described a particular bathing pool (personal comm. with Brian Thom and

Sarah Morales April 14, 2021). The descriptions shared by these Elders, both of whom played a significant role in protecting *Hw'teshutsun*, demonstrate intimate knowledge of these places, while Abner Thorne's teachings revealed the connections between these places and the larger landscape they are a part of.

Beyond *kw'aythut*, *Hw'teshutsun* has also been identified as an important area for hunting elk and harvesting berries and medicines (Larry George personal comm. Jan 2021; Tim Kulchyski personal comm. June 2021; Jared Williams personal comm. April 2021; Traditions Consulting Services, Inc. 1998) and is connected with stories of *Stutsun*, one of the Hul'q'umi'num' First Ancestors<sup>20</sup> (Traditions Consulting Services, Inc. 1998; Cowichan Tribes 2000b; Marshall 1999; Thom 2005; Morales 2014). Teachings about these practices emphasize the importance of quiet and seclusion for the efficacy of medicinal properties of the plants (Jared personal comm. April 2021) and for connection with the land and safety when hunting (Tim personal comm. June 2021). People I spoke with indicated the importance of engaging deeply with the land, of the integration of tangible aspects (trees, water, elk, ecosystem pollution) with the intangible (spiritual pollution, deep engagement with the land). These teachings point to necessary qualities of the landscape while stories of *Stutsun* connect Hul'q'umi'num' people with the teachings and this significant ancestor through place. These teachings of and from *Hw'teshutsun* form the basis for the proceeding characterization of *Hw'teshutsun* as a cultural landscape, a network of places sharing uniting qualities (Fowles 2010).

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<sup>20</sup> This story will be discussed in Chapter 3. Stories of the Hul'q'umi'num' First Ancestors are highly significant, forming the basis of the Hul'q'umi'num' legal tradition and connecting families who trace their lineage to these ancestors with specific places where the First Ancestors fell (Thom 2005; Morales 2014; Marshall 1999).

### ***Hw'teshutsun as a cultural landscape:***

Abner Thorne's teachings about *Hw'teshutsun* emphasize that the integrity of powerful places there is intertwined with the wellbeing of the surrounding landscape. An understanding of *Hw'teshutsun* as a cultural landscape, referring holistically to Hul'q'umi'num' understandings of and relationships with *Hw'teshutsun* (for similar approaches see Basso 1996; Strang 2008; Walter and Hamilton 2014; Head 2010; 2008; Joly *et al.* 2018; Tilley 2008), encourages attentiveness to the teachings about how to care for the area. The term 'cultural landscape' can thus be a useful communication tool, "a crucial way for us to talk about or to relate some of those things that we can't really relate", as explained by Cowichan knowledge keeper Tim Kulchyski (personal comm. June 2021).

This section will briefly explore some aspects of theories of cultural landscapes, which are extensive and diverse (Gregory *et al.* 2009; Head 2010; Taylor 2012; David and Thomas 2008). I focus on theories which are most relevant when discussing and understanding *Hw'teshutsun* and in forwarding a conception of 'cultural landscape' that can usefully reference the teachings and ways of knowing the land shared by a society with the aim of caring for the land in accordance with these teachings. However, the theorists that I find the most useful in understanding the significance of *Hw'teshutsun* are the late Elder Abner Thorne (quoted above), who spoke about the integration of places within a larger landscape, and Tim Kulchyski (quoted in Chapter 3), who emphasized layers of relationality with the land. I will position *Hw'teshutsun* within cultural landscape theory drawing from what Abner and Tim have shared, though I aim to be inclusive of many expressions of cultural landscapes. Ultimately, the character and geographical scale<sup>21</sup> of a

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<sup>21</sup> Scale is quite important as a huge part of the work in protecting Indigenous cultural landscapes is recognizing that postage stamp protection does not respect the ways in which these landscapes are known. Discussed below, Head (2008) argues that scale is constituted through relationships, meaning that protection of a cultural landscape – or an Indigenous cultural place which faces the same issues in protection – must reflect the relationships it includes.

cultural landscape are understood through people's relationships with and teachings of the land (Head 2008; Basso 1996).

Theories of cultural landscapes have long been debated in Geography, alternatively emphasizing the materiality and the symbolic aspects of landscapes (Head 2010; Perez 2012; Miller and Davidson-Hunt 2010). The concept was developed by Carl Sauer in 1925 and has since been thoroughly critiqued for artificially separating the 'natural' or physical aspects of the landscape from the 'cultural' or symbolic qualities (Head 2010; Gregory et al. 2009, 409-10; Perez 2012). Critiques of the term have further argued that landscapes are perceived of as an empty background or a sort of *terra nullius* devoid of humans (see Head 2010; Kearney and Bradley 2009, 79). This focus on materiality was temporarily replaced by Marxist perspectives on landscape, structuralist semiotics, post-structuralist, humanist, feminist, phenomenological and many other analytical perspectives seeking to understand people's relationships with the land (Gregory et al. 2009, 409-11). Head (2010) notes that emphasizing the "cultural" aspect of landscapes has been particularly necessary in settler colonial states built on the erasure of Indigenous peoples from their lands.

In an overarching definition of a cultural landscape aimed to be all-encompassing of the many theories and uses of the term, Head describes a cultural landscape as "a description of a region of the earth that has been transformed by human action" (2010, 1). Here, 'cultural landscape' may denote physical alterations of broad areas of land through past and present resource use, for example, cultural burning or clam gardens (Miller and Davidson-Hunt 2010; Berkes and Davidson-Hunt 2006). This broad definition reflects Sauer's focus on physical acts of transforming the natural earth (Brown 2007). Such a definition is useful in resource management because it allows for greater understanding and integration of Indigenous land management practices into

conventional state methods (Miller and Davidson-Hunt 2010; Berkes and Davidson-Hunt 2006; Davidson-Hunt 2003), though it does not reflect the importance of places or nodes within the landscape. However, of particular importance in the example of *Hw'teshutsun*, not all relationships leave physical traces of human engagement (Tilley 2008). Where they do, such physical or materialist traces of human-land relationships are not seen or recognized by those with little cultural understanding of how the land has been engaged with (Joly *et al.* 2018; Abramczyk 2017).<sup>22</sup> Part of the significance of *Hw'teshutsun*, which will be discussed in Chapter 3, is the quality of “wilderness” – being away from everyday life in a quiet, forested area (Suttles 1981) – resulting in fewer physical alterations of the land. The way I use the term ‘cultural landscape’ is inclusive of these intangible relationships, emphasizing the teachings, stories and experiences people have in a known landscape, a network of places (Fowles 2010; Tilley 1994).

Head’s definition may also include an understanding of cultural landscapes as networks of human interaction throughout areas, focusing on places and pathways depicting the interconnection in which lived landscapes are engaged with and perceived, including experiential and not only physical interaction (Brown 2007; Fowles 2010; Tilley 2008; Ingold 1993). Archaeologist Severin Fowles broadly defines cultural landscapes as networks of places throughout a larger landscape “perceived and made meaningful by particular human communities” (2010, 455). This need not include physical alteration of the land and is thus inclusive of intangible significance of and relationships with places throughout a landscape. From an archaeological perspective, Fowles (2010), Brown (2007) and Tilley (2008) are expanding the site of analysis

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<sup>22</sup> Cowichan Tribes’ TUA identified 88 traditional use sites. However, a survey done using archaeological methods – which, though useful, are not able to indicate to intangible significance of place – in one afternoon by CVRD and BC representatives without a Hul’q’umi’num’ representative reported no evidence of use (British Columbia Lands, Ministry of Environment, Lands and Parks 1997; BC internal emails Oct 22, 1997). This surveying issue is common as non-indigenous people may not know what they are looking for or even which places to go to and are only looking for material remains, resulting in a great misrepresentation of Indigenous peoples’ relationships with the land when used in isolation from other methods and engagement with the Nation whose land is being surveyed.

from an archaeological site to include the connections between sites, which may also be named places or may be a material trace in a locale without any particular cultural significance. Their use of a cultural landscape is easily expanded to include ongoing relationships with places which may or may not have tangible evidence of engagement. These definitions both have value in characterizing *Hw'teshutsun* as a cultural landscape – a large area throughout which teachings about quiet and seclusion have been emphasized where particular places are significant – though neither perfectly reflects the specificity of *Hw'teshutsun*.

Teachings about *Hw'teshutsun* are shared by Hul'q'umi'num' people: the landscape is understood through a common cultural framework. Critiques of the term 'cultural landscape' have argued that the term is redundant – every landscape is cultural as all landscapes are both physically impacted by humans and have symbolic meaning within particular cultural frameworks – and dichotomizes an overlapping 'natural' and 'cultural' landscape (Head 2010; Perez 2012). 'Cultural landscape' need not reflect distinctions between 'culture' and 'nature' which exist only in certain cultural frameworks and do not separate tangible and intangible aspects of the land. They instead refer holistically to the relationships with and teachings from the land shared amongst a society with a common cultural framework (Head 2010; Tilley 1994; Basso 1996; Walter and Hamilton 2014).

In his famous ethnography of Western Apache places, Keith Basso writes:

[Landscapes] acquire value and significance by virtue of the ideational systems with which they are apprehended and construed. Symbolically constituted, socially transmitted, and individually applied, such systems operate to place flexible constraints on how the physical environment can (and should) be known, how its occupants can (and should) be found to act, and how the doings of both can (and should) be discerned to affect each other. Accordingly, each system delineates a distinctive way of being-in-the-world (Ricoeur 1979), an informal logic for engaging the world and thinking about the engagement (Geertz 1973), an array of conceptual frameworks for organizing experience and rendering it intelligible (Goffman 1974). In any community, the meanings assigned [or existing in]

geographical features... will be influenced by the subjective determinations of the people who assign them, and these determinations, needless to say, will exhibit variation. But the character of meanings – their steadier themes, their recurrent tonalities, and, above all, their conventionalized modes of expression – will bear the stamp of a common cast of mind (1996, 72-3).

Basso's reflection on landscapes reflects the importance of understanding the flexible frameworks within which landscapes take on meaning. He emphasizes the 'cultural' aspect of landscapes: there are shared ways of knowing and engaging with landscapes amongst a society who have common values, teachings and laws, though there is variation in experience amongst the group.

I further use the modifier 'cultural' to indicate that other understandings of and engagements with that area are overlapping. By speaking of *Hw'teshutsun* as a 'cultural landscape', I acknowledge the multivocality of the landscape (Rodman 1992; Bierwert 1999) – multiple cultural landscapes overlap and are entangled (Dussart and Poirier 2017; Borrows 2017). *Hw'teshutsun* today cannot be fully understood without reference to municipal and provincial and non-indigenous experiences of this mountain ridge (Hill 60) as a place for resource extraction and recreation. However, the focus of this chapter is on Hul'q'umi'num' people's teachings and experiences of *Hw'teshutsun*, which have a different character than that of Hill 60, as understood by the province and non-indigenous residents of the Cowichan Valley.

Hul'q'umi'num' teachings about *Hw'teshutsun* as an area for harvesting medicines, hunting and spiritual bathing and connected with the travels of the First Ancestors are not shared by non-indigenous people's conceptions of Hill 60 as a site for past and potential future resource extraction and construction. Some people within the Cowichan Valley see it as a place for recreational activity, such as quadding, sport hunting, and mountain biking. These practices are inconsistent with Hul'q'umi'num' teachings about caring for *Hw'teshutsun*. Provincial land management and resource development policies and regulations reflected their understandings of the land as a resource, not the teachings spoken of by Hul'q'umi'num' Elders. The continued use

of the land by non-indigenous people for recreation – such as riding ATVs and partying – reflects a sense of entitlement: many non-indigenous people feel that they have the right to use the land as they want, regardless of Indigenous people’s inherent title and their laws and protocols. In such actions, we can see how the ongoing mentality of *terra nullius* persists. The process of protecting *Hw’teshutsun* involved bringing those teachings specific to *Hw’teshutsun* into exercises of provincial jurisdiction. Given the history of colonial land grabs and privatization within Hul’q’umi’num territory, detailed below, laws and practices aimed at eliminating Indigenous peoples, ongoing disrespect towards Indigenous peoples, their knowledge and relationships, the resulting need to protect Indigenous cultural landscapes in accordance with Indigenous values and teachings is evident.

Ethnography reveals the scale and temporality of the landscape, which are specific to place (Head 2008; Strang 2008). Head explains that the scale is “constituted in the process of social relations” (2008, 380) – it is through relationships that constitute the cultural landscape that its extent can be known. Scale was of particular relevance when protecting *Hw’teshutsun*. As discussed above by Dianne, postage stamp protection of bathing places proposed by the provincial government did nothing to maintain the integrity of the places within the *Hw’teshutsun* landscape. Throughout the process of protecting *Hw’teshutsun*, it was delineated by Cowichan Tribes leadership as bounded by the Cowichan and Chemainus Rivers (Traditions Consulting Services, Inc. 1998) and by mountain tops surrounding the area (Cowichan Tribes 2000b. See Figure 3). These delineations were not based on state cadastral data but on the physical geography of the land. These articulations of *Hw’teshutsun* were constrained through negotiations with the province to include only 1700ha in the protected area. However, the protected area was able to encompass

some important bathing places and the landscape that was protected still attends to Abner Thorne's explanation of the importance of the geography of *Hw'teshutsun*.

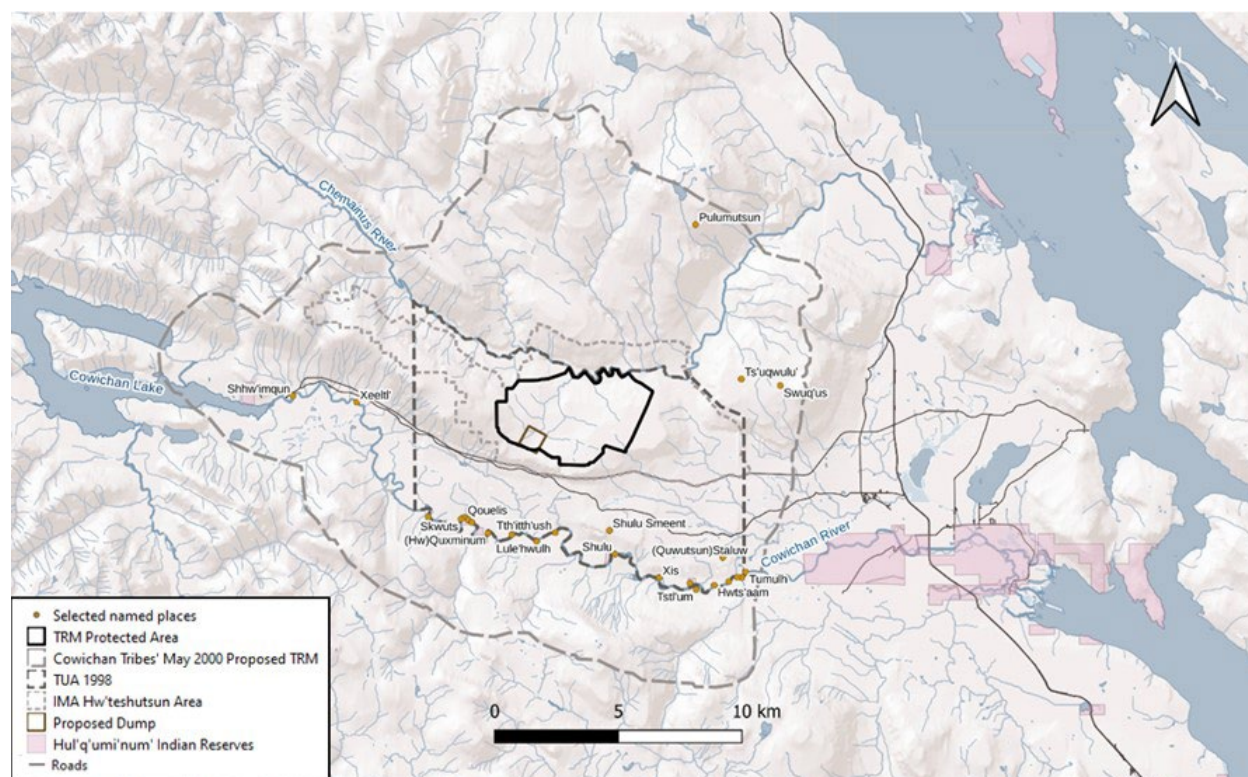


Figure 3: Various articulations of the cultural landscape of *Hw'teshutsun* through Cowichan Tribes TUA (1998), Cowichan Tribes' TRM Presentation (May 2000), the area protected through the TRM (2001) and the area identified as in the IMA (2001) outside the protected area but still needing protection for culturally significant attributes.

Elders highlighted the importance of waterways and mountains as significant for maintaining the valued attributes of the landscape.

Selected named places within the largest area identified as *Hw'teshutsun* from the Cowichan Dictionary have been included. This is not inclusive of all Hul'q'umi'num' place names in the mapped area.

This thesis thus draws upon an understanding of cultural landscapes which engage with teachings and experiences of 'place' at a scale larger than a single locale, integrating a network of places with shared attributes (Fowles 2010; Tilley 1994; Taylor 2012). They are not merely symbolic or metaphorical, but are experienced, felt, and valued in a nexus of relationships between human and non-humans, imbued with history and physical qualities and attributes that engage and sustain life (Tilley 2008; Ingold 1993; Strang 2008; Taylor 2012; Joly *et al.* 2018). They engage with tangible and intangible, material and symbolic dimensions of 'place' throughout a region,

capturing the entirety of teachings and relationships with the landscape shared by a people (Tilley 2008; Basso 1996; Strang 2008; Perez 2012). *Hw'teshutsun* is therefore not a cultural landscape juxtaposed against a biological landscape (Bannister and George 2014; Head 2010), but a landscape that, in this example, entangles Hul'q'umi'num' values, teachings and corresponding legal systems with those of the Canadian society. The geographical scale (Head 2008), teachings and valued qualities of a cultural landscape are specific to a society and legal traditions which are reflected in the laws pertaining to care or management of the land.

Indigenous peoples' understandings of place and landscapes stem from deep relationships with the land, yet knowledge and teachings associated with places is not confined to a cultural framework. 'Truths' about places have implications beyond those who are aware of and abide by these teachings. I agree with archaeologist Christopher Tilley when he states that: "I reject a notion of landscape as inhering solely in the form of mental representation and cognition" (1994, 25). He sees landscape as made up of places experienced and known by humans which "draw on qualities of landscape to create part of their significance" (25-6). In other words, meanings and stories of places are co-created through relationships with places. There are teachings from places that, while they may be known by a particular group of people, have implications beyond those who know the stories (Thom 2017; Scott 2017). This is a significant observation because, while caring for Indigenous cultural landscapes for the wellbeing of Indigenous peoples is the ultimate reason for this discussion, teachings of places developed over thousands of years of intimate relationships reveal truths that may have implications for everyone living there. Taking seriously the teachings of places involves everyone living on Indigenous landscapes to live with attention to these teachings.

As will be seen throughout this thesis, Cowichan Tribes leadership asserted this full understanding of *Hw'teshutsun* throughout their efforts to protect the area, refusing postage stamp protection of sites within. In doing so, they ensured that Hul'q'umi'num' teachings and relationships with the land were reflected in exercises of provincial jurisdiction at *Hw'teshutsun*. Naming *Hw'teshutsun* and drawing it into a category like 'cultural landscape' not only makes it visible to the state – which should reorder its practices and intentions to come into alignment with the Indigenous teachings and legal traditions – but also draws attention to Indigenous peoples' emplaced relationships and responsibilities that are rooted in their teachings.

***Cultural landscape, sacred site or general use area?***

*Hw'teshutsun* has also been spoken about as a “sacred site” and as a “general use area” (Traditions Consulting Services, Inc. 1998). These terms, like “cultural landscape”, have been expanded on to reflect the particular valued characteristics of and teachings around *Hw'teshutsun*. I discuss how these terms that have been used to emphasize that protection of Indigenous cultural landscapes, places, sacred sites or whatever term is employed to indicate their significance, will always need to attend to the ethnographic specificities of that area. Hul'q'umi'num' teachings that indicate how *Hw'teshutsun* must be cared for do not apply to many other Hul'q'umi'num' cultural landscapes. These teachings, as discussed further in Chapter 3, are specific to place and to the cultural practices that occur there. I discuss some ways in which these terms have been used to get a better understanding of the legal and practical implications of applying overarching terms to intimately known areas.

Numerous Cowichan people described *Hw'teshutsun* as a sacred place due to its connection to where the Hul'q'umi'num' First Ancestors came to earth and because people go there to get

away from the noise, smells and activity of everyday life (Ernie Elliott personal comm. Dec. 2021; Larry George personal comm. Nov. 2020; Traditions Consulting Services, Inc. 1998). I was initially hesitant to use the word ‘sacred’ to describe *Hw’teshutsun* as within anthropology, sacredness exists in opposition to the profane, distinctions which have been critiqued as representing dichotomous Cartesian philosophy. However, as I listened more closely to how people describe the significance of *Hw’teshutsun*, emphasizing the necessity of seclusion and quiet, they did indicate that *Hw’teshutsun* is an area removed from daily life. People shared teachings that outsiders near places for bathing and medicines can interfere with the efficacy of valued qualities (Lydia Hwitsum personal comm. Sept. 2021; Dianne Hinkley personal comm. April 2021; Qwustenixun personal comm. April 2021). ‘Sacred site’ was a way of referring to the teachings and relationships described by Tim which are specific to *Hw’teshutsun*. While hunting would generally be categorized as a subsistence activity, the teachings shared by Tim reveal that such classifications imposed from outside do not often fully encompass or express the culturally specific aspects of a particular activity or place.

As demonstrated in *Ktunaxa vs. BC*, designation of an Indigenous cultural place as a ‘sacred site’ has not proven to have the legal force in Canada to necessitate the Crown upholding aboriginal rights to religious or sacred sites (Robinson 2020; Blair 2020). The Ktunaxa Nation took BC to court to prevent the construction of a ski resort at *Qat’muk*, a sacred mountain to the Ktunaxa people in southeast BC (Blair 2020). Similarly to Cowichan Tribes’ assertions at *Hw’teshutsun*, Ktunaxa asserted that mitigation involving any construction of the ski resort would result in irrevocable damage to this mountain associated with the Grizzly Bear Spirit (Ktunaxa Nation 2010; Blair 2020). Though the Ktunaxa Nation argued for the protection of *Qat’muk* under their aboriginal rights under section 35 of the Canadian constitution and their religious rights under

section 2(a) of the Charter of Rights and Freedoms, the court ruled that under tests laid out in s.2(a), the proposed project would not violate Ktunaxa’s rights to religious freedom (Blair 2020). The court held that s.2(a) protects the rights to believe in something, but does not extend to the protection of objects of belief, in this case, with *Qat’muk* (Ktunaxa Nation v. British Columbia (Forests) 2017). Canadian law was interpreted to uphold colonial values held by the Canadian government and legal system and in doing so, suppress Indigenous spiritualities through the attempted alienation of their lands<sup>23</sup> (Blair 2020). ‘Sacredness’ was not given legal power and the cultural significance of *Qat’muk* was not encompassed by these legal tests.<sup>24</sup> This case provides another example of the need to holistically communicate an Indigenous nation’s relationships, teachings and values enmeshed in their territory and the failure of the courts to recognize and uphold such teachings and values.

Within their TUA, Cowichan Tribes utilized a different term to characterize and relate the significance and extent of their teachings and relationships with *Hw’teshutsun*. Cowichan Tribes’ Traditional Use Assessment of the *Hw’teshutsun* area describes three levels, or scales, of traditional use sites considered in the study: traditional territory, general use area and specific use site (1998, 46). A specific use site was the most commonly used category indicating intensive use of smaller places. General use areas were defined as “large areas or regions that were identified in the study interviews or in the literature review. For example, the entire area of Hill 60 was described in interview as being a good place for hunting” (1998, 46). While Joly *et al.* (2018) argue that Traditional Land Use studies misrepresent Indigenous peoples’ relationships with the land by

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<sup>23</sup> *Qat’muk* was ultimately protected from development through the creation of an Indigenous Protected and Conserved Area (IPCA) in 2020 (Nelson Daily Staff 2020).

<sup>24</sup> Here, we can see a divergence between Canadian and Indigenous law – Canadian law does not function to protect the values and teachings of the Ktunaxa people. Creation of an IPCA at *Qat’muk* was, similar to the *Hw’teshutsun* TRM, an entanglement of Indigenous and Canadian law where Ktunaxa teachings guided the exercise of Canadian jurisdiction. Such legal entanglements will be discussed further in Chapter 4.

not representing “the cultural importance of the landscape as a whole” by asking Indigenous peoples to identify particular sites of significance, in this instance, report authors used terms available to them to convey Hul’q’umi’num’ teachings about *Hw’teshutsun* as a cultural landscape. Their use of ‘general use area’ has many common characteristics with the definition of cultural landscape that I am employing and has been categorized as a site.

Rather than watering down the need for a term to holistically reflect Indigenous engagement with the land beyond small sites, I find that other attempts to articulate a similar phenomenon over time make a stronger case for a common piece of communication. *Hw’teshutsun* could be described as a sacred site because there are places for spiritual bathing. It could be described as a “general use area” because people go there to hunt. Provincial and federal policy and law attempt to direct Indigenous nations to segment their cultural landscapes into pieces that fit into state cadasters – isolated postage stamp-sized sites that disregard the relationships and teachings enmeshed in the land. These mitigation options are clearly inadequate. Disassembling cultural landscapes and places to fit pieces of them into someone else’s categories is an ongoing act of colonial violence that continues the devaluation of Indigenous knowledge, teachings, governance and Indigenous peoples’ ways of being in the world. Land protection measures must directly reflect Indigenous teachings and center Indigenous governance and authority to their lands if these measures are to protect the cultural landscapes where these teachings reside and where relationships occur. *Hw’teshutsun* stands as an example of Cowichan Tribes’ refusal to participate in this colonial game of segmenting their territory through state law. Rather, Cowichan Tribes leadership utilized their own laws and legal traditions to protect a cultural landscape, pushing on Crown negotiators to exercise their jurisdiction in accordance with Hul’q’umi’num’ teachings throughout the culturally significant area.

## **Land privatization and deforestation:**

Hul'q'umi'num' people's exercises of authority and jurisdiction within their territories have never been "reconciled" with those of the Crown – the "land question" remains outstanding and private property owners and state governments take advantage of this lack of formal agreement to continue to alienate Hul'q'umi'num' territory. While throughout much of Canada historical treaties exist between Indigenous Peoples and the Crown, Cowichan Tribes and the neighbouring Hul'q'umi'num'-speaking communities have never historically entered into a treaty relationship. Five of the Hul'q'umi'num' communities – Cowichan Tribes, Lyackson First Nation, Halalt First Nation, Penelakut Tribe and Lake Cowichan First Nation – currently make up the Hul'qumi'num Treaty Group (HTG) formed in 1993 (which then included Stz'uminus First Nation) to engage in negotiations with Canada and British Columbia (BC) for the recognition of their title, rights and governance through the BC Treaty Process (HTG 2005). While these negotiations are ongoing, formal Crown recognition of Hul'q'umi'num' jurisdiction is limited to tiny reserves comprising about 2% of Hul'q'umi'num' traditional territory (HTG 2005, 26). Participation in the treaty process allowed for the creation of a protection treaty-related measure (TRM) agreement in 2001 to prevent development at *Hw'teshutsun*, in a unique affirmation of Hul'q'umi'num' values through exercises of provincial jurisdiction. Preventing logging and construction throughout almost 1700 hectares of this culturally significant forested mountain ridge is astounding considering the history of land grabs and ongoing privatization and logging throughout Hul'q'umi'num' lands and waters.

Historically, over 85% of Hul'q'umi'num' territory was alienated as fee-simple private property, through mid-19th century Crown Grants and an infamous land grab by coal baron Robert Dunsmuir in 1884 (Morales, Thom and Egan 2007; HTG 2005; Van Wagner 2021; Ekers et al.

2021; Ekers 2019). 800 000 hectares of land, timber and subsurface rights was granted to Dunsmuir through the Esquimalt-Nanaimo (E&N) Railway Grant (Morales, Thom and Egan 2007; Thom 2014. See Figure 4). This land was subsequently sold, primarily to three forestry companies who now hold fee simple title to 77% of Hul'q'umi'num' traditional territory, the rest divided amongst other private property owners (Tim personal comm, June 2021; Morales, Thom and Egan 2007; Ekers 2019).

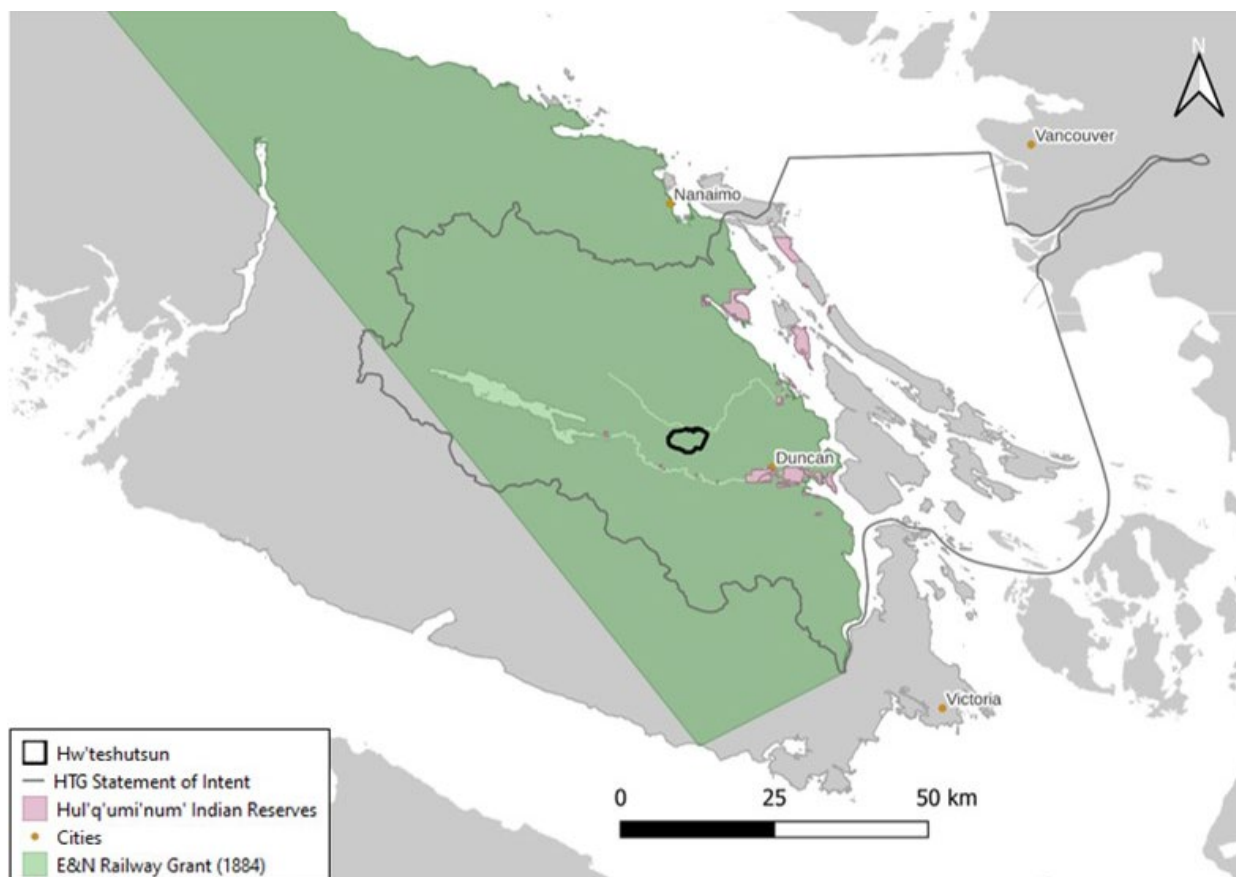


Figure 4: The E&N Railway Grant resulted in the privatization of over 85% of Hul'q'umi'num' territory. Most of the land acquired through this land grab was subsequently sold to private property owners and is thus largely inaccessible to Hul'q'umi'num' people now and not available as treaty settlement lands.

This privatization has resulted in the catastrophic industrialization of the forests of Hul'q'umi'num' people's territories, described by Robert Morales:

When they built the E&N Railway, it certainly facilitated logging and other activities in a big way. When you read the stories about the Amazon forests burning

and so forth, we went through that experience a hundred years ago when the deforestation happened here. And there is very, very little old growth in this territory, in the Hul'q'umi'num' territory.

Hul'q'umi'num' territory is marked by networks of logging roads and gates preventing access to lands owned by timber companies. On the south side of *Hw'teshutsun*, there is a turnoff onto one such network of logging roads. Some of these roads are active as there is a narrow strip of land between the highway and the protected area still owned by a timber company, Island Timberlands, that is actively being logged (see Figure 5). Access to *Hw'teshutsun* via one of the logging roads requires traversing this small area (a few hundred metres) of private land which is gated, though *Hw'teshutsun* is Crown land under BC law. While these gates can be skirted on foot or on a quad, gates present a greater problem for Elders who may wish to visit *Hw'teshutsun*, particularly if they want to go deep into the forest (Dianne personal comm. April 2021).



Figure 5: Private property sign and gate preventing vehicle access through the strip of privately owned land on the south side of Hill 60.

Land privatization has widespread and significant impacts on Hul'q'umi'num' people's lives. Lack of access to and governance of their traditional territory has severely restricted

Hul'q'umi'num' people's economic security, both monetarily and through lack of harvesting rights (Tim personal comm. June 2021; Thom 2014). Industrialization of lands and waters has resulted in increased toxicity of seafoods and a dramatic decline in salmon populations across the West Coast (Ernie personal comm. Dec 2020). Elk habitat has been greatly constrained due to clear cuts throughout the Cowichan Valley impacting food security for Cowichan hunters. Tim Kulchyski aptly described the inaccessibility of many important places and areas to Cowichan people throughout the territory:

[W]e're kind of continually told, "Oh, well that's private land." People elsewhere in the province have a huge appreciation for Crown lands and Crown forestry. Those are public areas, public access. They don't really get how huge an issue it is here. I could take you almost anywhere in this watershed to places that I knew and could access in my time even that are completely inaccessible now. [I could] show you all the different gates, show you brand new houses.

The back of Tzouhalem down throughout Maple Bay Road, down to Maple Bay, it's a big chunk of reserve there and municipal forest. That was a huge hunting area for my uncles in their time. There was no one there. There was a road, and there were some ephemeral houses, but that was kind of their bread-and-butter place to go and hunt. Well before my time they quit hunting. My older brother brought me a few times to hunt, but you'd be going along and be like, "Wow, this is amazing! This is beautiful. There are deer here. Oh, whoops. Well, there's the house." My brother said, "Oh, there wasn't a house when I came through." Well, there's a house there now, so there's a road... So those kinds of things impact on so many different levels. That's [throughout] the whole watershed (personal comm. June 2021).

Tim's story makes evident the need for large intact forests for elk habitat and for hunting, which was an important reason for protecting *Hw'teshutsun*, an intact forest large enough to support elk populations (Larry personal comm. Jan 2021). Though *Hw'teshutsun* is a rich microcosm providing an example of governance of Hul'q'umi'num' lands, as Tim points out, issues resulting from industrialization and privatization occur throughout the Hul'q'umi'num' territory; they are not isolated to *Hw'teshutsun*.

As Crown lands available for treaty comprise less than 10% of Hul'q'umi'num' territory (Cowichan Tribes and BC 2000) and BC's position has long been that other than cash-constrained

willing-seller/willing-buyer deals only Crown land is available for treaty settlement (BCTC 2022), the BC Treaty Process seems unable to adequately address the issues faced by Hul'q'umi'num' people through privatization of their lands. In 2007, HTG submitted a petition to the Inter-American Commission on Human Rights (IACHR) protesting BC's violation of their human rights to property, culture, religious freedom and equity through alienation of their lands and waters (Thom 2014). There have not been clear outcomes from this case, which Canada is nonetheless not obligated to comply with, yet HTG's petition highlights the multiplicity of ways in which Hul'q'umi'num' people continue to be negatively impacted by provincial and federal property laws (Thom 2014; 2019).

E&N Grant lands continue to stand out as somewhat of an anomaly in BC policy as this is the largest contiguous area of private land in BC and private forestry lands are not subject to the same provincial legislations and environmental management as are Crown lands (Thom 2014, 7; BC n.d.). In November 2021, the Government of BC announced proposed old-growth logging deferrals of over 2.6 million hectares throughout BC in response to growing public pressure to preserve these forests (British Columbia 2021). While there are essentially no old-growth forests in Hul'q'umi'num' territory, privately held lands are not part of the deferral process, thus further exempting Hul'q'umi'num' forests from potential protection through provincial legislation. Canadian public desires to protect old-growth forests while viewing previously logged areas, such as *Hw'teshutsun*, as industrial wastelands reflect a different value system than that of Cowichan Elders and knowledge keepers who have shared the importance of *Hw'teshutsun* for entwined cultural, spiritual and ecological reasons. In current discussions of forestry management, Hul'q'umi'num' forests are left doubly unprotected through lax BC legislation of private land and

the exclusion of Indigenous values and laws from shaping provincial forestry policy (Ekers et al. 2021).

Robert Morales, Chief Negotiator of the HTG, explains that “it’s been 200 or some odd years or more, that Indigenous legal orders have not been acknowledged in a greater context. So internally it still exists, but... it’s been superseded by non-First Nations laws” (personal comm. April 2021. See also Thom and Morales 2020; Thom 2020a; Thom 2020b). In this light, the protection of *Hw’teshutsun* from development driven by assertions of Hul’q’umi’num’ jurisdiction and enactments of Hul’q’umi’num’ legal traditions to shape exercises of provincial jurisdiction is noteworthy. Perhaps stories such as that of *Hw’teshutsun*, a success story where an Indigenous cultural landscape was protected or “preserved” (in reference to Cowichan Tribes’ declaration of a “tribal preserve”) in accordance with the associated Indigenous teachings, values and legal traditions, can be useful to highlight the imperative for federal and provincial governments to similarly exercise their jurisdictions in other areas as guided by other Indigenous nations. While such exercises of Crown jurisdiction are not an alternative for the recognition of Indigenous self-determination and title within their territories, such exercises of provincial jurisdiction that reflect deep engagement with Indigenous Nations in good faith can be useful interim measures (while larger discussions of aboriginal title and/or co-governance are settled) that support Indigenous self-governance and care for the land.

### **Bringing forward the teachings to protect a cultural landscape:**

In this context of immense land privatization and the resulting deforestation and industrialization, proposals to log a large area of intact forest and to build a dump at *Hw’teshutsun* created an urgency to reach an agreement to protect this place; this could not wait until treaty

negotiations dealing with these controversial private land issues were concluded (Ratcliff & Co. letter to BC's MOF, Nov. 4, 1999). Today, *Hw'teshutsun*, a second-growth forest logged in the early twentieth century, stands out as a green area that can be seen from space amidst clear cuts throughout the Cowichan, Koksilah and Chemainus watersheds (see Figures 6a-c).

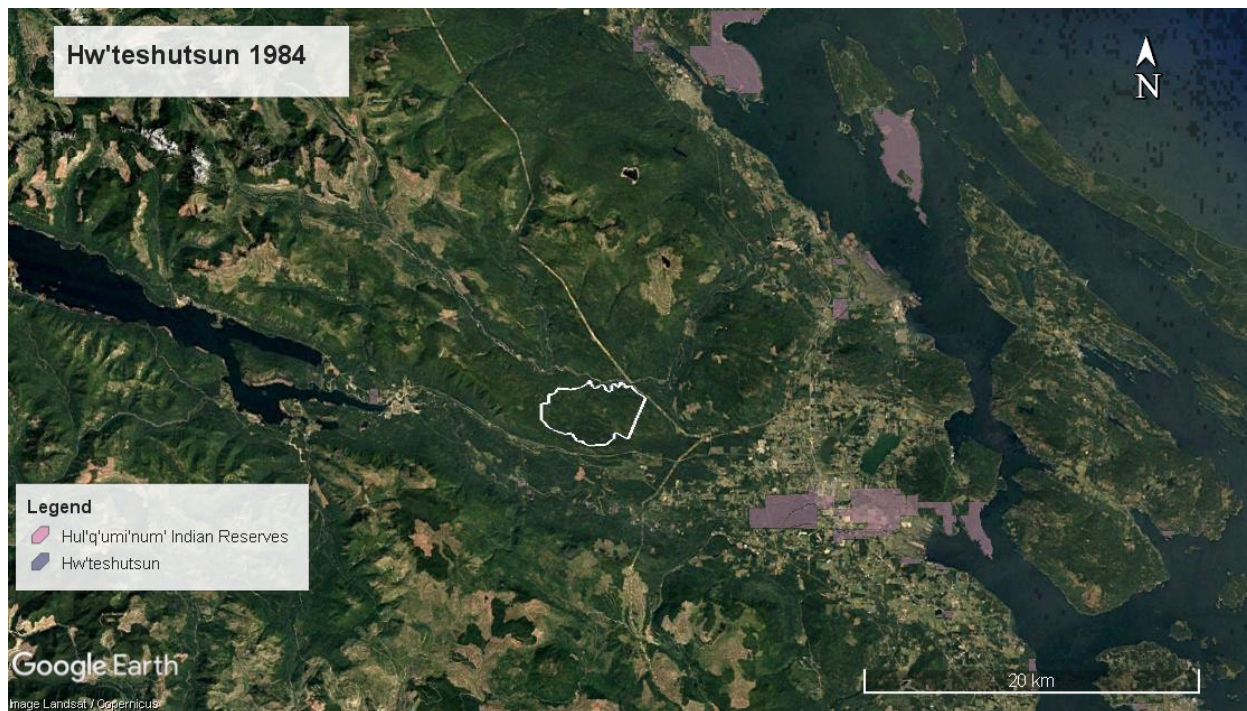


Figure 6a: Good Earth satellite image of *Hw'teshutsun* and the surrounding area in 1984.

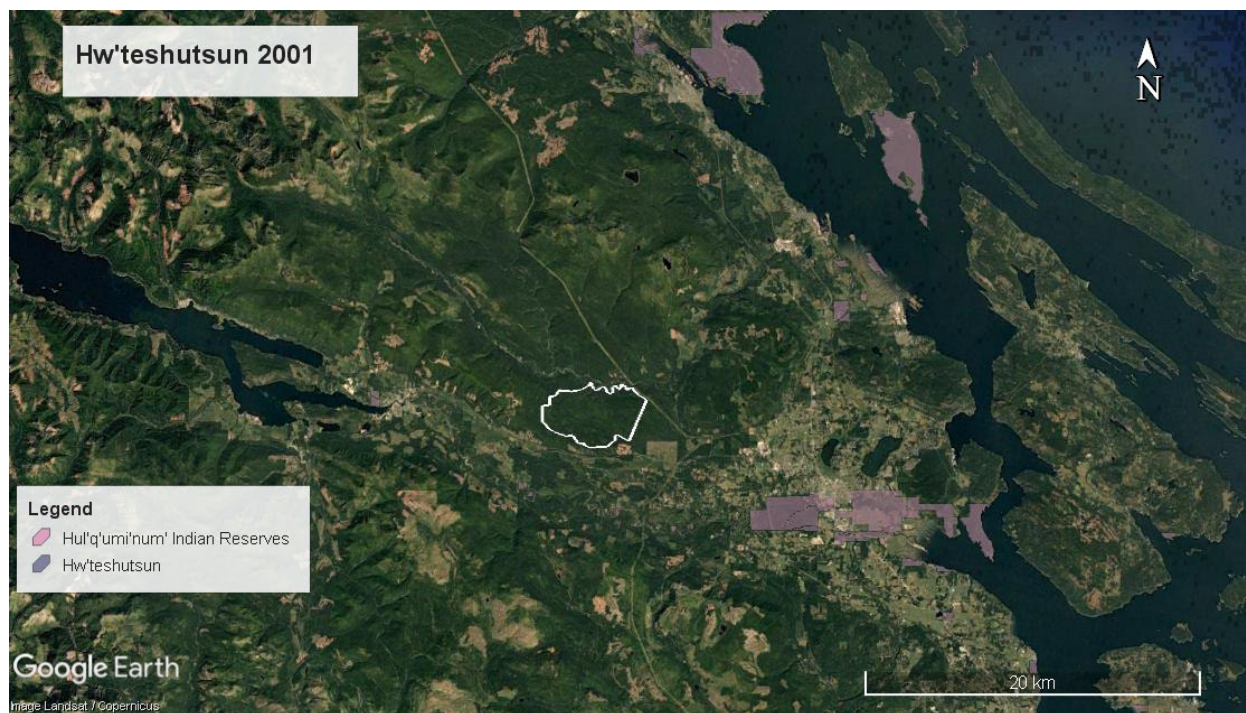


Figure 6b: Good Earth satellite image of *Hw'teshutsun* and the surrounding area in 2001, the year *Hw'teshutsun* was protected through the TRM.



Figure 6c: Good Earth satellite image of *Hw'teshutsun* and the surrounding area in 2020, the most recent imagery in Google Earth.

Together, these three images illustrate the impacts of clearcutting throughout the Cowichan Valley over the past 36 years (until 2020) while *Hw'teshutsun* remains a green area.

***Carefully sharing the significance of Hw'teshutsun:***

In the mid-1990s, the Cowichan Valley Regional District (CVRD) was looking for a location to build a new dump.<sup>25</sup> After proposing, evaluating and consulting on four locations, one of which was approved by BC, the CVRD changed the proposed location to Hill 60, for which no adequate consultation with Cowichan Tribes nor non-indigenous residents had been undertaken.<sup>26</sup> Elder Luschiim brought his concerns to HTG that development of this area would negatively impact Hul'q'umi'num' people's ability to go there to hunt, harvest medicines, and for cultural practices such as *kw'aythut*, bathing in cold water, and other spiritual practices (personal comm. with Brian Thom and Sarah Morales, April 2021). Once Lydia Hwitsum, whose Hul'q'umi'num' name is *Xtli'li'ye*, was elected Cowichan Chief in December 1997, she immediately began working with Luschiim and other Elders and knowledge keepers to prevent construction of the dump and to prevent proposed imminent logging at *Hw'teshutsun* (personal comm. Jan 2021).

In a recent conversation about stories the land can teach about Indigenous legal traditions with my supervisor, Dr. Brian Thom, Luschiim described a particular bathing place in the forest and explains the name, *Hw'teshutsun*, as was told to him by another Cowichan Elder whom he had interviewed during efforts to protect *Hw'teshutsun*:

[It] was so much work and we were able to block that work, stop that garbage dump from going in there. It was right at the top of the hill, and our bath hole's way down there, long ways down. So now it's, for now it's safe. It's a long walk to get in there now.

In one of the interviews I'd done, [he] asked me, "where are you talking about?" I says, "well, oh man..." "Oh, sounds like I know that place." "So, that one hole, it looks like a bowl facing up, right above it is another bowl facing up, holds water, and on that side is a bigger pool, some pools up above it. It's a sloping falls going down to the river." "Oh yeah, I know that place." His mother-in-law called it *shwuhwa'uselu*. Supposed to be the home of the *shwuhwa'us* [Thunderbird], that

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<sup>25</sup> For a more in-depth version of the protection of *Hw'teshutsun*, see Appendix A.

<sup>26</sup> See Appendix A, pg. 210-217.

place. *Shwuhwa'usehu*. So [with] everybody's effort we were able to stop that garbage dump from going in there.

So that's *Hw'teshutsun*. You see the shadow? You see the sunny side? So, when you're, the shady side is shaded from the sun. That ridge over there, Hill 60, at one side, it's in the shade part of the day, and the other side, the south side is in the sun all the time. So *stut'un*, *Hw'teshutsun* is how that word becomes to be (personal comm. with Brian Thom and Sarah Morales, April 2021).

Cowichan Tribes asserted that the entire cultural landscape must be protected to ensure the integrity of valued qualities throughout the landscape (Lydia Hwitsum personal comm. Sept. 2021). They argued to the province and the CVRD that Hill 60 lands were subject to aboriginal title as expressed in the 1997 *Delgamuukw* decision. Construction of a landfill would infringe upon their constitutionally protected aboriginal rights as noise, pollution and smell from the dump would disrupt cultural practices and the integrity of sacred sites at Hill 60 (Ratcliff and Co. letter to BC's MAA, Feb. 4, 1998). In response to these assertions, the BC Ministry of Forests (MoF) declared their confidence that the construction of the dump, including logging 9.5 hectares at Hill 60, would not impact water quality, vegetation and wildlife around identified creeks and traditional use sites and that hunting and gathering were not dependent upon the dump site. Ecological impacts that the MoF considered were not the same as the impacts described by Cowichan elders and knowledge keepers which reflected different engagements with and knowledge of the land than those held by the Province. Provincial mitigation measures addressing ecological impact would thus not have been sufficient to protect the qualities of the cultural landscape emphasized by the Elders.

A lack of understanding of the culturally significant qualities that pervade throughout the landscape was evident in the CVRD's mitigation proposal at Hill 60 to protect bathing places from destruction. Ernie Elliot, a Cowichan Elder and the band manager at the time who worked closely

with the CVRD during consultation for the dump construction at Hill 60, expressed concern that mitigation strategies would draw attention to cultural places:

In the negotiations, we made [the CVRD] aware of the fact that there were sacred sites, there were areas for bathing and doing rituals... One of the things they had to do, or wanted to do, was log it, before they started up the landfill site. So what they offered to do was:... you point out those areas that are sacred to you, and the bathing sites that you want preserved and we'll work around them. But we felt that would only highlight those areas... that area holds so much meaning to us (personal comm. Dec. 2020).

Refusing mitigation of sites within *Hw'teshutsun* reflects both the interest to keep places and cultural practices private and necessity of protecting desired qualities throughout the forest.

Maintaining privacy of these places is not the same as keeping knowledge of the places secret. Chief Hwitsum knew that it was necessary to discretely share information with the Crown about the significance of *Hw'teshutsun*. Yet some Elders whose experiences had taught them the importance of remaining silent about the locations of and teachings around cultural places and practices were hesitant to divulge information about *Hw'teshutsun* to the government or the public. Lydia described how she navigated the desire to keep knowledge private with the understanding that if she said nothing, *Hw'teshutsun* would be logged and developed:

So that was, again, working within community with the Elders, getting the data [to prove use of *Hw'teshutsun* to BC]. And it wasn't easy. The Elders were saying, "they've already taken enough from us. We don't want to tell them anything more about us." So I had to have a really strong relationship with the Elders to say, "Look, if I don't say anything, they're going to put a landfill there. And we'll never be able to use it like we did ever again." And that was the tipping point for them. It's like, we speak now or we lose it. It was that urgent. And so that was, in terms of the Elders agreeing that I could bring forward a whole body of knowledge to convince the Crown that we weren't making up a story about our spirituality in order to stop them from putting in the landfill (personal comm. Sept. 2021).

Chief Hwitsum's perspective was shared by Elder Angus Smith who shared stories about one of the powerful places at a creek at Hill 60 saying, "that's what we're trying to save today. And that's the thing I would like to always talk to. If you know anything, bring it out. Bring it out,

don't be afraid to bring it out, what you know" (in Thom 2005, 163). Angus Smith emphasized the need to talk about these places, to bring government officials to these places so that they can experience these important places outside of the negotiation table (Thom 2005, 162-3).

***Bringing the teachings to the treaty table:***

Knowledge from Elders was confidentially shared with the Crown through a Traditional Use Assessment (TUA)<sup>27</sup> conducted in 1998 to document Cowichan people's engagement with *Hw'teshutsun*, including cultural practices, stories and teachings present there. This TUA informed discussions between BC, Canada, Cowichan Tribes and HTG in a side table to treaty negotiations led by Chief Hwitsum, who was concerned the forest would be logged and developed before treaty negotiations were concluded in the "talk and log" mentality typical of BC negotiations with First Nations (personal comm. Jan 2021; Ratcliff & Co. letter to BC's MOF, October 27, 1999). In the optimism of the early days of the BC Treaty Process, provincial negotiators were eager to find a solution to protect Hill 60, indicating the Crown's commitment to treaty making (Doug Caul and Robert Leece personal comm. June 2021). While plans to construct the dump were dropped in October 1998 after Cowichan Tribes took the CVRD to court, negotiations with BC were necessary to prevent logging *Hw'teshutsun*. Discussions with the CVRD about *Hw'teshutsun* continued as the construction of a motorsport race track, known locally as the "noise park", was proposed just south of *Hw'teshutsun*. The noise park was opposed by Cowichan members as the noise from these activities would disrupt the quiet valued at *Hw'teshutsun*. Chief Hwitsum used multiple strategies

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<sup>27</sup> This TUA included teachings shared by cultural advisors Leonard Antoine, Ruby Peter, *shhu'ultuhw* Angus Smith, Abner Thorne, Rita Johnnie, Arvid Charlie, Ken Sam, Mary Alphonse, Lawrence George, Fred Roland Jr., Stella Johnny, Allen Jack, Brian Elliott, Joanne Charlie, Craig George, and one other cultural advisor who wished to remain anonymous.

Cowichan Tribes researchers were Abner Thorne, Arvid Charlie and Dianne Hinkley. Traditions Consulting report authors were Kevin Neary, Don Abbott, James C. Haggarty and Helene Demers.

to assert Cowichan values and jurisdiction to *Hw'teshutsun* including litigation, assertions that direct action would be taken to prevent commercial logging (that Cowichan people would log the forest), and strong leadership at the negotiation table.

Simultaneous to these interactions with provincial and municipal governments, Chief Hwitsum was working within the Cowichan community to ensure that the actions of Chief and Council reflected values and direction from Cowichan Elders and community members. Though Cowichan Tribes was leading discussions with BC to ensure respect for Cowichan inherent rights and title at *Hw'teshutsun*, Cowichan Tribes, Stz'uminus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe affirmed their shared connection with *Hw'teshutsun* in a solemn ceremony in the *S'amuna'* Big House and a written protocol in November 2000. In this protocol, the communities affirmed a “mutual desire to maintain relationships, the purpose of which is to keep and protect sacred and important lands within the territory of our peoples and to openly trade resources, including hunting, fishing and trapping, amongst ourselves” (2000). These five Hul'q'umi'num'-speaking communities came together to uphold kinship relationships between the communities and to uphold relationships with and responsibilities to their shared lands guided by their Hul'q'umi'num' legal principles (Lydia Hwitsum personal comm. Jan. 2021), which will be discussed in depth in Chapter 4. As demonstrated in this ceremony, Hul'q'umi'num' people continue to enact their jurisdiction at *Hw'teshutsun* which extends beyond interactions with the province or with Canada. The protection of *Hw'teshutsun* was an assertion of Hul'q'umi'num' people's rights to their land based on their values, relationships and worldview, which will be explored further in depth in Chapters 3 and 4. Nevertheless, it was still necessary to achieve BC's recognition of Hul'q'umi'num' people's relationships with *Hw'teshutsun* to prevent enactment of provincial laws and values.

After a year and a half of negotiations at the side table to the treaty table, in March of 2001, Cowichan Tribes signed the first protection treaty-related measures (TRM) agreement in the province. The TRM was driven by an Order in Council and drew upon Part 13 of the *Forest Act*, section 16 of the *Land Act* and the *Mineral Tenures Act* to prevent any extractive industrial activities throughout 1694 hectares designated the protected area of *Hw'teshutsun* (Doug Caul and Robert Leece, personal comm. June 2021; BC's MOF 2001; Canada, British Columbia, Hul'qumi'num Treaty Group, Cowichan Tribes, 2001). The area continues to be held as Crown land with the commitment to formally transfer title back to Cowichan Tribes through treaty settlement. While treaty negotiators at the time thought that modern-day treaties would be settled within a few years (Doug Caul personal comm. June 2021), significant disagreements between First Nations and the province over the principles of the treaty process (BC Treaty Commission 2008; Thom 2008) have meant that over twenty years after the TRM was signed, Cowichan still does not have recognized title to *Hw'teshutsun*.

### ***Ongoing protection of Hw'teshutsun:***

Cowichan Tribes prevented construction of the CVRD's proposed noise park south of *Hw'teshutsun* through negotiations with TimberWest<sup>28</sup>, the prior fee simple owner, the CVRD and the provincial Land Reserve Commission (Cowichan Tribes 2000a; BC's MAA 2001a). The CVRD proceeded with the noise park, instead constructing it on private land east of *Hw'teshutsun* towards Duncan, not far from *Hw'teshutsun*. In 2019, owners of the Vancouver Island Motorsport

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<sup>28</sup> BC refused to consider this area within the TRM protected area as it was privately owned and thus not part of the BC Treaty Process mandate (see BC's MAA 2001a). Documents I received from the CVRD, BC and Cowichan Tribes do not discuss the details of these negotiations nor provide a map of the proposed noise park site. As such, I was not able to ascertain who currently owns this land under Canadian law (Cowichan Tribes are the aboriginal rights and title holders). While the noise park is a piece of the story of protecting *Hw'teshutsun* and Cowichan Tribes' prevention of its construction directly adjacent to *Hw'teshutsun* reaffirms the important of quiet throughout the cultural landscape, the specifics of preventing the noise park are outside the scope of this thesis.

Circuit (VIMC) proposed an expansion which was strongly opposed by some Cowichan members, including Qwustenuxun, who shared with me some of the reasons for his opposition to the expansion, and non-indigenous residents. Qwustenuxun also came up against perspectives that he should not share information about *Hw'teshutsun* with *hwunitum*, non-indigenous people. Similar to Chief Hwitsum, he felt that sharing enough about *Hw'teshutsun* to teach *hwunitum* people to respect its significance for Cowichan people was more likely to prevent destruction of the forest than remaining silent.

So, 2019 when we were all allowed to meet [pre-COVID-19], ... they had a public meeting about the race track at VIMC [Vancouver Island Motorsport Circuit]. And I, in front of 600 people, I shared a few things that “you don't share, Qwustenuxun, you don't tell nobody,” that elder said. “Oh yeah, you shouldn't share that.” So they [Elders] were mad at me, but the reality is that what I shared helped change the outcome of the decision. So when an Elder's getting mad at me and they're saying, “you shouldn't tell them that”, I say “well, Auntie, if I never said nothing, we wouldn't even have it anymore. So what do you wanna do?” And they go “oh well, maybe you just gotta watch who's there when you're sharing it.” And I'm saying “Auntie, like, if I only shared with the one who was the one to decide, it's hard in the white world because the rest of the individuals won't actually trust that individual's decision. So I have to say to everybody, so everybody knows why. And then everybody else can say “hey, you have to make the right decision”” (personal comm. April 2021).

Qwustenuxun's focus on public education reflects an understanding of entangled Hul'q'umi'num' and *hwunitum* cultural landscapes which exist in the same space. Through sharing stories, he draws attention to Hul'q'umi'num' teachings and values, working towards respect for Hul'q'umi'num' ways of being which have been devalued throughout the colonial process. Ultimately, the Municipality of North Cowichan eventually decided against the expansion, but the proposal is just one example of ongoing threats of disturbance to Cowichan cultural landscapes and ways of being.

## Conclusion:

Ongoing work by many First Nations and the Province to overhaul the *Heritage Conservation Act* is one indication of the need for mechanisms that protect Indigenous culturally significant places and landscapes in accordance with the respective Indigenous teachings and laws. Such legislation will need to have the space to reflect the particular teachings embedded in cultural landscapes and places and should position the Province to support, rather than constrict, the implementation of Indigenous legal traditions throughout their territories but particularly in the care of cultural landscapes and places. This is an idealistic vision, yet the fluidity of common law leaves open the potential to shape provincial legislation in accordance with Indigenous law where there is the political will. The protection of *Hw'teshutsun* provides an example of the ability of exercises of provincial jurisdiction to be shaped in accordance with Indigenous teachings from the land.

In these conversations, the term ‘cultural landscape’ can be useful to point to a particular configuration of tangible and intangible qualities of the landscape, highlighting relationships, teachings and values within in a particular cultural framework. Teachings shared by Cowichan Elders and knowledge keepers, both with me and during the protection of *Hw'teshutsun*, emphasize the importance of maintaining quiet and serenity throughout the landscape, within which particularly powerful places are situated. The teachings speak of the inseparability of tangible and intangible qualities of the landscape. Yet these teachings are specific to *Hw'teshutsun* – legal principles emplaced at *Hw'teshutsun* and connected with the cultural practices occurring there cannot be transposed onto a different cultural landscape. Care for the land requires attention to the teachings associated with a particular place or cultural landscape to ensure the wellbeing of the land and the people engage with it. In an area where over 85% of Indigenous peoples’ territory

has been alienated and is now held in fee simple by private property owners, coming to agreements with the Province that ensure the protection of Indigenous cultural landscapes and continued access to them for Indigenous peoples is essential.

While the story of *Hw'teshutsun* makes visible the need for the protection of Indigenous cultural landscapes, this protection story has significance on its own. *Hw'teshutsun* remains an area where people engage in cultural practices despite continued gates barring entrance and quadders ripping through the forest. It is important elk habitat, demonstrating that centering Indigenous cultural values not shared by the majority of non-Indigenous Canadians can still address Canadian values, such as ecological integrity. The success that Cowichan leadership achieved in protecting a cultural landscape twenty years before the present-day popularity of frameworks combining Indigenous governance and environmental protection, before *UNDRIP* was passed into provincial legislation, before BC's *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples* and other similar commitments is extraordinary. With these provincial commitments comes the imperative for the province to follow through, to respect Indigenous people's jurisdiction throughout their territories and implement provincial legislation that sufficiently acknowledges and supports Indigenous peoples' governance of their cultural landscapes.

### **Chapter 3: The legal fabric of *Hw'teshutsun***

#### **Introduction:**

In Chapter 2, I discussed the need to understand and care for Indigenous cultural landscapes in accordance with the values and teachings embedded within them. The extent and significance of cultural landscapes and the relationships between places that they encompass becomes apparent through the qualities and teachings of people who know the landscape. As Indigenous places and cultural landscapes are consistently devalued and destroyed by industrial and urban projects throughout British Columbia and Canada, protecting *Hw'teshutsun* because of its cultural significance continues to be a valuable and relevant example of Indigenous-led land protection today.

The teachings and values that characterize and are emplaced at a cultural landscape, such as *Hw'teshutsun*, are part an Indigenous legal tradition, the foundational framework that provides order in a society (Morales 2014; Napoleon 2007; Borrows 2010; Mills 2018; WSÁNEĆ Leadership Council n.d). These teachings guided not only the work of Cowichan Tribes' leadership to protect *Hw'teshutsun*, but they also shaped the exercise of provincial jurisdiction through the treaty-related measure (TRM) agreement and Order in Council that prevented industrial development at *Hw'teshutsun* in accordance with Hul'q'umi'num' law. While these entanglements of Hul'q'umi'num' law and provincial jurisdiction will be the subject of Chapter 4, this chapter will focus on the legal teachings emplaced at *Hw'teshutsun*. Some of these teachings – significantly Abner Thorne's quote – were shared in the previous chapter, as they characterize *Hw'teshutsun* as a cultural landscape. These teachings will be expanded upon as I show how the protection of *Hw'teshutsun* was driven by *snuw'uyulh*, including a story of *Stutsun*, one of the Hul'q'umi'num' First Ancestors, which provides significant teachings for Hul'q'umi'num' people

and connects them with the land (Thom 2005; Morales 2014; McLay et al. 2008). However, law is always actioned in a particular context; it is the deliberation and expression of a legal tradition in a particular moment. Experiences and teachings shared by Cowichan knowledge keepers indicate some of the constraints on their expressions of Hul'q'umi'num' law and teachings. *Hw'teshutsun* was protected in such a context where the ability of Hul'q'umi'num' people to action their laws and exercise their aboriginal rights is continually restricted by Canadian law and society (see also Morales and Thom 2020). In such a context, the recognition of Hul'q'umi'num' law within exercises of provincial jurisdiction through the protection of *Hw'teshutsun* is astounding.

The protection of *Hw'teshutsun* in accordance with Hul'q'umi'num' principles and teachings was an expression of Hul'q'umi'num' law. As an anthropology student engaging with Indigenous legal scholarship from the outside, I have been guided by my committee member Dr. Sarah Morales who sees law as an action, an enactment of Indigenous teachings (Morales 2014; 2018; see also Napoleon 2007). Indigenous law may certainly include traditional protocols, but can also take the form of declaring a tribal preserve or other actions that attend to the teachings (Napoleon 2007). In Hul'q'umi'num' law, relationships with ancestors, kin and places are highly significant (Morales 2018; Thom 2005). Protecting *Hw'teshutsun* involved Hul'q'umi'num' legal actions – affirming the kinship relations between the Hul'q'umi'num' communities and their connection with the land and personal relationships that people have with the land.

*Hw'teshutsun* was protected in accordance with Hul'q'umi'num' teachings and stories about how to engage with the land specific to *Hw'teshutsun* to ensure Hul'q'umi'num' people's continued ability to engage with *Hw'teshutsun*. The teachings, *snuw'uyulh*, are rooted in oral histories of the First Ancestors of the Hul'q'umi'num' *mustimuhw* (Hul'q'umi'num' people) and

of *Xeel's*, the Creator or Transformer (Morales 2014; McLay et al. 2008). *Snuw'uyulh* encompasses the guiding principles about how to live a good life as a *hwulmuhw* person – how to be lawful in Hul'q'umi'num' society (Morales 2017a, 148-9). One First Ancestor story in particular is emplaced at and around *Hw'teshutsun*, connecting Hul'q'umi'num' people with the *Hw'teshutsun* area through story, teachings and ancestral connection (TUA 1998).

While these teachings drove Cowichan Tribes' actions to protect *Hw'teshutsun*, it is essential to understand that Hul'q'umi'num' teachings, legal traditions and law today are always expressed in a colonial context. Land alienation and subsequent degradation, residential schools and the potlatch ban have greatly impacted knowledge transmission, access to places and cultural landscapes within Hul'q'umi'num' territory and the ability of Hul'q'umi'num' people to exercise their laws, teachings and cultural practices. This will be elaborated on in the second part of this chapter by Cowichan knowledge keepers Tim Kulchyski and Jared Qwustenuxun Williams, who shared with me teachings about *Hw'teshutsun* and personal experiences that entangle the expression of the teachings – personal legal actions – with the ongoing impacts of colonization. Canadian law and society continue to constrain and disrespect Indigenous peoples and their authority and jurisdiction throughout their territories. Such experiences call for the protection of cultural landscapes in accordance with their Indigenous teachings, but also for the respect for Indigenous nations' exercise of their laws throughout their territories.

### **Operationalizing law from legal traditions:**

In order to illustrate entanglements between Canadian and Indigenous law, this section will draw upon Indigenous legal scholars such as Sarah Morales, Aaron Mills, Robert YELKÁTTE Clifford, Val Napoleon and John Borrows to contextualize the ensuing discussion of the

Hul'q'umi'num' teachings and legal principles invoked to prevent development at *Hw'teshutsun*. This brief review of legal theory will conceptualize law as the determination and enactment of appropriate conduct in a particular context through the interpretation of a legal tradition rooted in a particular cultural framework (Morales 2014; 2018; Napoleon, 2007; Glenn 2005; Borrows 2010). Each element of this definition has particular relevance for understanding how Hul'q'umi'num' law was operationalized to protect *Hw'teshutsun* and how Hul'q'umi'num' and Canadian law are entangled and thus influence one another.

Beginning from a broad understanding of legal traditions and law, including the recognition that law is not only enacted through formal systems by centralized governments, allows for an analysis of Indigenous law that does not rest upon justification through equivalencies with Canadian law (Morales 2014; 2017a; 2018; Clifford 2016b; Mills 2016; Glenn 2005). Numerous Indigenous legal scholars have identified how such false equivalencies have constrained the full description and recognition of Indigenous legal traditions as law stems from a particular cultural framework (Morales 2014; Clifford 2016b; Mills 2016). Outside of the academy, the lack of understanding and recognition of Indigenous law by the Canadian state and society results in Canadian law overshadowing assertions of Indigenous governance (Morales and Thom 2020; Thom 2020b).

This modern-day ethnohistorical account of how Hul'q'umi'num' law was operationalized to protect an important cultural area from development reveals the power of Indigenous law to shape the exercise of Canadian jurisdictions which are more malleable than often depicted. In a country such as Canada where multiple legal traditions are simultaneously operating (legal pluralism), understanding the relationships between these legal traditions and their enactment as law is key to developing a system of governance that takes in account the principles, teachings and

values of Indigenous legal traditions as well as that of the state (transsystemic law). This section will draw from legal theory to conceptualize law as an action stemming from a legal tradition that is part of a cultural framework to provide some points of analysis of the use of Hul'q'umi'num' law to protect *Hw'teshutsun*. The rest of this chapter and the next will build on these concepts to illustrate Hul'q'umi'num' law in practice and the entanglements between Hul'q'umi'num' and Canadian and BC law.

Throughout my research, I struggled to conceptualize the connection between Hul'q'umi'num' teachings and law. People I spoke with throughout my research talked about teachings from the land and about how to conduct oneself which were not overtly characterized as law. The teachings, as they are often referred to, or *snuw'uyulh* in Hul'q'umi'num', are often found in stories and places and may be used as guidance or instruction in people's lives (Morales 2014; Thom 2005; McLay et al. 2008; Paul 2014; Cruikshank 2005). Sometimes I wondered if the framework of "law" was another false equivalency, an attempt to fit Indigenous peoples' knowledge and practices into an imported cultural category.

These doubts were due to my own cultural conception of law, relegated to institutional actions and enforced by the state. Legal theory allows me to discuss how law includes personal and everyday actions (Morales 2017a; 2018; Borrows 2010, 7; Mills 2022; Glenn 2005). Law can include ceremony and storytelling and it can be learned from the land (Mills 2022). Similar to storied knowledge, law requires active deliberation of principles and an understanding of the context within which decisions are made and felt. Making this connection between stories and law explicitly allows me to highlight how Hul'q'umi'num' First Ancestor stories guide legal action both on personal and institutional levels.

The words of Coast Salish Elders and knowledge keepers, both those whom I had spoken with and those whose words I have read, affirmed my sense that the teachings are something deeper than law and made this problem of categorization seem academic and esoteric, but they also provided a reminder of the practical reasons for characterizing legal actions as such. The work of Brian Thom (2005; 2020b), Sarah Morales (2014; 2017b), Robert Clifford (2016a; 2016b) and Johnnie Mack (2011), among many others, illustrate how Indigenous teachings and legal principles are used in governance of people and places. Understanding the ways in which they are used has great significance for the recognition of Indigenous law where it intersects with Canadian law. Thus, these baseline definitions of concepts such as law, legal tradition and legal system were relevant for understanding legal traditions on their own and the relationships between different legal systems. This theory is not only in relation to Indigenous law; Canadian law also extends beyond interactions with the state and is rooted in a particular cultural framework. Rather than trying to fit Indigenous legal traditions into a conversation with a particular state legal system, legal theory dethrones state legal systems as the standard of what law is.

Much discussion and debate has occurred around the meanings and use of “law”, “legal tradition”, “legal system” and “legal order” (for example, see Morales 2017a; Glenn 2005; Napoleon 2007; Borrows 2010). As a student of cultural anthropology, I am not particularly invested in the intricacies of these discussions and as such, my use of these terms is rather loose. Distinctions have been made between Indigenous legal orders “embedded in social, political, economic and spiritual institutions” (Napoleon 2007, 3; Daigle 2019) and legal systems, the state’s formal structure for enacting law (Napoleon 2007, 3). I have chosen not to address this distinction in this thesis because, while Indigenous legal traditions, themselves specific to each nation, and Canadian legal traditions differ in their underlying principles, sources and epistemologies, I do not

find frameworks that create oversimplified distinctions between Indigenous and Canadian law to be particularly useful or accurate.<sup>29</sup> I am more interested in how law is enacted in a particular context drawing from legal traditions and ways in which legal action entangles legal systems and traditions, including institutionally and informally. Understanding “law” and its relationship to a legal tradition is more pertinent than distinctions between legal systems in my discussion.

Legal traditions are a set of underlying social mores and cultural teachings and principles deeply rooted in a particular cultural framework (Borrows 2005, 174). They are an enduring

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<sup>29</sup> This will be expanded on in Chapter 4. This is a part of a much larger discussion on understanding the relationship between Indigenous law and state law, which is not the focus of this thesis, though I will offer a few preliminary thoughts here.

Napoleon argues that Indigenous legal orders are “embedded in social, political, economic and spiritual institutions” while state legal systems are “managed by legal professionals in legal institutions that are separate from other social and political institutions” (2007, 2). From an anthropological standpoint, all systems of law are entangled with other cultural practices, values and institutions in a given society. This is reaffirmed in Borrows (2010) assertion – which has been taken up by many other Indigenous legal scholars (Morales 2014; Mills 2018; Clifford 2016 to name a few) – that all law is to be understood in a particular cultural context. Legal traditions and principles underlie every legal system (see Glenn 2005).

Indigenous legal scholars and philosophers draw attention to the importance of place and relationality in Indigenous societies, which form integral parts of their legal traditions (Deloria 2001; Morales 2014; Clifford 2016; Mills 2020). These underlying principles are common amongst Indigenous legal traditions and distinguish them from state legal systems. However, these broad legal principles are not themselves laws: they do not give specific direction on how to conduct oneself and act properly as a member of society. These laws are specific to each Indigenous nation. So while they may have principles in common, Indigenous laws are not a unified body to juxtapose against state law. Impositions of state law impact all Indigenous nations, though particular experiences of colonialism are quite different throughout Canada. While it may be easier, and at times useful, to speak of the challenges that all Indigenous nations face in asserting their authority in a settler-colonial society, ethnography – used in this thesis – provides a way of looking at specific stories in their own contexts.

In this thesis, I am interested in how legal traditions are operationalized as law – how legal traditions are enacted in a particular context. As Napoleon (2005) explains, this requires active deliberation of how principles and teachings are to be expressed. Such deliberations are made in a context in which multiple legal traditions and value systems are operating – they are not derived from one legal tradition in isolation. In this process, we can see the importance of looking at law as entangling different legal traditions, values and teachings (see Dussart and Poirier 2017; Borrows 2017). Ethnographers may listen closely to the words of Elders and knowledge keepers who describe the fundamental teachings and legal principles (Thom 2005; Morales 2014; McLay et al. 2008) – these teachings are guidance on how to act; they inform legal actions. Ethnography is concerned with describing the world, which is always a mess of competing and overlapping stories, values and actions. It would be erroneous to depict law pertaining to Indigenous peoples and their lands in what is currently known as Canada as solely Indigenous or solely colonial (see Borrows et al. 2019). This is not to deny the imbalance of power relations between the state and Indigenous nations. However, to overlook the ways in which Indigenous peoples assert their laws and shape state law would be to ignore Indigenous peoples’ authority and agency and would provide an inaccurate representation of legal relations in Canada. In looking to lessen state constraints on Indigenous law, it is necessary to understand the nuances of current legal (as well as entwined political, economic, social, cultural) relationships to think about creative and innovative ways in which Indigenous nations can continue to assert their laws.

framework, providing organization and continuity within a society, yet they must be able to change and provide relevant guidance and order in the contemporary lives of the people who apply them (Borrows 2005, 174-5). “Tradition” therefore does not evoke a static or unchanging character of legal traditions or laws: the strength of a legal tradition may be measured through its flexibility and continued utility for a society (Borrows 2005, 175). Though legal traditions are strongly rooted in fundamental stories and teachings of a particular cultural group (Mills 2018) – for Hul’q’umi’num’ *mustimuhw* that would include stories of the First Ancestors and of *Xeel’s* (see Morales 2014) – the flexibility in legal traditions and the greater malleability of laws determined from them are a characteristic necessary to understand the ways in which laws entangle multiple legal traditions in legally pluralistic societies. Such entanglements were key in protecting *Hw’teshutsun* under provincial jurisdiction in accordance with Hul’q’umi’num’ legal traditions.

Law emanates from legal traditions. Law is a practice, the act of interpreting how humans ought to conduct themselves in accordance with social principles and teachings – legal traditions and principles – and enacting that interpretation (Morales 2018; Napoleon 2007, 3; Borrows 2010, 7-8; Cover 1983). Anishinaabe legal scholar John Borrows explains that “[law] pivots around deeply complex explicit and implicit ideas and practices related to respect, order, and authority. Laws arise whenever interpersonal interactions create expectations and obligations about proper conduct” (2010, 7). Laws put legal traditions into action; they are used to maintain order in a society and thus must be consistent with contemporary values and social mores (Borrows 2005).

Law facilitates meaning-making and ethical engagement within and outside of formalized legal systems (Cover 1983; Glenn 2005; Fuller 1969; Clifford 2016b; Mills 2022). Legal scholar H. Patrick Glenn argues that “while the theory of legal systems has sought the identification of law by formal means, those who look to law for guidance must look inevitably beyond the formal

identifiers. They are interested in content as a guide to action” (2005, 883). Law, seen as the determination and enactment of appropriate conduct with reference to a particular legal system, includes but extends beyond formal legal systems. Thus, when Indigenous legal scholars speak of stories and places as sources of law containing teachings which guide their actions (Morales 2016; Clifford 2016b; Napoleon 2007), they are clearly describing legal action proceeding from a legal tradition specific to their Indigenous nations. The teachings around *Hw'teshutsun* informed both informal acts of being a lawful person and formal legal actions which included a ceremony in the Big House and a TRM protection measure with BC and Canada. Legal traditions can be operationalized in different ways; operationalizing law is the process of deliberation and actioning the teachings in a particular context, which may call for personal and private actions or formalized law enacted through a governance system.

WSÁNEĆ legal scholar Robert YELKÁTTE Clifford states that: “A system of laws isn't a set of rules as much as it is a way of being, or creating particular citizens. It asks: ‘what does it mean to be a responsible person in the community? What does it mean to live in a healthy way?’” (WSÁNEĆ Leadership Council n.d.). These questions inquire into the values and principles within any given society that provide guidance on how to interact with others, with the land and how to govern oneself. Clifford's questions have particular relevance to the protection of *Hw'teshutsun*. The late Cowichan Elder Wes Modeste explained law as “a way of life” providing guidance on how to conduct oneself amongst your people (Morales 2017a, 149-50). *Snuw'uyulh*, the teachings from which Hul'q'umi'num' laws are determined, has been broadly described as the teachings about how to live a good life as a Hul'q'umi'num' person (Morales 2014; Lydia Hwitsum personal comm. Sept. 2021).

Many Coast Salish legal traditions center the importance of personal legal actions, kinship, relationships with and responsibilities to the ancestors and connections with the land (Morales 2018; Thom 2005), which play out in significant ways in the protection of *Hw'teshutsun*. Stories about the First Ancestors and *Xeels*, the Creator or Transformer, are important sources of Hul'q'umi'num' law (Morales 2014; McLay et al. 2008). Hul'q'umi'num' law centres relationships with and responsibilities to places, kin and ancestors (Morales 2018). Its application is often personal; people enact *snuw'uyulh* in their daily lives (Morales 2018). The protection of *Hw'teshutsun* was driven by the importance of being able to continue to enact *snuw'uyulh* and by the connections of the teachings with *Hw'teshutsun*.

Teachings and legal principles are not uncritically applied to our lives. Val Napoleon explains that “law is the intellectual process of deliberating and reasoning to apply rules according to the context” (2007, 4). Law is simply not a set of rules accepted by society with varying degrees of relevance in our lives. It is a way of applying implicit principles collectively held by a society which both regulate actions and interactions and create meaning (Cover 1983; Fuller 1969; Morales 2014; Napoleon 2007; Borrows 2010). As stated by John Borrows, not only is law an active process, changing over time, but legal traditions themselves are “living” – they are adjusted over time to provide effective standards and foundations for people in a society to live a good life:

On the one hand, [legal] traditions can be positive forces in our communities if they exist as living, contemporary systems that are revised as we learn more about how we should live with one another. On the other, traditions can be destructive if they become static and frozen in their orientation, interpretation, and application. They become negative forces if they are overly romanticized, essentialized, and fossilized in an inflexible framework. To avoid these pitfalls, tradition must not only be seen as helping to set the parameters of our lives, but it should also ‘provide us with the means of questioning and developing those parameters’ for it to be effective (Borrows 2010, 8).

Legal teachings, like stories which they often stem from, are not prescriptive. Law is the process of interpreting teachings and principles about how to act in particular circumstances (Napoleon 2007).

This is particularly instructive in understanding how Hul'q'umi'num' law shaped the protection of *Hw'teshutsun*. Teachings about cultural practices at *Hw'teshutsun* express the importance of quiet and seclusion (Lydia Hwitsum personal comm. Sept. 2021; TUA 1998; Suttles 1981; Ratcliffe & Co. to TimberWest 2000). Cowichan Tribes leadership drew upon those teachings in a particular socio-political context to protect *Hw'teshutsun*. Implementing Hul'q'umi'num' law thus took the form of negotiation with the province, litigation against BC and the CVRD, declaration of a tribal preserve and ceremony in the Big House.

The teachings that people draw upon to enact law are rooted in a particular cultural framework (Mills 2018; Borrows 2010). Aaron Mills has illustrated this concept through an analogy of law with a tree:

The earth conditions a range of possibility for what the roots may become. The roots condition the trunk. The trunk conditions the branches. The branches condition the leaves. The roots never determine what the trunk will become; determination is much too strong a word for the kind of relationship existing between parts of the tree. But they constrain and empower its range of possibility...

I want to argue that healthy human societies are like this too... [Foundational] stories set out a people's way of being in and (if rooted) of the earth. They give us our ideas of what a person is, what freedom is, and thus what community is. The trunk is the constitutional order that manifests these understandings as political community. It's our framework for living together called into being by the story we tell. I mean constitutionalism broadly in the sense of how we constitute ourselves as peoples, which may have nothing to do with founding documents. Our branches are our legal tradition(s): the assemblage of processes and institutions we use to generate, sustain, alter, and destroy norms. The leaves are our provisionally settled norms. They experience the highest degree of change within the set of relationships that constitute a normative order. Some will fall off, never to return. Others will return after renewal. (Mills 2018, 156-7).

As Mills indicates, the teachings and principles are not deterministic of action; they provide guidance and instruction to be interpreted in particular contexts by humans with agency. As a society, we agree upon a constitutional order – norms and principles informed by and reinforcing a way of living in the world.

In practice, people are influenced by teachings and principles from multiple traditions. No legal tradition exists in isolation. However, Indigenous people, including legal scholars, have illustrated how Indigenous legal traditions have been undermined and overshadowed by the Canadian legal system, such that the full enactment of Indigenous law and Indigenous peoples' ways of life are constrained (Tim Kulchyski personal comm. June 2021; Morales and Thom 2020; Mack 2011). They have signalled the importance of recognizing and revitalizing Indigenous law and governance on its own terms (Mack 2011; Clifford 2016b; 2016a). The protection of *Hw'teshutsun* stemmed from Hul'q'umi'num' teachings, values and relationships. This illustrates a practice of ongoing Indigenous governance and some of the ways in which Hul'q'umi'num' and Canadian law are entangled, which will be elaborated on in the next chapter.

Though every society has a legal system internally cohesive with the values, teachings and ways of life of that society, I do not intend to imply the equal truth and applicability of different legal traditions and legal systems. The Doctrine of Discovery – a doctrine originating from a papal bull in the 1400s and justifying colonial sovereignty under British law – and the E&N land grab are not legitimate claims to land (see, for example, Borrows 2015; AFN 2018; van Wagner 2021; Claxton and Price 2020; Stark 2016, 4). Hul'q'umi'num' teachings are often embedded within places (Thom 2005; Morales 2014) and say something about the place that is true not solely within a Hul'q'umi'num' cultural framework, while Canadian law prioritizes fee simple property ownership and a climate of certainty for economic investment, evident in BC's treaty mandates

(Mackey 2014; Egan 2013; 2012; Thom 2014; Yellowhead Institute 2019). I have situated law within a particular cultural framework because teachings, values and laws about places cannot be extracted from their relationship within a broader system of knowledge and relationships.

### **Driven by *snuw'uyulh*:**

Throughout resistance to proposed development at *Hw'teshutsun*, Cowichan Tribes asserted the primary reason for preventing development was because of the cultural significance of this area, in particular, cultural activities which, among other things (many of which are private knowledge), require quiet and seclusion. The Hul'q'umi'num teachings and values associated with *Hw'teshutsun* were recognized by the provincial government as the reason for protecting the area. This is clear from the *Hw'teshutsun* Interim Measures Agreement (IMA) which had as its first objective to “create and implement a process to address the preservation to the extent possible under existing legislation and policy... of the attributes of the Hw'te shutsun Area that are considered important to Cowichan Tribes” (Cowichan Tribes, Canada and BC 2001, 7). Hul'q'umi'num' teachings highlighted by Cowichan Tribes pointed to the significance of *Hw'teshutsun* as a place that could not be substituted with another area. Teachings about the significance of place included acknowledging the power of certain pools and creeks and the story of *Stutsun*, one of the Hul'q'umi'num' First Ancestors, which not only provides ancestral connections to place but provides direction on cultural practices, including *kw'aythut*.<sup>30</sup>

These teachings, of course, are part of a much larger set of knowledge and teachings of and from the land throughout Hul'q'umi'num' territory. Together, the teachings, *snuw'uyulh*, talk

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<sup>30</sup> See Chapter 2 for more details. Also, TUA 1998; Cowichan Tribes' TRM Presentation 2000; Elder Angus Smith in Thom 2005, 161-3.

about how to live as a Hul'q'umi'num' person in relationship with the land and other people (Morales 2014). *Snuw'uyulh* is a baseline of connection between the Hul'q'umi'num' communities beyond political affiliations, as these are teachings shared by the communities. *Snuw'uyulh* speaks of collective responsibilities held by the people, connecting them with the land and the ancestors (Lydia Hwitsum personal comm. Sept. 2021). Protecting *Hw'teshutsun* involved drawing upon the teachings to ensure that Hul'q'umi'num' people would be able to go to *Hw'teshutsun* in the future. Teachings connected with *Hw'teshutsun* are both specific to place and situate *Hw'teshutsun* within a larger fabric of knowledge and relationships throughout Hul'q'umi'num' territory.

***Hul'q'umi'num' legal fabric:***

Some of these broader teachings about the land were shared with me by Tim Kulchyski who provided a glimpse into the Hul'q'umi'num' teachings and relationships from which *Hw'teshutsun* draws significance. Tim, the grandson of the late Elder Simon Charlie (who was active at the time of the *Hw'teshutsun* negotiations) and nephew of Elder Luschiim Arvid Charlie, is a Cowichan knowledge keeper who works in the Lulumexun Lands Department at Cowichan Tribes. Due to the University of Victoria's COVID-19 regulations while I was doing research, Tim was the only person I was able to meet in person at *Hw'teshutsun*. I told Tim that I wanted to tell the story of how *Hw'teshutsun* was protected, to learn about the significance of *Hw'teshutsun* and to understand the ongoing work of Cowichan Tribes related to the governance of *Hw'teshutsun*. In response, he began sharing teachings about the land, providing context about the significance of protecting *Hw'teshutsun* in relation to Hul'q'umi'num' teachings from and relationships with the land.

As Tim and I walked up the hill from where we parked, he stopped by some *'uxwtunulhp*, Scotch broom, which was blooming at the time, and spoke about how this plant is both a medicine and a poison. As we were talking about traditional land management, we paused to watch *sxwut'ts'uli*, a hummingbird, dart across the dirt road. Tim picked a spruce tip and spoke about making tea with it. He shared teachings about red cedar, *xpey*, of which there are few old-growth trees – used for making huge canoes – left because of the extent of logging in Hul'q'umi'num' territory. He talked about how the Hul'q'umi'num language connects people with places, a language that was outlawed for decades.

How do you pull together a relationship between a people and a place that's developed over, not one or two millennia, not three or four or five millennia, over many millennia? Our language developed here. Our language and our contexts for our language. We just passed *sxwut'ts'uli*, hummingbird, coming up. That's one of the sounds that they make, [*sxwut'ts'uli*]. So that helps you... actually determine species, for one. [The name] also starts to talk about their actions, their motions. You can get hints of their personality and how they fit by their name. If you know the names, then it will give you real hints...

The importance of that connectivity, that perspective, [is] huge. It's actually not possible, maybe if we had a lot of time and we sat with our knowledgeable elders, you could kind of get a sense of all of these different layers (personal comm. June 10, 2021).

Tim gives a glimpse into the fabric of Hul'q'umi'num' teachings and relationships with the land as the setting in which the protection of *Hw'teshutsun* occurred. Hul'q'umi'num' teachings, which are part of the legal tradition, are grounded in relationships that Hul'q'umi'num' people have built with the land for millennia. Pushback against development of *Hw'teshutsun* attended to these relationships in a socio-political context of colonial relations, including the E&N land transfer in 1885, treaty negotiations and impacts of the potlatch ban and residential schools on the degradation of Indigenous knowledge (Tim Kulchyski personal comm. June 2021). The assertion of Cowichan rights and title to *Hw'teshutsun* was an activation of these teachings and relationships.

As discussed in Chapter 2, *Hw'teshutsun* is an area where Hul'q'umi'num' people may go to hunt, harvest medicines, practice *kw'aythut* and for other cultural practices. Elders and knowledge keepers have shared the importance of quiet and seclusion for these practices (Jared Williams personal comm. April 2021; Luschiim personal comm. with Brian Thom and Sarah Morales April 2021; Lydia Hwitsum personal comm. Sept. 2021; TUA 1998; Cowichan Tribes 2000b; Suttles 1981; Thom 2005; Mohs 1994; Moss 1986; Lane 1953). Cowichan Tribes was opposed to development at *Hw'teshutsun* because it interfered with the teachings about how to engage with *Hw'teshutsun*.

These teachings are part of *snuw'uyulh*, which “encompasses the basic normative principles upon which our culture is based. All of our practices and institutions stem from the guiding principles of our *snuw'uyulh*” (Sarah Morales 2017a). In Aaron Mills’ analogy of a tree where legal traditions are rooted in a framework of cultural teachings (2018), *snuw'uyulh* are the baseline teachings from which the Hul'q'umi'num' legal tradition proceeds. Recalling the understanding that law is the determination and enactment of the teachings in a particular context (Napoleon 2007), all the steps that Cowichan Tribes took to protect *Hw'teshutsun* can be viewed as Hul'q'umi'num' law, including negotiations and litigation against BC. These strategies were enactments of the teachings in response to colonial actions that would prevent Hul'q'umi'num' people from living out the teachings.

***The teachings are embedded in places:***

The teachings, *snuw'uyulh*, are often connected with places: places “teach Indigenous people about their legal obligations - to each other, their ancestors and the natural world” (Morales

2016, 103; see also Morales and Thom 2020). Robert Morales, Chief Negotiator of HTG since 2000, explained to me the connection between *snuw'uyulh* and place:

As I've heard the elders talk about it, the *snuw'uyulh* is really about the way you live your life. And the way that you live your life has got a lot to do with [the] activities that you do. There are parts of the culture that are very much associated with certain types of activities and that you do those activities in certain places. So in that respect, I guess they are laws, they are teachings or traditions, customary practices that occur [in places]...

You hear spiritual or supernatural activities that occur at a certain place and so that has embedded in it belief systems that are there. I recall my late uncle talking about a place that he went to and there are stories surrounding it where there were supernatural creatures that would come out of the waters... There's lots of principles..., there's a lot embedded in those kinds of stories. A lot that you have to unpack.

In non-Indigenous world, the way I parallel it is..., for example, Christians have certain beliefs [which are] very much also embedded in place. Mt. Sinai – the place where Moses went up and received the Ten Commandments where God wrote on them – these rules that they to live by. In other cultures, there are similar kinds of laws that exist [often] coming out of either spiritual or supernatural kind of origins.

I personally believe that Hul'q'umi'num laws are very similar. There is that spiritual, supernatural kind of underlying theme to these things where you hear of the origin of these laws... And they carry on. Laws that are there currently are a reflection of [those stories]. So there are laws that would govern how a person, if they follow those kind of teachings, how they govern their lives and how they live their lives. And so it is the basis for laws that organize a society and determine how the society operates (personal comm. March 2021).

As Robert describes, *snuw'uyulh* may be found in stories. Sarah Morales, a Hul'q'umi'num' legal scholar and Robert's daughter, explains that stories of *Xeel's*, the Transformer or Creator, and the First Ancestors are sources of sacred law form which inherent legal principles are derived (2014, 143; see Borrows 2010; Napoleon 2007 on sacred law). The late Cowichan Elder Angus Smith shared that the First Ancestors carried cultural teachings: “the cultural teachings were shown [to] them, instructing them what was good for their life... That's the way it was with our ancestors; that's why the Cowichan people carry this tradition. All the places have names” (Morales 2014, 145). Angus Smith spoke of the relationship between

ancestors, kin, places and law, a connection which Sarah Morales points out as fundamental in Hul'q'umi'num' law (2018). The story of *Stutsun*, one of the First Ancestors, is connected geographically with *Hw'teshutsun*, and will be discussed in greater detail in the next section.

One argument made by Cowichan Tribes against development at *Hw'teshutsun* was that such “wilderness” landscapes are increasingly destroyed due to industrial development throughout Hul'q'umi'num' territory and *Hw'teshutsun* is thus one of the only areas for these cultural practices (Ratcliff & Co. letter to MoF Oct 27, 1999; Thom 2005, 154-163). While the importance of quiet and seclusion have been emphasized, qualities that exist in a few other places, *Hw'teshutsun* is not a replaceable ‘place’: the particularities of this cultural landscape, such as its proximity to places where the Hul'q'umi'num' First Ancestors fell from the sky, means that connections with this landscape cannot be substituted with another place. Throughout the process of protecting *Hw'teshutsun*, Elders noted particularly powerful places for bathing, as noted in the previous chapter. While this thesis highlights the importance of practices at *Hw'teshutsun* and qualities of the landscape which may be present in other areas, the specificities, the “place-ness” of this landscape cannot be discounted. The importance of place, as indicated in Robert's words, is highly significant in Indigenous legal traditions.

***Snuw'uyulh unites the Hul'q'umi'num' communities:***

*Snuw'uyulh* not only conveys teachings about guidance in connection with *Hw'teshutsun*, but was also drawn upon as a point of connection between the Hul'q'umi'num' communities. Though Cowichan Tribes led the assertion of Hul'q'umi'num' people's relationships with and responsibilities to *Hw'teshutsun*, people from the neighbouring communities of Penelakut, Halalt, Lyackson and Stz'uminus also have connections with *Hw'teshutsun*. In asserting their rights and

title to *Hw'teshutsun*, Cowichan Tribes leadership was not aiming to create a territory of exclusivity necessitated through state legal tests for aboriginal title (Thom 2014). Rather, Cowichan Tribes acknowledged the shared relationship of all the Hul'q'umi'num' communities with *Hw'teshutsun*, attending to Hul'q'umi'num' legal traditions around property and sharing, invoking *snuw'uyulh* as a common way of relating with the land.

The commitment to share *Hw'teshutsun* was formalized through a solemn Hul'q'umi'num' protocol, discussed in detail in the next chapter. Chief Hwitsum described how *snuw'uyulh* was used to bring together the Hul'q'umi'num' communities, despite different family groups, villages and Indian bands because they all share these teachings and ways of living:

Scrape back that layer of the divisive Indian Act governance, or lack thereof, models they brought forward, *snuw'uyulh* exists. We all understand that amongst [ourselves]. *Snuw'uyulh*... can't be explained in one but it really is the full set of interconnected teachings about how to be a *hwulmuhw* person in this world.

Those teachings were still the underpinning [when protecting *Hw'teshutsun*]. We couldn't, even if we said, "we [Cowichan] better separate from Halalt." And I'm like: "you mean my Auntie Nora that I visited every Sunday?" Every time we said we [have to] divide this [land] up and I [said], "look at the teachings. Let's get to the *snuw'uyulh*." That's something people still can hang onto and have hung onto and it's not divided by a political piece. Yes, some people have... family *snuw'uyulh* that's connected to the big teachings because they carry ceremony or something. But there is a base set of those teachings in *snuw'uyulh* about how to be a human being that were the underpinning reference points... we try to follow...

*Snuw'uyulh* talks about not only how you are as a human being, but if you carry ceremony, [it talks about] how you are as a group holding that responsibility. It crosses political lines, without question. [That's] the thing that we had in common, that despite the divisive aspect of the different Indian Act bands and intergenerational impacts, those teachings of *snuw'uyulh* were a reference point we could believe in, a reference point that was not colonial, a reference point that was carried through by the ancestors. It was just a whole [way of doing things that was] completely not colonial where there's so much distrust... We share those ways of being amongst Cowichan, Stz'uminus, Halalt, Lyackson, Penelakut...

[The protocol] doesn't speak to how people are there [at *Hw'teshutsun*], it speaks to the fact that you have the right to be there. Because lots of different people have different ways of expressing their... ceremony for spirituality and they're not all

exactly the same, so it's definitely not saying here's how. It's more here's the space and we're going to make sure that that space is still there for the exercise of the right.

Chief Hwitsum's comment illuminates what implementing Hul'q'umi'num legal traditions looks like on the ground, attending to collective principles and values while allowing for familial variation of these teachings. *Snuw'uyulh* is not prescriptive (see also Morales 2014; 2018). In embodying the teachings of *snuw'uyulh*, protection of the land focuses primarily on enabling relationships, on making space for cultural practices and the proliferation of wellbeing that ensues from creating that space.

At present, BC continues to hold legal title to *Hw'teshutsun*, yet it has been protected in such a way that many of the valued qualities remain<sup>31</sup>, allowing for this enactment of *snuw'uyulh*. *Snuw'uyulh* is not contingent upon political relations between government bodies and attends to relationships much deeper than those articulated through the Indian Act. The *Hw'teshutsun* ceremony attended to those relationships between kin and between people and land through Hul'q'umi'num' ways of doing things. However, *snuw'uyulh* and the relationships and responsibilities reaffirmed through the ceremony have political manifestations as they are implemented through relationships with the provincial government in order to assert Hul'q'umi'num' teachings and law.

Attending to *snuw'uyulh*, Cowichan Elders and Cowichan Tribes leadership pursued actions to protect Hul'q'umi'num' people's ability to engage in cultural practices at *Hw'teshutsun*. The teachings they drew upon characterize *Hw'teshutsun* as a specific place, emphasizing the impact that development would have on the cultural significance of *Hw'teshutsun*. These teachings

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<sup>31</sup> The IMA prevents extractive industry at Hill 60 but allows for "recreational use". This allows for people to quad through the area and leave garbage there, particularly along the edges of the forest. However, in general, the values expressed by Cowichan Elders and knowledge keepers have been upheld through these agreements.

are part of a much larger fabric of knowledge and relationships between Hul'q'umi'num' people, the land and the ancestors. *Snuw'uyulh* was important within the process of protection not only as the impetus for protection, but because these teachings are held by all the Hul'q'umi'num' communities. This common baseline united the communities in their relationships with each other and with *Hw'teshutsun* against state logics that attempt to draw divisive lines on the land and between the communities. Actions guided by these teachings, resulting in the prevention of development at *Hw'teshutsun*, may be viewed as Hul'q'umi'num' law. *Snuw'uyulh* is central to an understanding of the role of Hul'q'umi'num' law in protecting *Hw'teshutsun* as the teachings guided relationships between the Hul'q'umi'num' communities and influenced provincial legislation.

### **The story of *Stutsun* as a source of law:**

As Robert Morales and Elder Angus Smith spoke about in the previous section, Hul'q'umi'num' teachings and law are often connected with places through stories of the First Ancestors. The strength of the stories of the First Ancestors and *Xeels'* to root our understanding of *snuw'uyulh* cannot be understated: Sarah Morales points to the stories of the First Ancestors and *Xeels'*, known as the Creator or the Transformer, as fundamental sources of Hul'q'umi'num' law (2014; Thom 2005). In their Traditional Use Assessment (1998) and TRM Presentation (2000) at the treaty side table, Cowichan Tribes leadership shared one of these stories, that of *Stutsun*, with provincial and federal negotiators. Sharing the story of *Stutsun* did much more than demonstrate land occupancy prior to British assertions of sovereignty; First Ancestor stories are a source of *snuw'uyulh*, holding teachings for Hul'q'umi'num' *mustimuhw* about every aspect of life (Thom 2005; Morales 2014). Of particular relevance here is the significance of places

associated with the First Ancestors and teachings about *kw'aythut*, part of the advice shared by *Syalutsa*, the first man to fall from the sky, with *Stutsun* (Marshall 1999; Thom 2005).

Brian Thom explains that “[p]art of the inherent telling of these [First Ancestor] stories has been to express in Coast Salish legal terms, the legitimacy of their claims to land and resource ownership, and to self-government” (2005, 83). By invoking the story of *Stutsun*, centering the attention of their own community and the representatives of the Province on the story, its significance, and its teachings, Cowichan Tribes leadership utilized their teachings and legal traditions to guide governance of *Hw'teshutsun*. Through their negotiations with the BC, Hul'q'umi'num' teachings implicit in the First Ancestor stories have implications for provincial governance. The TRM was a piece of provincial legislation guided by teachings in one of the First Ancestor stories, entangling Hul'q'umi'num' and Canadian law.

In their TRM proposal presentation to BC, the Cowichan Tribes leadership work to highlight the significance of the teachings passed down from *Syalutsa*, the first Cowichan ancestor who fell from the sky (Marshall 1999):

The legacy of traditions passed down from the beginning of time, from *Syalutsa*, the first Cowichan ancestor, must be permitted to continue...

[The] spiritual and cultural importance [of *Hw'teshutsun*] dates back to the earliest oral histories of the Cowichan Tribes in which *Stutsun*, the second Cowichan person to be placed on earth travels throughout this area [*Hw'teshutsun*] and learns of the importance of the land and its resources to his own spirituality and survival (Cowichan Tribes 2000b, 31-2).

*Stutsun*, the second man, travels across *Hw'teshutsun* and through Hul'q'umi'num' territory and, having received the teachings and advice from *Syalutsa*, learns from the land and makes himself strong.

One version of this story is printed in *Those Who Fell From the Sky*, which was reproduced in Cowichan Tribes' TRM presentation. I will refer to this version in a brief discussion of how this story connects to Hul'q'umi'num law.

***Stutsun's travels:***

Hul'q'umi'num' origin stories tell how twelve humans fell from the sky throughout Coast Salish territories. The first to fall was *Syalutsa* who, in Marshall's version<sup>32</sup> fell to the earth near *Hwsalu'utsum*<sup>33</sup> (Koksilah Ridge). *Stutsun* followed, landing between the two peaks of *Swuq'us* (Mt. Prevost), nearby and to the east of *Hw'teshutsun*. *Syalutsa* welcomed *Stutsun*, and began to give him guidance about how to live on earth, explaining that there was much that *Stutsun* needed to learn from the land. Among the advice shared, *Syalutsa* explained the importance of frequent bathing in cool water to make one strong and for one's understanding and knowledge to increase.

*Stutsun* left his brother *Syalutsa* and began his journey through Hul'q'umi'num territory, regularly bathing in cold water, brushing off with cedar and meditating. *Stutsun* had been instructed by his brother not to "tell of the special sights, sounds, and strengths that he might receive. These special gifts were for his sole use and benefit, and he was not to boast of them, otherwise the newly found strengths would leave him" (Marshall 1999, 17).

After travelling for many years, *Stutsun* returned to *Syalutsa's* home. *Stutsun* decided not to tell his brother what knowledge he had received, though he would confide what he had seen. *Stutsun* told *Syalutsa* of the places he had been to and some of the creatures he had seen. *Stutsun* spoke of bathing in all the streams and lakes he came across, and of receiving a song from the

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<sup>32</sup> Daniel Marshall worked primarily with the late Cowichan Elder Wes Modeste, who was also an active and prominent member of the Hul'q'umi'num' and Cowichan Elders' committees during the TRM negotiations.

<sup>33</sup> Other locations have been noted, particularly *Swuq'us* (Mt. Prevost). See for example Boas 1981; Rozen 1985; Thom 2005.

Thunderbird, *shwuhwa'us*<sup>34</sup> *Stutsun* walked to the tops of the mountains and then, upon seeing a lake, to *Showe'luqun* (Shawnigan Lake). *Syalutsa* asked what powers his brother had received through his travels, but *Stutsun* remembered the teachings and refused to share what he had received (Marshall 1999 9-23).

***Stutsun's teachings in Hul'q'umi'num' law and provincial jurisdiction:***

Guided by Hul'q'umi'num Elders he worked with, Marshall writes that “as the Hul'q'umi'num peoples came into being they looked to these first humans for guidance, who in turn nurtured their spiritual and physical well-being” (1999, 12). The teachings *Stutsun* shared, particularly around bathing and spending time in the forest learning from the land, have continued significance for many Hul'q'umi'num people today. This was reflected in HTG's mandate book, “Getting to 100%”, which reflected the importance of the Teachings for the future of the Hul'q'umi'num' community.

Our *snuw'ey'ulh* or Hul'qumi'num laws... lay the foundation for how Hul'qumi'num people must continue our obligations in our relationship with the natural world, which is connected to us through the First Ancestors. Respecting these obligations is integral to the Hul'qumi'num way of life. It is the foundation of our wealthy, healthy society (HTG 2005).

Protecting *Hw'teshutsun* was a way of attending to the foundations of *snuw'uyulh*, allowing for cultural practices and relationships with the land to continue. The protection of *Hw'teshutsun* may be seen as a series of legal actions guided by the teachings in Hul'q'umi'num stories such as that of *Stutsun's* travels. The impetus for the protection of *Hw'teshutsun* was about allowing for the continued application of the teachings of the First Ancestors.

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<sup>34</sup> Luschiim recalled that *Hw'teshutsun* was said to be the home of the *shwuhwa'us* (personal comm. with Brian Thom and Sarah Morales April 2021).

The First Ancestor stories are not told or understood as fictional: the ancestors existed and communities and individuals today trace their descent from the First Ancestors (Thom 2005, 84). Some cultural heritage, such as family teachings, and places associated with the ancestors are carried through their descent lines (Thom 2005, 85). Members of Halalt, Penelakut and Lyackson communities trace their ancestry to *Stutsun* and, accordingly, *Swuq'us* and other places associated with *Stutsun* are of particular importance to his descendants (Morales 2014, 188). However, my understanding is that *Hw'teshutsun* is not seen as an area associated with only one particular family (Robert Morales personal comm. March 2021), though it is very clearly an Island Hul'q'umi'num' place, not an open commons used by other Indigenous communities (see Thom 2020a; Morales and Thom 2020 on Coast Salish land tenure). I bring up the connections of other Hul'q'umi'num' communities with *Stutsun* and with *Swuq'us* as a reminder that *Hw'teshutsun* is an area that people from all the Hul'q'umi'num' communities engage with. This collective connection which was reaffirmed through a Big House ceremony and protocol (Lydia Hwitsum personal comm. Sept. 2021) and might be viewed as a contemporary expression, among others, of the solidarity of the historic Cowichan Nation.

The connection between the Hul'q'umi'num' communities and their shared relationship with *Hw'teshutsun* was underlined by their shared *snuw'uyulh*, including First Ancestor stories (Cowichan Tribes, Stz'uminus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe 2000; Lydia Hwitsum personal comm. Sept. 2021). This was not the only discussion at that time about the use of First Ancestor stories and Hul'q'umi'num' legal and social principles to guide self-governance. In his dissertation, Brian Thom notes similar conversations around the time of *Hw'teshutsun* negotiations – 2000-2001 – between Hul'q'umi'num' Elders Angus Smith, Abner Thorne and Ross Modeste to “discuss how principles of social organization

that operate outside the terms of the *Indian Act* could contribute to the self-government aspirations of the communities” (2005, 87). Thom notes that “Abner perceives that these stories [of the First Ancestors] can provide a charter for the way communities relate to each other in a contemporary context of self-government which challenges the imposed relations of the *Indian Act*” (2005, 88). It is possible that Cowichan Tribes’ leadership was inspired by these kinds of discussions the Elders were leading at the time of the protection of *Hw’teshutsun*. They looked to First Ancestor stories, *snuw’uyulh* and the principle of *nuts’a’maat* (which speaks of the kinship relations between the Hul’q’umi’num’ communities and will be discussed in Chapter 4) to guide the protection of *Hw’teshutsun*, reaffirming teachings and relationships that go beyond *Indian Act* authority (Lydia Hwitsum personal comm. Sept. 2021).

In a context where over 85% of Hul’q’umi’num’ people’s land has been alienated (Morales, Thom and Egan 2007) and where their laws, teachings and wellbeing are woefully disregarded by the state, the application of Hul’q’umi’num’ teachings and principles often involves political interactions with the state and implementation through negotiation, litigation or direct action. Hul’q’umi’num’ law may be used to address Canadian societal or state malfeasance, and Hul’q’umi’num’ values and teachings may direct Canadian political action. Both occurred during the protection of *Hw’teshutsun*. In essence, the socio-political, economic, legal context in which Hul’q’umi’num’ people live is inseparable from the context in which non-Indigenous Canadians live and in which the colonial state operates. Teachings from the First Ancestors may provide personal guidance for Hul’q’umi’num’ people and provide a basis for law internal to the Hul’q’umi’num’ communities but, as we can see in the protection of *Hw’teshutsun*, are also brought to influence relations with the state and can be used to shape provincial jurisdiction and law.

Yet, I want to accentuate that the quieter, personal legal actions were ultimately the reason for protecting *Hw'teshutsun*. “Quiet” legal actions refers to some people’s preference to not share the intimacy of the significance of *Hw'teshutsun*, to the highly local valued sonic qualities in the forest there and to the personal ways in which Hul’q’umi’num’ people may take teachings from the First Ancestor stories and from their experiences at *Hw'teshutsun* into their lives. In Marshall’s version of the *Stutsun* story, *Stutsun* was instructed by his brother *Syalutsa* not to “tell of the special sights, sounds and strengths that he might receive” (1999, 17). Such a focus on private knowledge and personal relationships with *Hw'teshutsun* was emphasized throughout the protection of *Hw'teshutsun* and this research. Yet the significance of the teachings associated with *Hw'teshutsun* was able to be conveyed within negotiations, incorporating those teachings into the exercise of provincial jurisdiction.

### **Valued qualities of this cultural landscape:**

As was described throughout the negotiations to protect *Hw'teshutsun* and in my own discussions with Cowichan people, this forested mountain ridge is an area where people gather medicines, hunt and engage in spiritual practices, valued particularly because of its quiet and seclusion. Qualities of quiet and seclusion, dependent upon tangible characteristics such as lack of outsiders, contribute to the ‘purity’ of the landscape, referring as more to spiritual purity than to a lack of ecological pollution. Teachings about these qualities indicate that they extend throughout the cultural landscape. In Chapter 2, I conceptualized *Hw'teshutsun* as a cultural landscape reflecting these teachings, as the teachings indicate that the entire area is a connected region, and should be governed, managed and stewarded according to Hul’q’umi’num’ people’s values, teachings, priorities and cultural logics.

This section expands on teachings previously mentioned around quiet and seclusion at *Hw'teshutsun*, which are important not only for *kw'aythut*, but for other cultural practices. Previous ethnographers have also noted the importance of these qualities in Coast Salish spiritual practices (Suttles 1981; Moss; 1986; Thom 2005). Hul'q'umi'num' teachings shared by knowledge keepers Jared Qwustenuxun Williams and Tim Kulchyski about hunting and harvesting medicines indicate the importance of quiet and seclusion to engage deeply with the land and for increased efficacy of the medicines harvested there. These teachings highlight potential problems of delineating cultural practices as either “spiritual” or “economic” but not both (for an analogous discussion on “cultural rights”, see Thom 2008). Such a delineation is part of a different cultural framework<sup>35</sup> and cannot be imposed upon Hul'q'umi'num' ways of life. These teachings more broadly provide legal guidance on how to live in a good way as a *hwulmuhw* person (see Morales 2014).

Interwoven with the teachings they shared, Jared and Tim describe some of their personal experiences of living out these teachings within a territory heavily shaped by colonial governments and policies. Land privatization and assertions of Canadian jurisdiction within Hul'q'umi'num' territory work to constrain the application of these teachings – the exercise of Hul'q'umi'num' law (see Morales and Thom 2020). As illustrated in the *Hw'teshutsun* protocol where the five communities agreed to “protect, preserve and maintain Hw'te shutsun for the use and benefit of present and future generations”, protecting *Hw'teshutsun* was about asserting Hul'q'umi'num' jurisdiction to their land and maintaining relationships with the land (Cowichan Tribes, Stz'uminus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe 2000). This notion of

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<sup>35</sup> Such delineations are common in early to mid-twentieth century ethnography and still an underlying assumption in “Western” society – the notion that economic, spiritual, legal, political and other “institutions” can be separated. I find this to be a great misrepresentation of Canadian society which, in this case, works to obscure the entanglements between Canadian social and cultural institutions.

“protection” in the protocol was based on the Hul’q’umi’num’ legal tradition which upholds different teachings and values than those of Canadian law. Protection of and care for Indigenous cultural landscapes must reflect the specific values, teachings and laws emplaced there. Listening to people’s teachings and experiences around spiritual practices, hunting and harvesting medicines at *Hw’teshutsun* brings out significance particular to this cultural landscape. In a country founded on the displacement and attempted erasure of Indigenous peoples, listening to Indigenous peoples’ stories of the land and respecting Indigenous nations’ authority, jurisdiction and ongoing exercise of their legal traditions is an essential component in working out how to live here together.

***Quiet and secluded “wilderness” areas:***

Ethnographers have long noted the importance of quiet, secluded forests for certain Coast Salish spiritual practices (Suttles 1981; Mohs 1994; Moss 1986; Thom 2005; Lane 1953). These areas “have the potential to be cleansing, strength giving, and power conferring”; they contain places for spiritual bathing, *kw’aythut*, for grieving, and for other ways of connecting with the land (Thom 2005, 158). Cowichan Elder Luschiim shared that *Hw’teshutsun* is a place to go for

[p]icking berries, meditation. One of the big things was places of sorrow where you go when you're in sorrow. Whether you just sit there and meditate or whether you bathe in that creek, whatever. Sit in the wind. You can use the wind just like you do the water. Let the wind blow, blow all your heaviness away, your grief (interview with Brian Thom and Sarah Morales, April 2021).

Another Cowichan member explained that many people “believe in the water, in the mountain waters, that's really big amongst our people yet today... [to] cleanse themselves. They use it as medicine” (personal comm. Dec 2020). Members of the Big House, especially winter dancers, may go up there to bathe or “just to be with nature” (Ernie Elliott personal comm. Dec 2020; Williams 2020).

As part of a 1981 inventory of Coast Salish religious use sites in the Mt. Baker-Snoqualmie National Forest in Washington, Coast Salish ethnographer Wayne Suttles argued that “wilderness [is] a source of spiritual strength” for Coast Salish people, and places of wilderness, “places away from humanity”, are often not available for use due to development and inaccessibility (1981). Suttles’ points were also made by Cowichan leadership in efforts to protect *Hw’teshutsun*, emphasizing the importance of “serenity” in some cultural practices, and making the case that there were not many areas for spiritual practices because of privatized land and intensive logging practices. In reference to the same report where Suttles’ essay appears, archaeologist Madonna Moss also highlighted the importance of “isolation, privacy, and purity of the setting surrounding religious site” (1986, 192). She noted that religious “sites” identified in the study range in size from less than one acre to 15 000 acres, or over 6000 hectares in comparison to the 1700 hectares that comprise the *Hw’teshutsun* protected area. While labeled as religious “sites”, these large areas are cultural landscapes similar to *Hw’teshutsun*, extending far beyond a traditional use site. Suttles argued that Coast Salish people have a spiritual “need for wilderness” indicating the importance of a cultural landscape with the valued qualities, rather than isolated sites which would not contain the quiet and seclusion necessary if surrounded by clear cuts hills and a noisy motorsport racetrack. What Suttles called a “need for wilderness” refers to teachings around certain places and cultural practices. Living in accordance with the *snuw’uyulh* is one way of living as a lawful Hul’q’umi’num’ person (see Morales 2014). At *Hw’teshutsun*, Hul’q’umi’num’ law was exercised to uphold these teachings.

Dianne Hinkley and Lydia Hwitsum indicated the importance of these qualities of purity and seclusion at *Hw’teshutsun*:

[B]athing sites have to remain pure. They shouldn't be seen or visited by, let's just, for a lack of a better term, say non-believers. If they are accessed by non-believers,

then they lose their purity. They become polluted, and they're no longer able to be used for purification purposes (Dianne Hinkley, personal comm. April 2021).

The Crown would say, "oh well, there's some water there, no problem. You can just go on the periphery of the landfill and I'm sure you'll be fine." But it was like, no, the teachings are about the purity. The teachings are about how you draw strength from the natural environment and that gets diminished when it gets interfered with (Lydia Hwitsum, personal comm. Sept. 2021).

Purity of the cultural landscape results from both tangible and intangible elements of the landscape and separates *Hw'teshutsun* from other areas where teachings about pollution and purity are not central. As Dianne says, other people aren't supposed to be around these places. Lydia emphasizes the importance of the "natural" environment being intact. The late Peter Seymour, who was chief of Stz'uminus First Nation, a neighbouring Hul'q'umi'num'-speaking community, during the protection of *Hw'teshutsun*, similarly articulated the importance of these "natural" forest areas: "So we have to come back to nature, we have to call it nature. Come back to the land, to the forest to get rid of that heavy and send it back. Send it somewhere" (Thom 2005, 160). In cultural practices and teachings about *Hw'teshutsun*, there is a distinction between places for everyday life and natural wilderness places for purification and engagement with the land.

These qualities of purity, seclusion and quiet are encompassed in the designation of cultural landscapes such as *Hw'teshutsun* "natural" or "wilderness" areas. These qualities are not synonymous with "nature" in national parks where hundreds of humans trapse through forests and mountains on designated hiking trails and camping sites, nor with ecological conservation areas which may prevent people from entering with the assumption that they will harm the area. These understandings of "natural" areas share an emphasis on lack of industrial development, but they stem from different values and teachings about how to engage with the land. This is a meaningful distinction because even if a desire to prevent development is shared, for example by Hill 60 residents and Cowichan Tribes, the qualities of the landscape that are valued and the ways in which

people engage will result in different types of land management and different ways of conducting oneself in these places. Robert Morales explains the difficulties of trying to balance some of these different values:

Indigenous peoples are not necessarily environmentalists in the traditional way. But they have very many of the same objectives but for different reasons. And that's, I think, the challenge. Environmentalists want to protect the environment for a particular reason. First Nations want to protect the environment but for other reasons... I've heard many Elders and members speak [about this] in relation to spiritual bathing. [Here,] you need to have a private, secluded place and a pool of water that you can actually use. And there were certain places where that was [and is] conducted. A lot of those places are now no longer available. Either they've been destroyed or there are houses around them... So the objective of preserving the environment is there, but it's for a different set of reasons. And that's where issues like *Hw'teshutsun* [provide challenges:] how does Cowichan manage all of those different considerations?" (personal comm. March 2021).

Robert Morales explains here how, even though the actions of environmentalists and Indigenous peoples may overlap to prevent industrial activity, these actions stem from different value systems and teachings which are embedded in particular ways of being in the world. Non-Indigenous Hillcrest homeowners who do not partake in spiritual practices at *Hw'teshutsun*, and who likely did not know of the significance of the landscape within the Cowichan community, also opposed the construction of the dump in the mid-1990s, due to concerns about polluted groundwater and other ecological reasons (Hill 60 Homeowners Group letter to Cowichan Regional District Board of Directors, June 3, 1997; Hill 60 Homeowners Group letter to BC, June 3, 1997.). These concerns can be mitigated in ways that will not attend to values articulated by Cowichan Elders and knowledge keepers. Ecological values alone, which were nevertheless encompassed through the Cowichan-driven protection TRM, do not necessitate the recognition of Indigenous jurisdiction or the legal traditions which attend to Cowichan values and relationships with the land.

Differing ideas of “wilderness” or a “pristine” landscape can be seen in BC’s field survey report in 1997 from a trip by CVRD and BC technicians to *Hw’teshutsun* to survey the area proposed for the dump without the expertise and guidance of a cultural advisor. The report stated that:

The site and its surroundings are far from pristine, second growth timber with ample evidence of past logging, mineral exploration and, possibly settlement... There was no clear evidence of any ceremonial or other use by First Nations. There is also no clear indication of any differentiation between this area and the very large tract of similar logged land between the Cowichan and Chemainus Rivers from Mount Prevost to Lake Cowichan and beyond. In view of this, it is recommended that, as there will be no apparent significant infringement upon traditional First Nations uses and as the project is in the public interest... the application be approved as previously recommended (British Columbia Lands, Ministry of Environment, Lands and Parks 1997).<sup>36</sup>

From the perspective of provincial surveyors, the area is not “pristine” wilderness. As an area previously logged, they assumed that it must therefore not be used or engaged with by Hul’q’umi’num’ people. For the surveyors, “wilderness” signified lack of human engagement with the land and was therefore not compatible with past development. “Wilderness” described by Suttles (1981) reflects the teachings shared by Cowichan Elders and knowledge keepers about the importance of quiet and seclusion without outsiders polluting powerful areas. This survey privileged tangible evidence over intangible, without giving thought to the teachings, values and cultural activities entangled here outside of the surveyors’ narrow conception of use. While conclusions formed from this cursory survey by BC were clearly misinformed, this report illustrates the some of the broader assumptions made by non-indigenous peoples that previously industrialized landscapes are wastelands<sup>37</sup> (see, for example, Gagnon and Desbiens 2018; Shaw

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<sup>36</sup> This report was signed by W.A. Hubbard. This quote, and the report more generally, are discussed in Appendix A.

<sup>37</sup> Nevertheless, Abner Thorne’s teachings about *Hw’teshutsun* illustrate the damage that industrialization does to a place. Similarly, Luschiim noted that *Hw’teshutsun* is “partially intact... because of the logging up there” (personal comm. with Brian Thom and Sarah Morales April 7, 2021) – previous industrialization and current logging in the proximity of *Hw’teshutsun* do impact the cultural landscape though the valued attributes are considerably more intact at *Hw’teshutsun* than at many other areas in Hul’q’umi’num’ territory.

2016, 30). It further indicates the commonly held perspectives on landscapes that Cowichan Tribes had to contend with as they asserted and articulated the cultural significance of *Hw'teshutsun*.

The protection of Indigenous cultural landscapes centers Indigenous self-determination and jurisdiction, enabling the expression of Indigenous values, teachings, legal traditions and relationships with their territories. Crown law stems from a different worldview and different value system than Hul'q'umi'num' law. The protection of cultural landscapes therefore necessitates the recognition of and respect for the exercise of Indigenous teachings and legal traditions throughout Indigenous territories, a point which will be further developed in Chapter 4. Protecting *Hw'teshutsun* was an assertion of Hul'q'umi'num' people's jurisdiction and authority to an importance area, against the continued onslaught of government policies which attempt to undermine such authority.

Protection of Indigenous cultural landscapes must attend to the specific teachings about a particular area. While numerous Cowichan people spoke about teachings of drawing strength from the land in “natural” areas of quiet and seclusion, the values and qualities behind words such as “pollution”, “nature” and “wilderness” are not analogous between normative Canadian and Cowichan ways of understanding the land. Numerous times, I have heard Hul'q'umi'num' people refer to their lands as “pristine” before colonization where the construction of a settler colonial landscape – particularly through industrialization and the resulting devastation of important ecosystems and species – has heavily impacted the relationships that comprised that “pristine” state. I see the characterization of lands as “pristine” as reference to balance and good way of life for all beings achieved through Hul'q'umi'num' governance of their lands in accordance with their *snuw'uyulh*. “Wilderness” seems to indicate that these areas were secluded from everyday life. “Purity” speaks to the undisturbed spirit power located in places, as described by Abner Thorne.

None of these words indicate that the land was unused, unknown or unchanged by Hul'q'umi'num' people who have lived in their territory since time immemorial. Critiques of wilderness that proliferate in the academy pertain to the colonial lens which sought to justify land theft for economic expansion, imposing European values and understandings of lived landscapes onto Indigenous landscapes<sup>38</sup> (Cronon 1996; Kurnick 2019; van Wagner 2021). In this cultural lens, wilderness is equated with *terra nullius*. A critical analysis of wilderness as *terra nullius* does not reflect what these words signify when used by Hul'q'umi'num' people. Though these terms are carefully chosen by knowledgeable Elders to do the work of cultural translation, they are always approximations – English words or analogies employed for practical use. The importance of closely listening to the values and teachings behind the English words used to explain the teachings is evident in this example.

Protection of Indigenous cultural landscapes must attend to the specific teachings about a particular area. The previous chapter discussed the importance of thick ethnographic description that closely attends to the teachings and experiences people share about places. At *Hw'teshutsun*, these teachings and values include places for bathing and deep engagement without distractions of noise, smell and human presence from activities occurring outside of the forest. Such teachings are not necessarily applicable to other cultural landscapes and associated cultural activities – Hul'q'umi'num' teachings and legal traditions are intricately linked with place (Morales 2014; Thom 2005). Attempts to set out specific criteria that define and manage all cultural landscapes will inevitably fail to encompass the particular relationships of people with a given cultural place,

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<sup>38</sup> I agree with these critiques in reference to colonization and I think they are valuable in understanding the underlying principles and values of the colonial state and settler society, but here I am arguing that this analysis does not help us understand how Hul'q'umi'num' people use these words.

constricting any application of Indigenous legal traditions in the formalized care for, or management of, the land.

***Living the teachings in a colonial context:***

The stories Tim and Jared shared with me about their experiences of *Hw'teshutsun* reflect valued qualities of quiet and seclusion that Luschiim, Lydia and Dianne also spoke about. They also spoke more broadly about the interconnectivity within the landscape and the relationships that make up the land, relating other Hul'q'umi'num' legal principles. In their stories, Tim and Jared pull together these teachings with their experiences on their traditional territory in context of land grabs, racism and the legacy of residential schools and the potlatch ban that outlawed Indigenous governance systems to emphasize that these are not abstract teachings told in the ethnographic present. Rather, the teachings continue to hold meaning and guide Hul'q'umi'num' people even though the expression of these teachings is constrained by the Canadian government and society. As Tim says, “some of our cultural practices, well not just some of our cultural practices, in a way, I guess simplistically, our entire way of life is under threat” (personal comm. June 2021). Stories that he and Jared share illuminate threats to Cowichan cultural practices which people have nonetheless continued and ways in which Cowichan teachings continue to inform their actions.

Jared was involved in public opposition to expansion of the noise park in 2019, as the expansion would have impacted the quietness at *Hw'teshutsun*. He shared with me some of his knowledge about *Hw'teshutsun* and his concerns about this expansion. He had also shared these teachings at public municipal hearings so that North Cowichan municipal officials could hopefully gain some understanding of the cultural significance of *Hw'teshutsun* and the values that Cowichan leadership had worked so hard to protect twenty years earlier.

[*Hw'teshutsun*] was a traditional bathing site, and specifically a place where a young man would transfer to becoming a man. And that there are bath holes that have been used for generations, I would argue at least a thousand years if not thousands of years, to help young men to become men. And then on the other half of the river actually there, the other half of the river is where the young women used to become women.

The water source for the creek that we used to do the baths – because everything is watershedy, so if you're up here, even though you're up here all that has to run downhill – was logged. And there was a lake, or lakes, or ponds that were then left wide open which then became a harbouring area for ducks. And I love ducks, but with the limited amount of watersheds and wetlands, those animals then, they moved up to this new water source. And in duck feces there is a bacteria that actually lays eggs on the inside of you if you're in the water and then they like to rip out of you and really nasty stuff. And so, we're not allowed to use those holes anymore because of that bacteria. So even though the area that we use was reasonably protected, the areas nearby were not. And so that has therefore wrecked this thousand-year-old bath hole. And so a little bit of that information is what I shared with everybody there. And also about *Tsuq'wulu* and *Tsuq'wulu* is the land between *Hw'teshutsun* and Mt. Prevost [*Swuq'us*].<sup>39</sup>

*Tsuq'wulu* is this, if you were on the mountain [*Swuq'us*], which I was just up there yesterday so it's really easy to be like, "oh look at all this area!" I just want to add that when you look at our valley from the top of Mt. Prevost, a lot of our legends and things almost seem to make a lot more sense. You know, when you can say "okay, there's that, one village is over there and that village is there." So this is why those ones were there, because it's really easy to see everything up there.

Anyway, *Tsuq'wulu* is, according to legend, is where majority of those who fell from the sky landed. So, I don't know if you have that information about how Syalutsa landed on *Hwsalu'utsum* [Koksilah Ridge] and *Stuts'un*, he landed on *Swuq'us* and *Suhiltun*, he landed in *Kwa'mutsun*, but the rest of them, or at least the majority of the rest of them, they arrived in *Tsuq'wulu*. And so *Tsuq'wulu* is that whole flat land between the bottom of the mountain and *Hw'teshutsun*. And so that area is directly where they wanted to build this racetrack. And I wasn't really happy with that, but thought that I should hand out, as information, that this is literally like the Garden of Eden. If we were to have a religion that could be paralleled with Christianity, that this is the Garden of Eden. This is where all the ancestors were at the beginning. And so we would like to use this area and leave it alone, even though it's all property of North Cowichan and all that. I wanted them to know it's not their property, it's ours, and this is actually what it is. No matter what they want it to be

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<sup>39</sup> See map pg. 47 which includes these place names.

or what they've zoned it as. This is what it actually is. There's no way to zone around that. It's just what it was.

So, there is the main creek that I was referencing. There are a few other creeks up there too that are not exactly the one, but they're in that space. And so, I said, I've got some young sons. And every day, we're outside, we're using language. They wear traditional names as their actual names and they already know plants and they already know all this information. And so, in just a few years, they're going to be the right age, and I'm going to walk them up there [to *Hw'teshutsun*]. One on one. You're not allowed to bring nothing. You leave everything at home. And you're up there for four days. And so, there's all these rituals, everything that you have to do. But one of them is that you have to have a bath. Every day. Can you imagine: I'm up there with my son, I have a drum, I'm up there, having them do his song, and all you hear is [machine noises] in the middle of my song when he's trying to take a bath when he's all the way up there to become a man. Can you imagine how that would wreck that whole area? Can you imagine how, you went up all the way into these woods so you're on your own [and all you can hear is the noise park?]

So, in yesteryear, this was way up in the woods because we used to live over here, so you'd have to walk all that way, not just drive. You had to walk all the way up there. And then you're there, and then there's nobody around. It's just you. You're in the woods. [Now you go and] you're able to reconnect and then all you can hear is [machine noises]. Terrible, right? Like how do you reconnect when you're surrounded by this horrible sound?

I think that that was one of the largest problems that the Elders had, was that when we want to go harvesting, the Elders [said] "don't harvest anything at the edge of the road." And it has nothing to do with exhaust. They'd also say, "don't harvest off the edge of a trail." "Never harvest where anybody else is." There's the idea that when we look at something, we absorb the energy of it. So, they would say that all of the herbs on the edge of a pathway, they're no good. It's all been used up. Everybody walks by and goes, "oh look at those nice flowers!" They absorb all that already. It's gone. And so they'll walk way off in the bush where there's nobody, and they're going to sing songs to all of these little plants and their ancestors and we don't need that to be interrupted with all this ugly noise. We leave where the ugly noise is in order to go up there and now they want to put some more ugly noise up there. And so, I think it reaches a point where you're like, "when is it enough? How much do we need? Can't you have that over where there is noise, over there, and just leave us up here?" (personal comm. April 2021).

Jared's story interweaves personal experiences of how he relates with *Hw'teshutsun* with places associated with the Cowichan First Ancestors, valued sonic qualities and interconnectivity of the landscape, and the impacts of the proposed construction on land owned, under Canadian law, by

North Cowichan which disregards Cowichan knowledge of the land and how Cowichan people engage with this landscape.

While there are multiple versions of the First Ancestor stories, including a few places where the First Ancestors are said to have landed (Thom 2005, 88-9), the *Tsuq'wulu* area of *Swuq'us* adjacent to *Hw'teshutsun*, has ancestral cultural importance that greatly influences how many Hul'q'umi'num' people, including Jared, know the land. First Ancestor stories and places are fundamental stories connecting Hul'q'umi'num' people with the land; the First Ancestors taught practices and carried knowledge that are still valued today (Marshall 1999, 9-21; Thom 2005; Morales 2014). Thom explains that “oral traditions about the First Ancestors of local communities and the mythic journeys of the Transformer who travelled the land provide some of the basic cultural material by which people develop and express their relationship to the land. Through these stories, ancestors are associated with and embodied in the land” (2005, 77). Places and landscapes associated with the First Ancestors contain important Cowichan teachings and are areas of particular significance for cultural practices.

Jared asserts that North Cowichan's land management, for example, zoning bylaws and allowing construction of the noise park, ignore “what [the land] actually is”. Municipal governance doesn't foreground the story of *Stutsun*, Hul'q'umi'num' cultural practices or connections between places throughout Hul'q'umi'num' territory. Twenty years after the protection of *Hw'teshutsun*, Jared is still publicly relaying the same concerns that were previously expressed in opposition to development in this area. A provincial Order in Council prevents industrial development within *Hw'teshutsun*, but not in the surrounding areas, thus allowing for a noise park. Ultimately, the Municipality of North Cowichan decided not to allow the noise park (VIMC) to expand as they concluded that such an expansion was not permitted under their zoning laws (Barron 2021), still

failing to acknowledge the significance of this land for Cowichan people. Priorities held by the municipality, entangled with private property, extractive economics and, at times, ecological and biological management are based on different relationships and rely upon different knowledge and values than teachings shared by Cowichan Elders and knowledge keepers. Even though Cowichan Tribes was successful in preventing development at *Hw'teshutsun*, the broader implications of different ways of relating to the land and the ways in which Cowichan teachings and practices have been devalued have not been widely recognized.

Jared also highlights teachings of quiet and seclusion for engaging in cultural practices at *Hw'teshutsun*. He foregrounds the importance of teaching his sons cultural practices at *Hw'teshutsun*, which would be impeded by the noise of the motorsport facility. While Dianne and Lydia shared the need for seclusion during spiritual bathing, as outsiders both detract from the practice and pollute the area, Jared also noted the importance of seclusion when harvesting medicines, commenting that the medicinal qualities of plants is degraded when other people interact with those plants. Harvesting medicines thus requires going places not frequented by outside people and noises. Such places can be difficult to find as even within *Hw'teshutsun*, people go quadding and leave debris from parties scattered nearby the remnants of old logging roads. Environmental conditions, noted throughout the years by Elders and previous ethnographers, have great impact on the purity and spiritual efficacy of cultural practices, intertwining tangible and intangible aspects of the landscape in ways distinct from conceptualizations of the same space by non-indigenous people and provincial and federal governments. These teachings were also shared by Tim in relation to hunting.

Perspectives and teachings about hunting shared by Tim Kulchyski and Larry George describe the need to protect *Hw'teshutsun* in such a way that reflected not only the physical

requirement for a large area of land at which to hunt, but encompassed Hul'q'umi'num' teachings about hunting also emphasize the importance of quiet and seclusion. *Hw'teshutsun* was identified as elk habitat and as a hunting area throughout the process of protection. Larry George, a Cowichan member and Director of *Lulumexun*, the Cowichan Tribes Lands and Self-Governance Department, spoke about the importance of *Hw'teshutsun* for elk habitat:

From information from [Cowichan] members, [*Hw'teshutsun*] is a pretty important area for the elk population... There [are] travel routes and feeding areas that are pretty important... The elk do require a large area of lands that are not developed, and that's one of them within this area, for their growth and protection... I know there's a big concern with one development that is trying to be pushed forward in that area that is of high concern because it will affect the elk migration significantly (personal comm. Jan. 2021).

Within a larger landscape devastated by logging, large areas of land necessary for elk habitat are crucial. While concern for the wellbeing of elk populations reflects the importance of elk as sustenance, Tim shares teachings around hunting, elaborating that for him, it is a practice beyond obtaining food. He points out the importance of quiet and seclusion, for obvious safety concerns as well as for facilitating deep engagement with the land, qualities which are difficult to find.

So we're here [Tim and I], we're just trying to have a basic conversation about this area. We've got the highway going down below, we've got planes going by, we've got all of these things happening. If you're here, and you're hunting, for one, then you run into people and you're like, "Oh, I didn't know there were people hanging out here. Okay, I'll go over there." Well you go over there, and it's the same thing. You go over there and it's the same thing. If you're doing something that much more specific, that you are supposed to be – I'll just put it this way – you're at a crucial time in your life where you're supposed to be, in the elders' words, you're kind of "fixing yourself." You're aligning yourself with not just this physicalness of the world around you. All of a sudden, you're out in the woods and you have this moment with a hummingbird or an elk or a bear or a cougar, and they're looking you in the face. And they're not worried. They're just sitting there. And all of a sudden, if you're a hunter and you're there and you run into an elk, and you all of a sudden realize, "Wow, this is a living, breathing being that has family and has that same connectedness." It brings you to a new level of understanding...

There [are] places that you can go in the territory that help bring forward all of those things that you're connected to. Here, and kind of beyond. How do you have that moment if all of a sudden on your trip there's somebody whipping by on a quad, or somebody comes over, "Hey! What the hell are you doing in here? There's a gate out there, don't you know? Can't you read?" People yelling at you, people cursing at you.

I quit hunting on reserve in Sansum Narrows, 30 years ago. On reserve. Because there were too many people out there. And we have our own teachings about safety and... Part of our teachings, if there's a negative interaction, and you're just a recipient, you're still kind of in the wrong if you let that happen. And so there's a... People have had to push back, but there's also kind of a pre-emptive nature. If you think there's a chance you might run into somebody out here during the day, then you might come super, super early in the morning, or super, super late in the evening. So that it's less likely that you might run into people. It's not necessarily to say that every time you run into a person that's a negative thing, but if your intent is uninterrupted connection, how do you do that in our territory? Where can you find that in our watershed? You can't.

And so the thought here was how do we build that for the future? How do you have a place that has some layers to it? ... Place that might, that isn't just one thing. It's not just one cultural practice...

I would say that there were a certain number of people who've kept the practices alive, even if it's, in some ways, sometimes it's just being able to communicate that. On a deeper level, it doesn't have that same resonance until you go and do it. Having this conversation in a parking lot doesn't mean the same, unless you can see camas and kind of have that added context to it. Then having that context, if you have the opportunity to then take that and run with it... Maybe because it is a quiet space, and there are elk there, they could totally mean that elk becomes your passion. To some people it sounds strange, but in community, if you are an elk hunter, then you want your children to learn. You want the respects and the practices to continue (personal comm. June 2021).

Tim's discussion of hunting highlights the difficulties faced by Hul'q'umi'num' people in accessing areas to continue cultural practices. The extent of industrial development and lack of respect by non-indigenous people living in the Cowichan Valley have resulted in few hunting areas, and decreasing elk habitat. Tim shared teachings about the need for quiet and seclusion in engaging deeply with the land which are not possible in areas devastated by logging or which have become the playground of recreationalists. In such circumstances where non-indigenous values

often prevail in shaping the physical landscape, the importance of protecting *Hw'teshutsun* is evident.

The importance of the qualities of quiet and seclusion shared by Elders about *Hw'teshutsun* are reinforced when Tim explained that the “real” meaning of a landscape is in the intangible aspects of the land, the relationships that draw together people living today with ancestors and with other beings that make up the land. Layers of teachings and stories, personal experience in places and their integration within a larger Hul'q'umi'num' landscape are all pieces of context that have built up Tim's deep connection with places and landscapes. The significance of *Hw'teshutsun* lies within these deep connections with the land. By grounding the protection of *Hw'teshutsun* in Hul'q'umi'num' values and teachings, Cowichan Tribes leadership ensured the space to engage with the land in accordance with the teachings (Lydia Hwitsum, personal comm. Sept. 2021).

## **Conclusion:**

Teachings shared about the cultural significance of *Hw'teshutsun* centered around the importance of quiet and seclusion throughout the landscape. These teachings are part of *snuw'uyulh*, the foundational Hul'q'umi'num' teachings providing instruction and guidance on how to live as a Hul'q'umi'num' person, on how to be lawful (Morales 2014; 2016). In protecting *Hw'teshutsun*, Cowichan Tribes' leadership attended to the teachings to uphold the integrity of the cultural landscape. Their actions taken to do so, discussed in the next chapter, are an exercise of Hul'q'umi'num' law, where law is understood as an action proceeding from the principles and teachings that make up a legal tradition (Morales 2018; 2017a; 2014; Napoleon 2007; Borrows 2010; Mills 2018; Cover 1983; Glenn 2005; Fuller 1969). As Chief Hwitsum noted, the importance of the protection of *Hw'teshutsun* was to allow people to exercise their aboriginal rights – to engage

in their cultural practices. During the protection of *Hw'teshutsun*, *snuw'uyulh* was significantly invoked as a common foundation shared by the five Hul'q'umi'num' communities who share a relationship with the area. Hul'q'umi'num' law attends to the relationships between Hul'q'umi'num' people and the land and provides guidance for governance beyond the *Indian Act*.

The importance of protecting *Hw'teshutsun* is indicated in the stories shared by Jared Williams and Tim Kulchyski. They share how living out the *snuw'uyulh* is increasingly difficult in Hul'q'umi'num' territory due to industrial and urban expansion. In such a context, the protection of Indigenous cultural landscapes through the recognition of Indigenous law that attends to these teachings is essential to care for these areas in ways that promote wellbeing of the land and the people who engage with the teachings in place. The next chapter will look at how these foundational teachings of *snuw'uyulh* directed Cowichan leadership's actions of asserting their authority and jurisdiction at *Hw'teshutsun*. Their actions entangled Hul'q'umi'num' law, as discussed in this chapter, with Canadian law, resulting in the protection of an Indigenous cultural landscape by shaping exercises of provincial jurisdiction through Indigenous law. Tim's and Jared's stories at the end of this chapter indicated how Hul'q'umi'num' law operates in a colonial context; the next chapter will describe how Hul'q'umi'num' law was used to address the failure of Canadian law to uphold Indigenous rights and title.

## **Chapter 4: Entangling Hul'q'umi'num' and provincial law**

### **Introduction:**

The previous chapter described the teachings associated with *Hw'teshutsun* and discussed how those teachings are part of the Hul'q'umi'num' legal tradition. These teachings are operationalized as Hul'q'umi'num' law, both formally through governance structures and informally in people's personal lives. Today, Hul'q'umi'num' teachings are applied in a context marred by the colonial alienation of Indigenous lands and the legacies of residential schools, the potlatch ban and other Canadian policies which have resulted in, amongst many other things, increasing constraint in operationalizing Indigenous law.

This chapter builds upon the previous two as I inquire into the ways in which the legal principles and teachings at *Hw'teshutsun* were the underlying driver of the protection and how the exercise of Hul'q'umi'num' legal traditions worked to entangle Hul'q'umi'num' and Canadian law. In this chapter, I ask how Hul'q'umi'num' legal traditions were expressed throughout the protection of *Hw'teshutsun* both through traditional Hul'q'umi'num' governance practices, principles and teachings and through innovative ways of reconfiguring state legislation to reflect Hul'q'umi'num' law. This chapter will reveal some of the ways in which Indigenous and state (municipal, provincial and federal levels) law are entangled in places though they are rooted in different fundamental values and teachings, or legal traditions (Borrows 2010; Morales 2014; Morales 2017a; Mills, Aaron 2018). Indigenous peoples may shape provincial decision-making and authority in accordance with their teachings and values, pushing state institutions to find creative ways to exercise their authorities consistent with Indigenous legal traditions. These strategies respond to conflicts arising from state governance by bringing out the foundations of Indigenous legal principles. As state and Indigenous governance intersect in relation to people and

places, these different modes of governance, including legal systems, are never operating in isolation from one another. This is a core foundation of the operation of Indigenous legal traditions in the Canadian context.

The focus of this chapter was shaped in particular by meetings and conversations with HTG Chief Negotiator Robert Morales and former (and current) Cowichan Tribes Chief Lydia Hwitsum. Before starting my research, Professor Thom and I met with Robert and a few other people from HTG on two occasions to discuss our projects. Robert discussed the “disharmony” between Canadian and Hul’q’umi’num’ law and the difficulties in navigating these differences when Canadian law continues to overshadow Indigenous law in many ways (personal comm. March 2020; March 2021). He pointed out that treaty relationships and land governance should be grounded in Indigenous law rather than Indigenous peoples continually having to justify their legal traditions and teachings through the Canadian legal system. Questions about the relationships between Indigenous law and Canadian law are not new, but the ethnographic specificity of *Hw’teshutsun* offers an example of how Hul’q’umi’num’ teachings and legal traditions were expressed throughout the process of protection. Cowichan Tribes leadership’s assertions of authority at *Hw’teshutsun*, including the declaration of a “tribal preserve”, had the practical and lasting effect of powerful and unique land protection measures being deployed by the provincial government.

As the Cowichan Chief who led the protection of *Hw’teshutsun*, Lydia Hwitsum drew my attention to ways in which Hul’q’umi’num’ teachings and principles guided Cowichan Tribes’ actions to protect *Hw’teshutsun*. She emphasized how she employed the Hul’q’umi’num’ principle of *nuts’a’maat* to bring the five Hul’q’umi’num’ communities together to re-establish their collective relationship with *Hw’teshutsun* and their relationships with each other. The experiences

and knowledge she shared with me provided a framework through which I began to understand the legal work internal to the Hul'q'umi'num' communities done in order to protect *Hw'teshutsun*. Robert's perspective instructed questions around entangled legal systems, while Chief Hwitsum's experiences and teachings provided a description of and insight into how Hul'q'umi'num' law attended to relationships between the Hul'q'umi'num' communities and their connection to *Hw'teshutsun*.

As discussed in the previous chapter, the protection of *Hw'teshutsun* was to ensure the continued ability for Hul'q'umi'num' people to live out their teachings at *Hw'teshutsun*. Bringing forward *snuw'uyulh* took the form of asserting Cowichan relationships through rights, title and interest claims in negotiation and litigation, calls for direct action, the declaration of a "tribal preserve" and a ceremony between the Hul'q'umi'num' communities which affirmed their relationships and collective commitment to care for *Hw'teshutsun*. In 2001, Cowichan Tribes, the Hul'q'umi'num Treaty Group (HTG) of which Cowichan Tribes is a member, the province of British Columbia (BC) and Canada signed a Treaty-Related Measures (TRM) agreement and an Interim Measures Agreement (IMA)<sup>40</sup>. While Cowichan Tribes, informed by consultation with and teachings from Elders, utilized provincial mechanisms to prevent development at *Hw'teshutsun* under provincial jurisdiction, they forwarded their own teachings and values, thus achieving a measure of recognition of *snuw'uyulh* within provincial law.

The flexibility of a pluri-legal system to accommodate both the exercise of Indigenous legal traditions and Canadian law is evident through Cowichan Tribes' work to shape exercises of provincial jurisdiction to reflect their teachings and legal traditions. However, the TRM was

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<sup>40</sup> HTG was not a signatory to the IMA was signed outside the treaty framework and was focused on Cowichan economic development and mitigation throughout a larger *Hw'teshutsun* area. The TRM was the protection mechanism that prevent any development at *Hw'teshutsun*.

constrained by Canadian and provincial law and policy through a tight cadastral delineation of an area available for protection. It was particularly impacted by private property ownership and forestry tenures, the former which is not available for treaty settlement and thus was not part of *Hw'teshutsun* negotiations at a side table to the treaty table and the latter which is costly to revoke and did not reflect the province's desire to create economic certainty for industrial partners. While considerable work still needs to be done to protect Indigenous cultural landscapes on both public and private lands and to recognize the extent of Indigenous jurisdiction, teachings and relationships, this example highlights the possibilities for such exercises of Indigenous legal traditions.

### **Entangled law:**

In Chapter 3, I argued that law is the enactment of a legal tradition rooted in a cultural framework (Morales 2014; Mills 2018; Clifford 2016b; Napoleon 2007; Borrows 2010). While this theoretical perspective is a useful starting point, Indigenous law and Canadian law often influence each other in practice as they frequently operate in the same spaces. The concept of entanglements is useful to highlight the agency of and interconnectivity between actors (Dussart and Poirier 2017; Borrows 2017). John Borrows explains that “Indigenous peoples resiliently struggle to strengthen their agency by resisting, deepening, or transforming their entanglements” (2017, ix). Disregarding these entanglements results in an inaccurate and essentialized conception of Indigenous and Canadian law and peoples by ignoring the relations implicated in interactions of multiple legal systems in place (Borrows 2017). Law is malleable; when we consider law as an action in a particular sociopolitical context, it becomes easy to see how law may be directed by

multiple legal traditions and legal systems. Ethnography is a useful tool to tease out the ways in which different legal traditions interact in practice.

***Entanglement as an analytical tool:***

Though the teachings, values and principles that law is derived from differ, over time and through interaction the expression of different legal traditions may become increasingly interwoven. The *Hw'teshutsun* TRM is an example of this interwovenness: the TRM is the outcome of Cowichan Tribes acting in accordance with Hul'q'umi'num' teachings and of using provincial, federal and Hul'q'umi'num' legal processes to shape exercises of jurisdiction at *Hw'teshutsun*. This section will briefly discuss entanglements as an analytical tool to examine practical relationships between state and Indigenous law. The protection of *Hw'teshutsun* illustrates the ability for provincial jurisdiction to be shaped through expressions of Indigenous legal traditions, effectively showing that these different legal systems are not incommensurable when state logics of Indigenous dispossession are not foregrounded.

Various analyses of the relationships between different legal traditions and legal systems, including transsystemic legal theory and legal pluralism, have been used to inquire into interactions between civil law, common law and multiple Indigenous legal traditions in Canada (Morales 2014; Borrows 2010; Glenn 2005). As an anthropology student, I choose to use the concept of entanglements (Dussart and Poirier 2017; Borrows 2017) as a framework for understanding relationships between Hul'q'umi'num' and Canadian law. Rather than a focus solely on legal relationships, entanglements allow discussion of arenas other than law in which Indigenous and Canadian peoples' lives are interwoven. As demonstrated in the previous two chapters, *Hw'teshutsun* is a cultural landscape where multiple phenomenological, legal, cultural,

economic, social, political, ancestral and historical understandings and resulting engagements are at work. A focus on legal entanglements is an analytical framework that can easily be extended to entanglements in other aspects of social life, particularly entangled relationships with *Hw'teshutsun*.

Entanglement complicates what is often a presumed divide between Indigenous and non-Indigenous peoples by attempting to understand how our stories are interwoven and inform each other's lives (Dussart and Poirier 2017, 10; Dennison 2012, 8). As explained by anthropologists Françoise Dussart and Sylvie Poirier, “[t]he concept of entanglement is opposed to ideas such as separate objects or discrete operators... [It] is best suited to analyse “what is going on,” since it draws attention to the imaginative possibilities and unexpected consequences of colonization, neo-colonization, and commodification” (2017, 11). It is a way of speaking about the messiness of real-world interactions where the conditions we find ourselves in and the relationships we navigate are never entirely of our own making (Borrows 2017, xiii). Entanglements direct attention to lived complexities that are evident through ethnographic study.

While contemporary law may illustrate entanglements between Canadian and Hul'q'umi'num' legal traditions, these legal traditions remain distinct (Dussart and Poirier 2017, 4-5; Mills 2018). The teachings, stories, values and principles shared with me about *Hw'teshutsun* may be understood and acted upon differently throughout the Hul'q'umi'num' community (see Thom 2005 and Morales 2014 on variation of stories and family law, <sup>41</sup> respectively). However, these teachings are at the core of the significance of *Hw'teshutsun* and, as detailed in Chapter 1,

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<sup>41</sup> Morales (2014, 244-8) explains that a degree of legal pluralism exists within Hul'q'umi'num' law through family law: some legal traditions are specific to different families. She says “[t]he existence of pluralism within the Hul'q'umi'num' legal tradition is significant to my research. It demonstrates that Hul'q'umi'num' Mustimuhw have always dealt with differing legal practices and traditions” (2014, 245). Perhaps Hul'q'umi'num' legal traditions are able to provide insight into what legal pluralism including Canadian law can look like within Hul'q'umi'num' territory.

differ greatly from non-indigenous people's understandings of Hill 60. Distinction remains between legal traditions, though the application of these teachings and values may entangle Hul'q'umi'num' and Canadian law.

Speaking of entanglements does not negate colonial relationships that Indigenous peoples must contend with. Rather, the logic of entanglements draws attention to the agency of Indigenous peoples in transforming colonial power (Dennison 2012, 7; Dussart and Poirier 2017). Through such a lens, entanglements “avoid either ignoring or empowering the colonial forces with which colonized peoples must contend... [T]his approach allows for understanding settler colonial forces as having varied, dynamic, and uneven impact across space and time” (Dennison 2012, 7-8), revealing the specificity and messiness of particular relationships in practice. Focusing on relationships in a particular time and place – *Hw'teshutsun* in the late 1990s-early 2000s – provides the opportunity to look closely at how different actors navigate and transform entanglements between peoples in place. Such stories provide possibilities for understanding what coexistence can look like in Canada.

Hul'q'umi'num' teachings, governance and legal practices are ongoing despite contemporary and historic suppression by the Canadian government and Canadian society (Lydia Hwitsum personal comm. 2021; Cowichan Tribes, Stz'uminus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe 2000<sup>42</sup>; (Morales 2017a; Morales and Thom 2020; Thom 2014; Claxton and Price 2020; Simpson 2017). Canadian governance, including the potlatch ban, the pass system which regulated the movement of Indigenous peoples off reserves, residential schools, land grabs and other acts of colonial violence, have been attempts to destroy Indigenous peoples' ways of life and their governance systems in order to control and profit from their land

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<sup>42</sup> Hereafter referred to as Hul'q'umi'num' 2000 for brevity.

(Simpson 2017; Yellowhead Institute 2019). The suppression of Indigenous governance and lifeways continues to manifest in a myriad of ways including the lack of Crown recognition of and respect for Indigenous legal traditions which may conflict with the state legal system (Clifford 2016a; Clifford 2016b; Morales 2017b; Thom 2020a). Cowichan Tribes' assertion of their jurisdiction to *Hw'teshutsun* is one such example of ongoing Indigenous governance of their lands stemming from their teachings and values.

***Resisting explanations of incommensurability:***

In explicating why Canadian legal instruments often fail to attend to Indigenous values, Ziff and Hope (2008) identify broad hallmarks of Indigenous relationships with the land which do not have analogues in Canadian property law or Western conceptions of property. They found that these fundamental differences make it difficult to protect cultural landscapes in accordance with the teachings Elders have shared about them using Canadian law. Ziff and Hope point to differences in land relationships also identified by Indigenous legal scholars who argue that legal systems and traditions are rooted in a particular worldview or cultural framework and thus cannot fully attend to protecting culturally significant places (Borrows 2010; Mills 2016; Napoleon 2007; Morales 2014). These differences result in the seeming inability of Canadian legislation to adequately protect cultural landscapes and places in ways consistent with Indigenous engagement with them.

This explanation centers epistemological differences between Canadian and Indigenous societies and ensuing legal frameworks as the reason for lack of protection of Indigenous cultural landscapes. Their argument relies, to a degree, upon the “incommensurability” of different legal

systems.<sup>43</sup> I would argue that more pertinent in the lack of protection of Indigenous cultural landscapes is the Canadian government and society's lack of respect for Indigenous peoples, their authority and jurisdiction and, as always, the priority of upholding opportunities for non-Indigenous people and companies to profit off Indigenous land and resources (Yellowhead Institute 2019). There is a general unwillingness by government and much of Canadian society to engage in actions which concretely result in "land back" which Indigenous nations are working towards through assertions of their authority, jurisdiction and rights and title (see Tuck and Yang 2012; Yellowhead Institute 2019). "Reconciliation" is engaged in only insofar as it does not threaten the Crown's priorities to uphold fee simple land ownership and create a climate of economic certainty for industrial partners (who may have tenure on Crown lands). While there are different general epistemologies and values held by Indigenous nations and the Canadian state and society, the core problem is not the inability of state actors to comprehend Indigenous worldviews, but constraint placed on the application of Indigenous self-determination and jurisdiction by legal values and priorities – implicit legal principles (Fuller 1969; Morales 2014, 17) – underlying Canadian law. Crown law can be changed where there is a willingness on the part of the courts or ministers: Canadian law is malleable and needs to be altered to reflect the contemporary circumstances whereby ongoing land theft cannot be justified through obligations to industry or fee simple property owners.

To address practical constraints on the protection of Indigenous cultural landscapes, I focus on the malleability of law through a lens of entanglements which affords greater possibility for the increased influence of Indigenous legal traditions in Canadian law. Throughout this chapter, I

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<sup>43</sup> Glenn asserts that "incommensurability is the rejection of interdependence" (2005, 872). Examples of entangled law, transsystemic law and legal pluralism provide evidence of interrelated legal systems. Morales (2014) points to the existence of legal pluralism within Coast Salish law, which she argues has the potential to inform relationships between Indigenous nations' laws and Canadian law.

illustrate that while Hul'q'umi'num' and Canadian legal *traditions* are distinct, law entangles these traditions and reflects both legal traditions, to varying degrees (see Morales and Thom 2020). This is a key characteristic of a legally pluralistic state (Glenn 2005; Borrows 2005). Legal scholar Patrick Glenn argues that “incommensurability is the rejection of interdependence” (2005, 871-2); incommensurability forecloses on the inclusion of Indigenous legal orders in state law. As can be seen in the example of *Hw'teshutsun*, Indigenous and Canadian legal systems are clearly interwoven – Hul'q'umi'num' law drove the protection of *Hw'teshutsun* – though the influence and significance of Indigenous legal orders may be overlooked.

An analytical framework of entanglement focuses on the interactions between Canadian and Indigenous law – inclusive of legal actions that work to protect the state's power and authority – and recognizes epistemological differences while inquiring into how different legal traditions interact in practice. With such a lens, we can see the ability of Indigenous legal traditions to shape exercises of provincial or federal authority - we are not stuck on opposite sides of a chasm of difference. Entanglement thus promotes action in contrast with a perspective of irreconcilable legal traditions which does not hold much hope for coexistence. This does not mean that difference is not present, but that state and Indigenous legal systems are intertwined; they influence one another through entanglements which play out in people's lives and on the land.

***Legal entanglements in treaty negotiations:***

Concrete differences in legal systems are evident in treaty negotiations where different perspectives on land relationships come into contact. BC's aim is to create fee simple treaty settlement land to provide certainty for industrial partners while HTG's position is that their member communities will not cede nor surrender their inalienable relationships with the land

(HTG 2008; HTG 2005; Egan 2012; Egan and Place 2013). Chief Negotiator of the HTG, Robert Morales, explains some of the difficulties in re-establishing Hul'q'umi'num' governance throughout their territories within the treaty process:

The treaty negotiations are very much a product of a particular point of view that the colonizing countries held, which is that Hul'q'umi'num' people didn't have laws that were governing relationship to the ownership of land. That they didn't have laws that would govern in relationship to how their society operates. So those [Hul'q'umi'num' laws] were completely disregarded and in its stead, European, English, now Canadian laws dominated the landscape. In the treaty process, the Hul'q'umi'num' nations are trying to reclaim and to re-establish their legal position on the land. Although people have never relinquished that at a personal level, they still go out, they still do the activities on the land and they still have that association with the land.

There's no legal recognition of that by British Columbia or Canada. And so the treaty process is very much a Westernized kind of approach to this [to the land question]. I mean, we do acknowledge the underlying values of the Hul'q'umi'num' people in the negotiations and we try and bring as much of that into the negotiations as we can. But to be able to have the nations be able to exercise the right to self-determination. And what exactly will that entail is an interesting issue. We've been talking about that lately in our meetings. You know, how far do we go in terms of regulating very central spiritual features of the culture? Do you try and, do you make it so that your Hul'q'umi'num' government will be able to pass laws as Western laws, regulating how the Big House operates or regulating how certain things are done? And it is a challenge. The assertion that dominant laws could be applicable onto First Nations lands even more than they already are, in terms of those close cultural pieces are very concerning. But yet, how do you sort of deal with that?...

It is a challenge to negotiate a modern treaty and a modern way of implementing self-determination. How much of it does have to sort of reflect these very old cultural ways, and how much of it do you have to adapt to the modern societies? That's the challenge that nations have right now. Trying to revive and breathe life back into Indigenous laws and Indigenous legal orders is part of the work that is just evolving. Because it's been denied for so many centuries. It's been 200 or some odd years or more that Indigenous legal orders have not been acknowledged in a greater context. So internally it still exists, but it's been superseded by non-First Nations laws.

Robert describes some of the issues in the contemporary exercise of Hul'q'umi'num' jurisdiction throughout their territories. While the Hul'q'umi'num' communities continue to assert their laws

and governance systems, they may be undermined by municipal, provincial and federal law and policy. HTG's work towards shared decision-making throughout their territories between the Hul'q'umi'num' communities and the Crown is a recognition of the possibility for these different governance systems to work in concert (HTG 2008).

***Finding tools to engage the malleability of law:***

As exemplified by the protection of *Hw'teshutsun*, possibilities exist in the malleability of provincial legislation to recognize and respect Indigenous jurisdiction. *Hw'teshutsun* is an area whose cultural significance has been affirmed through an innovative approach to provincial legislation by conventional authorities. Such possibilities for land protection do not negate the position that law is rooted in a cultural framework espousing particular values, but rather demonstrate “the dialogical dimensions of the encounters and the coexistence” between Indigenous and non-Indigenous systems of governance (Poirier 2017, 215). In such dialogues, it becomes clear that different systems of governance are not incommensurable.

Recent provincial and federal legislation bringing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including BC's recently released (March 2022) *Declaration Act Action Plan* dedicated to implementing BC's UNDRIP legislation, hold the potential to facilitate more meaningful and equitable governance relations between Indigenous nations and the province. Of particular relevance to this thesis is the commitment to overhaul the *Heritage Conservation Act* to align with UNDRIP<sup>44</sup> (BC 2022, 27). Some First Nations in BC have already begun developing their own heritage management policies and plans in accordance with UNDRIP prior to the release of BC's Action Plan (see for example K'ómoks First Nation 2021).

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<sup>44</sup> As of Sept. 2022, work on the *Heritage Conservation Act*, including substantial engagement with Indigenous nations in BC, is ongoing.

IPCAAs are another tool available to Indigenous nations specifically for land governance agreements. These legislative changes are part of a growing body of tools which can be mobilized to recognize and respect Indigenous governance within provincial and federal legislation. A variety of tools are needed to attend to the diverse issues Indigenous peoples face in their ongoing interactions with state governance.

However, in the late 1990s, there were fewer tools available to protect Indigenous cultural places and they were more difficult to implement. The Treaty-Related Measures (TRM) agreement between Cowichan Tribes, HTG, BC and Canada, which designated 1700 ha of the “*Hw’teshutsun* Area” a protected area and allocated it for future treaty settlement lands, was the first land protection TRM in BC (Robert Leece personal comm. June 2021). Preventing logging at *Hw’teshutsun* required an Order in Council (OIC) to declare *Hw’teshutsun* a “designated area” under section 169 of the *BC Forest Act* (BC’s MOF 2001). The TRM also ensured protection under part 16 of the *Land Act* and section 22 of the *Mineral Tenures Act* to prevent future resource development (BC’s MAA 2001b; Canada, British Columbia, Hul’q’umi’num Treaty Group, Cowichan Tribes, 2001). Protection of *Hw’teshutsun* in accordance with the values and teachings shared by Cowichan Tribes required ingenuity on the part of the provincial negotiators to find places in existing BC legislation which were able to recognize the exercise of Hul’q’umi’num’ legal traditions. The TRM is provincial legislation shaped and directed by Hul’q’umi’num’ law; it illustrates the entanglement of these two legal systems.

The malleability of provincial legislation, able to be shaped by Hul’q’umi’num’ law, came as a surprise to provincial negotiator Doug Caul, who was well aware of the focus in BC legislation on providing certainty to industrial partners rather than being used to reflect Indigenous law:

The legislation that’s out there, especially at that time, was really oriented towards accessing land and resources for the purposes of development. Extraction,

development, doing something. There was very little, there was no contemplation in our legislative framework back then around making room for taking land... out of that development frame and including it in the context of a treaty settlement. So it was brand new for us to sort of find our way through that. So much of the legislation was aimed towards extraction and development, and here we were having a conversation about the opposite.

I remember being almost pleasantly surprised when I found out that the *Forest Act* included a tool that was available for us [to protect *Hw'teshutsun*]. Because honestly, I... probably thought, "how do we actually protect land? There are no tools available." So finding it in the *Forest Act*, this tool that hadn't been used before, was handy, [it] was helpful. Somebody who did the *Forest Act* way back when had the foresight to actually include [in] it [the ability to prevent development]. I don't think it was ever contemplated for doing it for reconciliation purposes, and that in itself created an interesting conversation around what was the original intent of legislators when they created Part 13 of the *Forest Act*. But clearly we got the legal advice that said you could use it that way...

It was really about just us putting a lockdown on everything and leaving [*Hw'teshutsun*] as it was to allow the negotiations to proceed and ultimately for Cowichan [Tribes] to make some decisions for themselves, in the future (personal comm. June 2021).

At the time of *Hw'teshutsun* negotiations, provincial negotiators were optimistic that treaties in BC would be settled within a few years. They were motivated to look for innovative solutions to make progress on treaty negotiations, particularly as a provincial election was coming up, and to provide greater certainty on land ownership for the province's industrial partners, such as TimberWest or Weyerhaeuser, who had operations on both private lands and Crown land tenures (Doug Caul personal comm. June 2021). With motivation on both sides of the treaty table and limited time in which to prevent development, a lot of work was put into developing a solution that was permissible through both Hul'q'umi'num' law and BC legislation.

The modern-day treaty process provided a unique avenue, via TRM and IMA agreements, to protect *Hw'teshutsun*. However, these interim measures were designed as a stage of the treaty process and utilized with the intention of accelerating treaty negotiations (Doug Caul personal comm. June 2021). They were thus limited in their scope as the lands remained under provincial governance until treaty is signed. Under the modern-day treaty model, only some future land

transfer would fully recognize Indigenous jurisdictions over these lands their entirety. The TRM was not officially a recognition of aboriginal rights and title nor sovereignty; such determinations were yet to be made through the treaty process (Canada, British Columbia, Hul'qumi'num Treaty Group, Cowichan Tribes, 2001). It was, however, a means of preventing development of a place that could not wait to be protected until treaty was signed (BC internal email May 30, 2000; Ratcliff & Co letter to MOF, October 27, 1999).

This chapter considers how Hul'qumi'num' legal traditions were employed to guide Cowichan Tribes' actions to protect *Hw'teshutsun*, shaping provincial legislation in accordance with Hul'qumi'num' teachings. In an article on legal entanglements in the Salish Sea, anthropologist Bruce Miller describes “the imaginative ways [in which Coast Salish people] attempt to integrate their historical legal concepts into the law of the dominant society... It is significant that they are not merely attempting to find their way through Canadian national or provincial law... Rather, they are creating a new legal path, which takes seriously their own understandings and practices” (Miller 2014, 993). The protection of *Hw'teshutsun* is part of this new legal path which incorporates both Canadian and Indigenous law in land governance. While these legal systems may stem from different legal traditions, enactment of these legal traditions entangles them in places. This chapter is an exploration of one such entanglement, which hopes to provide insight into legal and governance possibilities of Indigenous territories through recognition of the strength of legal pluralism.

### **Asserting Hul'qumi'num' law through aboriginal rights and title:**

Cowichan Tribes used the framework of aboriginal rights and title, affirmed through Section 35(1) of the *Constitution Act, 1982*, to communicate the cultural significance of *Hw'teshutsun* to BC in order to prevent development (Lydia Hwitsum personal comm. Sept. 2021;

Ratcliff & Co. letter to BC's MELP and MOF, Feb. 3, 1998; Cowichan Tribes 2000b). Their documentation of *Hw'teshutsun* demonstrated Cowichan's strength of claim to provincial and federal governments (Cowichan Tribes 2000b; Traditions Consulting Services, Inc. 1998) and pointed to the significance of place through Hul'q'umi'num' teachings and stories about *Hw'teshutsun*. However, neither the TRM, which protected *Hw'teshutsun* through the treaty framework, nor the IMA affirmed nor denied Cowichan Tribes' aboriginal rights and title at *Hw'teshutsun* (Cowichan Tribes, Canada and British Columbia 2001). It was agreed that land would be part of treaty settlement land in an eventual Hul'q'umi'num Final Agreement, but until then, *Hw'teshutsun* remains under provincial jurisdiction (Canada, British Columbia, Hul'q'umi'num Treaty Group, Cowichan Tribes, 2001). In effect, the protection measures created space for the continued exercise of unacknowledged Cowichan aboriginal rights while the contentious issue of delimiting areas of recognized rights and title were postponed until the larger context of the treaty was settled. This use of rights and title discourse illustrates how Canadian and Indigenous legal traditions may be interwoven in practice. Section 35 can be a place for communication with the potential to resolve conflict between Indigenous and non-Indigenous peoples and governance systems where those rights and title are recognized by the Crown and characterized by Indigenous nations (Thom 2014; Morales 2017a).

***Characterizing inherent aboriginal rights through the teachings:***

Cowichan Tribes characterized their aboriginal rights at *Hw'teshutsun* to reflect the teachings shared by Elders, explained by Chief Hwitsum:

[The protection of *Hw'teshutsun*] was rights and title based. Because of the intergenerational aspects of the colonial application of the Indian Residential School, many of our youth have been colonially dispossessed from the knowledge

and connection to our lands. So it was that thread. We've [had to] fight continually, how many generations have we been going...

[I kept saying,] assert. If you're on the land, and you're acting, that's real. It's more than a piece of paper that says, "one day, we will be on the land" in a treaty that [is] implemented in 20 years. So that was what I was really pressing for was [to] get action. Assertion. Explaining how that's what we need to do. We need to act on our rights or they will fizzle. If our young people aren't aware of what those rights are, then we're not acting appropriately. I'm not acting appropriately as a leader.

So that was kind of the [conversation]. Rights-based; we have a right. There are traditional, cultural uses [of the land at *Hw'teshutsun*]. When you think about our spiritual strength that's helped us survive this many generations of residential school impacts, that's where the strength was. So [it was important to be] able to try to bring that to the youth. Rights-based [dialogue included] connecting to a healthy environment. The elders had all kinds of teachings and [they] instructed me because the Crown would say, "there's some water there, no problem. You can just go on the periphery of the landfill and I'm sure you'll be fine." But [we said], "no, the teachings are about the purity." The teachings are about how you draw strength from the natural environment and that gets diminished when it gets interfered with.

Cowichan Tribes argued against the position of the provincial government that their rights could be confined to a small area limited by private property and Crown-tenured industrial activity (see Thom 2014). They brought forward the teachings about purity, quiet and seclusion, discussed in Chapter 1, to expand the Canadian legal description of *Hw'teshutsun* to reflect Hul'q'umi'num' teachings. These valued characteristics throughout the area were part of the characterization of the Cowichan's aboriginal right to cultural activities. Cowichan Tribes asserted that their right to be on the land does not emanate from the *Constitution Act, 1982*; it is part of a relationship with the land that includes responsibilities to the land (Hul'q'umi'num' 2000; HTG 2008).

### ***Asserting aboriginal rights at Hw'teshutsun:***

Assertion of Cowichan rights and title began with opposition to the landfill proposal. Cowichan Tribes directed their lawyers to argue that aboriginal rights and title to *Hw'teshutsun*, which were given expression by the Supreme Court of Canada (SCC) in the 1997 *Delgamuukw* decision, would be infringed upon if development occurred there:

Establishment of the landfill will severely infringe Cowichan aboriginal title and rights. Once a landfill is created in the vicinity of sacred sites for bathing and ritual practises, traditional areas for hunting, gathering foods, medicines and cultural technology materials, Cowichan aboriginal title and rights will be severely infringed by surface or subsurface contamination, impacts on wildlife and natural resources, and the noise, pollution, smell, and other deleterious impacts associated with operation of the landfill (Ratcliff & Co. letter to BC's MELP and MOF, Feb. 3, 1998).

They explained to BC that *Hw'teshutsun* is an area containing sacred sites and that development there would infringe upon Cowichan aboriginal title and rights. Furthermore, they argued that Crown had not fulfilled its legal duty to consult Cowichan Tribes on the proposed development: in particular, no known archaeological, traditional use, ethnographic or cultural heritage studies had been conducted. Cowichan Tribes had previously informed BC that they would conduct an independent traditional use study to demonstrate their aboriginal title and rights at *Hw'teshutsun*, but BC approved the dump before this study was conducted. Lawyers for Cowichan Tribes directed BC to stop and rescind development permits at Hill 60 so that Cowichan Tribes, BC and the CVRD could enter into negotiations or Cowichan would pursue litigation to protect their aboriginal rights, title and interests (Ratcliff & Co. letter to BC's MELP and MOF, Feb. 3, 1998). However, three months later in May 1998, BC again argued that the Licence to Cut in the dump area (9.5 ha) and the road permit to access the dump on Hill 60 would not infringe upon Cowichan people's aboriginal rights (BC's MOF letter to CVRD, May 12, 1998).

In June 1998, following BC and the CVRD's lack of engagement with Cowichan's concerns, Cowichan Tribes filed a court case against BC and the CVRD for failure to consult and infringement of aboriginal rights (*Cowichan Indian Band v. Cowichan Valley Regional District and the Province of British Columbia* 1998, 4-7). They argued that the Waste Management Plan, the Licence of Operation and the Licence to Cut, all approved by BC's Ministry of Environment, Lands and Parks (MELP), infringed upon aboriginal rights as previously outlined by Cowichan

Tribes' lawyers (4-7). Cowichan Tribes expressed concerns about water quality, loss of privacy, noise and interference with cultural practices (7). They identified one creek in particular where Hul'q'umi'num' people engage in "customs and traditions integral to the distinctive aboriginal culture of the Cowichan Tribes", drawing upon the *Sparrow* and *Van der Peet* decisions which were crucial in developing the Court's understanding of the expression of aboriginal rights (5). Ultimately, the CVRD abandoned the dump proposal at Hill 60 due to the court case (CVRD letter to Cowichan Tribes, Nov. 4, 1998), but the work done by Cowichan Tribes to establish strength of claim continued to be useful in their work to prevent logging at *Hw'teshutsun*.

Completed in September 1998, Cowichan Tribes' Traditional Use Assessment (TUA) was a detailed compilation of Hul'q'umi'num' oral histories of the *Hw'teshutsun* area and the significance of cultural activities conducted there. This included the documentation of various plants and animals harvested and hunted at *Hw'teshutsun* (Traditions Consulting Services, Inc. 1998). The TUA specifically addressed development proposals to build the dump and to log Hill 60 to determine impacts of these developments on Cowichan engagements with an area of "cultural heritage value" (Traditions Consulting Services, Inc. 1998, 1-2). The TUA stated that "[t]he Cowichan Tribes bear a special responsibility for their territory, invested in them by centuries of history, and countless thousands of ancestors. These circumstances are currently recognized in government policy and law as aboriginal rights" (1998, 1).

Assertions of rights and title continued through opposition to provincially sanctioned logging at *Hw'teshutsun*. In response to several referrals for logging around Hill 60, Cowichan Tribes requested that no logging take place on their territory until Hill 60 negotiations were complete, as an act of negotiating in good faith (Ratcliff & Co. letter to BC's MOF, Oct 27, 1999). Citing the *Delgamuukw* decision, Cowichan Tribes' lawyers argued that Cowichan's aboriginal

rights and title include an “inescapable economic component” and that “the continued alienation and depletion of forest resources within Cowichan Territory has the potential to render treaty negotiations and treaty-related measures... meaningless” (Ratcliff & Co. letter to BC’s MOF, Oct 27, 1999).

Forestry approvals continued without Cowichan’s consent and treaty negotiations seemed unable to provide a timely resolution. In October 1999, Cowichan Tribes announced that they were developing plans to log within their traditional territory without provincial permits in January 2000 unless they were able to reach an agreement with BC before then to develop Cowichan forestry and protect *Hw’teshutsun* from being logged (BC’s MAA 1999; Trevor Proverbs (BC’s MAA) and John Langford (Canada) to Lorne Brownsey (FTNO) and Philip Steenkamp (BC’s MAA), memorandum, June 7, 2000). This followed a similar assertion of rights and title by Westbank First Nation (Syilx) and several Secwépemc communities who began logging on their respective traditional territories without provincial permits in September 1999 (BC’s MAA 1999). Cowichan Tribes held the position that if Hill 60 was going to be logged, they would log it themselves. The position was described by Chief Hwitsum:

I’d even created a [notice that] I put in the [Cowichan Tribes] newsletter, I think: “anybody who wants to sign up to come be part of this come and sign up!” There were all kinds of things going [on]. The forest companies really wanted in there, they had tenure, they wanted in. And I was saying, “well if anybody’s cutting then bring your chainsaw because Cowichan people will be the ones that take control of this area.” So it was a real show of force to Crown that I’m not just one *hwulmuhw*, one Indian woman standing there going on [about *Hw’teshutsun*]. I’ve got elders behind me, I’ve got my community behind me and I’ve got a mandate. And we’re ready to go to court if you don’t cooperate (personal comm. Sept. 2021).

Such assertions of Cowichan sovereignty expressed the seriousness of Cowichan Tribes’ position at *Hw’teshutsun* to BC negotiators. Negotiations with BC began following the pronouncement of Cowichan Tribes’ willingness to directly assert their rights, title and interests to *Hw’teshutsun*. Cowichan Tribes agreed to postpone direct action during negotiations, but

provincial negotiators' awareness of this possibility provoked in them a sense of the immediacy of Cowichan Tribes' concerns (BC's MAA 2000b). While Cowichan Tribes expressed a preference for negotiations over blockades and litigation (see Ratcliffe & Co. letter to MoF and MAA, Nov. 17, 1999), they faced a great lack of respect for their rights, title and interests in their territory. At a time when rights and title were seen as largely theoretical – in the late 1990s there were no court declarations of aboriginal title and few specific aboriginal rights had been recognized through BC or Canada's courts – Cowichan Tribes strategically expressed their rights, title and authority in their territory. They argued that BC must take their consultation responsibilities set out in the 1997 *Delgamuukw* decision seriously and negotiate with Cowichan Tribes in good faith allowing Cowichan Tribes to demonstrate their aboriginal rights and title (Cowichan Tribes, 2000; Ratcliff & Co. letter to BC's MELP and MOF, Feb. 3, 1998).

Negotiations at a side table to the treaty table, led by Chief Hwitsum, began in November of 1999 (Ratcliff & Co. letter to BC's MOF and MAA, Nov. 17, 1999). Having available to them the policies and tools available through the BC Treaty Process, Cowichan Tribes and BC identified that a treaty related measures agreement (TRM), a type of interim measures agreement (IMA) available which would be incorporated as part of Cowichan Tribes' land selection into a Final Agreement, would be a useful tool to address Cowichan's concerns at Hill 60 (Trevor Proverbs (BC's MAA) and John Langford (Canada) to Lorne Brownsey (FTNO) and Philip Steenkamp (BC's MAA), memorandum, June 7, 2000; BC's MAA 2000a). Negotiations proceeded over the next fifteen months, marked with deadlines set by Cowichan Tribes to ensure the protection of *Hw'teshutsun* did not stall in prolonged bureaucratic processes or hesitant provincial political wrangling.

Even during the negotiations, Cowichan Tribes continued to contend with “log and talk”

politics. In response to TimberWest's draft Forest Development Plan for TFL 46 in 2000, lawyers for Cowichan Tribes argued to BC that the draft plan was not in compliance with the *Forest Practices Code* and asked for cutblocks at *Hw'teshutsun* to be removed. Though TimberWest, the logging company with tenure at *Hw'teshutsun*, was aware of the cultural significance of *Hw'teshutsun*, the draft plan did not include measures to protect the economic, social and cultural values of Cowichan Tribes in relation to the forest (Radcliffe & Co. letter to BC, May 11, 2000). This example of how Cowichan Tribes had to continually assert their rights and title to *Hw'teshutsun* on multiple fronts, even during the negotiation process, and illustrates Cowichan Tribes' position that significant legal protection for *Hw'teshutsun* could not wait until a Final Agreement was signed.

***Communicating Hul'q'umi'num' teachings through Canadian legal concepts:***

On May 26, 2000, Cowichan Tribes presented a comprehensive Treaty Related Measures Presentation to protect *Hw'teshutsun* to provincial negotiators. This document elaborated on research in the TUA to define "Cowichan's connection to the forest" as constitutional law (2000b, 37). Cowichan Tribes demonstrated their existing aboriginal rights in and title to *Hw'teshutsun* based on physical presence at the time of colonization, cultural activities at *Hw'teshutsun*, oral histories and Hul'q'umi'num' customary law (2000b, 37-60). They drew upon recent case law, including *Sparrow*, *Van der Peet*, *Gladstone* and *Delgamuukw* cases, to situate Cowichan rights and title within common law. While these methods of articulating Cowichan knowledge of, relationships with and responsibilities to the land are based on tests within Canadian aboriginal law, Cowichan Tribes mobilized Canadian legal concepts to create space for Cowichan people to continue cultural practices.

The strength of this ethnographic documentation and Elders' testimonies was powerful in its ability to convey the cultural significance of *Hw'teshutsun* to provincial negotiators. Chief Hwitsum felt that this research was enough to gain recognition of aboriginal title in court:

I [had] gotten enough actual research done that I was able to say [to government]: "Look, you protect this." I had enough data that in terms of proving Aboriginal Title we could've hived that little piece out of our territory, brought them to court and won a title case on that piece of land. That was huge leverage. I had good information, solid data on the negotiating level with the Crown (personal comm. Sept. 2021).

Through their assertion of title to *Hw'teshutsun*, Cowichan argued that not only are the cultural practices occurring at *Hw'teshutsun* "an integral part of their distinctive culture" (*R v Sparrow*, [1990] 1 SCR 1075, para. 40), but that they are tied to the land (Cowichan Tribes 2000b, 38-9). Title was demonstrated through physical presence in 1846 when Britain asserted sovereignty, traditional activities at *Hw'teshutsun*, oral histories and customary laws connected to *Hw'teshutsun* (Cowichan Tribes 2000b, 43-51). These descriptions are to satisfy Canadian legal tests for aboriginal title, yet the story of *Stutsun* and the teachings associated with these cultural practices also speak to the importance of places connected with the First Ancestors and the teachings from these stories which are central to Hul'q'umi'num' legal tradition (Morales 2014). The acceptance of oral histories and customary law as a means of demonstrating aboriginal rights and title established in *Delgamuukw* (see Thom 2020b) brought Hul'q'umi'num' teachings about place into conversation with provincial and Indigenous decisions for the governance of *Hw'teshutsun*.

However, BC continued to avoid formal recognition of any aboriginal rights and title in the 2001 TRM, despite creating a framework that prevented development at *Hw'teshutsun* and agreeing to *Hw'teshutsun* as a Cowichan land selection area. An Interim Measures Agreement (IMA), which also set aside formal rights and title recognition, was developed alongside the TRM.

This IMA set out to address some of Cowichan Tribes' forestry interests and was intended to give effect to the preservation of cultural attributes outside the TRM-area but within a larger region identified by Cowichan Tribes as the *Hw'teshutsun* area (Cowichan Tribes, Canada, British Columbia 2001). Through the IMA, we again see the recognition of a Hul'q'umi'num' cultural landscape unable to be confined within provincial cadastral delineations take shape through these negotiations. This larger *Hw'teshutsun* Area was still subject to development and issues of decision-making and the exercise of inherent Indigenous rights on private property sections of the IMA area were not formally addressed in the IMA. Though Cowichan Tribes had framed their connection with *Hw'teshutsun* through aboriginal rights, title and interests throughout their efforts to prevent construction of a dump or logging at *Hw'teshutsun*, the IMA was not "intended to define, create, recognize, limit, extinguish or derogate from any aboriginal right, including aboriginal title, of the Cowichan Tribes" (Cowichan Tribes, Canada, British Columbia 2001, 22). Terms of the agreement state that "the commencement of litigation involving the assertion of aboriginal rights or title by Cowichan in their asserted traditional territory which Canada and BC agree precludes effective treaty negotiations with the Hul'qumi'num of Cowichan" (2001, 24). This *quid pro quo* is indicative of Crown strategies which may allow for some recognition of Indigenous rights while attempting to gain economic and legal certainty throughout the rest of the territory.

While formal recognition was unaddressed, Cowichan's aboriginal rights were *de facto* protected through the TRM as the prevention of development allowed for people to continue to engage in cultural activities at *Hw'teshutsun*. Thom (2014) explores how Indigenous peoples use concepts central to state conceptions of property to articulate their own relationships with the land, attending to the specificity of the important places.

Indigenous peoples have also asserted their own categories of “territory” and “property” within these debates [on reconciling land relations]. At the same time as they mobilize these concepts in ways that make their own territorial relations familiar to state actors, they also work to retain their local character and to enfold the fabric of social, economic, and political orders in ways that make sense in indigenous terms (Thom 2014, 4).

State legal concepts may therefore be used as a communication tool, shaping the exercise of state jurisdiction through Indigenous legal traditions. This is not without a great deal of work on the part of Indigenous nations who are tasked with transforming concepts of “territory” or “rights and title” to represent their legal traditions and priorities (see Morales 2017a).

Similarly to categories mentioned by Thom, Cowichan Tribes mobilized Canadian law around aboriginal rights and title to reflect their teachings, legal principles, values and relationships at *Hw'teshutsun*. In the previous chapter, I showed how stories of the Hul'q'umi'num' First Ancestors relate the significance of *Hw'teshutsun* as a culturally significant place and teach about the practices to engage in there. *Snuw'uyulh*, Hul'q'umi'num' teachings and law, is entangled with places associated with the First Ancestors (Morales 2014; Thom 2005). These shared teachings are a baseline of connection between the Hul'q'umi'num' communities (Lydia Hwitsum personal comm. Sept. 2021). Cowichan Tribes articulated significance of place through their assertion of title to *Hw'teshutsun*. Teachings about *kw'aythut*, hunting and harvesting medicines which were expressed to Canadian and BC governments through the framing of aboriginal rights, protected under section 35(1) of the *Constitution Act, 1982* and characterized through case law. Teachings about quiet and seclusion when engaging with the land were discussed as cultural attributes to be preserved throughout an area that extends far beyond bathing sites. While these Hul'q'umi'num' values and legal principles were mobilized through the discourse of aboriginal rights and title to make them evident to provincial decision-makers, values and legal principles specific to *Hw'teshutsun* reflect the importance of relationships with place in the Hul'q'umi'num' legal

tradition.

Chief Hwitsum discussed the difficulties of communicating the importance of *Hw'teshutsun* and the associated teachings to the government:

It was really challenging because the [provincial and federal] governments didn't really believe us... They [said], "look at these people, they're just trying to make something up." Because our people have been historically quite protective of [these] places [and cultural practices]. The whole colonial exercise meant that we had to save that in a very protective way, for Cowichan.

So I had to go to the elders. I went to the elders, I went to the different leaders in different parts of our territories that knew those areas [best], and I had to aggregate a whole lot of information... I went to the elders to get all this background information [to present to government to say:] "this is legit, here's our history." Then [we] got them all [the provincial representatives] to sign these non-disclosure agreements because it's none of your business to be sharing this around with the rest of the Crown (personal comm. Sept. 2021).

Proving aboriginal rights and title puts the burden of proof on Indigenous nations while assuming Crown sovereignty, forcing Indigenous nations to demonstrate their title through the Crown's legal tests while "the Crown gains its title through mere assertion" (Borrows 1999, 15-16). As Thom illustrates through the BC Treaty Process, "state actors are invested in discourses that do not closely attend to these indigenous social and political realities" (2014, 17). This is specifically in relation to title tests requiring proof of exclusivity which do not reflect Indigenous peoples' principles around property, territory and sharing land (Thom 2020a; Morales and Thom 2020; Thom 2014; Barsh 2008). Proof of rights and title through the Canadian legal system may also fail to attend to the ways in which Indigenous peoples themselves characterize their relationships with the land through their legal traditions.

Though legal entanglements through aboriginal rights and title are embedded with colonial power, within Cowichan Tribes' proof of claim lie details of the knowledge and relationships with the land that Hul'q'umi'num' peoples continue to care for. Lists of medicines and trees used by Hul'q'umi'num' people in the *Hw'teshutsun* area, including the Hul'q'umi'num' names of each

species, point to the deeper knowledge of these plants and connect them to cultural landscapes within the territory. People know where to harvest them and how to care for them. In a way, such documents mobilize knowledge about places, plants and practices to indicate their significance and teachings without revealing the particulars about these plants and practices. While in the context of the tests established by the courts to prove rights and title a list of plants may simply indicate use of an area, in other contexts the names bring forward knowledge about places where the plants may be found and how they may be used. Viewed in this way, we can think of Cowichan Tribes' presentation to the provincial government (2000) and their TUA (1998) as a direct articulation of Hul'q'umi'num' teachings and relationships, the foundations of the Hul'q'umi'num' legal tradition.

Like the plant list which evoked relationships in which Hul'q'umi'num' law is grounded, the *Stutsun* story was not evoked solely to demonstrate prior occupancy to Hul'q'umi'num' territory. It was explained as a story containing *snuw'uyulh* and connecting Hul'q'umi'num' people today with the First Ancestors and the places associated with them, integral aspects of the Hul'q'umi'num' legal tradition (Morales 2014). It was likely not necessary to communicate the full extent of these teachings to government and many of these teachings are private and not to be shared with non-Hul'q'umi'num' people. However, Cowichan Tribes shared enough of these relationships and teachings to communicate to the state the significance of *Hw'teshutsun* as a particular place and the connections to Hul'q'umi'num' teachings.

Aboriginal rights and title have been rightly critiqued for privileging sovereignty of the Crown and limiting possible iterations of Indigenous relationships with the land through the Court's deterministic characterizations of aboriginal rights and title (Morales 2017a; Thom 2014; Borrows 1999). While Cowichan Tribes was still saddled with the burden of proof to demonstrate

their aboriginal rights and title, they used their strength of claim arguments to bring forward Hul'q'umi'num' teachings, shaping the protection of *Hw'teshutsun* through their legal traditions. As will be shown later in this chapter, this was not without constraint by state property law and the province's industrial priorities and obligations. However, Cowichan Tribes was effectively able to leverage aboriginal rights and title to protect an area characterized through their teachings around quiet and seclusion, defying the state's attempt to define *Hw'teshutsun* as isolated bathing holes. Though they were not formally recognized, aboriginal rights and title were used to entangle Hul'q'umi'num' and Canadian law, shaping provincial legislation through the assertion of Hul'q'umi'num' legal traditions.

### **Centering Hul'q'umi'num' relationships and responsibilities through *nuts'a'maat*:**

Hul'q'umi'num' legal traditions and principles were also invoked to guide actions outside of interactions with the province. This was evident in the protocol and ceremony between the Hul'q'umi'num'-speaking communities who resolved to work together to “protect, preserve and maintain Hw'te shutsun based on our Aboriginal rights... for the use and benefit of present and future generations” (Hul'q'umi'num' 2000). On Nov. 30, 2000, Chiefs, Elders and members from Cowichan, Stz'uminus, Halalt, Penelakut and Lyackson communities gathered at the *S'amuna'* Big House “in solemn traditional ceremony to sign the Hw'te shutsun Protocol which re-affirms the sacred importance of this area and the resolve of all Hul'qumi'num tribes to work together and take whatever steps are necessary to preserve and protect this area” (Cowichan Tribes 2000a). Following the ceremony, Cowichan Tribes declared 6000 hectares at *Hw'teshutsun* a tribal

preserve, a public declaration of their commitment to prevent development at *Hw'teshutsun* and assertion of Cowichan jurisdiction (Cowichan Tribes 2000a; Costa 2000).

The *Hw'teshutsun* protocol and ceremony is an example of how Hul'q'umi'num' legal principles were used to guide the process of protecting *Hw'teshutsun* by reaffirming the relationships between the Hul'q'umi'num' communities and asserting Hul'q'umi'num' people's jurisdiction within their territories on their own terms. While provincial and federal law and policy around treaty and aboriginal title mandate exclusive ownership by one First Nation (see Thom 2020a; Morales and Thom 2020; Thom 2014), the Hul'q'umi'num' communities committed to share and collectively protect and care for *Hw'teshutsun*. Hul'q'umi'num' leaders attended to relationships and responsibilities beyond the *Indian Act* and Canadian authority (Lydia Hwitsum, personal comm. Sept. 2021), activating their own legal traditions to address conflicts with state law.

This section will provide an overview of the ceremony and protocol, particularly the use of the Hul'q'umi'num' principle of *nuts'a'maat*, which talks about being together as one (Lydia Hwitsum personal comm. Sept 2021; Thom 2014). As I was not present at this ceremony, I will focus on the use of the *nuts'a'maat* principle in this ceremony and throughout the process of protecting *Hw'teshutsun* as described by Chief Lydia Hwitsum. Lydia explained that *nuts'a'maat* was invoked to bring the communities together using “the tools of the people” to break down colonial processes attempting to alienate people from their land by emphasizing the relationships between the Hul'q'umi'num' communities and their collective rights and responsibilities to *Hw'teshutsun* (personal comm. Jan 2021; Sept. 2021). I will then discuss the significance of this collective action by briefly looking at historical relationships between Coast Salish peoples and the ability of Hul'q'umi'num' law to address inadequacies of provincial and federal policies

regarding Indigenous shared territories.<sup>45</sup> The *Hw'teshutsun* ceremony and protocol illustrate how Indigenous law has been used to prioritize Indigenous peoples' relationships and values when addressing political conflicts with Canadian governments.

***Hw'teshutsun ceremony and protocol agreement:***

While negotiations with the province to prevent development at *Hw'teshutsun* through a TRM were progressing, Cowichan Tribes leadership also addressed the relationships between the Hul'q'umi'num' communities and the collective use of *Hw'teshutsun*. Lydia Hwitsum, who led discussions at the treaty side table, elaborated on the work done at the community level, beyond negotiations with the Crown:

When it came to protecting *Hw'teshutsun*, I had to work at the Hul'q'umi'num' level, which was the treaty negotiation body engaging with government, and I was also doing the work at home. *Nuts'a'maat* is a principle you can apply in all kinds of different ways... [It's about how] you're going to come together about something (personal comm. Sept. 2021).

Lydia spoke to me about working with her Elders and the Cowichan community to bring these perspectives to the treaty side table (personal com.. Jan 2021). She also emphasized the work done between the Hul'q'umi'num' communities, which culminated in the ceremony and protocol in November 2000. Dialogue about *Hw'teshutsun* between the communities was indicated in Cowichan's TRM presentation to BC in May 2000, six months before the formal protocol: "we have the support of other HTG nations to negotiate and enter into a TRM or an Interim Measure for the above lands [the core *Hw'teshutsun* area]. This support is being documented in the form of a protocol agreement" (Cowichan Tribes 2000, 61). In spite of the fact the Cowichan Tribes stated

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<sup>45</sup> "Shared territory" refers areas which multiple Indigenous nations use. I use the term "overlapping territories" to refer to the province's convenient excuse to avoid recognizing title and subsequent implications for returning the land to the respective nation(s), a political device rather than a recognition that multiple nations have ties to an area.

later in the document that “there is particularly strong evidence that the Cowichan Tribes had exclusive use and occupation in the Cowichan Valley itself” (Cowichan Tribes 2000, 43), speaking to the problematic and divisive language of exclusivity insisted on by the courts, the *nuts’a’maat* approach was used throughout the process of protection, not only in the ceremony and protocol (Lydia Hwitsum personal comm. Sept. 2021).

The ceremony and protocol in the *S’amuna’ thi lelum* (Big House) “sanctified” the relationship between Cowichan, Penelakut, Lyackson, Halalt and Stz’uminus First Nations and their mutual commitment to protect *Hw’teshutsun* (Hul’q’umi’num’ 2000). A paper protocol<sup>46</sup> was signed between the chiefs followed by a traditional ceremony. The “Protocol Affirmation of the Traditional Relationships Amongst the Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe” affirmed the jurisdiction of each community over their traditional territories, recognized their right as sovereign governments to enter into mutual agreements, and resolved to “protect, preserve and maintain *Hw’teshutsun*” (Hul’q’umi’num’ 2000). The ceremony was conducted in a traditional manner, and included speakers and *sxwayxwuy* dancers, which my supervisor, Brian, who was present at the ceremony, explained to me were indicative of the significance of the event.

Chief Hwitsum emphasized the importance of the ceremony as a Hul’q’umi’num’ way of doing things, rather than the written protocol. She described the ceremony to me in the following way:

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<sup>46</sup> During my research, I was aware that the written protocol existed, but no one at Cowichan Tribes who I spoke to could locate it. Some people expressed surprise at the existence of a written protocol, as Hul’q’umi’num’ protocols do not place great importance on written documents. Brian Thom and I received permission from the Cowichan Treaty Department for Brian to share his copy of the written protocol with me. Though the written document was not the most important aspect of the formal commitment to share and protect *Hw’teshutsun* (the ceremony attended to by *sxwayxwuy* was clearly the central work) the intentions reflected in this document make it a valuable material reminder, an element of an event that I and many others were not witness to.

This formal written document wasn't the main thing. The main thing is we stepped into the Longhouse and we stood on the floor in the Longhouse. There's a certain framework within which you do that in our peoples. When you step onto that floor, that dirt floor amongst the people, it's your time to be accountable as well, from a governance perspective...

You've got your churches and all of that; we've got the Longhouse. Ceremony happens there, and when something happens there, it's not to be taken lightly. This [protocol] is formalizing [Hul'q'umi'num' law] on a piece of paper. But in the Longhouse, the way our peoples would have historically come together to make decisions about everything [about] governance, from a self-determination perspective, but here [we came together] with respect to protecting our territories.

*Nuts'a'maat* again, just to keep bringing that principle, standard forward, is about coming together and working together, but it's also a standard of accountability. We've agreed to come together, we've stood in the Longhouse, in the *thi lelum*, in the Big house... for this. And we had our speakers and we had ceremony around it. We brought ceremony to it. It wasn't, "Let's go in the Big House and sign a piece of paper." There is a process [for how to act]. We got speakers..., we called a gathering, we spoke to the people about what we were doing [and] why we were doing it. Some elders spoke about our historical connections to each other and why it made sense that we worked together. And then had a formal signing of the document.

Lydia explains the ceremony in the Big House as the traditional way in which Hul'q'umi'num' governance was enacted. The ceremony and protocol, which invoke *nuts'a'maat*, are uses of Hul'q'umi'num' law in response to conflict created through colonial relationships.

Following the ceremony, Cowichan Tribes publicly declared 6000 hectares at *Hw'teshutsun* a tribal preserve<sup>47</sup> (Cowichan Tribes, 2000a; Costa Dec 3, 2000). This was in the

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<sup>47</sup> With their declaration of a "Tribal Preserve", Cowichan Tribes leadership explained that without such assertions of jurisdiction and sufficient protection measures "there may be little left to preserve and protect" (Cowichan Tribes 2000a). *Hw'teshutsun* was not declared a tribal "park" as Meares Island was; rather, the word "preserve" reflects Cowichan Tribes' assertions throughout their work to prevent development that the *Hw'teshutsun* area needed to be preserved – the culturally significant characteristics needed to be maintained in the face of proposed development. The teachings shared by Cowichan Elders and knowledge keepers about quiet and seclusion, which were argued by Suttles (1981) as the "Coast Salish [spiritual] need for wilderness", are reflected in this idea of a "preserve". *Hw'teshutsun* was not a "park" for recreation, but an area where culturally significant attributes are found due to the geography (see Abner Thorne's quote in Chapter 2). As discussed by in Chapters 2 and 3, quiet and seclusion are important qualities at *Hw'teshutsun* and particularly powerful places should not be visited by outsiders, teachings not conducive to a recreational park. What is being "managed" for at *Hw'teshutsun* is quiet and seclusion at powerful places, avoidance of these places by outsiders.

The *Hw'teshutsun* protocol also referenced *Hw'teshutsun* as an area to be "preserved" for future generations.

years following the declaration of the Meares Island Tribal Park by Tla-o-qui-aht *Ha'wiih* (hereditary chiefs) in 1984 on the West Coast of Vancouver Island. That declaration was also in response to logging practices opposed by Tla-o-qui-aht *Ha'wiih* on their traditional territories during the infamous War in the Woods (Murray and Burrows 2017; Murray and King 2012; Renner 2021; ICE 2018, 44). Cowichan's declaration can be viewed as a public assertion of jurisdiction to *Hw'teshutsun*, signalling their commitment to protect the area, one outcome of the *Hw'teshutsun* ceremony and protocol. Tla-o-qui-aht assertions of a tribal park were followed by developing management plans at Meares Island and several other Nuu-chah-nulth tribal parks with respect to Nuu-chah-nulth priorities (ICE 2018, 44). The protection of *Hw'teshutsun* did not include formal recognition of Cowichan jurisdiction and does not appear to have included long-term management plans between Cowichan Tribes and BC, perhaps because it was not protected as a conservation area or for some other specific type of land use planning. However, this declaration made public Cowichan Tribes leadership's strong position that logging would not occur at *Hw'teshutsun*.

### ***Addressing relationships beyond the Indian Act:***

The use of *nuts'a'maat* throughout the process of protecting *Hw'teshutsun* culminating in the Big House ceremony addressed certain concerns not dealt with at the treaty side table. Though Cowichan Tribes was leading *Hw'teshutsun* negotiations (HTG was also sitting at the table, representing all the Hul'q'umi'num' communities), Cowichan Tribes leadership did not want to overpower the other communities by asserting that only Cowichan people had access to or responsibilities to *Hw'teshutsun*, a shared area (see Morales and Thom 2020 on sharing as a Hul'q'umi'num' legal principle).

First Ancestor stories are one source which indicate relationships with the *Hw'teshutsun* area held by Cowichan, Stz'uminus, Halalt and Penelakut communities. Rozen (1985, 126) records that *Stutsun* was “certainly the first ancestor of the Chemainus [people]”, here referring to the “Chemainus Tribe” which included Stz'uminus, Halalt, Lyackson and Penelakut communities (see Thom 2005, 65). Cowichan Elder Abner Thorne also connects *Stutsun* and *Swutun* (another First Ancestor) to Halalt and Penelakut, two other Hul'q'umi'num' communities, and to the Malahat community in one version (Thom 2005, 90-1). Different versions of First Ancestor stories and connections held by multiple Hul'q'umi'num' communities with places associated with the First Ancestors is one way of illustrating ancestral connection that multiple communities hold with the *Hw'teshutsun* area. Cowichan Elder Luschiim, who was instrumental in protecting *Hw'teshutsun*, indicated the ongoing use of *Hw'teshutsun* by people from other Hul'q'umi'num' communities, besides Cowichan (personal comm. with Brian Thom and Sarah Morales, April 14, 2021). Luschiim also mentioned that Elders from some of the other Hul'q'umi'num' communities actively worked to protect *Hw'teshutsun* (personal comm. with Brian Thom and Sarah Morales, April 7, 2021), indicating the importance of *Hw'teshutsun* for non-Cowichan Hul'q'umi'num' people.

However, the provincial government maintains that shared territories, or “overlapping claims” as they term it, between Indigenous nations must be resolved before land claims will be settled, following the logic of “exclusivity” set out in the Supreme Court’s test for Aboriginal Title, only one First Nation will have recognized title to an area. Though this was not expressly stated to me as a reason for the *Hw'teshutsun* ceremony, it is likely that awareness of the provincial and federal government’s perennial argument against the recognition of aboriginal title – “overlapping claims” or shared territory – formed part of the context in which the ceremony took place.

Cowichan Tribes leadership drew upon the principle of *nuts'a'maat* to bring the communities together for the work of protecting *Hw'teshutsun*, to recognize the authority held by each community and to affirm shared relationships with this area though Cowichan was heading the negotiations. Lydia Hwitsum described the use of *nuts'a'maat* in this context:

A lot of... what needed to be done [was] in terms of being able to recognize between us [the Hul'q'umi'num'-speaking communities] as peoples how connected we were. And, because of the Indian Act colonial exercise that created different bands, going back to the layer below that. So it was a bit of a business of that reconnecting, recognizing relationships, honouring those historical, ancestral connections.

When I looked around the table at who we're trying to call together, these are my relations. The Chief of Lyackson is my nephew, in our traditional kinship ways. And my grandfather came from Penelakut.

So it was that business, the underlying piece before getting to a written protocol was re-establishing [those relationships] because from a cultural perspective our peoples... were part of the Hul'q'umi'num Treaty Group. So I tried to deal with them to say, "look, I'm trying to rebuild the Cowichan Nation here", in a way. Those were the building blocks of recognizing our historical ancestral connections... It was bringing [in] *nuts'a'maat*, the principle of *nuts'a'maat*: we're all in it together, we're connected, but we don't agree on everything but we're going to agree to talk about how we protect our title.

So that's the *nuts'a'maat* concept: you all come together. I get everybody's bringing their Indian Act authorities to the table; I'm not trying to break that nut now. What I'm saying is below that, we have ways of being that have continued through our cultural and ceremony. That was the layer below the Indian Act political piece. So let's re-recognize our connections to each other...

Because Cowichan Indian Band, or Cowichan Tribes, was the largest in number amongst us, there was a real concern that, "oh here comes Cowichan. They're just going to take over." So that was really important to say, "look, I get you've got Indian Act authority. I'm not trying to say that's right or wrong. I understand it's colonial. But right now, we're trying to save a very important piece of our territory that serves us all on a cultural, spiritual level." So it was almost like having to just scrape away that political layer and let's say, "no we're not going to talk about [Indian Act authority] right now and resolve it, but we're going to agree on that underlying piece [to protect *Hw'teshutsun*]." It was our ceremonies and cultural ways that brought us to connect with our territory that got us beyond the political piece and focused on our reliance on our connection to each other and our connection to our culturally significant areas, that actual connection at that level.

When I brought us all together, I said, “Look, Cowichan's not trying to do this so we can stop our own extended families from accessing this area for the purpose of our cultural, spiritual strength.” So that was just an agreement I brought forward. [With] *nuts'a'maat*, you bring your authority forward. Cowichan's not trying to overrun you, but without question, if we don't work together we're going to lose even more in terms of culturally significant sites. The underlying piece is rekindling those strengths of relationship [and] reliance on each other and our territories. Recognizing we're not completely different entities as humans just because the Indian Act has separated us. So it was a big exercise of trust-building, recognizing our connections and our relationships, understanding our mutual reliance on our territories. It was just dwindling – because of development and all kinds of other incursions – dwindling real quality sites that our people could still go and express our ways of being in a spiritual way.

As Lydia explained, *nuts'a'maat* is an approach that informed how the Hul'q'umi'num' communities worked together throughout the protection of *Hw'teshutsun*. This ceremony was part of a larger nation-building effort at the time, as indicated through Lydia's words. At different times throughout history, Coast Salish communities have alternatively aggregated and emphasized more local relationships (Thom 2010). Through the use of *nuts'a'maat*, the protection of *Hw'teshutsun* was a time of amalgamation where Hul'q'umi'num' leaders drew upon shared connections with the land, kinship relations and *snuw'uyulh* to unite the Hul'q'umi'num' communities.

Penelakut Elder Florence James shared with Brian Thom (2014) her understanding that *nuts'a'maat* draws on kinship connections between the communities but recognizes that different familial descent lines have ongoing significance for Hul'q'umi'num' people.

We don't make each other different because of our bloodline. And we're families that are made up of all different families. You know, make up the tree and every branch doesn't come from one place...

Today we use *nuts'a'maat* and that represents “one thought,” that word. And so *nuts'a'maat*.

But we are not “one thought.” They were all different, separated communities [put] on reserves. And [today] everyone's learned “oh, you're from there, you can't come here” and “you can't do this and say that” and “it never used to be like that.” And so that's why they had that word *nuts'a'maat* (Thom 2014, 20).

Though she was not speaking about the protection of *Hw'teshutsun*, Florence James' words offer understanding of the relationships invoked through *nuts'a'maat*. She emphasized the ongoing importance of descent lines and connections with places held by specific families though the Hul'q'umi'num' communities have much in common. *Nuts'a'maat* brings people together, transcending these differences. The importance of this concept may be illustrated with reference to social organization amongst Coast Salish peoples which connects people to place and within kin networks across their territories and the position of the Canadian government that aboriginal title will not be recognized in areas of shared territory.

***Networks of kinship relations:***

Anthropologists, archaeologists and historians have illustrated tensions between connections to place through familial descent lines (Morales and Thom 2020; Thom 2020a; Thom 2005) and a social organization system characterized as a decentralized “region-wide system of intercommunity relations” within Coast Salish societies (Harmon 2007; Thom 2010; B. G. and D. C. S. Miller 2016; B. G. Miller 2007). Connection with and access to places may be associated with particular families (Morales and Thom 2020; Thom 2020a; Thom 2005), while familial connections across Coast Salish territories may be activated to draw communities together (Thom 2010; Miller 2016; Angelbeck and McLay 2011). Both are significant markers of identity.

Thom (2010) details the dynamics of social and political organization in Coast Salish communities where kinship relations, including connections to pre-colonial village groups, and Indian band relations are both at play. The process of creating Indian bands often involved aggregating more than one village group into a band. All of the bands represented by HTG, except for Lake Cowichan, consist of more than one former village group. Cowichan Tribes, for example,

consists of more than 10 village groups (Thom 2010), and is the largest Hul'q'umi'num' band. Hul'q'umi'num' people continue to place emphasis on their identity through ancestral groups related to the village places they are from and on the Indian band they are a member of (Thom 2010, 40).

Multiple family groups, Indian bands and historical ties to villages does not negate the connections between the Hul'q'umi'num communities and Coast Salish people more broadly. As Thom notes, there are people who support more regional-style governance based on shared language, cultural practices, family, history and territory (2010, 46). For example, historical amalgamation of Coast Salish communities includes the battle of Maple Bay (*Hwtl'upnets*) in the mid-19<sup>th</sup> century. Coast Salish communities throughout Vancouver Island and the Gulf Islands, from Comox to Sooke, and from downriver *hənqəminəm* and upriver Halq'eméylem communities and Puget Sound organized together against the Lekwiltok people from further north on Vancouver Island, historic enemies of the Coast Salish (Angelbeck and McLay 2011, 369-371; Rozen 1985, 131; Cryer 2007, 141-5). Today, litigation for the recognition of Cowichan, Stz'uminus, Halalt and Penelakut's aboriginal title to *Tl'uqtinus*, a place on the Lower Fraser River, has brought these Hul'q'umi'num' communities together with Lyackson as the Quw'utsun Nation<sup>48</sup> (Cowichan Tribes v Canada (Attorney General), 2018 BCSC 647 (CanLII), <https://canlii.ca/t/hrmwX>. Accessed July 26, 2022) in a title claim opposed by Tsawwassen and Musqueam. Kin relations, ancestral connections to place and contemporary bands all play a role in Coast Salish governance, though such governance is not restricted by local connections.

This context about Coast Salish kinship is important for understanding the relationships which were pulled together through the protection of *Hw'teshutsun*. Though they maintain strong

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<sup>48</sup> They have recently changed their name from the Cowichan Nation Alliance.

kinship ties, Hul'q'umi'num' and other Coast Salish communities have alternatively amalgamated or emphasized the distinctness of their own family units or Indian bands (Thom 2010). The protection of *Hw'teshutsun* was one such event where Cowichan Tribes leadership brought the Hul'q'umi'num' communities together by emphasizing kinship relations and shared teachings, *snuw'uyulh* to achieve a collective goal.

***Addressing “exclusivity” through Hul'q'umi'num' law:***

Through reaffirming the relationships between the communities and their shared connection with *Hw'teshutsun*, the protocol and Big House ceremony also illustrated Hul'q'umi'num' ways of dealing with the BC government's problematic argument that they will not recognize title of one First Nation in an area of shared use with other First Nations. Thom (2020a) contends that in circumstances where BC refuses to recognize a First Nation's jurisdiction in a shared territory, BC should defer to Indigenous legal traditions and protocols whereby the nations or communities agree amongst themselves in their own ways how to share governance and use of the land. This would entail a recognition that Indigenous legal traditions and laws are equally legitimate to common law – the recognition of legal pluralism within Canada including Indigenous legal traditions which can, and do, function to attend to realities that Canadian common law does not adequately address. This recognition would negate claims made by BC that *Hw'teshutsun* is an area of overlapping claims by communities negotiating treaty through HTG, thus eliminating one of BC's main reasons to refuse recognition of Indigenous title and jurisdiction.

In this context, the use of *nuts'a'maat* may be viewed as a way of preventing conflict between the Hul'q'umi'num' communities in a context where Crown policies attempt to pit Indigenous communities against one another. The protocol used *nuts'a'maat* to reaffirm kin

relationships between Hul'q'umi'num' people, to recognize their collective relationship with *Hw'teshutsun* and then to evoke the responsibilities that all the Hul'q'umi'num' communities had to protect *Hw'teshutsun*, bringing forward a Hul'q'umi'num' legal principle that speaks to the importance of kinship relations (Morales 2014). Morales (2014, 259-60) gives explains the role of kinship within dispute resolution in Coast Salish law:

While families are still central to dispute resolution (as well as social, ceremonial and political life) some may argue that the focus has shifted towards utilizing kinship relations to resolve disputes, rather than drawing on them to avoid conflict in the first place. However, in every conversation with Elders about conflicts and disputes, it was always stressed that entire families, not just individuals, are the subjects of disputes. It is for this reason that I classify kinship as a universal standard of conflict resolution... kinship must always be considered in the resolution of any conflict in the Coast Salish world.

The ceremony and commitment between the Hul'q'umi'num' communities can be seen as drawing upon the strength of these kinship relations to prevent future conflict through the agreement that *Hw'teshutsun* would continue to be accessible to all Hul'q'umi'num' community members. The protocol and ceremony may have prevented future conflict between the Hul'q'umi'num' communities over access to *Hw'teshutsun* by affirming that *Hw'teshutsun* was protected for all Hul'q'umi'num' people, not just Cowichan Tribes band members.

It is possible that the use of *nuts'a'maat* and the public declaration of a tribal preserve were also an affirmation to BC that the Hul'q'umi'num' communities had addressed provincial arguments regarding shared territories through their own legal mechanisms. BC treaty mandates at the time undermined Indigenous customary law and governance of relationships with the land by demanding exclusivity of ownership rather than listening to Indigenous territorialities as represented by each nation (Thom 2014). Cowichan Tribes used the provincial executive and legislative mechanisms available to protect their relationships with *Hw'teshutsun*. Where BC jurisdiction was inadequate in attending to Hul'q'umi'num' laws around land relationships,

including sharing land, the Hul'q'umi'num' communities, led by Cowichan Tribes, used their own governance mechanisms to affirm their relationships with each other and with the land. The ceremony and protocol demonstrate how Indigenous communities are able to use their legal traditions to center their own teachings and relationships, with kin and land, in contexts where Crown governance creates conflicts – present-day applications of traditional principles.

### **Recognition and constraint of a cultural landscape:**

The “Treaty Related Measure: Land Protection” (TRM), signed March 7, 2001 between Cowichan Tribes, HTG, B.C. and Canada, prevented development throughout 1700 hectares at *Hw'teshutsun*, the first land protection TRM in BC (Canada, British Columbia, Hul'q'umi'num Treaty Group, Cowichan Tribes, 2001; BC's MAA 2001b; BC's MOF 2001). The negotiations also resulted in an Interim Measures Agreement (IMA) between Cowichan Tribes, BC and Canada to address Cowichan Tribes' logging interests and to implement protection of attributes valued by Cowichan Tribes throughout a larger area than protected under the TRM (Cowichan Tribes, Canada, British Columbia 2001, 7). Given effect through provincial jurisdiction, the TRM was shaped by Hul'q'umi'num' teachings and values expressed throughout the negotiations and other assertions of jurisdiction by Cowichan Tribes. However, the expression of Hul'q'umi'num' legal traditions within their territory was constrained by provincial law and policy around private property and priorities in creating a good investment climate for industrial partners.

This section will consider how Hul'q'umi'num' and Canadian law and values have shaped the governance and extent of *Hw'teshutsun* via the TRM. While the protection of *Hw'teshutsun* is significant – this is a green area so significant that it can be seen from space amidst devastating logging throughout Hul'q'umi'num' territory – the application of Hul'q'umi'num' law and

ongoing relationships were nonetheless constrained by the Crown's mandates premised on exclusive ownership and an unwillingness to recognize the extent of Indigenous peoples' relationships with the land. However, Cowichan Tribes' ability to assert their teachings and principles to inform provincial legislation is notable. This story is one example of the entanglements of Canadian and Indigenous law, demonstrative of the legal pluralism that exists in Canada. Where this legal pluralism is recognized, greater potentials for the expression of Indigenous legal traditions, teachings and values may be recognized.

**Hw'teshutsun agreements:**

The TRM was an enabling mechanism that protected *Hw'teshutsun* by preventing any industrial development through the exercise of ministerial and cabinet power under existing legislation. The TRM used Part 13 of the *Forest Act* (sections 169, 170 and 173), section 16 *Land Act* and section 22 of the *Mineral Tenures Act*, which established a No Staking Reserve and a No Disposition Notation throughout the area, to prevent any industrial development at *Hw'teshutsun* (BC's MAA 2001b). Part 13 of the *Forest Act* required the Minister of Forests to pursue Cabinet approval to designate *Hw'teshutsun* a temporarily protected area. Protection would be renewed every two years until treaty is signed (BC and Canada 2001). Part 13 requires that temporary protection of a cutblock is in "public interest" (*Forest Act* s.169(1)). As the TRM was used to help treaty negotiations progress, it was determined to be in the public interest to prevent any development at *Hw'teshutsun* (BC's MAA 2001b).

The TRM set aside 1700 ha at *Hw'teshutsun* for future treaty settlement land. Costs of establishing TRMs are shared by provincial and federal governments (Canada's FNTO 2001). The agreement established that until treaty is signed, BC will "retain ownership of the Land" and

“administer, manage, maintain and operate the Land at its discretion”. The protected area remained available for recreational use for non-indigenous people, including hunting, mushroom picking and recreational all-terrain vehicles (Canada, British Columbia, Hul’qumi’num Treaty Group, Cowichan Tribes, 2001, 2-3; BC’s MAA 2001b ).

The *Hw’teshutsun* TRM included a clause where Cowichan Tribes agreed to “participate in agency referral processes regarding land and resource developments... within Cowichan’s traditional territory... and will not unreasonably obstruct the business of British Columbia” (Canada, British Columbia, Hul’qumi’num Treaty Group, Cowichan Tribes, 2001, 5). The Province’s intentions can be seen through a confidential document internal to BC, where MAA negotiators expressed that the “Province will require from Cowichan Tribes, in exchange for this protection measure, forestry operations and development plans to proceed without delay, as well as mineral and/or oil and gas development in their asserted traditional territory” (BC’s MAA 2001b). Cowichan also agreed not to assert aboriginal title and to participate in the Crown land referral process to allow for economic development (Canada, British Columbia, Hul’qumi’num Treaty Group, Cowichan Tribes, 2001; Canada’s FNT0 2001). While the TRM achieved Cowichan Tribe’s desire to protect *Hw’teshutsun*, the *quid pro quo* was intended to make it easier for industrial development of Crown lands and resource within Cowichan territory as these developments were regularly opposed by Cowichan Tribes and other Hul’q’umi’num’ communities.

The IMA resulted from BC and Canada’s acknowledgement that the *Hw’teshutsun* area extends beyond the 1700 ha protected through the TRM. The IMA, which did not include HTG as a signatory, established a Cowichan forestry pilot project and further elaborated on management aims reflecting Cowichan values in the “Hw’te shutsun Area” (Cowichan Tribes, Canada, British

Columbia 2001). The IMA has as its first objective to “create and implement a process to address the preservation to the extent possible under existing legislation and policy... of the attributes of the Hw’tē shutsun Area that are considered important to Cowichan Tribes” (2001, 7). This included an objective to work with logging companies TimberWest and Weyerhaeuser who had tenure in the *Hw’teshutsun* Area to promote greater understanding Cowichan values. A *Hw’teshutsun* Joint Implementation Council<sup>49</sup> consisting of two representatives from each the provincial government and Cowichan Tribes was to be tasked with enacting the objectives and responsibilities under the agreement (2001, 8-11).

***Negotiating protection under the “shadow” of Canadian priorities:***

Provincial recognition of the cultural importance of *Hw’teshutsun* is reflected in objectives in both the TRM and IMA. However, the TRM protecting *Hw’teshutsun* was not without constraints on the geographical extent of *Hw’teshutsun* or the recognition of Cowichan jurisdiction throughout their territory. These limitations largely stemmed from BC’s general unwillingness to consider private property in treaty negotiations and their priorities to lease-holding forestry companies. The Province’s ability to uphold their values through law and policy cast a shadow over Indigenous peoples’ exercise of their legal traditions (Morales and Thom 2020). The IMA recognized that the significance of *Hw’teshutsun* extends beyond the 1700 ha where development was prevented, yet implementation of this recognition where legislation did not enforce it appeared to be negligible in practice. This is evident through large-scale clearcutting within larger *Hw’teshutsun* Area discussed in the IMA and BC’s dismissal of Cowichan Tribes’ opposition to the construction of a race car track directly south of the protected area.<sup>50</sup>

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<sup>49</sup> As far as I can tell, this board was not implemented.

<sup>50</sup> For a description of the noise park controversy, see Appendix A, especially pg. 222-4.

In accordance with their mandates, BC negotiators were unwilling to consider protection for the entire *Hw'teshutsun* area detailed by Cowichan Tribes and aimed to “further define the highest priority areas for protection” (BC’s MAA 2000b). This sentiment is remarkably similar to provincial strategies when protecting smaller sites: determine the core area and consider it isolated from the larger landscape it is a part of. Such logic pervades the province’s TRM policy: BC’s Ministry of Aboriginal Affairs (MAA) stated that “the chief negotiator for the province indicated that there are rules and funding limits related to TRMs and the Cowichan Tribes proposal would put pressure on those limits and rules” (BC’s MAA 2000b). The area proposed for protection, comprising 5371 ha, was determined to be too large according to government TRM mandates. The governments’ position on the inclusion of private lands in treaty settlement were no different during the TRM negotiations than at the treaty main table: private land must be procured on a willing seller/willing buyer basis (BC’s MAA 2000b). BC prioritized the economic impact on forestry companies if tenure at Crown cutblocks at *Hw'teshutsun* was revoked, arguing that “from an economic standpoint, continuity of tenure is very important for the province and the local community to provide certainty of investment, development, employment and revenues” (BC’s MAA 2000b; Cowichan Tribes, Canada, British Columbia 2001). Consistent with their priorities throughout the BC Treaty Process, the provincial government was concerned with providing an investment climate based on certainty which, combined with stipulations about the cost of TRMs, may have made BC reluctant to buy back many cutblocks in the TFL and Small Business Forest Enterprise (now BC Timber Sales) areas to increase the protected area.

Provincial negotiator Doug Caul described the process of negotiating the *Hw'teshutsun* protected area from Cowichan Tribes' descriptions to the 1700 ha in which the TRM prevented any development:<sup>51</sup>

HTG provided their negotiator with a mandate and I had the mandate... We just started trying to figure out [what area could be protected] with an understanding that we weren't going to be able to do the full 6000 [ha] but we were going to be able to do [something]. I thought we were going to be able to do something, because the mandate I was given was to go and explore it. And ultimately, I don't think there's a lot more magic to it, coming up with the 1700 [ha], than that. Other than... I seem to remember we were trying to make sure we were following some boundaries and that we weren't getting into... private parcels of land in the TFL...

I cannot tell you I remember all those details, but it's very, very common that when we start looking at a map or somebody's drawn a line, says this is a tribal park, then we have to start looking at all the interests and try to focus in on the area of land that is going to have the least amount of challenge from outside interests and private land and different types of tenures and things like that. And ultimately, through negotiations you find compromises and that's what we did with the Hul'q'umi'num Treaty Group (personal comm. June 2021).

While negotiation over treaty land selection, which is how the province understood these negotiations (BC's MAA 2000b), is part of the treaty process, negotiation over the number of hectares protected at *Hw'teshutsun* is not dissimilar from the routine process of postage stamp site protection discussed in Chapter 2. The TRM defined a Hul'q'umi'num' cultural landscape, limiting the geographical scope through BC's agreements with TimberWest who held tenure to cutblocks in Tree Farm Licence (TFL) 46 at *Hw'teshutsun* (see Figure 8 pg. 174; BC's MAA 2001b). The *Hw'teshutsun* protected area is large enough to allow for cultural practices to continue – the work was successful. However, these negotiations over the geographic scope of a Hul'q'umi'num' cultural landscape demonstrate a lack of willingness by the Province to fully recognize and incorporate Hul'q'umi'num' people's relationships with the land and

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<sup>51</sup> The TRM permitted TimberWest to harvest a small area within the protected area before the legislations came into effect (BC's MAA 2001a).

Hul'q'umi'num' teachings and legal traditions. These teachings and legal traditions exist throughout the landscape regardless of BC's agreements with industrial partners and private property owners. This could be seen as a clash of underlying legal traditions where Hul'q'umi'num' teachings speak to the connectivity of the landscape whilst provincial designations of land into parcels owned in fee simple upholds a different set of priorities and obligations (see van Wagner 2021).

Provincial priorities to uphold the rights of fee simple property owners, combined with silos between provincial ministries and between municipal and provincial governments, were further demonstrated through the province's response to CVRD plans to build a motorsport race track directly adjacent to the core *Hw'teshutsun* area. While Cowichan Tribes was negotiating at the treaty side table to protect their cultural interests at *Hw'teshutsun*, the CVRD was simultaneously negotiating with TimberWest, the land owner, to purchase land just south of the Cowichan Valley Highway within the *Hw'teshutsun* Area for their "noise park". Cowichan Tribes leadership opposed this development as it did not respect the values and teachings, particularly the importance of quiet, shared by Hul'q'umi'num' Elders throughout the *Hw'teshutsun* area. BC's response was that the noise park development was not a treaty issue as it pertained to the purchase of private land<sup>52</sup> (BC's MAA 2001a). As is evident through the treaty process more generally, BC's categorization of land into public and private is an attempt to limit the expression of Hul'q'umi'num' jurisdiction and law, curtailing Hul'q'umi'num' people's relationships with the land. BC's position on the noise park construction is consistent with their mandate for the treaty process, yet this unilateral and inflexible position regarding private lands and a lack of consistency

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<sup>52</sup> Ultimately, Cowichan Tribes purchased that section of land from TimberWest (Tim, personal comm. June 2021) to prevent construction of the noise park. It was built further west, towards *Swuq'us* – the Vancouver Island Motorsport Circuit (VIMC).

between municipal and provincial jurisdictions resulted in Cowichan Tribes fighting the same battle on two different levels of government.

The following images (Figures 7 and 8) provide some insight into BC's considerations in negotiating the protected area. Illustrated in the first image, Cowichan Tribes articulated the *Hw'teshutsun* area in different ways throughout negotiations based on geography, as seen in Abner Thorne's quote in Chapter 3, rather than on a Canadian cadastral matrix of land ownership. The TUA (1998) depicted *Hw'teshutsun* as the area between the Cowichan and Chemainus Rivers. In Cowichan's May 2000 TRM presentation to BC, they depicted the *Hw'teshutsun* Area bounded by the mountain peaks to the north of the Chemainus River and south of the Cowichan River. However, as negotiations with BC proceeded, the area considered for land protection became constrained by private property ownership, particularly lands held in fee simple by forestry companies and forestry tenures licenced by the Crown land under TFL 46. The geographic scale was further limited by Crown funding through TRMs (Canada's FNT0 2001). These different priorities were negotiated at the treaty side table, resulting in a significant protected area, but not one that fully reflected Hul'q'umi'num' teachings of and relationships with *Hw'teshutsun*.

The first image (see Figure 7) uses contemporary forestry ownership and BC Timber Sales (BCTS) tenures in TFL 46 (today the TFL does not include the *Hw'teshutsun* protected area). These are not the exact forestry tenures providing problems at the negotiation table in 2000, but they provide a visual example of the sorts of tenures dotting TFL 46. The second image (see Figure 8) is a historical map from the negotiations in 2001. It includes the forestry tenures of the time though the scale is smaller and does not show the extent of tenures and forestry ownership within the previously articulated *Hw'teshutsun* areas.

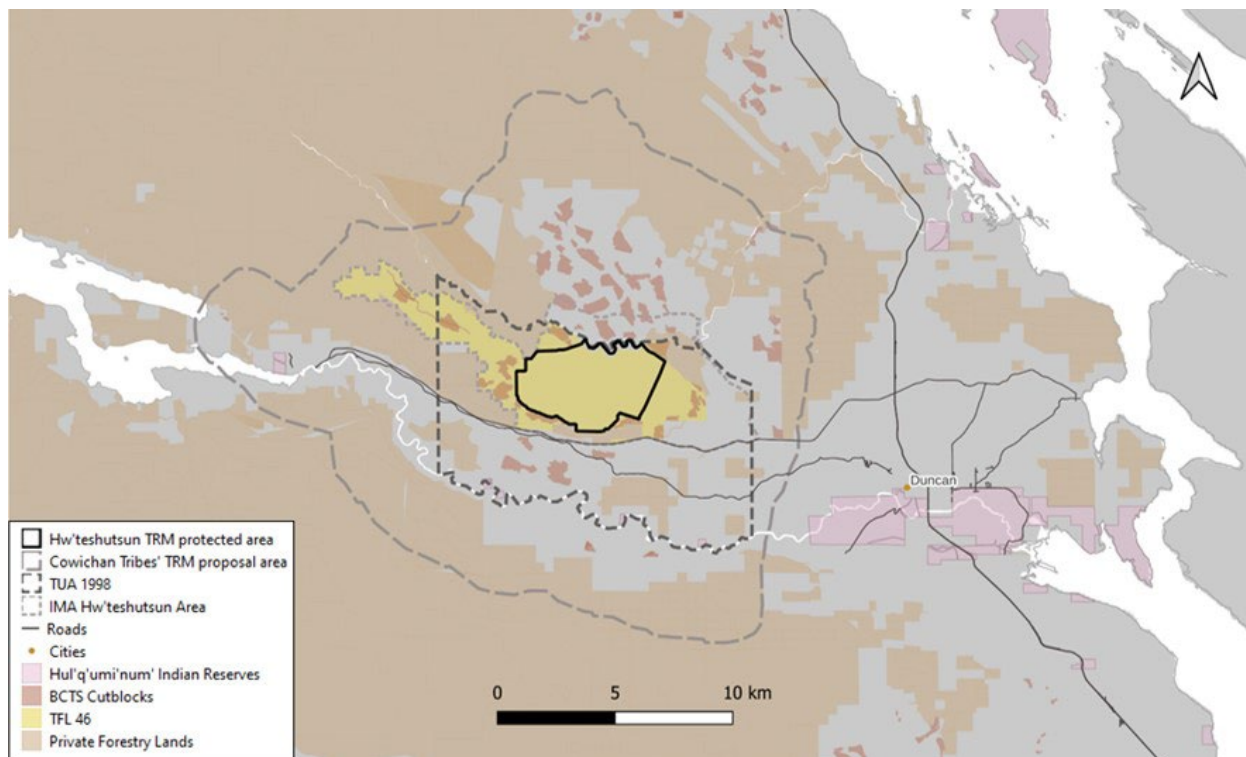


Figure 7: Privately owned forest lands and forest tenures in TFL 46 constrained the extent of the protected area.

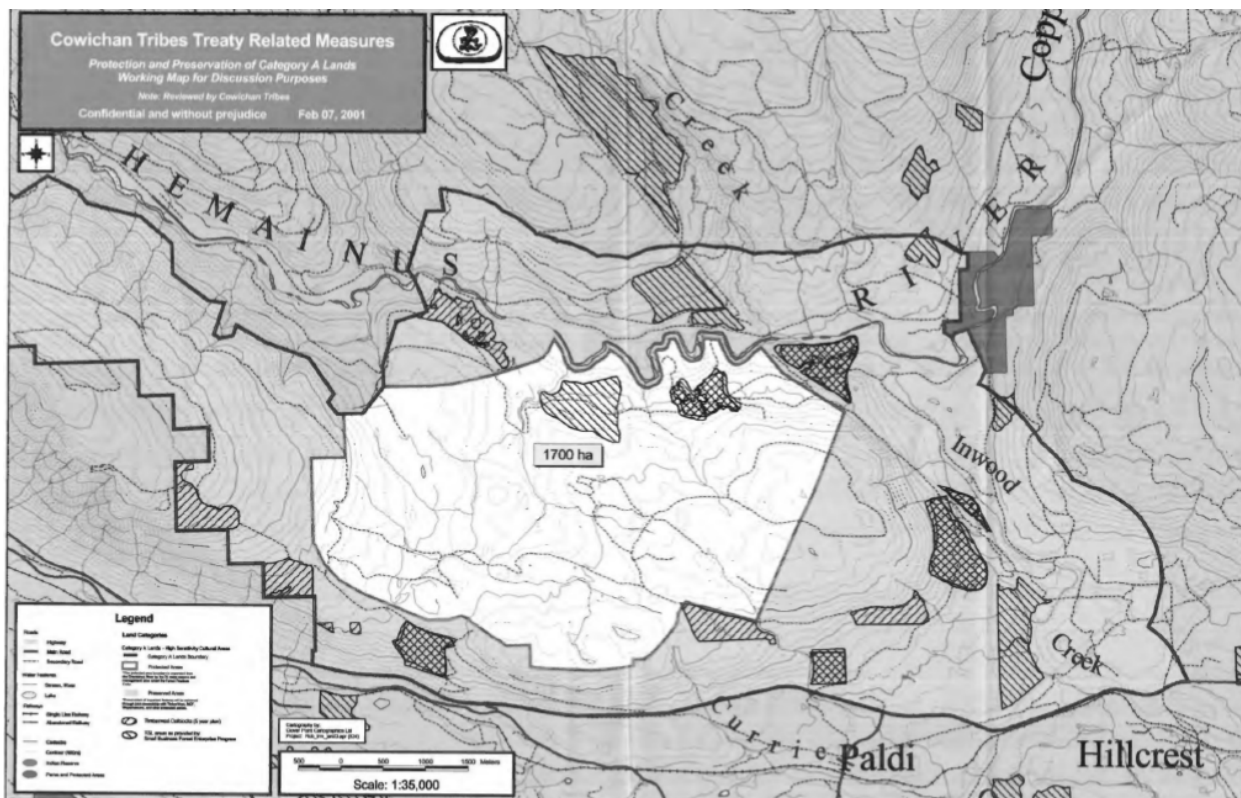


Figure 8: Constraint of the protected area is further depicted in this map from negotiations in 2001 which includes the forest tenures at the time in the vicinity of Hw'teshutsun (hatched polygons). The Chemainus River Provincial Park can also be seen as the dark grey polygon northeast of Hw'teshutsun. The white polygon (1700ha) was protected through the TRM; the larger grey polygon is the IMA area.

The TRM was entangled with broader limitations of Hul'q'umi'num' governance outside of the *Hw'teshutsun* agreements. Previously mentioned *quid pro quos* in the TRM constrained Cowichan Tribes exercise of their jurisdiction in other areas of their territory. *Hw'teshutsun* is not the only Hul'q'umi'num' place requiring protection, which is a costly and time-consuming process. Tim Kulchyski recognized the work done to protect *Hw'teshutsun* while articulating some of the practical difficulties and limitations related to the protection of *Hw'teshutsun*, a reminder that the work to protect Hul'q'umi'num' places and govern their land is far from over.

We've had our thoughts about the integrity of this area, hence a noise park purchase<sup>53</sup>. A broader plan for incorporating this area with the surrounding areas and using that as an example of how that can then be done elsewhere. Because it's not just [*Hw'teshutsun* that needs to be protected], right?

I've asked our elders: "Well, hey, we've got all these issues. [Places that need to be protected]. Tell me all you can tell me about Shaw Creek." And I'm busy, "Okay, we've gotta protect Shaw Creek, come on, let's go." And they're like, "But what about Eagle Heights [*Hwsalu'utsum*]?" Okay, now that's protected [now] but [there are so many other places]. It's so difficult, and so nebulous to try and develop a meaningful process when you don't have the capacity. You can't take that broader picture view...

Well Hill 60's done. The province put money into that. For the next 10, 15, 20 years, they're not going to put any more money into your watershed, as far as protections, unless something explodes and is catastrophic and there's people masked or being arrested or what have you. It's a catastrophe... Without the understanding that there's kind of like a provincial allocation process, and it's very limited, you don't really know what you can do and what the implications are. If you have one area that's protected, does that mean everything else in the whole watershed gets logged? It's kind of the premise<sup>54</sup>. And so, I think from Cowichan's perspective, there is the understanding that there's a to and fro, and you don't always know what the implications are, even if you think, "Oh yay, we got Hill 60." Okay, look at the rest of the watershed. What does that mean?

So it's great; it's brilliant to have something and to be able to demonstrate it. We can't really demonstrate all of these values and all of that potential right there. We

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<sup>53</sup> Cowichan Tribes purchased the area south of the Cowichan Valley Highway where a race car track ("noise park") was proposed in order to prevent development adjacent to *Hw'teshutsun*. The noise park was built further east of *Hw'teshutsun* – the Vancouver Island Motorsport Circuit (VIMC).

<sup>54</sup> *Quid pro quos* in the *Hw'teshutsun* IMA were effectively designed to allow development within Cowichan territory without opposition by Cowichan Tribes.

don't have any capacity... Those are the kinds of discussions that we have to have about what the benefits of a protected area [are] to the water table, to the provincial wells, that were suggested for large scale extraction for the Paldi development that was suggested at the time. For the dump.

So all of this happened because everything kind of blew up over the dump, and then there was kind of like all of these nestle of issues that, at the time, there weren't really effective tools. And that's the unfortunate thing; like that's the great thing about the fact that [*Hw'teshutsun*] is there. But the unfortunate thing about the timing is that there wasn't the ability to continue on with that [in terms of long-term management planning]... If it's going to be protected, how? Protected from what? In a lot of ways, it's kind of protected from us as well. If an elder's going to come, that's a fair bit of a walk. So those kinds of questions haven't really met meaningful discussion. And that's a pretty big issue. And it's a problem. And I don't see any immediate resolution (personal comm. June 2021).

As Tim pointed out, both the province's willingness to protect areas and Cowichan Tribes' ability to manage such areas is limited. This is a time-consuming, expensive process. Cowichan Tribes was successful in preventing development within the core *Hw'teshutsun* area. This is a significant feat, as there were few mechanisms to adequately protect Indigenous cultural places at the time. There remain enormous difficulties in legislating the protection of Indigenous places throughout Canada.

The work done by Cowichan Tribes' leadership to alleviate some of the shadow of Canadian law that attempts to constrain Indigenous peoples' ways of life was accentuated by the efforts of BC negotiators to listen to the teachings shared by Cowichan Tribes leadership. Negotiators had to work to find pieces of legislation to attend to the values and concerns expressed by Cowichan Tribes. Provincial negotiator Doug Caul expressed his surprise at the existence of a piece of legislation that would allow for the protection of an area slated for imminent logging:

The legislation that's out there, especially at that time, was really oriented towards accessing land and resources for the purposes of development. Extraction, development, doing something. And there was very little- there was no contemplation in our legislative framework back then around making room for taking land out of that development frame and including it in the context of a treaty settlement. So it was brand new for us to sort of find our way through that. So much

of the legislation was aimed towards extraction and development, and here we were having a conversation about the opposite.

I remember being almost pleasantly surprised when I found out that the *Forest Act* included a tool that was available for us. Because honestly..., I probably thought, “how do we actually protect land? There’s no tools available.” So finding it in the *Forest Act*, this tool that hadn’t been used before, was handy, was helpful. So somebody who did the *Forest Act* way back when had the foresight to actually include [a protection mechanism]. I don’t think it was ever contemplated for doing it for reconciliation purposes, and that in itself created an interesting conversation around what was the original intent of legislators when they created Part 13 of the *Forest Act*. But clearly we got the legal advice that said you could use it that way (personal comm. June 2021).

Protecting *Hw’teshutsun* presented legislative challenges for negotiators too as the mandates and policies that limited the expression of Hul’q’umi’num’ law and jurisdiction were already in place. Yet the fluidity of law is evident where there is willingness to manipulate it to reflect current priorities and relationships. Though Canada and BC’s treaty mandates did not allow for land protection until the treaty group reached an Agreement-In-Principle (AIP), a stage in treaty negotiations that HTG had not yet reached, negotiators were able to obtain special approvals from provincial ministers to use a protection TRM for *Hw’teshutsun* (BC and Canada 2001b). Cowichan Tribes’ firm assertions that development at *Hw’teshutsun* would not happen were recognized by provincial negotiators who were able to find and use existing legislation to protect *Hw’teshutsun*.

The TRM reflects the teachings and assertion of Hul’q’umi’num’ jurisdiction at *Hw’teshutsun*. The protection of *Hw’teshutsun* illustrates Cowichan Tribes’ agency as they worked to bring forward Hul’q’umi’num’ teachings to shape BC legislation. The TRM may thus be viewed as a piece of legislation that combines Hul’q’umi’num’ and Canadian law, an action that reflects the priorities, principles and values of multiple legal traditions and governance systems.

However, the province placed significant constraints on the geographical articulation of *Hw’teshutsun* by limiting the cultural landscape through BC’s priorities to industry. *Hw’teshutsun*

is one small area to which Hul'q'umi'num' relationships are formally recognized within a much larger territory where ongoing issues of development and private property ownership continue to greatly constrain Hul'q'umi'num' people's access to their lands. Questions of how to assert Hul'q'umi'num' teachings and legal traditions within other interactions with the province pervade.

In their article on the legal traditions that underlie Hul'q'umi'num' land tenure laws, Sarah Morales and Brian Thom argue that “though Indigenous property law continues to inform Island Hul'q'umi'num' people's legal orders, conventional Canadian property law casts a strong shadow on the legal landscape and makes it difficult for these principles to be seen and exercised” (2020, 122). That shadow was felt in the constraints of the extent of *Hw'teshutsun* and the related concerns about protecting other Hul'q'umi'num' places. Yet Hul'q'umi'num' teachings did shape the protection of *Hw'teshutsun*. Through multiple strategies, Cowichan Tribes leadership was able to successfully convey the cultural importance of an area much larger than an archaeological site. As Indigenous nations continue to face significant challenges and constraints from government in exercising their laws, stories that demonstrate the ability of Canadian law to reflect and incorporate Indigenous law provide hopeful examples of what is possible when legal pluralism is recognized.

## **Conclusion:**

This story demonstrates the entanglements between Canadian and Hul'q'umi'num' law where one is never operating in isolation from the other. Solidified through the TRM, these entangled engagements are evident throughout the process of protecting *Hw'teshutsun*. Hul'q'umi'num' teachings, including First Ancestor story of *Stutsun*, were drawn upon to illustrate the importance of *Hw'teshutsun* in reference to both Canadian law – demonstrating strength of claim – and Hul'q'umi'num' legal traditions – relaying teachings and connections with the First

Ancestors and the advice they provided for Hul'q'umi'num' people. Cowichan Tribes leadership used aboriginal rights and title to assert their relationships, teachings and legal traditions through a Canadian legal concept which they shaped to convey distinctive characteristics of *Hw'teshutsun*. The use of *nuts'a'maat* to bring the Hul'q'umi'num' communities together, committing to collectively protect and share access to *Hw'teshutsun*, was a way of invoking a Hul'q'umi'num' principle to address relationships between the Hul'q'umi'num' people and the potential “problem” of shared territory within Crown policy. Provincial and federal mandates, particularly those preventing negotiation over private property, did constrain the geographical extent of the *Hw'teshutsun* protected area. Provincial land protection mandates limit the applicability of similar actions throughout Hul'q'umi'num' territory. However, the TRM was successful in reflecting the teachings about how to care for *Hw'teshutsun* shared by Hul'q'umi'num' elders. It thus directs exercises of provincial jurisdiction in accordance with Hul'q'umi'num' teachings.

While this chapter focused primarily on formal elements of Hul'q'umi'num' law, the underlying impetus for these actions was to ensure that the space remained for operationalizing informal “law”, or the exercise of aboriginal rights as expressed through *snuw'uyulh*. *Hw'teshutsun* was “preserved” for the wellbeing of present and future generations, providing a space for cultural continuance within a territory that has been largely decimated through industrial activity and privatization of land that has effectively prevented the exercise of Hul'q'umi'num' jurisdiction over their lands in many ways. However, the protection of *Hw'teshutsun* demonstrates Cowichan leadership's continued assertion of their self-determination as a nation within their territory, working for the wellbeing of Hul'q'umi'num' people and the land.

## **Conclusion: Caring for the past and the future**

This thesis tells the story of how *Hw'teshutsun*, a Hul'q'umi'num' cultural landscape, was protected from impending industrial development in the late 1990s-early 2000s. This protection measure demonstrates the strength of Cowichan Tribes leadership in their assertion of their teachings and legal traditions, which brought exercises of provincial jurisdiction into accordance with Hul'q'umi'num' law. Hul'q'umi'num' teachings about *Hw'teshutsun* emphasize the importance of quiet and seclusion in the forest for certain cultural practices, such as *kw'aythut* and other spiritual practices, hunting and harvesting medicines (Traditions Consulting Services, Inc. 1998). The TRM agreement resulted in significant protection of a Hul'q'umi'num' cultural landscape for its cultural value in an Indigenous territory where over 85% of the land is privately owned and cultural places and heritage are routinely destroyed. In this conclusion, I draw together some reflections on how the declaration of *Hw'teshutsun* as a tribal preserve included the core elements of IPCAs and the importance of Indigenous teachings and laws in human and land wellbeing which extend beyond Indigenous peoples' worldviews.

As this land protection measure was driven by Indigenous assertions of authority and jurisdiction in accordance with Indigenous legal traditions, *Hw'teshutsun* can be viewed as an early Indigenous Protected and Conserved Area (IPCA). Similarly to the goals of IPCAs outlined in the ICE report (2018), *Hw'teshutsun* was protected to ensure the continued ability for Hul'q'umi'num' peoples to engage in cultural practices there and maintain relationships with the land with ancillary ecological benefits (Tran et al. 2020; ICE 2018). The *Hw'teshutsun* protocol and ceremony between the Hul'q'umi'num' communities emphasized the importance of protecting the area for the wellbeing of present and future generations. Framing *Hw'teshutsun* as an IPCA celebrates Cowichan Tribes work as visionary, prefacing a framework that, two decades later, is growing in

popularity as it provides a means of recognizing Indigenous jurisdiction and governance outside of modern-day treaties or the courts. This framing also reveals the possibilities for IPCAs to protect cultural landscapes, one solution against the continued desecration of Indigenous cultural landscapes.

Through an examination of the legal entanglements between Hul'q'umi'num' and Canadian law at *Hw'teshutsun*, this story emphasizes the importance of careful listening and attention to the specific teachings and laws associated with places. Ethnography is a useful tool to better understand the entangled relationships in places and how to incorporate multiple legal traditions when caring for the land and for ourselves (Dussart and Poirier 2017; Borrows 2017; Poirier 2017; Thom 2017). As provincial and federal governments commit to establishing better relationships with Indigenous nations through, for example, bringing their laws into accordance with United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), through IPCAs and government-to-governments agreements, assertions of Indigenous law and governance will hopefully become less impeded by Canadian law (see Morales and Thom 2020).

The protection of *Hw'teshutsun* was driven by *snuw'uyulh*, Hul'q'umi'num' teachings and laws which relate specifically to *Hw'teshutsun* and the cultural practices Hul'q'umi'num' people engage in there. These teachings have significance for and must be respected by everyone living on Hul'q'umi'num' land (see Thom 2017; McLay et al. 2008). Indigenous legal traditions stem from teachings emplaced in the land, from stories and relationships developed over millennia that guided Indigenous people in good relationships with each other and the land (Morales 2014; Morales and Thom 2020; Thom 2005; Clifford 2016b; Mills 2022). For *hwulmuhw* and *hwunitnum* people to live together on Indigenous land, we must all listen closely to these teachings and stories from place, respecting the authority and knowledge of Indigenous nations. Such respectful

governance is perpetuated through IPCAs, though the teachings and laws extend throughout Indigenous territories.

***Preserving an early IPCA:***

During the negotiations with BC to protect *Hw'teshutsun*, Cowichan Tribes declared 6000ha at *Hw'teshutsun* a “Tribal Preserve”, asserting Hul’q’umi’num’ jurisdiction and operationalizing Hul’q’umi’num’ legal orders in an early iteration of an IPCA (Cowichan Tribes 2000a). Chief Hwitsum explained that without assertions of jurisdiction through, for example, direct action, and sufficient protection measures “there may be little left to preserve and protect” (Cowichan Tribes 2000a). In Hul’q’umi’num’ territory where there are no historical or modern treaties and where industrialization, urbanization and land privatization have transformed the territory, the need to protect one of the few areas remaining intact for cultural practices was urgent.

Hul’q’umi’num’ *snuw’uyulh* speaks about the importance of quiet, secluded places for *kw’aythut* and other cultural practices, conditions which are increasingly difficult to find. Abner Thorne’s words, quoted in Chapter 2, speak to the importance of preserving the culturally significant qualities of the landscape – the characteristics of the landscape are an essential part of powerful places remaining good places for cultural practices. The importance of outsiders staying away from these places has been emphasized throughout this thesis, similarly to Wayne Suttles’ argument that “wilderness” areas are highly important for Coast Salish spiritual practices (1981).

The declaration of a “Tribal Preserve” has particular significance to *Hw'teshutsun* with reference to these teachings. The term “tribal park” was used by Tla-o-qui-aht *Ha'wiih* less than two decades prior to Cowichan Tribes’ declaration of a tribal preserve, which no doubt influenced this declaration, yet Cowichan Tribes leadership did not declare *Hw'teshutsun* a tribal park (for a

similar discussion on Tla-o-qui-aht's use of "park", see Murray and King 2012, 389-90). It was clearly not a "park" in the colloquial Canadian sense of an area for recreation and ecosystem preservation, although the protection mechanisms did achieve that latter. The word "preserve" corresponded with the teachings about *Hw'teshutsun* and the qualities valued there.

*Hw'teshutsun* is *not* an area of "purity" or "wilderness" by Canadian standards – it was logged within the past 100 years and is adjacent to much more recent cutblocks. As discussed in Chapter 3, BC's archaeology survey at *Hw'teshutsun* in 1997, which was done after Cowichan Tribes made known their opposition to the dump proposal, reported that *Hw'teshutsun* was not a "pristine" wilderness as there was evidence of past industrial activity (British Columbia Lands, Ministry of Environment, Lands and Parks 1997). In this example, we can see that terms such as "wilderness" or "nature" may be variably used to reflect different sets of values and different ways of seeing the landscape. Colonial imaginations of "wilderness" based upon *terra nullius* (Dearden and Langdon 2009; Zurba et al. 2019; Moola and Roth 2019; ICE 2018; Kurnick 2019; Cronon 1996) differ from Suttles' (1981) description of wilderness areas for Coast Salish spiritual practices – intimately known landscapes where powerful places reside. Robert Morales' words about the different values of environmentalists and Indigenous peoples are highly significant here: while at first glance we may appear to have similar goals, differences may be found in the underlying value systems that motivate different types of land management, for example, those conducive to recreation or spiritual practices.

Management, or care, for any landscape reflects the values associated with the landscape. Governance of IPCAs attends to the Indigenous values, teachings and legal traditions associated with a cultural landscape or broader area of their territory (ICE 2018; Artelle et al. 2019; Tran, Ban, and Bhattacharyya 2020). A "tribal preserve" encompassed the necessary actions to ensure

the ability of Hul'q'umi'num' people to continue cultural practices at *Hw'teshutsun*. This innovation in terms and strategies by Indigenous peoples to assert their authority and relationships with a cultural landscape are vital characteristics of an IPCA (Tran, Ban, and Bhattacharyya 2020; Kyle A. Artelle et al. 2019a). As noted in the introduction, IPCAs are a broad framework intended to facilitate the recognition of Indigenous jurisdiction and support Indigenous-led management of their territories (ICE 2018; Tran, Ban, and Bhattacharyya 2020; Artelle et al. 2019). The declaration of a tribal preserve attended to the Hul'q'umi'num' teachings specific to *Hw'teshutsun* as a cultural landscape.

The *Hw'teshutsun* protocol states that it is the intention of the Hul'q'umi'num' communities to “protect, preserve and maintain Hw'te shutsun for the use and benefit of present and future generations” (Hul'q'umi'num' 2000). This is a commitment to continue caring for a Hul'q'umi'num' cultural landscape so that present and future generations can engage with the land and carry out cultural practices. When I spoke with her, Chief Hwitsum highlighted the importance of getting youth on the land, connecting from the land and connecting with Elders. Not only do land grabs and industrialization prevent Hul'q'umi'num' people from accessing land, but, as Lydia articulated, “because of the intergenerational aspects of the colonial application of the Indian Residential School, many of our youth have been colonially dispossessed from the knowledge and connection to our lands. And so, it was that thread [when we protected *Hw'teshutsun*]” (personal comm. Sept. 2021).

I want to highlight this aspect of the protection of *Hw'teshutsun*. The tribal preserve also had the intention to “preserve” *Hw'teshutsun* for the youth, so that they had somewhere to go and learn teachings from the Elders in a place with suitable qualities for these cultural practices. This is an area preserved for a particular type of use – not an ecologically fragile zone or a park for

recreational use, but a preserve for the wellbeing of future generations. These cultural landscapes and places must be cared for because they have very real significance in the wellbeing of people's lives, people who care about the future of their children and their children's children. This priority is one shared by many Indigenous nations and is a key component of many IPCAs which have highlighted the importance of cultural transmission (ICE 2018).

As initiatives driven by Indigenous management, IPCAs are places where Indigenous laws are at the forefront of guiding the care for cultural landscapes. The term "IPCA" can be seen as a method of communication between Indigenous and state governments, a means of conveying different values between parties with the agreement to care for the land in accordance with those values. This term and framework are increasingly useful as the federal government has indicated willingness to engage in dialogues around IPCAs, resulting in a successful pathway towards the recognition of Indigenous jurisdiction. However, Indigenous nations have always been asserting their jurisdiction and authority to their territories and within their communities outside of their relationships with the government and employing their legal traditions to care for their nations, including the land.

***Legal principles, teachings and place:***

The protection of *Hw'teshutsun* resulted from the work by Cowichan Tribes and provincial negotiators to find and use mechanisms in provincial legislation that allowed for Hul'q'umi'num' law to direct exercises of provincial jurisdiction. This entanglement of Hul'q'umi'num' and provincial law had significant results. While at times, Hul'q'umi'num' law operates beyond the extent of Crown jurisdiction – for example, the Hul'q'umi'num' ceremony and protocol around protecting *Hw'teshutsun* – it is necessary to find ways in which Indigenous law can shape federal

and provincial law in accordance with Indigenous teachings and values where inherent Indigenous jurisdiction and asserted Crown jurisdiction overlap. By bringing the protection of *Hw'teshutsun* into conversation with a previous and similar study on Hul'q'umi'num' cultural heritage (McLay et al. 2008), I will reflect on the importance of legal entanglements and exercises of jurisdiction that closely reflect teachings specific to places.

In a study examining the destruction of Hul'q'umi'num' cultural heritage in the archaeological record, particularly burial places, McLay et al. (2008) relayed Hul'q'umi'num' Elders' distress over the disrespect shown towards their cultural heritage which contradicts their *snuw'uyulh*. The Elders shared their experiences and concerns which indicated the widespread disregard by Canadian governments and society for Hul'q'umi'num' teachings and laws. The authors sought legal solutions to violations of Hul'q'umi'num' teachings and laws around cultural heritage in ways that would allow Canadian law to be directed by Hul'q'umi'num' law and teachings. They brought forward several Hul'q'umi'num' legal principles that underlie the more specific teachings on how to conduct oneself in relation to ancestral remains and tangible cultural heritage.

The problems and concerns addressed by McLay et al. (2008) are similar to those I speak to in this thesis, though I focus on cultural landscapes rather than ancestral burials. While archaeological evidence may be generally considered tangible cultural heritage, it is clear in this article that the significance of archaeological cultural heritage has a great deal to do with intangible qualities and significance that are part of tangible cultural heritage. Similarly, *Hw'teshutsun* is a tangible place where the importance of qualities of quiet and seclusion in the forest and pure, powerful bathing pools have been emphasized. Yet the intangible significance is the underlying layer (Tim personal comm. June 2021), entangled with teachings about how to live one's life and

how to conduct oneself in places. Indigenous cultural heritage cannot be delineated into “tangible” and “intangible” – these mischaracterizations do not reflect the teachings about cultural landscapes or other cultural heritage (see McLay et al. 2008). Canadian law does very little to incorporate Indigenous legal traditions in the treatment of any Indigenous cultural heritage.

The authors explain that respect and reciprocity are key principles underlying the teachings on how to interact with cultural heritage, and particularly in caring for ancestors and burial places (2008, 157). They include teachings from Elders and knowledge keepers elaborating on what those principles look like in particular circumstances – what specific teachings stemming from these principles are and how to follow those teachings as a lawful Hul’q’umi’num’ person. Morales (2014) has similarly articulated principles underlying Hul’q’umi’num’ law. Some of these broad teachings and principles, such as the importance of respect and kinship, were also conveyed to me in relation to *Hw’teshutsun*. In teachings about burial places, McLay et al. highlighted the importance of avoidance of particularly powerful places and a concern for spiritual pollution (2008, 168-9), which were also advice and concerns shared about *Hw’teshutsun*.

However, these principles take on meaning through their specific applications. Answering the questions: *How should bathing holes be cared for to prevent spiritual pollution? Or how can one prevent spiritual pollution when in contact with ancestral remains?* result in significantly different practices. There are different teachings about how to conduct oneself in specific places which contain particular stories and where certain cultural practices, but not others, may be enacted. As with any legal tradition, broad principles are elaborated on through specific teachings, guiding action on how to be a lawful person in a specific context or place. These principles can be useful to understand the values underlying legal traditions, yet they themselves are not specific enough to characterize Hul’q’umi’num’ law regarding a particular issue. Bringing Canadian law

and social practices (informal law) into accordance with Indigenous legal traditions needs to attend to these specific teachings, as shared by the Elders.

***Indigenous legal teachings transcend worldview:***

Indigenous peoples' teachings and legal traditions stem from deep relationships with places (Morales 2014; Clifford 2016b; Deloria 2001). Yet these are not stories confined to one worldview; they contain truths and teachings that have relevance for everyone who interacts with those places. McLay et al. (2008) and Thom (2017) provide examples where teachings about burial places were not heeded and tangible harm was experienced by those interacting with the place, regardless of their worldview. We are not separated into different "worlds" through ontology or worldview; rather, these authors describe the experiences of people entangled within the same world. As discussed in these articles, there is an urgent need for protection of Indigenous cultural heritage and cultural landscapes that centers the teachings shared by Elders. These teachings stem from intimate relationships between people and land developed over millennia, containing truths in them about the land and how to conduct oneself in places for the wellbeing of people and the land. When Indigenous legal traditions are ignored or overshadowed today, this undermines the wellbeing of Indigenous peoples, their cultural heritage and the land (see Morales and Thom 2020; McLay et al. 2008; Clifford 2016b; Thom 2020b). The importance of attending to these teachings extends beyond Indigenous peoples, to everyone who lives on Indigenous territories. Attending to these teachings needs to take the form of both legislation and policy and informal law, whereby Canadians conduct themselves in accordance with these teachings. In this thesis, I have emphasized the utility of a framework of entanglements to understand our relationships in place and responsibilities to conduct ourselves in accordance with teachings from place.

Experiences, relationships and stories are entangled in places (and landscapes); they are not delineated through mutually exclusive ontological worlds. Within anthropology, there has been much recent discussion about the existence of multiple ontological worlds which make up a “pluriverse” – multiple ontological worlds which are not commensurate (de la Cadena 2010 especially pg 360-1; Viveiros de Castro 2015). I do not find this framing useful, or true, in understanding human experiences. Such a theoretical framework promotes a postmodernist multiplicity in which all worlds are equally “true” and deliberating which to accept or how to incorporate multiple worlds within a society is reduced to an ideological and political act.

I am reminded of geographer Barbara Bender’s words: “Landscapes refuse to be disciplined. They make a mockery of the oppositions that we create between time (History) and space (Geography), or between nature (Science) and culture (Social Anthropology)” (in Massey 2006, 34). Landscapes also make a mockery of attempts to categorize them into mutually exclusive “ontological worlds”. As discussed above, McLay et al. (2008) and Thom (2017) indicate ways in which Indigenous teachings and legal traditions, stemming from relationships with the land, have applicability for everyone who interacts with ancestral landscapes. As I have shown throughout this thesis, *Hw’teshutsun* as a Hul’q’umi’num’ cultural landscape is not separable from Canadian law and society. *Hw’teshutsun* was protected in response to proposals for industrial developments there which would have continued the destruction of cultural places so common in Hul’q’umi’num’ territory.

Rather than speaking of mutual exclusivity through ontological worlds, Tim Ingold (1993) focuses on how landscapes pull together many stories. These stories are all present in the land and we may be guided towards particularly efficacious or significant teachings by people who know the land intimately:

“Telling a story is not like weaving a tapestry to cover up the world, it is rather a way of guiding the attention of listeners or readers into it. A person who can ‘tell’ is one who is perceptually attuned to picking up information in the environment that others, less skilled in the tasks of perception, might miss, and the teller, in rendering [their] knowledge explicit, conducts the attention of [their] audience along the same paths as [their] own” (1993, 153).

Here, Ingold describes a landscape which interweaves many stories. This is not to say that all stories are equally true and efficacious: those who know the land well, who have a deeper understanding and intimate ancestral ties with the land, will guide attention to particularly significant teachings. Tim Kulchyski and Jared Williams, both Cowichan knowledge keepers, indicated that municipal and provincial land management planning, and Canadian society, did not attend to what the land actually is. Jared commented:

I wanted them [North Cowichan] to know it’s not their property [where the noise park is], it’s ours, and this is actually what it is. [*Hw’teshutsun. Tsuq’wulu.*] No matter what they want it to be or what they’ve zoned it as. This is what is actually is. There’s no way to zone around that. It’s just what it is (personal comm. April 2021).

Jared and Tim are both knowledgeable of these deep stories and teachings and have ancestral ties to Hul’q’umi’num’ territory. Their knowledge of the land is fundamental for caring for the land in such a way that facilitates the wellbeing of people and land.

Indigenous legal traditions are not part of one “ontological world”, a separate layer from a Canadian legal “world”. While these legal traditions attend to different values and teachings, they play out on the same landscapes, they both impact people’s lives. A framework of entanglement examines the ways in which experiences and stories are interwoven in places with the understanding that solutions for coexistence have to include and navigate these specific relationships (Dussart and Poirier 2017; Poirier 2017; Dennison 2012). Through a lens of entanglements, we can see that these teachings from the land impact everyone who interacts in said places. Thus, the Indigenous legal traditions which stem from these teachings are applicable

to everyone living on Indigenous lands. Governance of Indigenous territories – clearly including all of Canada – must stem from Indigenous legal traditions which proceed from these stories and teachings of places.

Today, BC’s DRIPA legislation (2019) based on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) including Free, Prior and Informed Consent (FPIC), TRC calls to action (2015), and BC’s “Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples” (2017) are expected to guide relationships between Indigenous peoples and the province. Upholding these commitments necessitates integrating Indigenous and state law on a nation-to-nation basis, not simply checking boxes that Indigenous nations have been consulted. These commitments provide a significantly different legal landscape than when *Hw’teshutsun* was protected. Hopefully, they will provide the space and the mandate to remove impediments from the implementation of Indigenous law throughout nations’ territories.

***Final thoughts:***

In describing the importance of Hul’q’umi’num’ places and the lack of respect they receive in comparison to relatively recent Canadian historical sites, Elder Luschiim (Arvid Charlie) made the following comment: “Why can’t we say our places are important to us? Because they are our culture, our heritage. It’s about our past and it’s our future” (in McLay et al. 2008, 157). This, I believe, was one of the underlying perspectives or teachings driving the protection of *Hw’teshutsun*. This can be seen in the *Hw’teshutsun* protocol where Hul’q’umi’num’ people’s relationships with the cultural landscape and the importance of *Hw’teshutsun* for the wellbeing of future generations were affirmed (Hul’q’umi’num’ 2000). The protection of *Hw’teshutsun* was an act of Hul’q’umi’num’ self-determination: Cowichan Tribes leadership utilized Hul’q’umi’num’

law, and in doing so shaped exercises of provincial jurisdiction, to assert the importance of and teachings around a cultural landscape and how it must be cared for for the wellbeing of future generations.

IPCAs represent a vision: an assertion of Indigenous self-determination for the wellbeing of the nation and the land for present and future generations. As Indigenous-led visions, they will incorporate the teachings, values, priorities and methods of governance of the nation(s) who cares for these areas. *Hw'teshutsun* is one such vision. Today it remains the largest contiguous area of Crown land for treaty settlement in Hul'q'umi'num' territory. Ongoing logging directly adjacent to *Hw'teshutsun* is a tangible reminder of the urgent situation in which *Hw'teshutsun* was protected. In the face of assertions of colonial power, the protection of *Hw'teshutsun* is a powerful success story of Hul'q'umi'num' governance and self-determination for the wellbeing of Hul'q'umi'num' people and the land.

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## **Appendix A: The story of protecting *Hw'teshutsun***

### ***Preface:***

This appendix describes in detail the protection of *Hw'teshutsun* throughout the dump proposal, logging referrals and the proposal for the noise park from 1997-2001. The main chapters of this thesis utilize an anthropological methodological and analytical framework to ask questions about the protection of cultural landscapes, Hul'q'umi'num' legal traditions emplaced at *Hw'teshutsun* and the entanglements between Canadian and Hul'q'umi'num' law in the protection of *Hw'teshutsun*. In contrast, this appendix provides a descriptive timeline of the events particularly relevant in the protection of *Hw'teshutsun*. Within my thesis, this appendix provides supplemental contextual information to support the analysis in my main chapters. This appendix will also be part of a community-facing project for Cowichan Tribes, providing a descriptive account of the protection of *Hw'teshutsun* for Hul'q'umi'num' community members. As such, some quotes included in the main chapters of the thesis are repeated here as these quotes provide a richness to the descriptive story and will likely be of interest to community members.

This appendix draws upon information from interviews with Cowichan Tribes members, including Elders and knowledge keepers, documentation shared by Cowichan Tribes and the results of Freedom of Information (FOI) requests placed with the Cowichan Valley Regional District (CVRD) and the Province of British Columbia (BC). FOI requests were placed in November 2020 (BC) and December 2020 (CVRD). Results from these requests were received between May 2021 and January 2022. Information shared by the province and the municipality includes, but is not limited to, reports, presentations, pamphlets, internal and external correspondence (emails and letters), press releases, personal notes and a Writ of Summons and Statement of Claim. Documentation shared by Cowichan Tribes includes, but is not limited to,

their Traditional Use Assessment (1998), reports, correspondence with lawyers and the province and a copy of the *Hw'teshutsun* Protocol signed between the five Hul'q'umi'num' communities (shared via Brian Thom). This appendix is not exhaustive of all communication, meetings or information shared regarding the protection of *Hw'teshutsun* but includes the main details and insightful perspectives of people knowledgeable about *Hw'teshutsun*. *Huy tseep q'u* to everyone who participated in this project for sharing their knowledge and time.

### ***Introduction:***

On March 7<sup>th</sup> 2001, Cowichan Tribes, the Hul'qumi'num Treaty Group (HTG) and the governments of British Columbia (BC) and Canada signed a treaty-related measures agreement (TRM) to protect *Hw'teshutsun*, an area with cultural significance to Hul'q'umi'num' people on southeast Vancouver Island, from imminent resource extraction.<sup>55</sup> The impetus for interim protection of this off-reserve cultural landscape was proposals in the late 1990s-early 2000s to build a dump at the top of Hill 60, or *Hw'teshutsun*, to log the area and to build a car racetrack, developments opposed by Cowichan Tribes. *Hw'teshutsun* is an area where many Hul'q'umi'num'-speaking people harvest berries and medicines, hunt, practice *kway'thut* (spiritual bathing) and engage in other cultural activities.<sup>56</sup> Proposed development, particularly sounds, smells and the presence of other people, would have diminished or destroyed valued attributes of *Hw'teshutsun* in a territory where upwards of 85% of the land is privately owned.<sup>57</sup> Cowichan Tribes leadership argued that the ability to engage in these cultural practices is an

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<sup>55</sup> Canada, British Columbia, Hul'qumi'num Treaty Group, Cowichan Tribes, *Treaty Related Measure: Land Protection* (hereafter cited as *TRM*).

<sup>56</sup> Traditions Consulting Services, Inc. *Traditional Use Assessment*

<sup>57</sup> Traditions Consulting Services, Inc. *Traditional Use Assessment*; Ratcliff & Company to British Columbia, Ministry of Environment, Lands and Parks (hereafter cited as MELP) and Ministry of Forests (hereafter cited as MoF), Feb. 3, 1998; Lydia Hwitsum, interview by Jen Argan, Sept. 25, 2021; Morales, Thom, and Egan, *The Great Land Grab in Hul'qumi'num Territory*; Thom, "Reframing Indigenous Territories."

aboriginal right affirmed under section 35 of the *Canadian Constitution* on lands subject to Cowichan aboriginal title.<sup>58</sup> Cowichan Tribes leadership asserted their jurisdiction to *Hw'teshutsun* in various ways, including litigation against the Cowichan Valley Regional District (CVRD) and BC over the proposed landfill, negotiations with HTG, BC and Canada and the declaration of a tribal preserve in December 2000 following a ceremony and protocol between the Hul'q'umi'num'-speaking First Nations to protect and share *Hw'teshutsun*.<sup>59</sup> These actions led to the first land protection TRM in BC, designating 1700 hectares of Crown land as part of future treaty settlement.<sup>60</sup>

This story celebrates Cowichan Tribes' unique success in protecting an important cultural landscape because of its value to Hul'q'umi'num' people. *Hw'teshutsun* was identified as a culturally significant area both because of the quiet and relative isolation there conducive to certain cultural practices and because of its proximity to and connection with locations where the Hul'q'umi'num' First Ancestors fell from the sky, places of great ancestral significance for Hul'q'umi'num' people.<sup>61</sup> Most land protection measures rely upon tangible evidence of significance in accordance values held by the Crown, such as archaeological, ecological or biological studies. However, the *Hw'teshutsun* TRM and accompanying Interim Measures Agreement (IMA), the latter which affirms the significance of the *Hw'teshutsun* area beyond the

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<sup>58</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998; Ratcliff and Co. to MoF, May 5, 1999.

<sup>59</sup> Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe (hereafter cited as Cowichan Tribes et al.), "Protocol Affirmation of the Traditional Relationships Amongst the Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe" (hereafter referred to as "Protocol"); Cowichan Tribes, "Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades".

<sup>60</sup> Canada, British Columbia, Hul'qumi'num Treaty Group, Cowichan Tribes, *TRM*; BC's MAA, *Communications Plan*.

<sup>61</sup> Marshall, *Those Who Fell from the Sky*; Thom, "Coast Salish Senses of Place"; Morales, "Snuw'uyulh: Fostering an Understanding of Hul'q'umi'num Legal Tradition"; Rozen, "Place-Names of the Island Halkomelem Indian People."

protected area,<sup>62</sup> directly protected attributes of the land valued by Hul'q'umi'num' people. The IMA recognized the “great cultural, spiritual, social, historical and economic significance [of *Hw'teshutsun*] to the Cowichan Tribes” and aims to “preserve cultural and spiritual attributes” outlined by Cowichan Tribes.<sup>63</sup> This is unusual as provincial recognition and the resulting protection of an area because of its value to Indigenous peoples is rare.<sup>64</sup> The protection of *Hw'teshutsun* is a unique success story of the enshrinement of Hul'q'umi'num' people's values, teachings and law in provincial legislation to protect a Hul'q'umi'num' cultural landscape.<sup>65</sup> The effects of this protection measure are visible from space: in satellite imagery, *Hw'teshutsun* is a large green area amidst recent cutblocks and urban development, indicating the ecological benefits of this protection measure as well as the cultural significance.<sup>66</sup> This appendix will describe Cowichan Tribes' work to protect *Hw'teshutsun* in detail to record and celebrate this cultural landscape.

### ***Dump proposal at Hill 60:***

The integrity of *Hw'teshutsun* as a Hul'q'umi'num' cultural landscape was first threatened by the designation of Hill 60 as the site for a new landfill by the Cowichan Valley Regional District

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<sup>62</sup> Cowichan Tribes, Canada and British Columbia, *Hw'te Shutsun Interim Measures Agreement* (hereafter cited as *IMA*).

<sup>63</sup> Cowichan Tribes, Canada and British Columbia, *IMA*; Canada and British Columbia, *Summary of the Treaty-Related Measure Proposal to the Cowichan Tribes*.

<sup>64</sup> Mohs, “Sto:Lo Sacred Ground”; Ziff and Hope, “Unsitely”; Nicholas, “Policies and Protocols for Archaeological Sites and Associated Cultural Intellectual Property”; McLay *et al.*, “‘A'Lhut Tu Tet Sul'hweentst [Respecting the Ancestors]”; Dianne Hinkley, interview by Jen Argan, February 17, 2021.

<sup>65</sup> Cowichan Tribes leadership led the protection of *Hw'teshutsun* through litigation against the CVRD regarding the proposed dump, negotiations with BC and declaration of a “tribal preserve”. I spoke only with Cowichan people, not with Hul'q'umi'num' people from the other communities. While I do not want to claim to represent the perspectives and teachings held by the other Hul'q'umi'num' communities, it was emphasized to me, particularly through the Hul'q'umi'num' protocol, that *Hw'teshutsun* is a Hul'q'umi'num' cultural landscape with significance to people in all the Hul'q'umi'num' communities. The protocol and ceremony commit to ensuring that this remains a shared cultural landscape.

<sup>66</sup> See Google Earth timelapse: <https://earthengine.google.com/timelapse/#v=48.82595,-123.90516,9.38,latLng&t=1.24&ps=50&bt=19840101&et=20181231&startDwell=0&endDwell=0>

(CVRD) in 1997. The CVRD had begun the process of selecting a new dump site in 1989, considering four possible locations for the dump, none of which were at Hill 60, and a detailed study of the four potential sites was undertaken. In 1994, the CVRD agreed upon a site location (Site B) which was approved by the BC Ministry of Environment, Lands and Parks (MELP). Then, in April 1995, the CVRD rescinded their decision and chose another of the previously studied sites (Site D). In May 1995, they again changed the dump site to Hill 60, a mountain ridge located just north of the Cowichan Valley Highway between Duncan and Lake Cowichan. This new site, Site D1, had not undergone the rigorous testing and community consultation that the four initially identified sites had. However, the Hill 60 site was approved by the Regional Waste Manager, contingent upon hydrogeological testing and public consultation.<sup>67</sup>

The CVRD's Solid Waste Management Plan included two locations for different facilities, one for a solid waste management complex (SWMC) west of Duncan near Drinkwater Rd. and Tansor Rd. and one for the dump at Hill 60. The proposed Hill 60 dump site was at the top of the mountain, in a marshy bowl area which drained into both Cowichan and Chemainus rivers.<sup>68</sup> Initially, the CVRD planned to have both complexes at Hill 60, however there were concerns about accessibility to the Hill 60 site. Instead, the municipality proposed to build the SWMC for drop-off and some processing of garbage, recyclables and compost at the Drinkwater Road Industrial Park, proposing that the dump, which had a projected lifespan of 50 years, be located at Hill 60.<sup>69</sup>

In May 1997, the Hul'q'umi'num Treaty Group (HTG) received a referral from the BC Ministry of Environment, Lands and Parks (MELP) regarding the proposed dump and processing

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<sup>67</sup> HTG to BC's MELP, February 3, 1998; Hill 60 Homeowners Group to Cowichan Regional District Board of Directors, June 3, 1997; Pottinger Gaherty Environmental Consultants Ltd., *Hill 60 Landfill Review*; Hill 60 Homeowners Group to BC, June 3, 1997; Context Research Ltd., *Draft Report CVRD SWMP*.

<sup>68</sup> Pottinger Gaherty Environmental Consultants Ltd., *Hill 60 Landfill Review*; Hinkley, interview; Luschiim, interview with Brian Thom and Sarah Morales, April 14, 2021.

<sup>69</sup> Cowichan Valley Regional District, *CVRD's Solid Waste Management Plan Amendment*; Dianne Hinkley interview by Jen Argan, Feb. 17, 2021.

facility. HTG reminded the BC government that the treaty group is unable to approve development projects on behalf of the communities it represents and that Cowichan representation on the planning committee does not equate to Cowichan consent for the project. HTG further noted that Hill 60 may be an area shared by multiple communities who would all have to give consent for construction of the dump.<sup>70</sup>

Ernie Elliott, a Cowichan Elder who was the Land Manager at Cowichan Tribes at the time, had worked with the CVRD directors to determine a location for the new landfill.

I was the land manager at the time and I was working with the CVRD directors... The CVRD has been looking for another site for [what] they call a sanitary landfill. It's a dump; I call it a dump. They had reached capacity at the site that we had leased to them previously and they were capping that off... They covered it with clay and they had piezometers, [which is] a recording device that they pound into the ground and it measures what's going into the environment.

So we had been monitoring that [the old dump], and we'd asked them to make some changes because [the] water flows downhill [and] they had the piezometers in the wrong place. They had them too high so it wasn't measuring what was going into the environment. Specifically in that case it wasn't too far from the Koksilah River... [So] that was an issue with us.

So they had closed that and were looking for an alternate site, and because I got to know the particular CVRD director, he and I were discussing it... It was off the Lake Cowichan Highway in the Paldi area that he was looking at. So we had started those negotiations, and we had outlined the area that they thought they might be able to put a landfill.

And things were going along. I was the Land Manager at the time. Philomena Alphonse was the chief. So I kept her updated, I went to see her on occasion and let her know how the negotiations were going and what was being planned up there. And everything seemed to be humming along. We thought it was far enough out of town that it wasn't going to be an eyesore or anything.

So everything was going along until we brought it to what was called the Land Management Committee at the time, and we updated them on what was going on. And that triggered some pushback from community members that were on the committee. The committee reviewed leases and applications for leases. They recommended [to] the Chief and Council whether or not the lease will go ahead.

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<sup>70</sup> HTG to BC's MELP, May 23, 1997.

Anyway, when it got to that committee, there were members on that committee that made us aware of why that wasn't going to be a good idea. It's a sacred site... That's the area where the first Cowichan was dropped by the Creator *Xeels'*. Not only that, there's areas, bathing areas and other areas where members of the Big House, the Longhouse, go up there to bathe... but they also go up there to just to be with nature. I don't know how else to explain it.<sup>71</sup>

As many of the teachings around these practices are private, shared only with members of the Big House or within families,<sup>72</sup> locations of places for *kway'thut* and other spiritual practices may not be widely known or openly discussed.<sup>73</sup>

Elder Luschiim (Arvid Charlie) brought his concerns about the dump proposal to HTG staff as soon as he became aware of the project.

So [the CVRD] found a spot up Hill 60 where there's a natural bowl, a big, big bowl. Oh, that's a good place for a garbage dump. So the work started, and then I heard about it, so I tried to get our powers to be at that time to do something to stop it. They said, "oh yeah, yeah, it's important," but nothing was happening. So, reading one went by, reading two went by, and I was getting really frustrated down and out. Because not only Cowichan, but others went up that hill for bathing in that creek. So I went to cry on the shoulders of HTG and luckily one of the staff slowed down to listen to me. Sometimes we are in too fast a world, we don't have time to hear what's being said. So he slowed down to listen to me. And he wrote, I guess to the CVRD, to stop it [before] reading number three or whatever it was. So he had to do that twice, to stop it.<sup>74</sup>

Cowichan Tribes' lack of action at this time was frustrating for Luschiim who expressed that *Hw'teshutsun* was an incredibly important area that needed to be protected "because it's one of the last few places that we could say is partially intact. I say partially because of logging up there."<sup>75</sup> The newly proposed site (D1) was at the top of Hill 60, and though some bathing places

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<sup>71</sup> Ernie Elliott, interview by Jen Argan, Dec. 2, 2020.

<sup>72</sup> Thom, "Coast Salish Senses of Place".

<sup>73</sup> See Glavin, "Eclipse of the Spirit Dancers"; Mohs, "Sto:Lo Sacred Ground"; Traditions Consulting Services, Inc., "TUA."; Chapter 1 of this thesis for more information on private knowledge and secrecy of places.

<sup>74</sup> Luschiim, interview, April 14, 2021.

<sup>75</sup> Luschiim, interview by Brian Thom and Sarah Morales, April 7, 2021.

are further down, far into the forest, they would still have been affected by the construction of the dump by diminishing the quiet, secluded qualities necessary for certain cultural practices.<sup>76</sup>

In July 1997, HTG wrote a letter to BC expressing their opposition to the construction of the dump at Hill 60. They expressed concern that the site selection process was flawed as the Hill 60 (D1) site had not undergone the same rigorous testing as the previously considered sites. HTG noted inadequate consultation with First Nations and the non-indigenous community on the Hill 60 site and that development at *Hw'teshutsun* would disrupt or destroy the ability of Hul'q'umi'num' people to engage in cultural practices there.<sup>77</sup> The CVRD had not held any open houses with Hul'q'umi'num' communities to notify or receive feedback on the D1 proposal, despite *Hw'teshutsun* being in the middle of the Statement of Intent of the HTG communities.<sup>78</sup> Though the majority of the proposed D1 dump area would drain into the Chemainus River, people living in that watershed, including members of Halalt, Penelakut and Stz'uminus First Nations, who were not given an opportunity to comment on this proposed site as consultation was primarily with people living in the Cowichan River watershed.<sup>79</sup> Many non-indigenous residents near Hill 60 also opposed the sudden changes between site locations, as they felt they were not adequately consulted. Their concerns included environmental degradation and groundwater contamination at the Hill 60 site, were the lining of the dump to leak.<sup>80</sup> HTG shared these environmental concerns, as contamination of the watershed would have deleterious impacts beyond Hill 60, and would impact cultural engagement with the area. HTG stated their opposition to developments that would

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<sup>76</sup> Luschiim, interview, April 14, 2021. Traditions Consulting Services, Inc., *TUA*; Costa, "Noise Park 'Incompatible.'"

<sup>77</sup> HTG to BC's MELP, July 4, 1997.

<sup>78</sup> HTG to BC's MELP, July 4, 1997.

<sup>79</sup> HTG to BC's MELP, July 4, 1997.

<sup>80</sup> Hill 60 Homeowners Group to Cowichan Regional District Board of Directors, June 3, 1997; Context Research Ltd., *Draft Report CVRD SWMP*, 13-14; Hill 60 Homeowners Group to BC, June 3, 1997.

damage people's ability to engage in cultural practices at *Hw'teshutsun* and reiterated that approval must come from proper consultation with affected First Nations.<sup>81</sup>

According to Joe Allan, CVRD director of the Lake Cowichan South/Skutz Falls region who was in favour of the Hill 60 landfill, the Hul'q'umi'num' communities later agreed that Cowichan Tribes should decide how to proceed. Allan reported his understanding that Chief Philomena Alphonse was satisfied with environmental assessments and consultation, but that there were still concerns about protecting areas of cultural use.<sup>82</sup> The CVRD suggested protecting small traditional use sites, postage stamp-sized protection preventing destruction of the smallest possible spaces, while logging the rest of *Hw'teshutsun*. Cowichan members felt that demarcating precise locations would highlight cultural areas making them more vulnerable to intentional destruction and would not prevent destruction of the intangible qualities of these places.<sup>83</sup>

In the negotiations, we made [the CVRD] aware of the fact that there were sacred sites, there were areas for bathing and doing rituals... One of the things they had to do, or wanted to do, was log it, before they started up the landfill site. So what they offered to do was:... you point out those areas that are sacred to you, and the bathing sites that you want preserved and we'll work around them. But we felt that would only highlight those areas... that area holds so much meaning to us.<sup>84</sup>

Cowichan Tribes' refusal to mitigate sites within *Hw'teshutsun* reflects both an interest in keeping places and cultural practices private and the necessity of protecting desired qualities of quiet and seclusion throughout the forest.

Looking for a practical solution, Cowichan Tribes had suggested an extension of the current landfill, located on reserve land, while decisions for a different landfill site were made.<sup>85</sup>

Though Cowichan Tribes had indicated that there were sacred places at Hill 60, BC noted that

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<sup>81</sup> HTG to BC's MELP, July 4, 1997.

<sup>82</sup> Max Nock to Bill Hollingshead (MELP), email, July 18, 1997; Bill Hollingshead (MELP) to Bill Hubbard, email, July 21, 1997.

<sup>83</sup> Elliott, interview; Hinkley, interview; Cowichan Tribes, *TRM Presentation*.

<sup>84</sup> Elliott, interview.

<sup>85</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

Cowichan did not identify the locations of specific sacred sites or lead a site tour.<sup>86</sup> Instead, MELP and the CVRD did site tours themselves without a Cowichan representative, reporting that:

[t]he site and its surroundings are far from pristine [and] [t]here was no clear evidence of any ceremonial or other use by First Nations. There is also no clear indication of any differentiation between this area and the very large tract of similar logged land between the Cowichan and Chemainus Rivers from Mount Prevost to Lake Cowichan and beyond.<sup>87</sup>

Through this field report and previous site reviews, BC's MELP concluded that constructing a dump on Hill 60 would result in "no apparent significant infringement upon traditional First Nations uses" and recommended that the dump be approved.<sup>88</sup> In October 1997, Cowichan Tribes informed BC's MELP that they would commission an independent traditional use study on Hill 60 to demonstrate their aboriginal rights and title.<sup>89</sup> However, the BC Minister of Environment, Lands and Parks (MELP) nevertheless approved the dump permit later that month.<sup>90</sup> MELP issued a licence of occupation under the BC *Land Act*, indicated that they would later issue a long-term lease, prepared an operational certificate and proceeded to consider issuing a licence to cut at Hill 60 to facilitate construction of the dump and roadways.<sup>91</sup> At the request of BC's Ministry of Aboriginal Affairs (MAA), MELP did not publicly announce dump approval because they were concerned about adding to bad governmental publicity.<sup>92</sup>

The conclusion that the project would not infringe upon Hul'q'umi'num' people's use of and relationships with *Hw'teshutsun* was made without any meaningful consultation, ignoring previous correspondence by HTG asserting Hul'q'umi'num' cultural practices at Hill 60.

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<sup>86</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998; British Columbia's Ministry of Aboriginal Affairs (hereafter referred to as MAA) internal emails, Oct. 22, 1997.

<sup>87</sup> BC's MELP, *Field Services Miscellaneous Report*.

<sup>88</sup> BC's MELP, *Field Services Miscellaneous Report*.

<sup>89</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998;

<sup>90</sup> BC's MAA internal emails, Oct. 22, 1997; Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

<sup>91</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

<sup>92</sup> BC's MAA internal emails, Oct. 22, 1997; Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

Cowichan Tribes has notified the CVRD of their opposition to the Hill 60 dump in July 1997, prior to BC's permit approval,<sup>93</sup> a position more strongly asserted when Lydia Hwitsum was elected Chief, beginning her first of two consecutive terms in 1998.

***Cowichan Tribes takes action:***

Upon her election as Chief, one of the first Crown-First Nation consultation referral notices to come across Lydia Hwitsum's desk were the plans to construct the dump at Hill 60 and forestry plans to log the area.<sup>94</sup> Chief Hwitsum began having discussions with elders and spiritual people to decide what Cowichan actions should look like regarding the dump and forestry proposals. Initially, some elders did not want to share the importance of *Hw'teshutsun* as they were concerned that people would purposely sabotage places of cultural importance. However, Chief Hwitsum and others felt that given the plans to build a dump and log *Hw'teshutsun*, silence would likely not be successful in preventing development.<sup>95</sup>

So that was, again, working within community with the elders, getting the data [to prove the use of *Hw'teshutsun* to BC]. And it wasn't easy. The elders were saying, "they've already taken enough from us. We don't want to tell them anything more about us." So I had to have a really strong relationship with the elders to say, "Look, if I don't say anything, they're going to put a landfill there. And we'll never be able to use it like we did ever again." And that was the tipping point for them. It's like, we speak now or we lose it. It was that urgent. And so that was, in terms of the elders agreeing that I could bring forward a whole body of knowledge to convince the Crown that we weren't making up a story about our spirituality in order to stop them from putting in the landfill.<sup>96</sup>

This dilemma is common among many Indigenous communities who are faced with the decision of sharing private knowledge with the possibility that their knowledge and values won't be taken

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<sup>93</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

<sup>94</sup> Lydia Hwitsum, interview by Jen Argan, Jan. 4, 2021.

<sup>95</sup> Hwitsum, interview.

<sup>96</sup> Lydia Hwitsum, interview by Jen Argan, Sept. 25, 2021.

seriously and that important places will thus be destroyed more easily, and the reality that if people remain silent about important cultural places, they are likely to be destroyed in ignorance.<sup>97</sup>

Discussions within the Cowichan community led to Cowichan Tribes' decision to confidentially share culturally sensitive information with the CVRD and BC negotiators to illustrate the importance of *Hw'teshutsun* within a Hul'q'umi'num' context. Through consultation with Cowichan cultural advisors and a review of ethnographic literature, Cowichan Tribes conducted a Traditional Use Assessment (TUA) of *Hw'teshutsun* to document the "scope, nature and extent of Cowichan Tribes' aboriginal rights in the *Hw'te shutsun* area within the Cowichan Tribes traditional territory"<sup>98</sup> The TUA specifically addressed development proposals to build the dump and to log Hill 60 to determine impacts of these developments on Cowichan engagements with an area of "cultural heritage value"<sup>99</sup>.

In the TUA, Cowichan Tribes identified the *Hw'teshutsun* area between the Cowichan River to the south and the Chemainus River to the north (see Figure i, pg 218).<sup>100</sup> The TUA identified 85 traditional use sites within the *Hw'teshutsun* area, including places for fishing, hunting, spiritual use, named places and places associated with Cowichan oral histories.<sup>101</sup> However, the importance of *Hw'teshutsun* extends beyond use sites as it is valued for the "untrammled and pristine nature" that require an intact forest. Cowichan cultural advisors explained that *Hw'teshutsun* is "very important to the emotional, spiritual and physical well-being of the Cowichan Tribes and its members", which is also true for members of other Island Hul'q'umi'num' communities who shared this area as traditional territory.<sup>102</sup> All Cowichan Tribes

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<sup>97</sup> Mohs, "Sto:Lo Sacred Ground"; Glavin, "Eclipse of the Spirit Dancers."; Qwustenuxun, interview by Jen Argan, April 13, 2021.

<sup>98</sup> Traditions Consulting Services, Inc., *TUA*.

<sup>99</sup> Traditions Consulting Services, Inc., *TUA*, 1-2.

<sup>100</sup> Traditions Consulting Services, Inc., *TUA*.

<sup>101</sup> Traditions Consulting Services, Inc., *TUA*, 71.

<sup>102</sup> Traditions Consulting Services, Inc., *TUA*; HTG to BC's MELP, July 4, 1997.

members consulted for this study indicated that construction of a dump, forestry activity and other developments would be incompatible with the “current and historic rights of the Cowichan people” and it would have “severe negative impacts on the sacred nature” of *Hw’teshutsun*. The study concluded that “[t]his is one of the worst possible locations, from Cowichans’ perspective, for development activity.”<sup>103</sup>

Cowichan Tribes also commissioned an independent environmental review of the 30-year landfill proposal at Hill 60, which was completed in June 1998.<sup>104</sup> The CVRD had initially proposed a 50-year landfill, but revised the plan to 30 years in response to environmental concerns. However, the 30-year proposal located the dump at the top of Hill 60, rather than the 50-year plan where the dump would be constructed in a “natural depression”. The report outlined numerous environmental concerns, particularly impacts on the waterways, a particular source of concern as some creeks are used for cultural bathing. It was “estimated that, even with mitigation, effects of the landfill will be apparent for about 1km radius around the landfill, and likely for the full... length of [a culturally significant creek]”. An acoustic consultant was contacted as part of this review, who indicated that noise from the dump may be heard several kilometers away. The dump would likely impact wildlife in the area, attracting some animals and driving others away, though it was recommended that impacts wildlife be more thoroughly studied. Water quality, noise pollution and wildlife habitat, particularly elk, were key concerns raised by Cowichan Tribes, all of which would likely be affected by construction of a dump at the top of Hill 60. The review recommends that the dump site be reconsidered due to economic, physical and cultural impacts on the area and that the 30-year proposal may even have more deleterious environmental impacts than the 50-year proposal.

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<sup>103</sup> Traditions Consulting Services, Inc., “TUA.”, *TUA*, 71.

<sup>104</sup> Pottinger Gaherty Environmental Consultants Ltd. (PGL), *Hill 60 Landfill Review*.

Supported by the TUA and the results of the environmental review and drawing upon teachings from Cowichan Elders and knowledge keepers, Cowichan Tribes leadership asserted that destruction or disturbance of *Hw'teshutsun* was an infringement on their aboriginal title and rights, outlined in section 35 of the Canadian *Constitution Act, 1982*.<sup>105</sup> Lydia Hwitsum described the need to assert aboriginal rights and title at *Hw'teshutsun*:

[The protection of *Hw'teshutsun*] was rights and title based. Because of the intergenerational aspects of the colonial application of the Indian Residential School, many of our youth have been colonially dispossessed from the knowledge and connection to our lands. So it was that thread. We've [had to] fight continually, how many generations have we been going...

[I kept saying,] assert. If you're on the land, and you're acting, that's real. It's more than a piece of paper that says, "one day, we will be on the land" in a treaty that [is] implemented in 20 years. So that was what I was really pressing for was [to] get action. Assertion. Explaining how that's what we need to do. We need to act on our rights or they will fizzle. If our young people aren't aware of what those rights are, then we're not acting appropriately. I'm not acting appropriately as a leader.

So that was kind of the [conversation]. Rights-based; we have a right. There are traditional, cultural uses [of the land at *Hw'teshutsun*]. When you think about our spiritual strength that's helped us survive this many generations of residential school impacts, that's where the strength was. So [it was important to be] able to try to bring that to the youth. Rights-based [dialogue included] connecting to a healthy environment. The elders had all kinds of teachings and [they] instructed me because the Crown would say, "there's some water there, no problem. You can just go on the periphery of the landfill and I'm sure you'll be fine." But [we said], "no, the teachings are about the purity." The teachings are about how you draw strength from the natural environment and that gets diminished when it gets interfered with.<sup>106</sup>

Robert Botterell, a lawyer from Ratcliff & Company representing Cowichan Tribes in their *Hw'teshutsun* negotiations, argued that the Crown had not fulfilled its legal obligation to Cowichan Tribes to consult in good faith on the potential infringement of Aboriginal Rights. The duty to consult with First Nations was given legal expression through the Supreme Court of Canada's 1997 *Delgamuukw* decision. Lawyers for Cowichan Tribes further noted that "[e]stablishment of

<sup>105</sup> Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

<sup>106</sup> Hwitsum, interview, Sept. 25, 2021.

the landfill will severely infringe Cowichan aboriginal title and rights.” In February 1998, they directed BC to stop and rescind development permits at Hill 60 so that Cowichan, BC and the CVRD could enter into negotiations, or Cowichan would pursue litigation.<sup>107</sup> However, in May 1998, BC again argued that the Licence to Cut the dump area (9.5 ha) and the road permit to access the dump on Hill 60 would not infringe upon aboriginal rights.<sup>108</sup>

Following BC and the CVRD’s lack of engagement with Cowichan’s concerns, Cowichan Tribes filed a court case against BC and the CVRD for failure to consult and infringement of aboriginal rights.<sup>109</sup> Cowichan Tribes specifically identified one creek at *Hw’teshutsun* as an area where Cowichan people engage in “customs and traditions integral to the distinctive aboriginal culture of the Cowichan Tribes” whose rights are guaranteed under Section 35(1) of the Canadian Constitution. This is one of the last remaining areas where certain cultural practices can be carried out due to logging and private property ownership throughout their traditional territory, present day results of the 19<sup>th</sup> century E&N railway grant.<sup>110</sup> Construction of a dump would alter the landscape in ways detrimental to the continuance of these cultural practices.<sup>111</sup> Cowichan Tribes cited MELP’s approval of the CVRD’s Waste Management Plan, MELP’s issuance of a Licence of Occupation and MOF’s Licence to Cut the 9.5 ha for the dump as violations of aboriginal rights to engage in cultural practices within Cowichan traditional territory and declared these licences and approvals “of no force or effect”.<sup>112</sup>

While the court case was ongoing, Cowichan Tribes again proposed to extend the existing Koksilah landfill for 5 years, including for BC and the CVRD an engineering study for the

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<sup>107</sup> Ratcliff & Co. to BC’s MELP and MoF, Feb. 3, 1998.

<sup>108</sup> BC’s MoF to CVRD, May 12, 1998.

<sup>109</sup> Lydia Hwitsum Chief et al. v. Cowichan Valley Regional District et al., 98 2240 (S.C.B.C. 1998).

<sup>110</sup> Traditions Consulting Services, Inc., *TUA*; Cowichan Tribes to CVRD, Sept. 23, 1998.

<sup>111</sup> Lydia Hwitsum Chief et al. v. Cowichan Valley Regional District et al., 98 2240 (S.C.B.C. 1998), 6-8.

<sup>112</sup> Lydia Hwitsum Chief et al. v. Cowichan Valley Regional District et al., 98 2240 (S.C.B.C. 1998), 4-8.

expansion, while continuing to search for an alternative to the Hill 60 site that doesn't infringe on aboriginal rights.<sup>113</sup> At the same time, TimberWest employees identified 16 possible western red cedar culturally modified trees (CMTs) at Hill 60.<sup>114</sup> A previous Archaeological Impact Assessment (AIA) had investigated two CMTs, determining that they were not archaeological as they had been stripped within the past year.<sup>115</sup> As the area had been previously logged, the presence of pre-contact CMTs is highly unlikely. While these may not meet government criteria for what is deemed "archaeological", the CMTs are evidence of continued cultural use of Hill 60.

In late October 1998, the CVRD abandoned the proposal to build the dump at Hill 60, deciding to continue looking for another site and asking Cowichan Tribes to withdraw their legal action against BC and the CVRD.<sup>116</sup> The CVRD was shipping garbage to Cache Creek, about 85km west of Kamloops, but rejected a motion to continue this garbage export past 1999 due to the expense.<sup>117</sup> However, the CVRD continues to send their garbage to Cache Creek now, having still not decided on a new landfill location.<sup>118</sup> While this was the first win for Cowichan, plans to log *Hw'teshutsun* continued to threaten continuance of cultural practices there.

### ***Opposition to logging:***

BC plans to allow logging at Hill 60 were the impetus for negotiations between Cowichan Tribes and BC which led to the Treaty Related Measure (TRM) to protect *Hw'teshutsun*. Hill 60 was a combination of Crown land, including logging areas for BC's Small Business Forest Enterprise Program, and private land, owned by TimberWest.<sup>119</sup> In April 1999, Cowichan Tribes

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<sup>113</sup> Cowichan Tribes to CVRD, Sept. 23, 1998.

<sup>114</sup> TimberWest to BC's MoF, July 2, 1998.

<sup>115</sup> Arcas Consulting Archaeologists Ltd., *Archaeological Impact Assessment Report*

<sup>116</sup> CVRD to Cowichan Tribes, Nov. 4, 1998.

<sup>117</sup> Price, "CVRD still committed to a landfill".

<sup>118</sup> Hinkley, interview, Feb. 17, 2021.

<sup>119</sup> Costa, "Tribes declare 6,000 hectares of sacred land off-limits to development."

expressed their opposition to TimberWest's 1999-2003 Forest Development Plan in TFL 46, which includes *Hw'teshutsun*, sharing their TUA which documented the cultural significance of the area in depth.<sup>120</sup> In addition, BC was considering turning some Crown land at Hill 60 into private land as part of compensation for logging company MacMillan Bloedel, as the province has taken away some of their timber supply in the mid-1990s to create provincial parks.<sup>121</sup> As well as ignoring the cultural significance of *Hw'teshutsun* articulated by Cowichan Tribes to the province through the TUA, this move would further diminish Crown land available for treaty settlement, which comprises only 9.6% of Hul'q'umi'num territory.<sup>122</sup> Like most of BC, Hul'q'umi'num land is unceded and without historical treaties; their territory was taken over by British colonists through force and settlement in the late 1800s.<sup>123</sup>

Cowichan Tribes had received several referrals for logging around Hill 60 and felt that with very little Crown land left for treaty settlement; Cowichan's land base for economic, spiritual and cultural needs was being alienated in multiple ways too quickly to wait for an Agreement in Principle (AIP) or Final Settlement given the slow pace of treaty making.<sup>124</sup> Cowichan Tribes requested that no logging take place on their territory until Hill 60 negotiations were complete, as an act of negotiating in good faith.<sup>125</sup> Citing the *Delgamuukw* decision, Cowichan Tribes' lawyers argued that Cowichan's aboriginal rights and title include an "inescapable economic component" and that "the continued alienation and depletion of forest resources within Cowichan Territory has the potential to render treaty negotiations and treaty-related measures... meaningless".<sup>126</sup>

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<sup>120</sup> Ratcliffe & Co. to BC's MoF, May 5, 1999.

<sup>121</sup> Hunter, "MacBlo Crown land transfer needs more study"; BC's MAA, "Request for Proposal".

<sup>122</sup> Cowichan Tribes, *Conceptual Framework: Elements of TRM Agreement*.

<sup>123</sup> Brazier, "How the Queen's Law Came to Cowichan."

<sup>124</sup> Rhonda Morris (MoF) to Jeff Smith and Doug Caul (MAA), email, Dec. 13, 2000; Ratcliff & Co. to BC's MOF, October 27, 1999.

<sup>125</sup> Ratcliff & Co. to BC's MOF, October 27, 1999.

<sup>126</sup> Ratcliff & Co. to BC's MOF, October 27, 1999.

In October 1999, in this context of continued forestry without Cowichan's consent and slow-moving treaty negotiations, Cowichan Tribes announced that they were developing plans to log within their traditional territory without provincial permits in January 2000, unless they were able to reach an agreement with BC before then to develop Cowichan forestry and protect *Hw'teshutsun* from forestry plans.<sup>127</sup> This followed a similar assertion of rights and title by Westbank First Nation (Syilx) and several Secwépemc communities who began logging on their respective traditional territories without provincial permits in September 1999.<sup>128</sup> While Cowichan Tribes expressed a preference for negotiations over blockades and litigation, they faced a great lack of respect for their rights, title and interests in their territory. As described by Chief Hwitsum, Cowichan Tribes held the position that if Hill 60 was going to be logged, they would log it themselves:

I'd even created a [notice that] I put in the [Cowichan Tribes] newsletter, I think: "anybody who wants to sign up to come be part of this come and sign up!" There were all kinds of things going [on]. The forest companies really wanted in there, they had tenure, they wanted in. And I was saying, "well if anybody's cutting then bring your chainsaw because Cowichan people will be the ones that take control of this area." So it was a real show of force to Crown that I'm not just one *hwulmuhw*, one Indian woman standing there going on. I've got elders behind me, I've got my community behind me and I've got a mandate. And we're ready to go to court if you don't cooperate.<sup>129</sup>

While assertions of Cowichan rights, title and interests in their territory were led by Chief Hwitsum, she emphasized that her authority to assert Cowichan's unextinguished rights to their traditional territory came from the Cowichan community, from being backed by elders and community members.<sup>130</sup> She was able to pull people together to talk about the need to prevent

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<sup>127</sup> Cowichan Tribes, "Cowichan Tribes plan to log their territory"; Curtis, "Cowichan bands target Crown land for logging"; Trevor Proverbs (MAA) and John Langford (Canada) to Lorne Brownsey (FTNO) and Philip Steenkamp (MAA), memorandum, June 7, 2000.

<sup>128</sup> Pemberton, "Vancouver Island band joins logging"; Curtis, "Cowichan bands target Crown land for logging"; MAA, "Daily Media Issues".

<sup>129</sup> Hwitsum interview, Sept. 25, 2021.

<sup>130</sup> Hwitsum interview, Jan. 4, 2021.

development at *Hw'teshutsun* and to express the concerns of the Cowichan community.<sup>131</sup> At a time when rights and title were largely seen as theoretical, Cowichan Tribes strategically expressed their rights, title and authority in their territory, demonstrating that BC must take their responsibilities articulated through the 1997 *Delgamuukw* decision seriously and negotiate with Cowichan Tribes in good faith.<sup>132</sup>

In response to Cowichan's direct assertion of rights and title, MOF stated that they were unaware of CT's interest in forestry but were willing to enter into negotiations, recognizing the importance of Cowichan's economic development.<sup>133</sup> BC was interested in negotiating with Cowichan to show progress on treaty making. The BC treaty process began in 1993, and negotiators were initially hopeful that all treaties would be settled within 10 years.<sup>134</sup> As Cowichan Tribes is the largest band in BC and over 85% of their traditional territory in private property, this was an important case for BC to demonstrate their willingness to negotiate through a TRM that would set aside land for future treaty settlement.<sup>135</sup> However, as Cowichan Tribes expressed their willingness to go to court or blockade Hill 60 to prevent logging,<sup>136</sup> BC was cognizant of the seriousness and capacity of the community and would likely have preferred negotiations to assertions of aboriginal rights and title that threaten BC's claims to sovereignty. Ministry of Aboriginal Affairs (MAA) negotiator Doug Caul recalled his mandate and the political climate of the time:

In those days that our mandates were really “go forth and explore”. I wouldn't have gone to the table if somebody said to me, “no, we don't want to engage.” So I had

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<sup>131</sup> Luschiim interview, April 7, 2021.

<sup>132</sup> Cowichan Tribes, *TRM Presentation*; Ratcliff & Co. to BC's MELP and MoF, Feb. 3, 1998.

<sup>133</sup> Cindy Stern (MOF) to Tim Sheldan and Dan Powell (MoF), email, Oct. 13, 1999.

<sup>134</sup> Doug Caul, interview by Jen Argan, June 9, 2021.

<sup>135</sup> Caul interview, June 9, 2021; Trevor Proverbs (MAA) and John Langford (Canada) to Lorne Brownsey (FTNO) and Philip Steenkamp (MAA), memorandum, June 7, 2000.

<sup>136</sup> Cowichan Tribes, “Cowichan Tribes plan to log their territory”.

to have that mandate to be able to engage. We call it “scoping.” Go and scope out what might be possible and what might be a resolution.

The dynamic was public policy and political commitment to make progress on treaty making. But the government also wanted to make sure that there was, the word especially we used back then was “certainty” for the investment climate out there. And it was, like a lot of mandates we were given, sometimes felt almost incongruent, if not impossible. On one hand, I remember feeling that part of this was going to resolve and get rid of our problem and allow for harvesting to carry on. And on the other hand, it was also to make progress on treaty negotiations. And that’s what this ministry’s had to do for a long, long time, is to try to bridge that gap and come up with a resolution that is as satisfying for everybody as possible. Not satisfactory for everybody as possible, just [as] satisfying as possible.

So, that was the mandate, was to go out there. It wasn’t crystal clear; no one sent me out to the table to say, “Go and protect land.” It was the idea of protecting an area emerging in that scoping and I would continuously go back and check in with my political masters to make sure that I wasn’t getting out ahead of things.<sup>137</sup>

In November 1999, a meeting between Cowichan Tribes, the BC MAA and Ministry of Forests (MOF) established the need for a Cowichan-led side table to the treaty table to specifically address Cowichan’s forestry interests, both protection and economic development.<sup>138</sup> Cowichan Tribes highlighted that Cowichan elders and the Cowichan community expected these matters to be resolved through negotiations by March 1, 2000 or they would assert Aboriginal Rights, Title and Interests.<sup>139</sup> From Cowichan Tribes’ perspective, it was necessary to reach TRM agreements quickly, to protect *Hw’teshutsun* and to develop Cowichan forestry, as logging was continuing unabated during negotiations.<sup>140</sup>

Chief Hwitsum describes the urgent need to create a side table to assert Cowichan authority at *Hw’teshutsun*.

I said to [the Hul’qumi’num Treaty Group]: “Look, I need to get this work done for my people.” I went to my council, as the chief, and I said: “Look, I want to create a side table, a Cowichan-specific negotiating side table, separate from [HTG].” I

<sup>137</sup> Doug Caul, interview June 9, 2021.

<sup>138</sup> BC’s MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

<sup>139</sup> Ratcliffe & Co. to MoF and MAA, Nov. 17, 1999; BC’s MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

<sup>140</sup> Ratcliff & Co. to MoF, Oct 27, 1999; John Langford (Canada) and Trevor Proverbs (MAA) to Cowichan Tribes, May 29, 2000.

felt there was urgency... [The treaty table] just wasn't moving fast enough in terms of getting protection. So I got a mandate from my council to create a side table and appoint myself as chief negotiator. So that wasn't an easy thing to do because... I didn't want [the chief negotiator for HTG] to feel like I didn't trust him, but I also wanted to make sure; this was so critical. I have a mandate and my community and my council gives me a mandate, we'll do that. So it was an interesting thing to [do], almost hiving off the political, because there are so many facets to the treaty negotiations – what stage are you on, what page are you on, what's the clause? It's like, hold on, we're trying to protect something urgently here.

So what that did was give me a direct line to apply my mandate. And [the BC and Canadian] government[s] didn't believe us. They were like, "look at these people, they're just trying to make something up." Because our people have been historically quite protective of [these] places... The whole colonial exercise meant that we had to save that in a very protective way, for Cowichan.

So I had to go to the elders. I went to the elders, I went to the different leaders in different parts of our territories that knew best those areas, and I had to aggregate a whole lot of information. And then we had to get [the government] to sign off because I'm like, "you guys don't believe us. Crown, you don't believe me, you literally think I'm making something up." I went to the elders to get all this background information. I'm like, "this is legit, here's our history." Then they got them all to sign these non-disclosure agreements because it's none of your business to be sharing this around with the rest of the Crown. And so that was the dynamics of the HTG relationship, treaty politics, Indian Act politics getting back to that piece, this is a focused exercise on this particular piece [*Hw'teshutsun*].

I got enough actual research done that I was able to say, "Look, you protect this." I had enough data that in terms of proving Aboriginal Title we could've hived that little piece out of our territory, brought them to court and won a title case on that piece of land. And so that was huge leverage. I had good information, solid data and on the negotiating level with the Crown. So now I'm working with my people, got all the data, got a mandate to move forward.<sup>141</sup>

Cowichan Tribes and BC both identified that a treaty related measures agreement (TRM) would be a useful tool to address Cowichan's concerns at Hill 60 and their desire for economic development.<sup>142</sup> TRMs are a type of interim measure available through the treaty table to expedite the treaty process designed to be incorporated into a Final Agreement.<sup>143</sup> Cowichan Tribes, as a

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<sup>141</sup> Hwitsum interview, Sept. 25, 2021.

<sup>142</sup> Trevor Proverbs and John Langford (MAA) to Lorne Brownsey (FTNO) and Philip Steenkamp (MAA), memorandum, June 7, 2000.

<sup>143</sup> MAA, "Treaty-Related Measures" Nov 10, 2000.

member of HTG who was in Stage 4 of treaty negotiations at the time, needed to negotiate through the treaty group.<sup>144</sup>

Side table negotiations began in January 2000, and on May 26, 2000, Cowichan Tribes presented their TRM proposal to BC and Canada. CT proposed two types of land arrangements to be addressed within the TRM: Category A lands which comprise 5371 ha of the core area of *Hw'teshutsun* to be protected for its “social, cultural and spiritual values”, and Category B lands for developing a Cowichan forestry land base, of which 8556 ha have been identified.<sup>145</sup>

During this TRM proposal to BC, Chief Hwitsum articulated the urgency of a *Hw'teshutsun* agreement with respect to Cowichan sovereignty:

My people have a strong and continuing connection to the forest lands and waters throughout our Territory. Every day that goes by that connection is being threatened by the actions of British Columbia and Canada. The Cowichan Community members and my Elders have spoken – “enough is enough”, we must have recognition and respect for our Aboriginal Rights, Title and Interests now. It is with this direction in mind that we seek a just and honourable Treaty Related Measure to protect Hw'te shutsun and establish a Cowichan forest land base.

If we do not achieve a Treaty Related Measure by July 2000, the direction of my Community and Elders is equally clear – take control of what is rightfully ours through other means.<sup>146</sup>

Though Cowichan had previously stated that they would directly assert rights and title by March 1, 2000 if an agreement had not been reached, the community and elders agreed to defer this assertion until July 28, 2000.<sup>147</sup> However, while BC was impressed by Cowichan's presentation, they found the July deadline unachievable, given the unknowns around TRMs, which were a new strategy, figuring out how to protect an area that included some private land, an unclear

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<sup>144</sup> Trevor Proverbs and John Langford (MAA) to Lorne Brownsey (FTNO) and Philip Steenkamp (MAA), memorandum, June 7, 2000; BC's MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

<sup>145</sup> BC's MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

<sup>146</sup> Cowichan Tribes, *TRM Presentation*, 2000.

<sup>147</sup> BC's MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

sale of TFL 46 and complications with the allocation of the Timber Supply Area (TSA) which would impact negotiations of Category B lands.<sup>148</sup> BC had to status the land to know which areas were Crown land and which sections of the proposed protected area were private property.<sup>149</sup> TRM funding is shared equally between Canada and the province, but the maximum TRM fund per year per nation is \$5 million. BC officials estimated this amount would support a protection TRM (*Hw'teshutsun*) between 1000-1500 ha, depending on which area was protected.<sup>150</sup> These costs are due to forgone revenue from preventing logging and compensation and third-party costs required through contracts with TimberWest.<sup>151</sup> BC was eager to reach an agreement as logging companies also putting pressure on BC for clarification if they could log and compensation if they couldn't as they had permits but were told by Cowichan Tribes that they were not allowed to log.<sup>152</sup>

Cowichan Tribes continued to put off their direct assertion of rights and title through logging or a blockade as negotiations progressed. In November 2000, Cowichan Tribes, BC and Canada signed a TRM to develop a “Forest Sector Economic Development Study” to identify and evaluate how Cowichan could develop their own forestry in accordance with existing BC legislation.<sup>153</sup> In this TRM, BC reserved the right to unilaterally terminate the economic development study if Cowichan Tribes or HTG “asserts aboriginal rights or title in its traditional territory in litigation, which in British Columbia’s opinion precludes continuing Treaty Negotiations”<sup>154</sup> This was a protection clause for BC as Cowichan Tribes had declared numerous times that they would assert their rights and title and an agreement for the protection of

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<sup>148</sup> BC’s MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

<sup>149</sup> BC’s MAA, *A Cost-Sharing Discussion Paper*.

<sup>150</sup> BC’s MAA, *A Cost-Sharing Discussion Paper*.

<sup>151</sup> BC’s MAA, *Cowichan Tribes Treaty Related Measure (TRM) Proposal of May 26, 2000 Progress Report*.

<sup>152</sup> Caul interview, June 9, 2021; TimberWest to Ratcliffe & Co., May 1, 2000.

<sup>153</sup> Canada, BC and Cowichan Tribes, *Treaty Related Measure: Forest Sector Economic Development Study Cowichan Tribes*.

<sup>154</sup> Canada, BC and Cowichan Tribes, *Treaty Related Measure: Forest Sector Economic Development Study Cowichan Tribes*, 7.

*Hw'teshutsun* had still not been reached. However, this TRM demonstrates some results from negotiations which continued to pass by Cowichan's timelines.

***Noise park encroachment via private land:***

Simultaneously to the logging proposal at *Hw'teshutsun*, Cowichan Tribes had to contend with plans to construct an outdoor recreation park nearby, on the south side of the Cowichan Valley Highway.<sup>155</sup> In October 2000, the CVRD received approval in principle from the BC Land Reserve Commission for a racetrack for dirt drag, mud racing and model plane flying, colloquially termed the “noise park”.<sup>156</sup> The CVRD was in negotiations with TimberWest, the property owner, to buy the 400 acres (about 160 ha) of private land for the noise park.<sup>157</sup> Joe Allan, the CVRD director, himself a car racing enthusiast, was determined to build the dump at Hill 60 and also pushed for the construction of the noise park. Cowichan Tribes' pushback against the noise park frustrated Joe Allan as it was private property and thus not available for treaty settlement according to the BC government.<sup>158</sup> Cowichan Tribes' opposition to the noise park directly adjacent to *Hw'teshutsun*, including their willingness to pursue legal action or blockade the area,<sup>159</sup> was not new as they had been publicly asserting the cultural significance of *Hw'teshutsun* since the dump at Hill 60 was proposed.

Though the proposal for noise park was outside the boundaries of the Category A lands identified as the core of *Hw'teshutsun* by Cowichan Tribes, the noise it would create in the surrounding area would impact Cowichan people's ability to continue cultural practices at

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<sup>155</sup> Tim Kulchyski, interview by Jen Argan, June 10, 2021; Luschiim interview, April 14, 2021. Costa “Tribes Declare 6,000 Hectares of Sacred Land off-Limits to Development.”

<sup>156</sup> Costa, “Noise park ‘incompatible’”; McLarty, “Band protocol could block noise park plan”.

<sup>157</sup> McLarty, “Band protocol could block noise park plan”

<sup>158</sup> Luschiim interview, April 14, 2021; Costa, “Noise park ‘incompatible’”.

<sup>159</sup> Cowichan Tribes, “Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades”, Nov. 30, 2000; McLarty, “Band protocol could block noise park plan”.

*Hw'teshutsun* due to noise pollution<sup>160</sup>. Chief Hwitsum explained that “the quiet and serenity of that area is extremely important to our people”, values incompatible with a neighbouring noise park.<sup>161</sup> Tim described the lack of meaningful consultation with Cowichan Tribes and respect for their concerns over the proposed noise park:

Just across [the highway from *Hw'teshutsun*] is where they wanted to establish what was called the noise park. It was this dirt race track. And there as a whole bunch of conflict at the time because the people that wanted that noise track were very loud. And they were very in your face. So we said, “Well, our community needs to meet and discuss this.” [The response was:] “When? Where are you guys [Cowichan Tribes] meeting? Because we’re going to be there and we’re going to protest you guys having a meeting to talk about this. Because we object to you guys having a voice.” [That was] really what it was about. They were very confrontational. Very aggressive. This was at our gym. We were having an internal community meeting. They didn’t want to respect that. They didn’t want to respect that we could potentially even have a voice. And so, in the end, we bought that land. It was private land, so we said, “Okay, if that’s gonna be the case then let’s solve that.” So really, not to make it too pointed, but the developers of that race track circumvented that whole process and basically did that in a way without any kind of meaningful consultation.<sup>162</sup>

As Tim mentioned, Cowichan Tribes prevented construction of the noise park in the initial location south of *Hw'teshutsun* through negotiations with TimberWest, the prior fee simple owner, the provincial Land Reserve Commission and the CVRD. BC refused to consider this area within the protected area as it was privately owned and thus outside the mandate of the treaty process.<sup>163</sup> However, the CVRD constructed the racetrack further east along the highway, still relatively close to *Hw'teshutsun* – the Vancouver Island Motorsport Circuit (VIMC).

### ***Youth involvement at Hw'teshutsun:***

<sup>160</sup> Jared Qwustenuxun Williams, interview by Jen Argan, April 13, 2021; Kulchyski, June 10, 2021; Costa, “Noise park ‘incompatible’”; McLarty, “Band protocol could block noise park plan”.

<sup>161</sup> Costa, “Noise park ‘incompatible’”.

<sup>162</sup> Kulchyski interview June 10, 2021.

<sup>163</sup> Cowichan Tribes, “Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades”, Nov. 30, 2000; BC’s MAA, *Communications Plan*.

As part of asserting jurisdiction by being on the land and engaging with the Cowichan community in these protection actions, Chief Hwitsum highlighted the importance of engaging youth in the protection of *Hw'teshutsun*. She looked for ways to provide opportunities for Cowichan youth to connect with the land as “many of our youth have been colonially dispossessed from the knowledge and connection to our lands”.<sup>164</sup> Being at *Hw'teshutsun* and partnering with international organizations was a way of supporting Cowichan youth to learn from the land and the Elders.

My approach is that I pull lots of pieces together. So I actually was working with this international organization that was supporting youth and I brought them on board and got our youth sort of working. It was sort of this “protect the environment” [discourse]. I had a local thing that I prepared a proposal for to start doing. What did we call it back then? It was like Traditional Trails. It was that sort of thing. So bring youth in. We were actually training some youth, we had some programming [and] we had some international involvement... I was doing a lot of work with youth in terms of youth empowerment, because we rely on them so much. But it didn't continue, mainly because it needs so much nurturing and adults are hard-pressed to hold space for youth...

I knew somebody that was working in this area and I said, “help me write a proposal so we can get some resources so I can get somebody, bring an elder and another couple of workers together to take the youth out on the land.” And so that business of that. And then having that international [engagement]. I had my finger on the pulse for the youth and that's [important]. Now, I think things might be a little better, but even back then if you don't have a vote, you don't get a lot of attention politically...

So that, again, just in the thread of getting the youth involved. [I partnered with an international organization] and they were actually doing actions in Germany, I think, to bring attention to the fact that we were trying to protect cultural land here. It was all youth environmentalists. I was able to raise money, well actually I convinced my council to allocate some own-source revenue to support three youth each year to go to Germany and come back, sort of building that connection in terms of the international network to support us. And to give our children an experience.<sup>165</sup>

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<sup>164</sup> Hwitsum interview Jan. 4, 2021; Sept. 25, 2021

<sup>165</sup> Hwitsum interview, Sept. 25, 2021.

Chief Hwitsum discussed her vision for youth to be at *Hw'teshutsun* monitoring the land after the TRM was signed: “all you had to do was go walk the territory out there... because we’re present, we’re watching. We want to know that [government] compliance [with the TRM] is there.”<sup>166</sup> Protecting, or caring for, *Hw'teshutsun* was not confined to negotiations and agreements with government, but was seen as a community effort to assert and reaffirm their relationships with and jurisdiction within their territory. This was more formally done through a traditional ceremony and protocol between the Hul’q’umi’num’ communities. Youth engagement and the ceremony both illustrate how the protection of *Hw'teshutsun* was for the Hul’q’umi’num’ people and was achieved through relationships and work within the community, not only at the treaty table.

***Hul’q’umi’num’ protocol and ceremony:***

Simultaneous to the negotiations with the provincial and federal governments, the Hul’q’umi’num’-speaking communities of Cowichan, Penelakut, Lyackson, Stz’uminus and Halalt “affirm[ed] and support[ed] the need to protect, preserve and maintain Hw’te shutsun based on our Aboriginal rights... for the use and benefit of present and future generations” through a traditional ceremony in the S’omena Longhouse.<sup>167</sup> Former Cowichan Chief Lydia Hwitsum explained that this ceremony recognized familial connections between communities and shared relationships with the land beyond *Indian Act* designations. She elaborated on the importance of being in the *thi lelum*, the Longhouse: “when something happens there, it’s not to be taken lightly... In the Longhouse, our peoples would have historically come together to make decisions

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<sup>166</sup> Hwitsum interview, Sept. 25, 2021.

<sup>167</sup> Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe, *Protocol: Affirmation of the Traditional Relationships Amongst the Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe* (hereafter cited as *Protocol*); Hwitsum, interview, Sept. 25, 2021.

about everything. From governance, from a self-determination perspective, but here [during the protection of *Hw'teshutsun*, it was] with respect to protecting our territories".<sup>168</sup> Hul'q'umi'num' teachings and law were expressed through the ceremony and protocol between the communities, reflecting relationships and teachings that extend beyond *Indian Act* jurisdiction and negotiations with the province. This commitment resulted in a declaration by Cowichan Tribes of *Hw'teshutsun* as a "tribal preserve", a public assertion of their jurisdiction to their lands.<sup>169</sup>

While actively opposing CVRD noise park proposals and negotiating with BC, Cowichan leadership was also aware of need for discussion about protecting and engaging with *Hw'teshutsun* amongst the Hul'q'umi'num' communities. As *Hw'teshutsun* is an area shared by multiple Hul'q'umi'num' communities, Cowichan leadership wanted to ensure that no Hul'q'umi'num' person was prevented from going there, though Cowichan was leading negotiations with BC. Cowichan Tribes leadership, with guidance from elders, drew from the teachings of *nut's'maat* to bring together the Hul'q'umi'num' communities to work as one in committing to care for *Hw'teshutsun*.<sup>170</sup>

On Nov. 30, 2000, Chiefs, elders and members from Cowichan, Stz'uminus, Halalt, Penelakut and Lyackson communities gathered at the Somena Longhouse "in solemn traditional ceremony to sign the *Hw'teshutsun* Protocol which re-affirms the sacred importance of this area and the resolve of all Hul'q'umi'num' tribes to work together and take whatever steps are necessary to preserve and protect this area".<sup>171</sup> The *Hw'teshutsun* protocol was a written document signed

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<sup>168</sup> Hwitsum, interview, Sept. 25, 2021.

<sup>169</sup> Cowichan Tribes, "Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades", Nov. 30, 2000; McLarty, "Tribes Vow Blockades If Needed"; Costa, "Tribes Declare 6,000 Hectares of Sacred Land off-Limits to Development"; Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe, *Protocol*.

<sup>170</sup> Hwitsum interview, Sept. 25, 2021.

<sup>171</sup> Cowichan Tribes, "Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades", Nov. 30, 2000.

by the chiefs of Cowichan Tribes, Stz'uminus First Nation, Lyackson First Nation, Halalt First Nation and Penelakut Tribe agreed to work together to “protect, preserve and maintain Hw'te shutsun based on our Aboriginal rights... for the use and benefit of present and future generations”<sup>172</sup>. Following the signing of this protocol, a traditional ceremony took place which included speakers and *sxwayxwuy* dancers. Cowichan Tribes leadership drew from traditional teachings and used Hul'q'umi'num' principles, protocol and ceremony to honour the relationships between the Hul'q'umi'num' communities and their shared connection with *Hw'teshutsun*.

Chief Lydia Hwitsum described the ceremony in the following way:

This formal written document wasn't the main thing. The main thing is we stepped into the Longhouse and we stood on the floor in the Longhouse. There's a certain framework within which you do that in our peoples. When you step onto that floor, that dirt floor amongst the people, it's your time to be accountable as well, from a governance perspective...

You've got your churches and all of that; we've got the Longhouse. Ceremony happens there, and when something happens there, it's not to be taken lightly. This [protocol] is formalizing [Hul'q'umi'num' law] on a piece of paper. But in the Longhouse, the way our peoples would have historically come together to make decisions about everything [about] governance, from a self-determination perspective, but here [we came together] with respect to protecting our territories.

*Nuts'a'maat* again, just to keep bringing that principle, standard forward, is about coming together and working together, but it's also a standard of accountability. We've agreed to come together, we've stood in the Longhouse, in the *thi lelum*, in the Big house... for this. And we had our speakers and we had ceremony around it. We brought ceremony to it. It wasn't, “Let's go in the Big House and sign a piece of paper.” There is a process [for how to act]. We got speakers..., we called a gathering, we spoke to the people about what we were doing [and] why we were doing it. Some elders spoke about our historical connections to each other and why it made sense that we worked together. And then had a formal signing of the document.<sup>173</sup>

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<sup>172</sup> Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe “Protocol”.

<sup>173</sup> Hwitsum interview, Sept. 25, 2021.

Cowichan Tribes leadership drew upon the principle of *nuts'a'maat* to bring the communities together for the work of protecting *Hw'teshutsun*, to recognize the authority held by each community and to affirm shared relationships with this area though Cowichan was heading the negotiations. Lydia Hwitsum described how *nuts'a'maat* how used in order to protect *Hw'teshutsun*:

A lot of... what needed to be done [was] in terms of being able to recognize between us [the Hul'q'umi'num'-speaking communities] as peoples how connected we were. And, because of the Indian Act colonial exercise that created different bands, going back to the layer below that. So it was a bit of a business of that reconnecting, recognizing relationships, honouring those historical, ancestral connections.

When I looked around the table at who we're trying to call together, these are my relations. The Chief of Lyackson is my nephew, in our traditional kinship ways. And my grandfather came from Penelakut.

So it was that business, the underlying piece before getting to a written protocol was re-establishing [those relationships] because from a cultural perspective our peoples... were part of the Hul'q'umi'num Treaty Group. So I tried to deal with them to say, "look, I'm trying to rebuild the Cowichan Nation here", in a way. Those were the building blocks of recognizing our historical ancestral connections... It was bringing [in] *nuts'a'maat*, the principle of *nuts'a'maat*: we're all in it together, we're connected, but we don't agree on everything but we're going to agree to talk about how we protect our title.

So that's the *nuts'a'maat* concept: you all come together. I get everybody's bringing their Indian Act authorities to the table; I'm not trying to break that nut now. What I'm saying is below that, we have ways of being that have continued through our cultural and ceremony. That was the layer below the Indian Act political piece. So let's re-recognize our connections to each other...

Because Cowichan Indian Band, or Cowichan Tribes, was the largest in number amongst us, there was a real concern that, "oh here comes Cowichan. They're just going to take over." So that was really important to say, "look, I get you've got Indian Act authority. I'm not trying to say that's right or wrong. I understand it's colonial. But right now, we're trying to save a very important piece of our territory that serves us all on a cultural, spiritual level." So it was almost like having to just scrape away that political layer and let's say, "no we're not going to talk about [Indian Act authority] right now and resolve it, but we're going to agree on that underlying piece [to protect *Hw'teshutsun*]." It was our ceremonies and cultural ways that brought us to connect with our territory that got us beyond the political

piece and focused on our reliance on our connection to each other and our connection to our culturally significant areas, that actual connection at that level.

When I brought us all together, I said, “Look, Cowichan's not trying to do this so we can stop our own extended families from accessing this area for the purpose of our cultural, spiritual strength.” So that was just an agreement I brought forward. [With] *nuts 'a'maat*, you bring your authority forward. Cowichan's not trying to overrun you, but without question, if we don't work together we're going to lose even more in terms of culturally significant sites. The underlying piece is rekindling those strengths of relationship [and] reliance on each other and our territories. Recognizing we're not completely different entities as humans just because the Indian Act has separated us. So it was a big exercise of trust-building, recognizing our connections and our relationships, understanding our mutual reliance on our territories. It was just dwindling – because of development and all kinds of other incursions – dwindling real quality sites that our people could still go and express our ways of being in a spiritual way.<sup>174</sup>

Chief Hwitsum's words highlight the how Hul'q'umi'num' law, teachings and ceremony guided the process of protecting *Hw'teshutsun*, beginning with affirming the relationships within the Hul'q'umi'num' community and Hul'q'umi'num' people's collective relationship with *Hw'teshutsun*.

Following the ceremony, Cowichan Tribes declared 6000ha at *Hw'teshutsun* a “tribal preserve”, a public assertion of the intentions of the Hul'q'umi'num' ceremony and protocol.<sup>175</sup> This assertion likely drew inspiration from the declaration of Meares Island Tribal Park by Tla-o-qui-aht chiefs in 1984 in a similar effort to prevent logging on their territory without their consent.<sup>176</sup> The tribal park made public Hul'q'umi'num' assertions of sovereignty to their territory which exists regardless of recognition by BC or Canadian governments.

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<sup>174</sup> Hwitsum interview, Sept. 25, 2021.

<sup>175</sup> Cowichan Tribes, “Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades”, Nov. 30, 2000; Costa, “Tribes declare 6,000 hectares of sacred land off-limits to development.”

<sup>176</sup> ICE (Indigenous Circle of Experts), “We Rise Together: Achieving Pathway to Canada Target 1 through the Creation of Indigenous Protected and Conserved Areas in the Spirit and Practice of Reconciliation.”

***Protection agreement through a TRM:***

Following the Hul'q'umi'num communities' affirmation of their shared jurisdiction to *Hw'teshutsun* as part of their traditional territories and their intention to protect their values at *Hw'teshutsun*, BC and Canada negotiators and Cowichan Tribes reaffirmed their commitment to the treaty process on an accelerated basis to negotiate TRMs.<sup>177</sup> In January of 2001, BC and Canada tabled their TRM proposal in response to Cowichan Tribes' May 2000 proposal.<sup>178</sup> After considering specific areas of significance identified by Cowichan Elders, including bathing places along a particular creek, provincial negotiators proposed to protect an area of 1700ha at *Hw'teshutsun*.<sup>179</sup> This area was significantly smaller than the 5371ha proposed in Cowichan Tribes' presentation<sup>180</sup> or the 6000ha declared a tribal preserve.<sup>181</sup> The extent of the protected area was limited by funding policies on TRMs, private land ownership which is not available for treaty settlement and existing forestry tenures on Crown land.<sup>182</sup> The *Hw'teshutsun* protected area would remain Crown land and be publicly accessible for recreational use until treaty is settled. BC also suggested that they were willing to explore options to protect Cowichan cultural interests within Category A lands identified by Cowichan Tribes which were not included in the proposed 1700ha.<sup>183</sup>

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<sup>177</sup> Canada, British Columbia and Cowichan Tribes, "B.C., Canada, Cowichan Tribes Reaffirm Commitment", Dec. 8, 2000.

<sup>178</sup> BC and Canada, *TRM and IM Proposal in Response to Cowichan Tribes' May 26, 2000 Presentation*.

<sup>179</sup> BC's MAA, *Treasury Board Submission*.

<sup>180</sup> Cowichan Tribes, *TRM Presentation*.

<sup>181</sup> Cowichan Tribes, "Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades", Nov. 30, 2000; Costa, "Tribes declare 6,000 hectares of sacred land off-limits to development."

<sup>182</sup> BC and Canada, *TRM and IM Proposal in Response to Cowichan Tribes' May 26, 2000 Presentation*; BC's MAA, *Treasury Board Submission*; Caul interview, June 9, 2021.

<sup>183</sup> BC and Canada, *TRM and IM Proposal*.

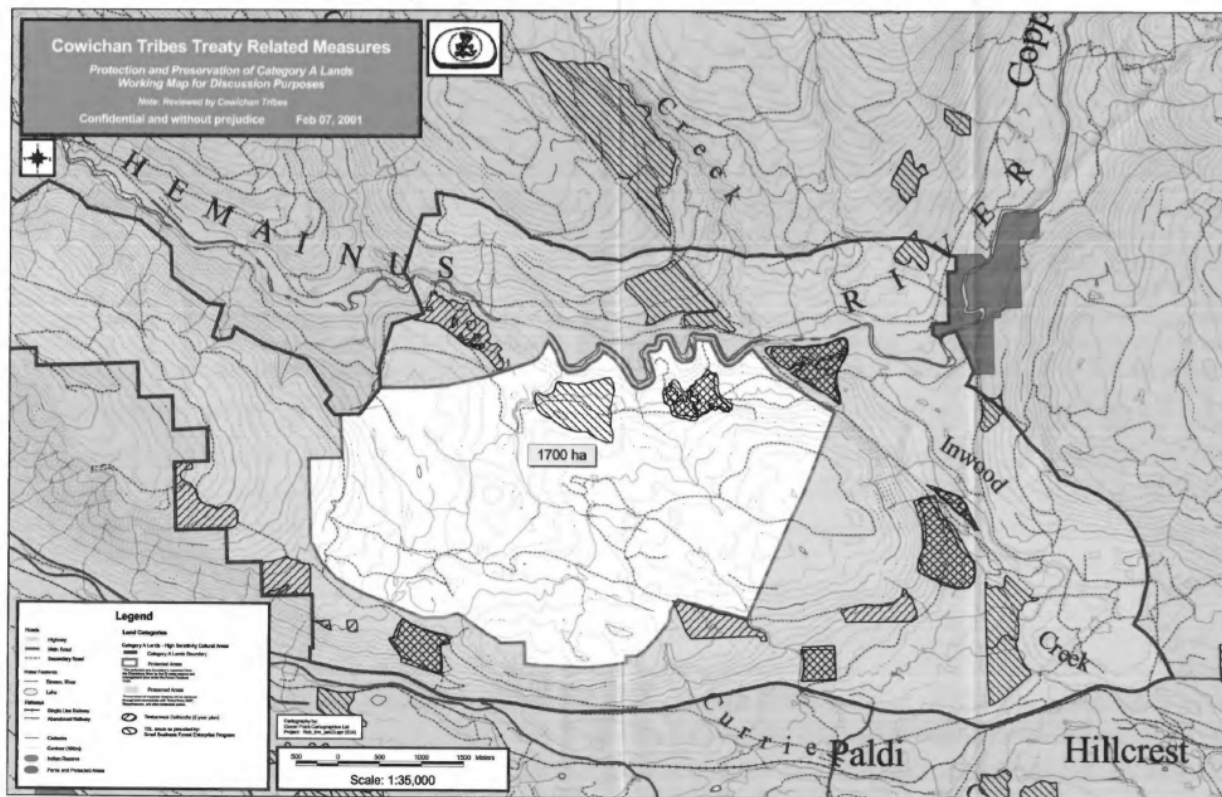


Figure 9: Canada and BC's January 20, 2000 TRM proposal which proposed a protected area of 1700 ha. The white polygon is the proposed protected area. The polygon outlined in solid black is the proposed IMA area.

The protection of Cowichan cultural interests outside the protected area were addressed in an Interim Measures Agreement signed between Cowichan Tribes, BC and Canada on February 19, 2001.<sup>184</sup> The IMA, which was to be renewed every five years, recognized that the *Hw'teshutsun* cultural landscape extends beyond the boundaries of the area which would later be protected through a TRM.<sup>185</sup> One of the first objectives of the IMA was therefore to “create and implement a process to address the preservation to the extent possible under existing legislation and policy... of the attributes of the Hw'te shutsun Area that are considered important to Cowichan Tribes.”<sup>186</sup>

The IMA did not prevent forestry or other industrial activity within the larger *Hw'teshutsun* area

<sup>184</sup> Cowichan Tribes, BC and Canada, *Hw'te shutsun Interim Measures Agreement*.

<sup>185</sup> BC, “Cowichan TRM/IMA Q&As.

<sup>186</sup> Cowichan Tribes, BC and Canada, *Hw'te shutsun Interim Measures Agreement*, 7.

The objectives of the IMA were twofold: to determine a way to protect cultural attributes throughout a larger area and to establish a Cowichan economic forestry base. As this agreement was not dependent upon the treaty process, HTG was not a signatory.

but rather sought to “promote greater understandings and appreciation” of the cultural attributes of *Hw’teshutsun* through improved consultation and information sharing between Cowichan Tribes, BC and industry.<sup>187</sup> The IMA sought to create a Joint Implementation Council comprised of two representatives from each BC and Cowichan Tribes to implement the agreement and to provide a meaningful way for Cowichan Tribes and the province to discuss management of the larger *Hw’teshutsun* area.<sup>188</sup>

The IMA was signed in conjunction with the TRM, the agreement that drew upon BC legislation to protect land from development according to the teachings and values asserted by Cowichan Tribes. Part of the difficulty in protecting *Hw’teshutsun* was finding a piece of legislation to support Cowichan Tribes’ aims. This was expressed by provincial negotiator Doug Caul:

The legislation that’s out there, especially at that time, was really oriented towards accessing land and resources for the purposes of development. Extraction, development, doing something. And there was very little- there was no contemplation in our legislative framework back then around making room for taking land out of that development frame and including it in the context of a treaty settlement. So it was brand new for us to sort of find our way through that. So much of the legislation was aimed towards extraction and development, and here we were having a conversation about the opposite.

I remember being almost pleasantly surprised when I found out that the *Forest Act* included a tool that was available for us. Because honestly..., I probably thought, “how do we actually protect land? There’s no tools available.” So finding it in the *Forest Act*, this tool that hadn’t been used before, was handy, was helpful. So somebody who did the *Forest Act* way back when had the foresight to actually include [a protection mechanism]. I don’t think it was ever contemplated for doing it for reconciliation purposes, and that in itself created an interesting conversation around what was the original intent of legislators when they created Part 13 of the *Forest Act*. But clearly we got the legal advice that said you could use it that way.<sup>189</sup>

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<sup>187</sup> Cowichan Tribes, BC and Canada, *Hw’te shutsun Interim Measures Agreement*, 7.

<sup>188</sup> Cowichan Tribes, BC and Canada, *Hw’te shutsun Interim Measures Agreement*.

<sup>189</sup> Caul interview, June 9, 2021.

Cowichan Tribes leadership was amenable to BC's proposal to prevent any industrial activities within 1700ha at *Hw'teshutsun*, and on March 7, 2001, a protection TRM was signed between Cowichan Tribes, HTG, BC and Canada.<sup>190</sup> BC and Canada's mandates did not allow for protection TRMs until the First Nation, Canada and BC have reached an Agreement-in-Principle (AIP) in their treaty negotiations. As HTG did not have an AIP, special approval for this protection agreement was needed from BC Ministers.<sup>191</sup>

BC legislated the protection of *Hw'teshutsun* from forestry through Part 13 of the *Forest Act*, which allows for temporary protection of an area from harvesting with Cabinet approval.<sup>192</sup> Part 13 stipulates that it must be in the public interest to protect the area. As the TRM was an important step in treaty negotiations, especially as it sought to reactivate treaty discussions that HTG had temporarily suspended,<sup>193</sup> and in establishing Cowichan economic forestry base,<sup>194</sup> BC negotiators determined that the protection TRM was in the public interest. Cabinet protected the area under s.169 in Part 13 of the *Forest Act* and suspended permits and licences under s.170. They also drew upon s.173, under which the Chief Forester may reduce Annual Allowable Cuts (AAC) in TFL 46, to prevent logging by TimberWest at an area they had tenure to within the protected area.<sup>195</sup> This was the first time the *Forest Act* was used to temporarily protect lands under a treaty related measure.<sup>196</sup> BC wanted to ensure that the area was protected by law from other forms of development, and thus used section 16 of the *Land Act* and a no-staking reserve in s.22 of the

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<sup>190</sup> Canada, British Columbia, Hul'qumi'num Treaty Group and Cowichan Tribes, *TRM*.

<sup>191</sup> British Columbia, "Notes for Cowichan Tribes' TRM and IM Proposal", Jan. 20, 2001.

<sup>192</sup> Caul interview, June 9, 2021; BC's MAA, *Treasury Board Submission*.

<sup>193</sup> BC and Canada, *Preliminary TRM Proposal: Cowichan-HTG*; BC and Canada, *TRM and IM Proposal*.

<sup>194</sup> Cowichan Tribes and BC were pursuing an economic development agreement within the same negotiations which would allow for Cowichan forestry. Canada and Cowichan Tribes, *Treaty-Related Measure: Forest Sector Economic Development Study Contribution Agreement*.

<sup>195</sup> BC's MAA, *Treasury Board Submission*.

<sup>196</sup> Rhonda Morris (MoF) to Jeff Smith and Doug Caul (MAA), email, Dec. 13, 2000; Robert Leece, interview by Jen Argan, June 9, 2021.

*Mineral Act* and No-Disposition Notation to prevent future land and resource claims.<sup>197</sup> These measures were temporary – the TRM must be renewed biannually – as the land would eventually be part of an HTG Final Agreement rendering this legislation unnecessary.<sup>198</sup> To date, no Final Agreement between BC, Canada and HTG has been reached, and Hill 60 is still held as Crown land.

The TRM and IMA also included Cowichan Tribes’ agreement to effectively streamline the approval process for other forestry, mineral, oil and gas exploration in their territory, “promote certainty... for non-Cowichan interests”.<sup>199</sup> Cowichan Tribes also agreed not to assert aboriginal title and to continue to participate in the treaty process.<sup>200</sup> While this TRM achieved Cowichan Tribe’s desire to protect *Hw’teshutsun*, it also made development easier within other areas of Cowichan territory.

The TRM states that this agreement “is not intended to nor is it interpreted to create, recognize, affirm, limit or deny aboriginal rights, including title or treaty rights”.<sup>201</sup> While Cowichan Tribes leadership took the position throughout negotiations that they have unextinguished aboriginal title, rights and interests at *Hw’teshutsun*, these have neither been affirmed nor denied through the agreement. However, in practice, Cowichan’s aboriginal rights at *Hw’teshutsun* were effectively protected as the TRM prevents industrial activity which would have harmed the ability of Hul’q’umi’num’ people to exercise their aboriginal rights there.

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<sup>197</sup> BC’s MAA, *Treasury Board Submission*; Caul and Leece interview, June 9, 2021.

<sup>198</sup> British Columbia, *Treasury Board Submission*; Canada, British Columbia, Hul’qumi’num Treaty Group, Cowichan Tribes, *TRM*; Doug Caul and Robert Leece interview by Jen Argan, June 9, 2021.

<sup>199</sup> Cowichan Tribes, BC and Canada, *Hw’te shutsun Interim Measures Agreement*, 8; Canada, British Columbia, Hul’qumi’num Treaty Group and Cowichan Tribes, *TRM*, 5; BC’s MAA, *Treasury Board Submission*.

<sup>200</sup> Canada, British Columbia, Hul’qumi’num Treaty Group and Cowichan Tribes, *TRM*, 4-5.

<sup>201</sup> Canada, British Columbia, Hul’qumi’num Treaty Group and Cowichan Tribes, *TRM*, 4.

The teachings and values shared by Cowichan Elders which initiated the work to prevent development at *Hw'teshutsun* and to protect it for present and future generations<sup>202</sup> were recognized by the province and shaped provincial legislation. In a province where Indigenous cultural places and landscapes are routinely destroyed and there is little working legislation capable of protecting places with intangible cultural value, *Hw'teshutsun* is an example of how these places and landscapes can be protected. Throughout the controversy and negotiations to protect Hill 60, Cowichan Tribes drove the direction of the discussions and demanded ongoing work to come to an agreement within a reasonable timeframe. Cowichan Tribes leadership asserted their self-determining authority and jurisdiction to their territory in ways that could not be overlooked by the provincial government including litigation, calls for direct action and the declaration of a tribal preserve. The TRM is an agreement resulting from such assertions of Cowichan jurisdiction, Hul'q'umi'num' teachings and governance through the Hul'q'umi'num' protocol and use of provincial legislation to protect an important Hul'q'umi'num' area.

***Recent protection of the integrity of Hw'teshutsun:***

Since the protection TRM in 2001, TRM renewals have come up every two years and *Hw'teshutsun* continues to be protected through BC legislation. As a treaty has not been signed between HTG, BC and Canada, *Hw'teshutsun* remains Crown land. It is not easily accessible for elders as the steep mountain has gates across the logging roads, but this does not stop other residents of the Cowichan Valley partying and quadding in the forest. Hill 60 is not the controversial area at the front of people's minds today as it was in the late 1990s-early 2000s, and some Cowichan Tribes staff are concerned that without broader knowledge of the protection

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<sup>202</sup> Cowichan Tribes, Chemainus First Nation, Halalt First Nation, Lyackson First Nation and Penelakut Tribe *Protocol*.

agreement and the cultural significance, people who do not know about the importance of *Hw'teshutsun* will log it.<sup>203</sup>

In 2019, the VIMC owners applied to Municipality of North Cowichan for an expansion which was opposed by Cowichan Tribes, many Cowichan members and other CVRD residents.<sup>204</sup> Cowichan knowledge keeper Jared Qwustenuxun Williams was vocal in his stance against the expansion of the noise park. His objections to the expansion of the noise park were the same as those expressed twenty years previously by Cowichan Elders who had worked to protect the integrity of the area by maintaining quiet and seclusion:

So, in yesteryear, this was way up in the woods because we used to live over here, so you'd have to walk all that way, not just drive. You had to walk all the way up there. And then you're there, and then there's nobody around. It's just you. You're in the woods. [Now you go and] you're able to reconnect and then all you can hear is [machine noises]. Terrible, right? How do you reconnect when you're surrounded by this horrible sound?...

We leave where the ugly noise is in order to go up there and now they want to put some more ugly noise up there. And so, I think it reaches a point where you're like, "when is it enough? How much do we need? Can't you have that over where there is noise, over there, and just leave us up here?"<sup>205</sup>

North Cowichan rejected the expansion in December 2019. However, this proposal is just one of the ongoing threats to culturally significant Cowichan places and the work done by Cowichan Tribes to care for their territory.

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<sup>203</sup> Meeting between Cowichan Tribes Lulumexun Lands and Self-Governance Staff, Jen Argan and Brian Thom, Nov. 6, 2020.

<sup>204</sup> Goulding, "N. Cowichan rejects Motorsport rezoning for a second time"; Dickson, "Motorsport company puts brakes on track expansion, plans lawsuit".

<sup>205</sup> Williams, interview, April 13, 2021.

## **Appendix B: Selected archival documents**

This appendix includes selected archival documents shared by Cowichan Tribes or obtained through FOI requests to British Columbia and the Cowichan Valley Regional District. These documents were particularly significant in piecing together the story of the protection of *Hw'teshutsun* and serve as important archives.



Province of  
British Columbia  
VANCOUVER ISLAND REGION

BC Lands

FIELD SERVICES  
MISCELLANEOUS REPORT

PURPOSE  
Of Report

<input type="checkbox"/> Abandonment	<input type="checkbox"/> Clean-up	<input type="checkbox"/> Review	<input checked="" type="checkbox"/> FT	FILE NO.  1408608
<input type="checkbox"/> Amendment	<input type="checkbox"/> Disallowance	<input type="checkbox"/> Trespass	<input type="checkbox"/> NPT	
<input type="checkbox"/> Assignment	<input type="checkbox"/> Expiry	<input checked="" type="checkbox"/> Other	<input type="checkbox"/> New	
<input type="checkbox"/> Cancellation	<input type="checkbox"/> Reserve			

APPLICANT  
Name

Report Date 97/09/19	Field Exam Made <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Date Made 97/09/18	<input checked="" type="checkbox"/> Status Completed <input type="checkbox"/> Not Completed <input type="checkbox"/> Not Required	Examiner JAS	Work Area
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PURPOSE  
& Tenure

Conditional Lease of Recreational District  
LEASE - LEASEHOLD

LEGAL

Description  
LOCATION

Those Portions of Blocks 219 and 229, Conditional  
Hill 60  
LAKE DISTRICT

Area	64.0 Ha ±
Ref. Map	9213.081

RENTAL  
Formula

(Specify Rental Rate, Land Value Type, Minimum, etc.)  
NOMINAL

Annual Amount \$ 1.00

Prepaid for 2 years (SEE REPORT)

Discount Rate & Period:

Other

Tenure Land Value:	
<input type="checkbox"/> Determined by Owner (A)	
<input type="checkbox"/> Fee Appraisal (A)	
<input type="checkbox"/> BCAA (B)	
<input type="checkbox"/> Zonal (Z)	

NEXT  
Review  
REQUIREMENTS

Date: 2 years from issuance

Circle Reason:  Rental; Insurance; Mgt. Plan; Royalty Rate; Security  
 Expiry; Diligent Use; Other:

Security Amount Existing	S.T.C. Required	Upland Owner Consent
Recommended	On File	Required On File

Typed version of Field Services Miscellaneous Report is presented on the following pages.

**RECOMMENDATION:**

- Please see previous reports on this file as well as license documents and offer (prepared but not yet sent) dated July 12, 1997.
- See also Site Reclamation Report (and amendment) prepared by Polster and Associates and letters addressed to Cowichan Valley Regional District by Piteau Associates drawing with concerns expressed by the Hul'Qumi'Num Treaty Group regarding ground water and water management issues.
- It is considered that, together, these reports provide assurance that, provided that all recommendations are followed and all regulations and/or management requirements imposed by the relevant branches of B. C. Environment are followed, the likelihood of any adverse impacts on adjacent lands or watercourses will be minimal and the site can be successfully reclaimed to forest use.
- In view, however, of advise from the Cowichan Tribes that the site and surrounding area are the location of traditional sacred bathing sites, a further visit was paid to the Hill 60 site and surrounding area on September 18. Present were Keith Anderson, Senior Land Officer; Bill Hollingshead, Manager.
- The Cowichan Tribes had been advised of the visit by both telephone and fax, and their participation invited, but there had been no response and no representative of the band was found to be on site. The visit included a traverse of all existing roads within the 64 hectare site (including both old logging roads and new roads cleared for exploration) as well as the Hill 60 road leading to and beyond the site and the old road running to the Chemainus River Valley. Much of this traverse was done on foot and as part of it, all running watercourses were inspected for pools and for evidence of human use (trails, debris, etc.). It was confirmed that that the entire area, extending far beyond the site itself, is second growth timber, logging having taken place approximately 60-70 years ago.
- Several of the old roads through the site are trafficable but there are also several overgrown skid trails.
- Evidence was found of at least one old cabin (almost totally disintegrated) and of several instances of garbage deposition (both old and recent). Several mineral claim corner posts (old and recent) were found and 3 cars were parked at various locations near (but not on) the site.
- One of these cars was owned by mushroom (Chanterrelle) pickers and it is likely that the remaining two were owned by mushroom or salal pickers as well.
- There is one very large swamp in the middle of the site which is traversed by a road via a causeway.
- This, like the smaller swamps in the area, is wholly vegetative with Hardhack, Willow, Crabapple, Sedges and various other semi-aquatic vegetation and showed no detectable areas of open water which could be used for bathing.
- The swampy area feeds a creek (likely perennial) which ultimately leads to the Chemainus River (other creeks encountered were dry or nearly so, even after a wet summer and two significant rainy periods in late August and mid September).
- It was on this creek, somewhat beyond the north boundary of the proposed dumpsite, that one possible pool was detected (it appeared as if it might have been artificially created by the felling of a tree across the creek).

- While there was no obvious trail leading to this site, there was, in the immediate vicinity, of paper debris from at least one “take-out” meal (coffee cup, bag, part of a styrofoam tray) and, unusually for the general area, the pool had a gravelly (rather than muddy) bottom with a small gravelly beach.
- As this pool was very close to the old cabin (remnants) mentioned above, however, it is possible that it may at one time have been dammed as a water source.
- The swamp mentioned above is fed via the headwaters of the stream which flow into the site from the higher ground to the west.
- If there are pools on this stretch of the stream they would not be impacted as they lie outside and upstream of the site.
- The southern slopes of the site are both steeper and dryer than the north and no permanent streams were noted here.
- These findings are confirmed by air photos of the area (BCC93027 No. 74-75) and shown on the attached map.

### RECOMMENDATION

- Based on the past review of the site and proposal and the visit of Sept. 18, the following conclusions can be drawn
  - a) If properly constructed and managed, the landfill will not have a deleterious effect on the quality of the surface or ground water.
  - b) As leachate from the site will be piped away, there will be a slight reduction in the flow of the perennial stream draining the area to the north and east. This will be minimized, however, as it is understood that the headwaters of the stream will be diverted around the site.
  - c) The site and its surroundings are far from pristine, \_\_\_\_\_ second growth timber with ample evidence of past logging, mineral exploration and, possibly settlement. There is also evidence of recent sporadic use by mushroom and salal pickers and the remnants of at least one deer or elk skeleton make it possible that it is also used for hunting.
  - d) There was no clear evidence of any ceremonial or other use by First Nations. There is also no clear indication of any differentiation between this area and the very large tract of similar logged land extending west between the Cowichan and Chemainus rivers from Mount Prevost to Lake Cowichan and beyond.
- In view of this, it is recommended that, as there will be no apparent significant infringement upon traditional First Nations uses and as the project is in the public interest (it will serve 70,000 ± inhabitants of the Cowichan Valley), the application be approved as previously recommended.

Signed

W. A. Hubbard

**RATCLIFF & COMPANY**

BARRISTERS &amp; SOLICITORS

HARRY A. SLADE  
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\* Non Practising

JOHN A. RUDDY (1938-1993)

Certain members of the firm are also called to  
the Bars of Sask., Man., Yukon, N.W.T., and Texas

February 3, 1998

**WITHOUT PREJUDICE**

Honourable Cathy McGregor  
Minister of Environment, Lands and Parks  
Room 337  
Parliament Buildings  
Victoria, BC V8V 1X4

Honourable Dave Zirnheft  
Minister of Forests  
Room 128  
Parliament Buildings  
Victoria, BC V8V 1X4

Dear Ministers:

**Re: Infringement of Aboriginal Title and Rights of Cowichan Tribes  
through approval of "Hill 60" Landfill Proposal**

We represent the Cowichan Tribes in this matter. As you may be aware, the Cowichan Valley Regional District ("CVRD") is planning to relocate the existing landfill located on Cowichan reserve lands to another area of Cowichan Traditional Territory known as Hill 60.

The Elders oppose the CVRD plan. On July 23, 1997, the Cowichan Tribes advised the CVRD that the Cowichan Tribes oppose further development of Hill 60 for reasons including that the area has traditional sacred sites. In order to accommodate the CVRD locating another site, the Cowichan Tribes proposed redevelopment of the existing landfill site with a possible five year extension subject to environmental concerns.

Despite being made well aware of the Cowichan Tribes' opposition to this development, the Provincial Crown has issued a license of occupation, has indicated it will automatically issue a long term lease, is in the process of issuing an operational certificate, and is considering issuing a license to cut timber on Hill 60.

February 3, 1998  
Page 2

The decision of the Supreme Court of Canada in *Delgamuukw* has given legal expression to the position of the Cowichan Tribes throughout; Hill 60 lands are subject to Cowichan aboriginal title and, for a development of this magnitude, prior consent of the Cowichan Tribes is required. Moreover, in the unlikely event that infringement of title could be justified, then fair compensation is required.

Chief Justice Lamer had this to say in the *Delgamuukw* decision on the duty to consult:

"The nature and scope of the duty of consultation will vary in the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation..." (Emphasis added)

Establishment of the landfill will severely infringe Cowichan aboriginal title and rights. Once a landfill is created in the vicinity of sacred sites for bathing and ritual practises, traditional areas for hunting, gathering foods, medicines and culturally technology materials, Cowichan aboriginal title and rights will be severely infringed by surface or subsurface contamination, impacts on wildlife and natural resources, and the noise, pollution, smell, and other deleterious impacts associated with the operation of the landfill.

The Crown has not fulfilled its legal obligation to consult with the Cowichan. We note in particular:

1. The Cowichan Tribes have not been provided with any of the archaeological, traditional use, ethnographic, or other cultural heritage studies which should have been prepared for all sites under consideration, including Hill 60.
2. The Cowichan Tribes were not involved in any of the archaeological and other types of cultural heritage studies in order to offer an aboriginal perspective to the research.
3. In October 1997, the Cowichan Tribes advised the Ministry of Environment, Lands and Parks that they would commission independent traditional use studies on Hill 60, in order to demonstrate

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Page 3

their aboriginal title and rights. The Provincial Crown then proceeded to issue a site tenure, without awaiting the results of this work.

4. Most importantly, the CVRD, with the tacit agreement of the Provincial Crown, summarily dismissed the proposal of Cowichan Tribes to extend the existing lease as an interim solution because, "time and process will not permit beneficial development of the site".

The selection of a site for the landfill involves more than simply time and cost for the CVRD; it involves avoiding the desecration of an area which is sacred to the Cowichan Tribes.

We call on the Provincial Crown to take the necessary steps to halt further development activity associated with the Hill 60 Landfill Proposal, halt the issuance of further Crown permits and licenses, and rescind those permits and licenses which have already been issued to the CVRD.

Once all development activity has been halted, we seek negotiations with the Provincial Crown and CVRD, which would lead to the early identification of an alternative landfill site which reconciles the interests of the parties, and places equal weight, as per *Delgamuukw*, on Cowichan title, rights and interests and the interests of the Provincial Crown.

Failing an immediate halt to any further activity, including the issuance of further licenses and permits in relation to Hill 60, we are instructed to pursue all available legal remedies in order to protect the aboriginal title, rights, and interests of the Cowichan Tribes.

Please advise us of your position in this regard.

Yours truly,

**RATCLIFF & COMPANY**

**ROBERT H. BOTTERELL**

RHB:jjj

cc: Chief Lydia Hwitsum, Cowichan Tribes  
Earl Whonnock, Regional Director, Environment and Lands, Vancouver Island Region  
Chris Hayhurst, District Manager, Ministry of Forests  
Rob Hutchins, Chair, Cowichan Valley Regional District  
Doug Caul, Director, Aboriginal Affairs, Ministry of Forests

LT\98-0353.LT:1



File: 19540-30/L43929

May 12, 1998

Robert Hutchins
Chairperson
Cowichan Valley Regional District
137 Evans Street
Duncan, B.C. V9L 1P5

Dear Robert Hutchins:

As indicated to you last week, I am writing to inform you of my determination on whether there will be an infringement on aboriginal rights created by the issuance of Licence to Cut L43929 for the initial phase of the Hill 60 landfill site. I believe the most efficient way to do this is to share with you the following two paragraphs from my letter to Chief Lydia Hwitsum.



"I am confident that logging the area currently proposed in the CVRDs application for licence to cut, can be conducted without infringing upon the aboriginal rights associated with the area. Specifically, the rights associated with the vegetation and wildlife in the swamps will not be affected by the Licence to Cut, as the logging occurs outside the swamps. I am also confident that conditions of the Forest Practices Code of B.C. Act can prevent impacts on water quality in Creek 9. Other traditional use activities such as general hunting and gathering, are broader-based, seasonal, and not specifically dependant on the site.

It is therefore my determination that approval of Licence to Cut L43929 and Road Permit R09817 would not create an infringement of aboriginal rights. However, in fairness to all parties, I must clarify that this determination applies only to the nine and one half hectares currently under application and that if the application had included the entire area to be developed, my determination would have been different. That conclusion is based upon my review of the ten, twenty, and fifty year projections in the CVRD site development plan and the TUA information provided by the Cowichan Tribes."

There are two factors in my determination which I would draw to your attention before I issue the Licence to Cut. The first is whether you wish to proceed in light of the second sentence in the preceding paragraph. The other is that pursuant to Section 21 of the Forest Practices Code of B.C. Act, I require that you prepare for my approval a logging plan which meets the requirements of the Operational Planning Regulation, and in particular addresses the maintenance of water quality.

.../2

Ministry of Forests

South Island Forest District

Mailing Address:
4227 Sixth Avenue
Port Alberni, British Columbia
V9Y 4N1

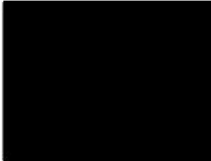
Location:
4227 Sixth Avenue
Port Alberni, British Columbia
V9Y 4N1

Tel: (250) 724-8205
Fax: (250) 724-8281

Robert Hutchins  
Page 2

I acknowledge the sensitivity of timing to your operations, and upon receipt of your response to the above, will assign priority to dealing with your applications. Should you need clarification or further discussion, please call me at 250-724-9206.

Yours truly,



C.H. (Chris) Hayhurst  
Acting District Manager

cc: Chief Hwitsum, Cowichan Tribes

Bill Hollingshead, MoELP



## Cowichan Tribes

5700 Albany Road Duncan, B.C. V9L 5J1  
 Telephone (250) 748-3100 Fax: (250) 748-1233

For immediate release

October 8, 1999

### COWICHAN TRIBES PLAN TO LOG THEIR TERRITORY

**DUNCAN** - Cowichan Tribes leaders say they will put their people to work early in the new year logging trees in their traditional territory unless the B.C. government and forest companies negotiate a speedy resolution to outstanding issues surrounding access to forest resources.

"With almost 3,500 members, we have substantial forestry needs," Cowichan Chief Councillor, Lynn Hwitsum, says. "While we hope the Province will negotiate seriously with us, our people have told us 'enough is enough.' We won't stand idly by while our territory is stripped again of trees and treaty talks drag on."

"Today, we're serving notice to the Province and the forest companies: Our people are going to work in the woods early in the new year."

The Cowichan Tribes prefer negotiation to litigation or direct action. "But," Hwitsum says, "the Minister of Forests, Minister of Aboriginal Affairs, and forest companies have failed to respond to our requests for meetings. Meanwhile, important decisions affecting our lands such as this week's transfer of forest tenures from MacMillan Bloedel to Weyerhaeuser, are made without the Ministers of Forests and Aboriginal Affairs addressing our concerns."

The transfer is just one of a number of recent decisions which have the potential to jeopardize Cowichan rights and interests. Last year, B.C.'s Environment and Forests Ministries almost approved a garbage dump in a sacred area of Cowichan Territory. Now there is a proposal to log the same area. Earlier this year, the Province identified almost 17,000 hectares of Crown land to be transferred to MacMillan Bloedel. If the transfer had gone through, the Cowichan people would have been left with almost no land to select to meet their treaty land forestry requirements.

The Cowichan Tribes have for centuries selectively harvested wood from surrounding forests for use in the building of houses, community facilities, artworks and for other cultural purposes. The Cowichan have constitutionally protected rights to do so, and will have no difficulty proving that they have title to their traditional lands as well.

Hwitsum says the Cowichan Tribes plan to log in a manner that is consistent with traditional practices. By January 2000, they will have a sustainable and environmentally sound logging plan in place. **(see next page)**

**(continued)**

The selective logging will support the Cowichan people's housing, cultural, community, and economic needs. Logging plans will be referred to the Province which will have 60 days to respond and provide input. Existing parks will not be logged. Beyond that, Cowichan leaders won't wait any further before putting people to work.

"We have to take this action now," Hwitsum says. "Our people are very worried that the government's current approach to treaty negotiations will leave us with nothing at the end of the day. We'll be sitting at the negotiating table with no Crown land and resources to put in a treaty."

For More Information Contact Chief Councillor Lydia Hwitsum: 

# Vancouver Island band joins logging

The Cowichan Tribes leaders say they would prefer to negotiate, but worries that their land is being stripped of timber force them to begin to cut trees illegally.

**KIM PEMBERTON**  
VANCOUVER SUN

A Vancouver Island native Indian band says it will follow three other native groups into the forest and begin logging without provincial permits.

Cowichan Tribes leaders blame the slow pace of forest resources treaty negotiations and say they'll begin logging traditional territory in January.

Westbank Tribal National and the Okanagan band began logging without permits in early September. The Shuswap communities of Adams Lake, Neskonlith and Spallumcheen began harvesting lumber at Harper's Lake, near Chase Sept. 28. A stop-work order has been issued.

Cowichan Tribes leaders say they prefer negotiations over action, but that they are forced to take a stand.

"While we hope the province will negotiate seriously with us, our people have told us 'enough is enough.' We won't stand idly by while our territory is stripped again of trees and treaty talks drag on," said Cowichan Chief Councillor Lydia Hwitsum Friday.

She said the minister of forests, minister of aboriginal affairs and forest companies have not responded to the Cowichan Tribes requests for meetings.

Nor did the government consult with the bands on decisions that had ramifications on the Cowichan, she said, pointing to this week's transfer of forest tenures from MacMillan Bloedel to Weyerhaeuser as an example. And last year, the bands weren't consulted on a decision to put a garbage dump in a sacred area of Cowichan territory.

tinuing, he said.

The Shuswap has been issued a stop-work order and the ministry of forests is waiting to hear whether they will comply, Hall said.

The Westbank stopped logging out of respect for B.C. Supreme Court justice William Davies, Tribal nation

chief Ron Derrickson said previously.

Last month Davies, in a procedural hearing, ruled the band could make arguments in that compliance order case that it has aboriginal rights and title in Hidden Creek.

A date has not yet been set for that trial.

Hall said the court case to seek a compliance order against the Okanagan band won't proceed provided they do not resume harvesting.

Meanwhile, a blockade that was erected Wednesday by the Siska First Nations near Lytton came down after J. S. Jones Timber Company went to court and got an interim injunction. A hearing in B.C. Supreme Court for a permanent injunction is expected to take place Tuesday.

An outside proposal to log in the area worries the Cowichan. They fear that when treaty negotiations to get under way, there will be almost no land left that meets with their forestry requirements.

"With almost 3,500 members we have substantial forestry needs," she said.

The Cowichan Tribes will have a logging plan, which they believe will be sustainable and environmentally sound, in place by January.

"We have to take this action now," said Hwitsum. "Our people are very worried that the government's current approach to treaty negotiations will leave us with nothing at the end of the day. We'll be sitting at the negotiating table with no Crown land and resources to put in a treaty."

But ministry of forests official Dave Hall said the provincial government has recently agreed to treaty-related interim measures and is awaiting the federal government approval, expected later this month.

He said the interim measures would be available to those First Nations who are further along in the process to reach an agreement in principle.

Meanwhile, of the three First Nations who logged without provincial permits, only one appears to be con-

## What was said

*"While we hope the province will negotiate seriously with us, our people have told us 'enough is enough.' We won't stand idly by while our territory is stripped again of trees and treaty talks drag on."*

Cowichan Chief Councillor Lydia Hwitsum

TIMES COLONIST

## TOP STORIES

## ▼ FORESTRY

Cowichan  
bands target  
Crown land  
for loggingBy Malcolm Curtis  
Times Colonist staff

The First Nation famous for carving the City of Duncan's totem poles has been denied access to wood for economic development.

As a result, the Cowichan tribes are planning to follow in the footsteps of the Okanagan Valley's Westbank Indian band by logging on Crown land.

"We are in the process of developing plans to harvest within our traditional territory in the new year," Lydia Hwitsum, Cowichan council chief, said this week.

The Cowichan tribes have 3,500 members spread over seven villages in the Cowichan Valley. And while they have no trees to cut on their 500 hectares of reserve land, they watch helplessly as major forest corporations ship truckloads of timber out of the valley.

The tribes claim traditional use of land stretching from Cowichan Bay to Cowichan Lake, as well as part of the Gulf Islands.

The tribes have tried without success to get the provincial government and forestry companies to come to the table to discuss providing access to timber, said Hwitsum. The Cowichan tribes won't say where they plan to cut trees but they say they plan to log in a "sustainably environmental manner."

But Forests Ministry spokesman Dave Hall said the province has not been contacted by the First Nation about its logging plans.

"Our general position is that harvesting without authorization from the ministry is a violation," Hall said.

The province has agreed in principle to interim measures to enable First Nations close to a land claim agreement to benefit from economic development before the deal is actually signed, he said. But the government is waiting a response from Ottawa to cost-share such interim deals, he said.

Historically, the Cowichan tribes have carved totems, and built canoes and wooden works of art. Although they have set up a forest corporation to do contract work, they have no land of their own to log, said Hwitsum.

The First Nation is involved with the larger Hulqumimum group of native Indians on Vancouver Island in land claims talks with the province and the federal government. But those negotiations are proceeding at a snail's pace while no interim measures have been put in place to deal with the aboriginal right to traditional territory, a right recognized by the Supreme Court of Canada in 1997, said Hwitsum.

Meantime, major decisions affecting land within the Cowichans' traditional territory — such as the transfer of forest tenures to Weyerhaeuser from MacMillan Bloedel — are ongoing, she said.

While companies are routinely given compensation whenever they lose rights to Crown land, First Nations are denied access to land to which they have aboriginal rights, she said.

Aboriginal Affairs spokesman Peter Smith acknowledged no treaty negotiations have been held with the Hulqumimum group for nine months. But that's because the First Nations involved cancelled talks so they could reorganize their negotiation team, Smith said.

The group has reached stage four of a six-stage land claims process and had been working toward an agreement in principle. Smith said the government is prepared to talk about interim economic measures for the Cowichan tribes once the negotiations resume.

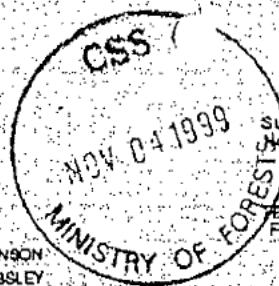
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JOHN A. RUDDY (1838-1993)

October 27, 1999

Honourable David Zirnelt  
Minister of Forests  
Room 128  
Parliament Buildings  
Victoria, BC

Dear Mr. Zirnelt:

**Re: Forestry Activity on Crown Land within Cowichan Tribes Traditional Territory**

We represent the Cowichan Tribes. We are writing in response to several letters received regarding forestry activities proposed for Crown Lands within Cowichan Tribes Traditional Territory. In particular, we refer you to the following letters:

- letter dated August 27, 1999 regarding Management Plan Woodlot Licence 0024,
- letter dated September 29, 1999 regarding proposed 1999 - 2004 Forest Development Plan for Woodlot Licence 0022, and
- letter dated January 19, 1999 regarding SBFEP Timber Sales Licence A52664.

We request that there be no more forestry-related activity, including timber harvesting on Crown Lands within Cowichan Tribes Territory, until the concerns of the Cowichan are addressed.

As we have noted in the past (for example please refer to our June 25<sup>th</sup>, 1999 letter attached) there is very little Crown land within Cowichan Tribes Traditional Territory which has not been alienated in one form or another. The continued issuance of woodlot licences, timber sale licences, and other tenures, unjustifiably infringes the Aboriginal Rights, Title and Interests of the Cowichan Tribes, and puts future treaty negotiations in jeopardy.

As the Supreme Court of Canada in *Delgamuukw* noted, Aboriginal Title has an "inescapable economic component". The continued alienation and depletion of forest resources within Cowichan Territory, has the potential to render treaty negotiations and treaty-related measures to reach a "reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown" meaningless.

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CERTAIN MEMBERS OF THE FIRM ARE ALSO CALLED TO THE BARS OF  
ALTA., SASK., MAN., ONT., YUKON, N.W.T., NUNAVUT AND TEXAS

File No. 99-1322

Via Fax 387-1040

MINISTER OF FORESTS

Page RECEIVED

MRL #: 18578

OCT 27 1999

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DUE DATE:

DRAFT REPLY

REPLY DIRECT

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- 2 -

On a number of occasions, including on September 24<sup>th</sup>, 1999, October 1<sup>st</sup>, 1999, through our press release on October 8<sup>th</sup>, 1999, and in a meeting attended by Timberwest and your District Manager, Cindy Stern, we have requested a meeting with yourself and Minister Lovick, to resolve how we can negotiate a resolution to forestry issues negatively impacting Cowichan Tribes. We have also notified you that in the absence of a resolution of this matter, the Cowichan intend to exercise their Aboriginal Rights, Title and Interests with respect to the forestry resource within Cowichan Territory.

We are awaiting your reply and we are hopeful that you will agree to meet.


In order to foster a positive climate for discussions and negotiations related to the forestry resource within Cowichan Territory, and as evidence of the Crown's good faith, we request that the Ministry of Forests take the necessary steps to place further processing of any forest development plans, tenures, licences, permits, etc., including Woodlot Licence 0024, Woodlot Licence 0022, and Timber Sale Licence A52664, on hold, pending resolution of Cowichan Tribes forestry concerns.. This voluntary act on the part of the Ministry of Forests would signal to the Cowichan Tribes that you are prepared to stop further alienation and depletion of the forestry resource within Cowichan Tribes Territory, while the Government of British Columbia and Cowichan Tribes seek to resolve pressing issues related to the forestry resource.

We note that we wish to continue being provided with referrals regarding any possible forestry activity within Cowichan Tribes Territory.

Thank you for your assistance in this regard. Please contact me if you have any questions.

Yours truly,

RATCLIFF & COMPANY

  
ROBERT H. BOTTERELL

RHB:ktm

cc: Lydia Hwitsum, Cowichan Tribes  
Jana Kotaska, Cowichan Tribes  
Cindy Stern, District Manager  
Robert Furness, RPF  
Emma Neill, RPF  
Kelly Schellenberg, Area Forester  
Doug Caul, Ministry of Forests

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CERTAIN MEMBERS OF THE FIRM ARE ALSO CALLED TO THE BARS OF  
ALTA., SASK., MAN., ONT., YUKON, N.W.T., NUNAVUT AND TEXAS

JOHN A. RUDDY (1938-1993)

November 17, 1999

File No. 99-1322

Honourable David Zirnheld  
Minister of Forests  
Room 128  
Parliament Buildings  
Victoria, BC

Honourable Dale Lovick  
Minister of Aboriginal Affairs  
P.O. Box 9100 Stn Prov Govt  
Victoria, BC  
V8W 9B1

MINISTER OF FORESTS  
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MIN	/
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Dear Ministers:

Re: Protection of Hill 60 and Establishment of a Cowichan Forest Land Base

We are writing on behalf of the Cowichan Tribes to thank you for agreeing to meet yesterday to discuss the above topics.

This meeting provided an important and long overdue opportunity to share information with you on the history and current circumstances of the Cowichan Tribes, disturbing events of the past two years, the vital cultural importance of the Hill 60 area, the significant social, cultural, and economic forest needs of the Cowichan Tribes, and the pressing need to negotiate protection of Hill 60 and the establishment of a Cowichan forest land base. It also offered an opportunity for the Cowichan Tribes to request that you immediately mandate your senior officials to commence negotiations with Cowichan Tribes on the above issues.

The Cowichan Tribes were very heartened by your commitment at the conclusion of the meeting to enter into negotiations to resolve these issues, most likely through treaty related measures.

Time is of the essence both with respect to the protection of Hill 60 and the establishment of a Cowichan forest land base. The Cowichan Elders and the Cowichan Community expect these

- 2 -

matters to be resolved, either through a negotiated outcome or through the assertion of Cowichan Aboriginal Rights, Title, and Interests, by March 1<sup>st</sup>, 2000.

One option you mentioned was the establishment of a treaty side table to deal with these issues. We agree with this approach and propose the immediate establishment of a Cowichan Tribes Side Table to the Hul'qum'num Treaty Group Main Table to address Cowichan Tribes specific treaty issues, including forest issues.

If the parties are to make every reasonable effort to reach a negotiated resolution by March 1<sup>st</sup>, 2000, it is our view that the Cowichan Tribes Side Table will need to be up and running, with resourcing and funding as necessary and appropriate, by the first week of January, 2000 at the latest.

The Cowichan Tribes request that further forestry related activity and crown land alienations and/or approvals for forestry related activity and crown land alienations on Hill 60 and on other crown lands within Cowichan Territory be deferred, while discussions and negotiations proceed.

We look forward to your early response to this proposed approach. Please contact me if you have any questions or require further information.

Once again, on behalf of Cowichan Tribes, we wish to thank you for the opportunity to meet and discuss these matters of very serious concern to the Cowichan Tribes.

Yours truly,

RATCLIFF & COMPANY

[REDACTED]  
ROBERT H. BOTTERELL  
[REDACTED]

RHB:ktm

cc: Chief Lydia Hwitsum, Cowichan Tribes  
[REDACTED]



## Cowichan Tribes

5760 Allenby Road Duncan, BC V9L 5J1  
Telephone (250) 748-3196 Fax (250) 748-1233

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For immediate release.

November 30, 2000.

# Cowichan Tribes declare traditional lands a Tribal Preserve Vow to halt all proposed developments through courts or blockades

DUNCAN – Cowichan Tribes announced today that they will not allow remaining undeveloped Crown lands in their traditional territory to be logged by forest companies or used in other ways pending the conclusion of negotiations with the governments of B.C. and Canada.

In a formal ceremony attended today by Cowichan Tribes leaders and other members of the Hul' qumi' num Treaty Group, a formal declaration was made to protect sacred lands west of Duncan known as the Hw' te shutsun area. The lands have been subject to a host of controversial development proposals including a proposed garbage dump, various logging plans, and a motorcycle racetrack.

Almost all of the core traditional lands of the Hul' qumi' num Treaty Group are developed to some extent, leaving very little Crown land which is relatively undisturbed.

"In declaring this area protected today, we are formally putting the province, Canada, and the forest industry on notice that we will not allow any developments in this sacred area," Cowichan Tribes Chief Lydia Hwitsum said today. "While we prefer a negotiated resolution, we'll do whatever it takes. If necessary, we'll use the courts or we'll blockade the area."

One year ago, B.C. and Canada agreed to establish a side table in negotiations with the Hul' qumi' num Treaty Group to resolve the sensitive issues surrounding these lands. In return, Cowichan Elders and the Cowichan community agreed to delay taking any further action.

But, Hwitsum says, after a year of negotiations the lands continue to be under intense pressure from proposed forestry and other developments. Proposed developments in recent years include:

- Various logging plans by TimberWest and the Ministry of Forests' small business program.
- A proposed garbage dump in the "Hill 60" area that was only abandoned after stiff resistance by the Cowichan Tribes and other local residents.
- Conversion of private forest lands adjacent to Hw' te shutsun from forest use to recreational use, including a motorcycle track.

"Each individual development could seriously jeopardize our rights, title, and interests in the area," Hwitsum says. "Collectively, they would be disastrous."

Original:	Copies to:
Board:	
Committee(s):	
Directed by: TW/hjs	Date: 11/30/00
File #	



## **Cowichan Tribes**

5780 Allenby Road Duncan, BC V9L 5J1  
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The Cowichan Tribes remain hopeful that negotiations will lead to the successful conclusion of an agreement with the Governments of B.C. and Canada. But, Hwitsum says, today's announcement had to be made otherwise "there may be little left to preserve and protect."

**For further information see the attached Background statement or contact Chief Lydia Hwitsum at**



## BACKGROUND

### Hw' te shutsun Protocol and Tribal Preserve Designation

In November 1999, Chief Lydia Hwitsum and representatives of Cowichan Tribes met with representatives of the Government of British Columbia, including Honourable Dale Lovick, then Minister of Aboriginal Affairs and Honourable David Zimhelt, then Minister of Forests, to discuss the protection of the Hw' te shutsun area (including the Hill 60 area outside of Duncan) and other forestry issues. Cowichan Tribes is a member of the Hul' qumi' num Treaty Group ("HTG").

This meeting provided an important and long overdue opportunity for the Cowichan to share information with the Government of British Columbia on the history and current circumstances of the Cowichan people, disturbing events of the past two years, the vital cultural importance of the Hw' te shutsun area, and the pressing need to negotiate the preservation and protection of the Hw' te shutsun area.

The Governments of British Columbia and Canada agreed to the establishment of a Hul' qumi' num Treaty Group side table to conduct time limited negotiations to resolve this and other issues. Based on this commitment to negotiate, the Cowichan Elders and the Cowichan Community agreed to defer a course of action involving direct assertion of Aboriginal Rights, Title, and Interests in the hope that a negotiated settlement could be reached.

It has now been a year. While negotiations are ongoing with British Columbia and Canada, and while we remain hopeful that a negotiated resolution can be reached, time is running out.

The remaining crown land within Hul'qumi'num Core Traditional Territory, 9.6 % of the land base, is under continuing and intense pressure from forestry and other developments. Examples in recent years include, but are not limited to:

- a proposal to build a garbage dump in the sacred Hw' te shutsun area. Despite knowledge of Cowichan concerns a licence of occupation was issued. It was only once the Ministry of Forests recognized aboriginal rights exist in the area and once the Cowichan Tribes commenced legal action, that Cowichan Valley Regional District abandoned the garbage dump proposal.
- active efforts by the Ministry of Forests to proceed with approval of a Forest Development Plan and woodlot licences on the crown land forest base which will impact Hw' te shutsun and other important areas of HTG Territory. Consultations with the Ministry of Forests are ongoing and Cowichan Tribes remains hopeful that concerns will be fully and properly addressed.
- Forest Development Plans of TimberWest that could see logging approved for the Hill 60 area of Hw' te shutsun.

- conversion of private lands in close proximity to Hw' te shutsun from forest use to recreational use, including a motorcycle track, which could severely impact neighbouring sacred and culturally sensitive areas. Consultations with the Cowichan Valley Regional District, TimberWest, and the Land Reserve Commission are ongoing.
- numerous other Crown dispositions and alienations which have been the subject of referrals.

Cowichan Tribes and other Hul'qumi'num Nations are very concerned that while negotiations with Canada and British Columbia could well be successful, there may be little left to preserve and protect. It is for this reason that the Cowichan Tribes and other Hul'qumi'num Nations have decided to come together on November 30th, 2000 in a solemn traditional ceremony to sign the Hw' te shutsun Protocol which re-affirms the sacred importance of this area and the resolve of all Hul' qumi' num tribes to work together and take whatever steps are necessary to preserve and protect this area. As well, lands within Hw' te shutsun will be formally designated a Tribal Preserve.

November 28<sup>th</sup>, 2000

Duncan  
BC

Pictorial

Dec. 3, 2000

# Band protocol could block noise park plan

## IT'S LIKE MOTORCYCLES IN CHURCH: CVRD director says putting private property on the table is setting a dangerous precedent

JENNIFER  
MCLARTY  
staff reporter

Cowichan Tribes' declaration of a tribal preserve near Duncan could stall plans for an outdoor recreation park.

The Hw'te shutsun Protocol implies Crown land next to the park site is sacred to First Nations, and would be negatively impacted if motorized sports took place nearby.

"If you had a church, it would be like putting a motorcycle track around the parking lot," said Robert Morales, chief negotiator for the Hul'qum'num Treaty Group.

Cowichan Tribes is prepared to halt all work at the 400-acre site through court action or blockades if consultation fails with the Cowichan Valley Regional District, the B.C. Land

Commission and the property's owner, TimberWest.

But CVRD Director Joe Allan believes the Tribes' position is setting a dangerous precedent, since it drags activities on private land into the realm of treaty making.

"We're talking about private property. Does that mean the protocol affects all rezonings on private property abutting Crown land?" said Allan. "As far as I can see, this sets a very dangerous precedent, and it does nothing for the treaty process."

If a compromise can't be reached, Allan suggests the province should negotiate a Crown land buffer between the proposed park and sacred sites.

Aboriginal Affairs spokesperson Peter Smith wouldn't comment specifically about the rec park, but confirmed fee-simple or pri-

vate lands aren't on the treaty table.

Cowichan Tribes' lawyer Rob Botterell says the band is focused on the rec park since a government agency — the B.C. Land Commission — determines whether it is removed from the forest land reserve. As such, it must consult First Nations, and be cognizant of how proposed development will affect adjacent lands.

The CVRD received approval in principle for the park in September.

About 400 acres off Highway 18 would be removed from the forest land reserve, and transformed into a facility for everything from dirt drag and mud racing, to extreme cycling and model plane flying.

The CVRD is currently in negotiations with TimberWest to purchase the property.

DUNCAN  
BC

# Tribes vow blockades if needed

**PRESERVATION ZONE: Six bands sign deal to halt development west of Duncan**

JENNIFER MCLARTY  
staff reporter

Cowichan Tribes has vowed to halt logging and development within a 6,000-hectare tribal preserve west of Duncan until a treaty is signed with B.C. and Canada.

The Native group sealed its intent during a protocol signing and traditional ceremony at the Somers Longhouse Thursday, which was attended by Matthew Coon Come, chief of the national Assembly of First Nations.

The Hw'to shutsun accord was endorsed by all six members of the Hul'qumi'num Treaty Group, and is intended to protect Crown land of cultural importance to First Nations before a land-claim settlement is reached.

"In declaring this area protected today, we are formally putting the province, Canada and the forest industry on notice that we will not allow any developments in this sacred area," said Cowichan Tribes Chief Lydia Hwitsum. "While we prefer a negotiated resolution, we'll do whatever it takes. If necessary, we'll use the courts or we'll blockade the area."

The 6,000-hectare preserve includes Hill 60, Crown forest land, and provincial property adjacent to the Cowichan Valley Regional District's proposed outdoor recreation park.

Cowichan Tribes was successful in quashing a planned CVRD dump on Hill 60 two years ago, but TimberWest also has logging plans for the area under Tree Farm Licence 46.

The company and Cowichan Tribes are currently discussing the issue, and no-cut plans for the site have been submitted to the Ministry of Forests for approval.

But Hwitsum still views the protocol as necessary to shield sacred areas, particularly given the slow pace of treaty talks and continued logging and development pressures northwest of Duncan.

Pictorial

Dec 3, 2000

from Tribes /

"If we don't act now, there won't be anything left to preserve and protect," said Hwitsum, explaining the harvest of medicinal plants is one ancient practice in jeopardy.

"We will not stand back any longer and have the rights of our people stepped on. We draw our spiritual strengths from the gifts that the Creator has given us — the gifts of the land," Hwitsum told band members before signing the protocol.

But Aboriginal Affairs spokesperson Peter Smith is confused by the Hul'qumi'num Treaty Group's position, given recent treaty-related measures granted to Cowichan Tribes.

Earlier this month, Victoria and Ottawa agreed to a \$125,000 study to explore the economic potential of land being dis-

cussed at the treaty table. The measure will give Cowichan Tribes a jump-start on planning for the future, and an understanding of what forestry opportunities are available.

According to Smith, weekly discussions are also underway with Cowichan Tribes regarding interim protection measures for Hill 60.

"I'm perplexed by the position they've adopted," said Smith, adding the province's actions show a clear commitment to negotiate.

The Hul'qumi'num Treaty Group represents the Cowichan Tribes, the Chemainus First Nation, the Halalt First Nation, the Lake Cowichan First Nation, the Lyackson First Nation and the Penelakut Tribe.

It's currently in stage four, or the agreement-in-principle stage of the B.C. treaty process.

Chief Lydia Hwitsum signs the protocol.

Citizen, DUNCAN, BC  
Dec 3, 2000

# Tribes declare 6,000 hectares of sacred land off-limits to development

BY ANDREW COSTA  
CITIZEN STAFF

66

The Cowichan Tribes declared a large section of forest land within their traditional territory a "tribal preserve" Thursday and vowed to fight any future development of the 6,000-hectare area.

That fight could include court action or blockades, said Tribes Chief Lydia Hwitsum.

"In declaring this area protected today, we are formally putting the province, Canada and the forest industry on notice that we will not allow any developments in this sacred area," Hwitsum said. "While we prefer a negotiated resolution, we'll do whatever it takes. If necessary, we'll use the courts or we'll blockade the area."

The land in question, known by the Tribes as Hw'teshutsun, centres around Hill 60 and includes a mix of Crown forest and private timberlands owned by TimberWest.

Matthew Coon Come, National Chief of the Assembly of First Nations, came to Duncan Thursday to lend his support to the Tribes and to observe a ceremony at the Somers Long

*In declaring this area protected today, we are formally putting the province, Canada and the forest industry on notice that we will not allow any developments in this sacred area*

- Chief Lydia Hwitsum

House, where the six chiefs of the Hul'qumi'num Treaty Group signed a proclamation stating they'll work together to protect their sacred lands.

"As far as they can see, development is still happening out there and they are not getting anything and now they want to take matters into their own hands," Coon Come said. "I think there has to be a signal (from Canada and B.C.) that says, yes, we are sincere, yes, we want to deal with this. We have to find a way to coexist and share the wealth of this country."

SEE TIMBERWEST • PAGE 2

FROM PAGE ONE

The Hul'qumi'num Treaty Group, comprising the Cowichan Tribes and the Chemainus, Halalt, Lake Cowichan, Lyackson and Penelakut First Nations, has reached stage four of the six-stage B.C. treaty process. Last year a side table negotiation was started in an attempt to resolve the Tribes' issues regarding Hw'teshutsun.

But Hwitsum said that after a year of negotiations the lands are still under "intense pressure" from forestry and other developments. That pressure includes logging plans proposed by TimberWest and the Ministry of Forests' small business program, as well as the Cowichan Valley Regional District's plan to build an outdoor recreation park in the area.

TimberWest land use forester Steve Lorimer said the company has already agreed to alter its logging plans and eliminate cut-blocks in order to help preserve lands deemed sacred by the Cowichan people.

"It's important to note that this is really an issue between the Tribes and the government as part of the treaty process," Lorimer said. "We are cooperating because we're supportive of the treaty process and the certainty it will bring."

Lorimer estimated at least half of the 6,000 hectares declared a tribal preserve fall within Tree Farm Licence 46, Crown-forest TimberWest is licenced to operate on and log. If the federal and provincial governments decided to remove that land from the TFL to give to the Tribes as part of a treaty settlement, TimberWest likely wouldn't be able to stop them, Lorimer said.

"Of course we'd be looking for compensation if we lost that area," he said.

Hwitsum said the Tribes remain hopeful a negotiated solution can be reached. However, Thursday's proclamation had to be made; otherwise there may be "nothing left to preserve and protect" by the time an agreement is made, she said.

"Now is the time to be standing up and make sure our rights are honoured and protected," said Hwitsum in a fiery speech following the signing ceremony Thursday. "We must follow the

teaching of our people if we are to stay strong. Our spiritual connection (to Hw'teshutsun) is too strong and it won't be broken."

Hwitsum said that according to the Tribes' oral history, Hw'teshutsun is the place where their first two people fell from the sky and were taught how to live spiritually by the Creator. Much of the forest land the Tribes are seeking to protect is second-growth forest that was logged between 60 and 80 years ago and could soon be ready for a second harvest.

"This area is just starting to come back to life spiritually and as a forest," she said.

Hw'teshutsun, she said, is now frequently used by Tribes members for ceremonial purposes, including the collection of medicinal plants.

DUNCAN  
BC

Citizen

Dec 3, 2000

# Noise park 'incompatible'

By ANDREW COSTA  
CITIZEN STAFF

The Cowichan Tribes' proclamation of 6,000 hectares of forest land west of Duncan as a "tribal preserve" could put the Cowichan Valley Regional District's plans to construct an outdoor recreation park in jeopardy. But Cowichan Lake/Skutz Falls Director Joe Allan is vowing to fight for his dream.

In October the CVRD received approval in principal from the Land Reserve Commission (LRC) to build an outdoor recreation park on forestry land near Paldi currently owned by

“  
*I think they've stepped  
over the line on this one*

- CVRD Director Joe Allan

TimberWest. The 400-acre property is currently within the Forest Land Reserve (FLR) but will be freed up for development if the CVRD and TimberWest can work out a sale agreement.

But the Tribes declared a 6,000-hectare area of Crown and private forest land adjacent to the TimberWest

property a "tribal preserve" Thursday, threatening to take court action against or blockade future development of the area, including the recreation park.

"That land is within the area we've identified as in need of protection," Cowichan Tribes Chief Lydia Hwitsum said. "Subject to discussion, the nature of (an outdoor recreation park) is incompatible with the values we are trying to protect in that area."

Hwitsum said that Hill 60 and other lands within the 6,000-hectare area

SEE DANGEROUS - PAGE 2

## FROM PAGE ONE

are "sacred lands" identified by elders as the place where their people first fell from the sky in the Cowichan peoples' creation myths.

Tribes members, who call the area Hw'teshutsun, often use the land for sacred ceremonies, to gather medicinal plants and engage in other cultural pursuits, she said.

"The quiet and serenity of that area is extremely important to our people," Hwitsum said.

But Allan noted the proposed recreation park is on private land adjacent to the "tribal preserve" and doesn't understand why the Tribes want to, or think they can, stop the project.

"This is private land we're talking about," Allan said. "Are

they now trying to say that private land is on the table (in the treaty negotiation process)?"

Allan, a member of the provincial team negotiating a treaty with the Ditidaht First Nation, said when searching for a site for a recreation park he deliberately stayed away from Crown land because he knew it would be subject to treaty claims. He's also mad the Tribes didn't voice their objections earlier in the process.

"I think they've stepped over the line on this one and they should have come forward a long time ago," Allan said. "This is not a positive move for the treaty process — they're trying to set a very dangerous precedent."

Allan said the Tribes' announcement could result in

serious opposition to the treaty process locally, considering the strong public support that exists for the recreation park proposal.

"To thousands of people in this Valley this is going to be a lightning rod," he said. "If this is part of a negotiating ploy I think it's a really bad move."

Allan said he'd have been happy to have the Cowichan Tribes as a neighbour to the recreation park if they are given Crown land in the area as part of a treaty settlement. But if the Tribes don't want the CVRD as a neighbour, he suggested another solution could be reached.

"Maybe we can negotiate a buffer between us," Allan said. "But we're going ahead with this as far as I'm concerned."

Confidential

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Treasury Board Submission

Honourable Paul Ramsey  
Chair, Treasury Board  
Parliament Buildings  
Victoria, British Columbia  
V8V 1X4

Request No.: 19/2001  
CDT No.: 3697283

Date: January 9, 2001

**Request:**

Authority to offer a federal-provincial "protection" Treaty Related Measure (TRM) to the Cowichan Tribes (as a member of the Hul-Qumi-Num Treaty Group). The Province proposes to protect up to 1,700 hectares of Crown land under the TRM policy framework that was approved by Treasury Board and Cabinet in May, 2000. The location is known as "Hill 60", west of Duncan, and within Tree Farm Licence #46. The "protection" TRM must be proposed jointly by British Columbia and Canada. The purpose of this request is to protect the lands and hold them for inclusion in a future treaty offer to the Hul-Qumi-Num Treaty Group ("HTG"). The Province will require from the Cowichan Tribes, in exchange for this protection measure, forestry operations and development plans to proceed without delay, as well as mineral and/or oil and gas development in their asserted traditional territory. Provincial and federal negotiators propose to table this package with the Cowichan Tribes in January 2001.

**Justification:**

- The HTG consider these lands to be extremely sacred and significant to their cultural and spiritual practices. The TRM will protect these lands that will eventually make up Treaty Settlement Land offered to the HTG. BC, Canada and the First Nations (the "parties") would agree that the parcel is an essential portion of eventual treaty land and will be included in the final land settlement.
- The intention is to protect this area of land from future land and resource disposition and development (forestry, mining, lands disposition). All parties will have more certainty for the availability and use of the lands to achieve treaty obligations.
- With this agreement, BC and Canada could point to a significant and successful "protection measure". There have been strong pressures from First Nations for a land protection measure in order to build credibility, for both governments, for interim measures and treaty related measures.

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*Note: All hectare and dollar figures are currently being confirmed*

Confidential

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- One of the *quid pro quos* for protection of a portion of the Cowichan Tribes' asserted traditional territory will be access to a long-standing log-around area, which will benefit TimberWest and the Small Business Forest Enterprise Program. The TRM would build better relationships between all parties, eliminate causes for potential confrontation and provide HTG with an incentive to cooperate rather than litigate.
- While this specific arrangement focuses on the Cowichan Tribes, the HTG have been participating in and are supportive of the negotiations. Success with the Cowichan Tribes will provide the impetus for the remainder of the HTG to more fully engage in treaty negotiations.

### Background

The HTG are in Stage 4 of the British Columbia Treaty Commission process, working toward an Agreement-In-Principle. A financial mandate for this table was approved by Treasury Board in June, 2000. The Cowichan Tribes are the largest of the five tribes that make up the HTG, with over 3,000 members. In November of 1999, Cowichan Chief Lydia Hwitsum met with then Forests Minister David Zirnhelt and then Aboriginal Affairs Minister Gordon Wilson to discuss forestry concerns. At that time, Cowichan Tribes asserted aboriginal rights and title to Hill 60 and expressed concern that scarce Crown land within the Cowichan Tribes' asserted traditional territory was being alienated prior to resolution of a treaty. The Ministers agreed to pursue a TRM, and in May of 2000, the Cowichan Tribes tabled a TRM proposal, with BC and Canada, that included protection of Hill 60 and their forest economic interests outside of Hill 60. Negotiations on protection and economic interests have been progressing quickly since September, 2000.

In order to facilitate further discussions of Cowichan Tribes' economic interests, BC and Canada committed to \$125,000 for a Forestry Economic Opportunities TRM Study. The focus of this study is to identify opportunities for the Cowichan Tribes to participate in the forestry industry in the Hill 60 area and the Cowichan Tribes' capacity needs. This study was announced in November by the Minister of Aboriginal Affairs.

More recently, as part of the HTG's efforts to better organize themselves for treaty negotiations and to publicly express support to the Cowichan Tribes' negotiations, the entire HTG signed an internal protocol. As part of the protocol of signing, the Cowichan Tribes issued a news release declaring Hill 60 to be a "tribal preserve". They further indicated, with strong language, that they are willing to pursue litigation and/or blockades to prevent further development in the area. The provincial and federal treaty teams clearly indicated to the Cowichan Tribes that this news release undermined the table's progress. This message was reinforced in a meeting between the Minister of Aboriginal Affairs, Cowichan Tribes' Chief and the federal negotiator on December 7, 2000. The Minister also indicated that the Province would like to make a proposal to the Cowichan in January, 2000. After that meeting, all three parties publicly reaffirmed a commitment to negotiations.

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*Note: All hectare and dollar figures are currently being confirmed*

**Confidential**

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**Settlement Package**

BC, in conjunction with Canada, propose to table the following package:

1. **Protection of up to 1,700 hectares of Crown land within the Hill 60 area from resource extraction.** This would be accomplished using several mechanisms, including the authority of Part 13 of the *Forest Act* (see notes below), and Section 16 of the *Land Act*, in the name of the Ministry of Aboriginal Affairs ("MAA"), for treaty negotiation purposes (British Columbia Asset and Land Corporation is prepared to implement a Land Act Reserve on this area to remove the area from future disposition). A small area within the land proposed for protection is already covered by a no-staking reserve (NSR) (Section 22 of the *Mineral Act*). The Ministry of Energy and Mines is prepared to work with MAA to establish a NSR and a No Disposition ~~Reserve~~ <sup>Notation</sup> over the entire area.

Use of Part 13 will require the Ministry of Forests to pursue Cabinet approval for designation of the area. Part 13 of the *Forest Act* allows Cabinet to designate an area for temporary protection if it is in the public interest to do so and also permits the Minister to order the temporary suspension of forest activity within the designated area. Since this TRM is an important step towards treaty and providing economic certainty within Cowichan Tribes' asserted traditional territory, it would be in the public's interest to temporarily protect these lands.

This will mark the first time Part 13 of the *Forest Act* has been used as a TRM to provide temporary protection of Crown land. s.14

s.14

To temporarily set aside these lands from forestry development, the following sequence of events needs to occur:

- Under section 169 of the *Forest Act* Cabinet would designate the area proposed for protection, shown on the attached map, as a designated area to January 1, 2006 (sunset date for Part 13).
- Under section 170 of the *Forest Act*, the Minister would suspend or direct the issuer of a permit, license or plan to suspend forest activity in the designated area until January 1, 2006.
- The Chief Forester, as per Section 173 of the *Forest Act*, may reduce the allowable annual cut (AAC) of TFL 46 until the designation is lifted.

The area proposed for protection includes only one proposed TimberWest cutblock. Initial discussions with Cowichan Tribes suggest that the Cowichan Tribes would be agreeable to TimberWest harvesting that cutblock prior to protection of the cutblock area.

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*Note: All hectare and dollar figures are currently being confirmed*

Confidential

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British Columbia Assets and Land Corporation ("BCAL") confirms that there are no land parcels proposed for disposition in the proposed protected area and will be statusing the land to determine if there are any existing tenures or applications.

Ministry of Energy and Mines is currently statusing the proposed area to determine if there are any mineral claims held and oil and gas potential. MAA will ensure that if any mineral claims or tenures, they will be excluded from the protected area. In the event of future mineral development, the Province will be willing to explore potential economic opportunities with the Cowichan Tribes. X X

The proposed area is also used extensively by outdoor recreationalists, hunters and some mushroom pickers; however, the area will remain available to these users.

The federal/provincial cost sharing values associated with the protection measure are as follows:

- **Foregone revenue that harvesting in the protected area would have generated.** BC and Canada have calculated the foregone revenue in the protected area to be \$8.4 million (\$2000) (to be confirmed). The Federal Government will be contributing their share of this foregone revenue according to the federal-provincial Cost-Sharing Understanding for TRMs (see attached Cost -Sharing Agreement).
- **Representative Hectares:** BC and Canada have also calculated the representative hectare value of the protected area to be 19,751 representative hectares. This converts to an implicit cost-sharing value of \$23.6 million (\$2000) (to be confirmed). According to the federal-provincial Cost-Sharing Understanding for TRMs, Canada will not share the representative hectare value of the protected Crown land until the land is actually transferred to the First Nation in a treaty settlement.
- **Third Party Costs:** As noted, below, provincial negotiators anticipate that the proposed TRM can be implemented without any, or minimal, payments to third party interests. Discussions are ongoing with TimberWest this regard. X
- **Impact on the Provincial Deficit:** The TRM will not impact on the provincial deficit for the following reasons:
  - a) There are no financial costs associated with setting aside Crown land for a future treaty;
  - b) TimberWest was unable to access Hill 60. In this proposed arrangement, the company will be able to access their proposed cutblocks. The area proposed for protection will not hinder any planned forest development in the near future. Therefore, there will be no revenue loss associated with the lands to be protected; and

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*Note: All hectare and dollar figures are currently being confirmed*

**Confidential**

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- c) The TRM will be implemented without third party costs.

The TRM policy framework approved by Treasury Board requires that the cost-sharing value of land protected in a TRM not exceed 10 per cent of an approved financial mandate for the First Nation. The cost-sharing value of proposed Crown land (representative hectare and forgone revenue value) to be protected is \$32.0 million (\$2000) (to be confirmed) and does not exceed the 10 percent ceiling.

Other parts of the proposed package that do not require Treasury Board approval are:

2. **Preservation of cultural and spiritual attributes** by managing public access within the bounds of existing legislation and conducting forest management activities with existing legislation including the *Forest Act*, *Forest Practices Code of British Columbia Act*, and the *Heritage Conservation Act*, and in cooperation with TimberWest.
3. **Forest economic development opportunities**, particularly a direct invitation by the Minister of Forests to Cowichan Tribes to submit a Community Forest Pilot Agreement proposal for his consideration. A mandate request will be put before the Minister of Forests for his decision prior to BC and Canada's proposal to Cowichan Tribes.

Third Party Consultation:

Full consultation with local governments and third parties will also occur. The current license holder, TimberWest, has been actively involved in discussions surrounding the implications of the protection measures and is supportive. The Chair of the Cowichan Valley Regional District ("CVRD") is a member of the provincial negotiation team. The provincial negotiator has met with the CVRD.

Meetings with the South Island Treaty Advisory Committee (local government) and a Regional Advisory Committee will be held prior to the tabling of the proposal.

Compensation:

As a result of the quid pro quos, BC anticipates that no, or minimal, compensation issues will arise as a result of protecting the proposed area. BC's negotiator is continuing discussions with TimberWest in this regard.

In return for the package (protection, access management and economic development), BC will require access to the log around area for TimberWest, as well as a streamlined consultation procedure for the SBFEP. BC will also need timely support by the Cowichan Tribes and the HTG of Woodlot 1557's Forest Development Plan and upcoming revisions to TimberWest's Forest Development Plan. BC also requires mineral and/or oil and gas development to occur in the HTG's asserted traditional territory.

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*Note: All hectare and dollar figures are currently being confirmed*

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**Options:****1. Approve the request:**

Approval of this request will most likely result in a quick protection measure agreement with the Cowichan. Preliminary discussions with the Cowichan indicate that they will accept this proposal.

**2. Do Not Approve the request:**


Requiring the negotiators to look at other options or smaller land quantum will result in several more months of negotiations. If there is not significant progress in protecting the Hill 60 area, negotiators anticipate that the Cowichan Tribes will proceed with direct assertion of rights, title and interests.

**Recommended Decisions:**

Authorize the provincial negotiator to propose, with the federal negotiator, a protection Treaty Related Measure to the Cowichan Tribes. Once the proposal has been tabled, and if it is received favourably by the Cowichan Tribes:

- The Ministry of Forests and the MAA will jointly seek a Cabinet authorized Part 13 (*Forest Act*) designation of the area to be temporarily protected.
- British Columbia Assets and Land Corporation and MAA will work together to implement a Land Act Reserve on the proposed land to remove the area from future disposition.
- Ministry of Energy and Mines and MAA will work together to establish a No Staking Reserve and a No Disposition Reserve over the proposed area.

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Ministry Contact  
Doug Caul  
A/Chief Negotiator  


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Honourable David Zirnhelt  
Minister of Aboriginal Affairs

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Treasury Board Chair  
Approved/Not Approved

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Date

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*Note: All hectare and dollar figures are currently being confirmed*

## **HW'ŪE SHUTSUN INTERIM MEASURES AGREEMENT**

Between

Cowichan Indian Band also known as Cowichan Tribes  
as represented by the Cowichan Indian Band Chief and Council  
("Cowichan Tribes")

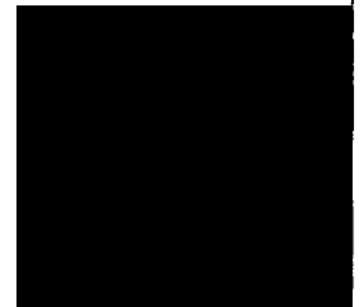
and

Her Majesty the Queen in Right of Canada  
as represented by  
the Minister of Indian Affairs and Northern Development  
("Canada")

and

Her Majesty the Queen in Right of British Columbia  
as represented by  
the Minister of Forests and the Minister of Aboriginal Affairs  
("British Columbia")

February 19, 2001



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## HW'IE SHUTSUN INTERIM MEASURES AGREEMENT

This Agreement made as of the \_\_\_\_\_ day of February 2001.

Between Cowichan Indian Band also known as Cowichan Tribes  
as represented by Cowichan Indian Band Chief and Council  
("Cowichan Tribes")

and

Her Majesty the Queen in Right of Canada  
as represented by  
the Minister of Indian Affairs and Northern Development  
("Canada")

and

Her Majesty the Queen in Right of British Columbia  
as represented by  
the Minister of Forests and the Minister of Aboriginal Affairs  
("British Columbia")

(collectively "the Parties")

### WHEREAS:

- A. The people of Cowichan Tribes are represented by their elected Chief and Council, which is a Band Council within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5.



- B. Pursuant to the August 20, 1993 Protocol Respecting the Government-to-Government Relationship between the First Nations Summit and the Government of British Columbia, and the September 19, 1996 extension of that Protocol, it was agreed that "a government-to-government relationship" exists between First Nations and the Government of British Columbia.
- C. British Columbia and Canada have accepted the recommendations of the June 1991 Report of the B.C. Claims Task Force, including the recommendation that, "the parties negotiate interim measures before or during treaty negotiations when an interest is being affected which could undermine the process".
- D. The Parties acknowledge that the honour of the Crown is at stake in British Columbia's and Canada's dealings with aboriginal peoples, including the Cowichan people.
- E. The Cowichan Tribes assert that the area known as Hw'te shutsun is an area of great cultural, spiritual, social, historical, and economic significance to the Cowichan Tribes.
- F. The Cowichan Tribes wish to preserve important attributes of the Hw'te shutsun area for present and future generations.
- G. The Ministry of Forests has the mandate to manage forest resources on Crown land in accordance with existing legislation, policy, and regulations.
- H. The Cowichan Tribes wish to pursue forest sector economic development initiatives in order to establish a Cowichan Tribes forest land base, create forest sector related training and employment opportunities for Cowichan members, secure economic returns for Cowichan Tribes from the forest sector, and establish a viable long term stake in the forest sector.
- I. The Parties acknowledge that the Cowichan Tribes' desire to pursue forest sector economic development initiatives is a long-

term objective and that it is the intention of the Parties to endeavour to advance that objective in the manner set forth in this Agreement.

- J. The Ministry of Aboriginal Affairs and the Ministry of Forests, through this Agreement, wish to provide for the involvement of the Cowichan Tribes in a process to facilitate preservation of attributes of Hw'te shutsun Area, and access by the Cowichan Tribes to economic development opportunities in the forest sector, such as those set out in H above.
- K. Canada is a Party to this Agreement only for the purposes of funding in accordance with the provisions set out in Section 7, attending Intergovernmental Meetings as set out in section 3.19, and fulfilling any commitments Canada makes by virtue of its participation in this Agreement under subsections 3.4, 3.12, 3.19, and 6.2.
- L. In entering into this Agreement the Parties reaffirm their commitment to continuing productive Treaty Negotiations and intend that the initiatives undertaken in furtherance of this Agreement will contribute to the successful conclusion of a treaty.

**NOW THEREFORE the Parties agree as follows:**

**1. DEFINITIONS**

1.1 In this Agreement:

**"Consensus"** means that British Columbia and Cowichan Tribes agree;

**"Cowichan Tribes Forestry Economic Development Discussion Paper"** means the January 15<sup>th</sup>, 2001 document entitled "Cowichan Tribes Discussion Paper on Forestry Economic Development Component of Treaty Related Measures";

**"Fiscal"** means the financial period beginning April 1<sup>st</sup> of a particular calendar year and ending on March 31<sup>st</sup> of the following calendar year;

**"Forest Sector Economic Development Study"** means the economic development study and recommendations prepared pursuant to the "Treaty Related Measure: Forest Sector Economic Development Study Contribution Agreement" with Canada dated "■", and the "Treaty Related Measure: Forest Sector Economic Development Study Contribution Agreement" with British Columbia dated "■";

**"Forest Sector Fund"** means a forest sector economic development fund administered by the Cowichan Tribes to support implementation of this Agreement, the Treaty Related Measure Memorandum of Understanding and implementation of the forthcoming recommendations of the Forest Sector Economic Development Study, where those recommendations fall within the list of eligible activities set out in section 7.5;

**"Hw'te shutsun Area"** means the area shown on the map labeled "■" which is attached to this Agreement as Appendix A;

**"Intergovernmental Meeting"** means a meeting of British Columbia and Cowichan Tribes;

**"Treaty Negotiations"** means treaty negotiations pursuant to the Hul'qumi'num Treaty Group Framework Agreement dated December 19<sup>th</sup>, 1997, or any successor treaty negotiation process, if such occurs;

## 2. PURPOSE, OBJECTIVES AND SCOPE

2.1 British Columbia and Cowichan Tribes enter into this Agreement for the purpose of establishing an effective inter-governmental working relationship, and endeavoring to achieve, within existing

■  
■ of 26 ■

policy and legislation as amended from time to time, the following objectives:

- (a) to create and implement a process to address preservation to the extent possible under existing legislation and policy as amended from time to time, of attributes of the Hw'te shutsun Area that are considered important to the Cowichan Tribes;
- (b) to build meaningful working relationships between the Cowichan Tribes, British Columbia, TimberWest, Weyerhaeuser Ltd., other forest sector companies, and others with an interest in the forest resource within the Hw'te shutsun Area;
- (c) to promote greater understanding and appreciation of attributes of the Hw'te shutsun Area considered important to the Cowichan Tribes through an expanded exchange of information, not considered confidential by any of the Parties, and education;
- (d) to ensure that there is full and timely sharing of information between British Columbia and Cowichan Tribes to support successful implementation of this Agreement;
- (e) to obtain information from other public and private sector organizations, where such information is required to support successful implementation of this Agreement;
- (f) to explore ways to implement to the extent possible, the proposals set out in the Cowichan Tribes Forestry Discussion Paper and the forthcoming recommendations contained in the Cowichan Forest Sector Economic Development Study;
- (g) to provide Cowichan Tribes with forest tenure opportunities through a Community Forest Pilot Agreement and a direct

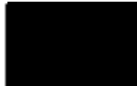
tenure award, and to assist Cowichan Tribes to pursue other fibre supply opportunities;

- (h) to pursue funding, and assistance of others, to support forest sector economic development activities of the Cowichan Tribes, and the successful implementation of this Agreement;
- (i) to promote certainty, while treaty negotiations proceed, for non-Cowichan interests in the Hw'te shutsun Area and the remainder of the asserted traditional territory of the Cowichan; and
- (j) to find ways to successfully implement this Agreement and the above objectives within existing policy, legislation, and regulations, as amended from time to time.

### **3. HW'TE SHUTSUN JOINT IMPLEMENTATION COUNCIL**

- 3.1 British Columbia and Cowichan Tribes will establish a Hw'te shutsun Joint Implementation Council which will be responsible and accountable for the implementation of this Agreement.
- 3.2 The core membership of the Hw'te shutsun Joint Implementation Council will be comprised of a maximum of two representatives of British Columbia including the Chief Treaty Negotiator and two representatives of the Cowichan Tribes, including the Chief Councillor.
- 3.3 The membership of the Hw'te shutsun Joint Implementation Council may be expanded, on a temporary or permanent basis, by mutual agreement of British Columbia and Cowichan Tribes, to enable it to more efficiently and effectively discharge its responsibilities under this Agreement.

- 3.4 Further to subsection 3.3, the Hw'te shutsun Joint Implementation Council may invite to any of its meetings a senior representative of Canada, where discussions directly related to Canada's participation in this Agreement are to occur.
- 3.5 A representative of the Cowichan Tribes and a representative of British Columbia will co-chair the Hw'te shutsun Joint Implementation Council.
- 3.6 The Hw'te shutsun Joint Implementation Council will meet twice per year, or as otherwise agreed by British Columbia and Cowichan Tribes, to:
- (a) review progress on implementation of this Agreement;
  - (b) develop implementation planning provided for in this Agreement, in respect of:
    - (i) issues surrounding preservation of attributes in the Hw'te shutsun Area that are considered important to the Cowichan Tribes, and ;
    - (ii) Cowichan Tribes forest sector economic development;
  - (c) identify, consider, and act on issues which arise from this Agreement;
  - (d) identify policy and legislative issues;
  - (e) undertake initiatives to support successful implementation of this Agreement;
  - (f) prepare an annual report to the Parties, including a report on the expenditure of funds from the Forest Sector Fund; and

- (g) consider agenda items proposed by any Party.
- 3.7 The Hw'te shutsun Joint Implementation Council will keep minutes of its meetings.
- 3.8 Decisions and recommendations of the Hw'te shutsun Joint Implementation Council with respect to matters considered under subsection 3.6 will be made by Consensus. Where Consensus cannot be reached, the matter will be dealt with in accordance with the dispute resolution provisions contained in Part 9 of this Agreement.
- 3.9 For greater certainty, subsection 3.8 shall not be interpreted or implemented in a manner which fetters the discretion of statutory decision makers.
- 3.10 The Hw'te shutsun Joint Implementation Council will seek to involve representatives of other public and private sector organizations where it will contribute to the successful implementation of this Agreement.
- 3.11 Where not provided for in this Agreement, the Hw'te shutsun Joint Implementation Council may determine its own rules of operation, in accordance with the principles of effectiveness, efficiency, timeliness, openness, and meaningful participation.
- 3.12 In order to develop relationships, foster a coordinated approach to preservation of attributes in the Hw'te shutsun Area that are considered important to the Cowichan Tribes, and/or further the forest sector economic development objectives of the Parties, the Hw'te shutsun Joint Implementation Council may invite the participation of other representatives of the Parties and/or other parties with an interest in forest and resource management within the Hw'te shutsun Area and/or economic development such as:
- (a) the elected Chief and Council of Cowichan Tribes; 

- (b) senior representatives of Hul'qumi'num Treaty Group;
- (c) senior representatives of British Columbia;
- (d) senior representatives of Canada;
- (e) other management agencies, as invited, such as Ministry of Environment, Lands and Parks, Ministry of Agriculture, Food and Fisheries, and Department of Fisheries and Oceans;
- (f) forest sector representatives such as TimberWest, Hayes, Weyerhaeuser, and IWA;
- (g) representatives of local government; and
- (h) others as agreed.

### **Intergovernmental Meeting**

3.13 An Intergovernmental Meeting between the British Columbia and Cowichan Tribes signatories to this Agreement will be held once per year. Additional Intergovernmental meetings may be scheduled either by agreement or by operation of the dispute resolution provisions in this Agreement. Additional Meetings may be attended by the British Columbia or Cowichan Tribes signatories or designated senior representative(s).

3.14 The purpose of the Intergovernmental Meeting is to ensure the successful implementation of this Agreement by:

- (a) reviewing progress on implementation of this Agreement;
- (b) receiving and discussing the annual report prepared by the Hw'te shutsun Joint Implementation Council;

- (c) receiving and reviewing recommendations of the Hw'te shutsun Joint Implementation Council;
  - (d) identifying, considering, and acting on issues which arise from this Agreement;
  - (e) undertaking initiatives to support successful implementation of this Agreement; and
  - (f) considering agenda items proposed.
- 3.15 A representative of British Columbia or the Chief Councillor of the Cowichan Tribes will chair the Intergovernmental Meeting.
- 3.16 Minutes of Intergovernmental Meetings will be kept.
- 3.17 Decisions and recommendations under subsection 3.14 must be made by Consensus. Where Consensus cannot be reached, the matter will be dealt with in accordance with the dispute resolution provisions contained in in Part 9 of this Agreement.
- 3.18 For greater certainty, subsection 3.17 shall not be interpreted or implemented in a manner which fetters the discretion of statutory decision makers.
- 3.19 Although Canada will not serve on the Intergovernmental committee, the Minister of Indian Affairs and Northern Development or his designate will, by invitation, attend the annual Intergovernmental Meeting, and may attend any additional scheduled meetings, for the purpose of reviewing issues related to economic development and funding by Canada to advance the long-term objective of Cowichan Tribes desire to pursue forest sector economic development initiatives.

#### 4. IMPLEMENTATION PLANNING

- 4.1 The Hw'te shutsun Joint Implementation Council will engage in implementation planning on an annual basis and, if the Council so decides will prepare a workplan setting out the planned activities and initiatives of the Hw'te shutsun Joint Implementation Council with regard to preservation of attributes in the Hw'te shutsun Area that are considered important to the Cowichan Tribes, and with regard to forest sector economic development.
- 4.2 An annual workplan will address:
- (a) financial and other resources, including information, education and training required to implement the workplan, and a plan of action to obtain such resources;
  - (b) representatives of other public and private sector organizations whose involvement and assistance is required to support successful implementation of the workplan;
  - (c) major issues expected to arise and the planned way in which these issues will be addressed by the Hw'te shutsun Joint Implementation Council;
  - (d) the scope, nature and extent of recommendations available to the Cowichan Tribes through the Hw'te shutsun Joint Implementation Council;
  - (e) mechanisms to monitor and review the implementation of this Agreement and the annual workplan including whether or not recommendations made by the Cowichan Tribes through the Hw'te shutsun Joint Implementation Council were incorporated into land and resource plans or decisions in the Hw'te shutsun Area and if incorporated, to assess their contribution to the achievement of the purposes of this Agreement; and

- (f) other matters considered necessary to successful implementation planning by the Hw'te shutsun Joint Implementation Council.

## **5. PRESERVATION OF ATTRIBUTES OF IMPORTANCE TO COWICHAN TRIBES**

- 5.1 The Hw'te shutsun Joint Implementation Council will ensure that the Cowichan Tribes have a meaningful opportunity to provide information and input and make formal recommendations to relevant agencies, forest companies, and/or statutory decision-makers regarding preservation of attributes in the Hw'te shutsun Area that are considered important to the Cowichan Tribes.
- 5.2 The Hw'te shutsun Joint Implementation Council will examine ways in which attributes in the Hw'te shutsun Area that are considered important to the Cowichan Tribes can be preserved, or impacts on those attributes minimized, in the context of existing legislation and policy as amended from time to time, and will discuss and develop options.
- 5.3 Where the Cowichan Tribes provide information and/or formal recommendations to the Hw'te shutsun Joint Implementation Council regarding preservation of attributes in the Hw'te shutsun Area that are considered important to the Cowichan Tribes, the Hw'te shutsun Joint Implementation Council will ensure that the information and/or recommendations are conveyed to relevant agencies, forest companies and/or statutory decision-makers in such a way that they can be given full consideration.

## **6. ECONOMIC DEVELOPMENT**

- 6.1 The economic development activities of the Hw'te shutsun Joint Implementation Council will give consideration to the Cowichan

Tribes Forestry Discussion Paper and the recommendations of the Cowichan Forest Sector Economic Development Study, and will:

- (a) identify a process to approach all interested parties to explore ways to work together towards development of a Cowichan Tribes Forestry framework agreement as proposed in the Cowichan Tribes Discussion Paper on Forestry Economic Development;
- (b) identify initiatives to:
  - (i) assist Cowichan Tribes to establish a Cowichan Tribes forest land base;
  - (ii) support ongoing participation of Cowichan Tribes members in the forest sector workforce;
  - (iii) support the development of a long term Cowichan Tribes stake in the forest sector; and
  - (iv) support the development of a forest sector workforce through access to forest sector related education, training and employment opportunities for Cowichan members; and
- (c) identify opportunities and mechanisms for the Cowichan Tribes to actively pursue forest tenure and economic development initiatives.

6.2 Pending completion of the activities in 6.1, the Parties will work together and make every reasonable effort to assist Cowichan Tribes, as set forth in Section 7 of this Agreement, to take full advantage of new and existing federal and provincial programs which could support Cowichan Tribes economic development through funding or other forms of support. Any funding provided will be subject to Cowichan Tribes meeting all applicable program

funding terms and conditions, including eligibility criteria and requirements, Treasury Board approvals, and appropriation of funds by the Parliament of Canada and the Legislature of British Columbia as the case may be.

## **7. FUNDING**

### **Funding (February 2001 – March 2002)**

#### **7.1 In Fiscal 2000/2001:**

- (a) British Columbia will contribute an amount of (\$250,000) to Cowichan Tribes to establish the Forest Sector Fund;
- (b) Canada will contribute an amount of (\$250,000) to Cowichan Tribes through an amendment of Cowichan Tribes' Comprehensive Funding Arrangements Agreement for the purposes of economic development activities including capacity building, forest development planning, silviculture and related activities, business planning for economic partnerships and contracting opportunities.

**7.2** Funding provided by Canada pursuant to Section 7.1(b) will be subject to all terms and conditions of the Comprehensive Funding Arrangements Agreement between Canada and Cowichan Tribes.

#### **7.3 In Fiscal 2001/2002:**

- (a) Cowichan Tribes will contribute an amount of (\$250,000) to the Forest Sector Fund from the harvesting of fibre supply provided under this Agreement;
- (b) Cowichan Tribes will make every reasonable effort to re-invest net profits from timber harvesting and other forest

sector economic development activities up to an amount of (\$250,000) in the Forest Sector Fund; and

- (c) In acknowledgement of the Cowichan Tribes' long-term objective of pursuing forest sector economic development initiatives, Canada through the DIAND BC Regional Office will make every reasonable effort to assist Cowichan Tribes in pursuing (\$500,000) in additional funds for contribution to the Forest Sector Fund, by:
- i identifying by March 1<sup>st</sup>, 2001 potentially suitable federal government funding sources and programs;
  - ii providing Cowichan Tribes by March 1<sup>st</sup>, 2001 information on application processes, and designating a DIAND official to assist Cowichan Tribes to complete those processes; and
  - iii generally, making every reasonable effort to assist Cowichan Tribes to secure \$500,000 by September 30<sup>th</sup>, 2001. Any funding provided will be subject to Cowichan Tribes meeting all applicable program funding terms and conditions, including eligibility criteria and requirements, Treasury Board approvals, and appropriation of funds by the Parliament of Canada.

#### **Funding (April 2002 – March 2005)**

7.4 In each of Fiscal 2002/2003, 2003/2004 and 2004/2005:

- (a) Cowichan Tribes will make every reasonable effort to contribute \$200,000 to the Forest Sector Fund through re-investment of net profits from timber harvesting and other forest sector economic development activities; and

- (b) In acknowledgement of Cowichan Tribes' long-term objective of pursuing forest sector economic development initiatives, Canada and British Columbia will make every reasonable effort to each secure \$200,000 to contribute to the Forest Sector Fund. Any funding provided will be subject to Cowichan Tribes meeting all applicable program funding terms and conditions, including eligibility criteria and requirements, Treasury Board approvals, and appropriation of funds by the Parliament of Canada and the Legislature of British Columbia as the case may be.

7.5 The Forest Sector Fund will be used for the purposes of funding the following activities:

- (a) capacity building of various types, including job shadowing, sponsoring students to participate in the Forest Technician Training Program, and other education opportunities;
- (b) training in safety procedures for forest operators;
- (c) forest development planning, layout, engineering design and road work;
- (d) silviculture, brushing and weeding;
- (e) preparation of resource development proposals;
- (f) business planning for potential economic partnership and contracting opportunities;
- (g) capital investments in forest sector businesses (not capital acquisitions);
- (h) other activities related to implementation of the recommendations of the Forest Sector Economic Development Study; and

- (i) other activities as may be agreed upon by Cowichan Tribes, Canada, and British Columbia.

## 8. FOREST TENURE OPPORTUNITIES

### Community Forest Pilot Agreement

8.1 Upon execution of this Agreement, the Ministry of Forests will:

- (a) through direct invitation for proposal, invite Cowichan Tribes to apply for a Community Forest Pilot Agreement of 10,000 cubic metres per year; and
- (b) subject to Cowichan Tribes meeting standard application requirements, offer a Community Forest Pilot Agreement to Cowichan Tribes as soon as practicable.

8.2 The Community Forest Pilot Agreement:

- (a) rate of harvest will be equivalent to 10,000 m<sup>3</sup> per year from the Crown land portion;
- (b) area will depend on site specific factors as described in the 1996 Arrowsmith Timber Supply Analysis, including, but not limited to, site productivity, tree species, operability and environmentally sensitive areas;
- (c) area will be located within the area highlighted on the map attached as Appendix B to this Agreement;
- (d) area will also take into consideration forest management objectives as outlined by the Cowichan Tribes in their CFPA proposal.

- (e) will be subject to all existing legislation,
- (f) will be operated as a pilot project with an term of 5 years;  
and
- (g) during the course of its term, will be evaluated by the Ministry of Forests as per the *Forest Act*, *Forest Practices Code of British Columbia Act* and the regulations under those Acts.

8.3 If the Community Forest Pilot Agreement is successful during the evaluation described in 8.2(g) a long term agreement, with a term of not less than 25 years or greater than 99 years may be offered to Cowichan Tribes in accordance with the *Forest Act*, *Forest Practices Code of British Columbia Act* and the regulations under those Acts.

8.4 Over the term of this Agreement, British Columbia will make every reasonable effort within the context of existing legislation, to assist Cowichan Tribes in its efforts to secure additional timber volume with a target of 50,000 cubic metres per year.

### **Direct Award Timber Sale**

8.5 Upon execution of this Agreement, the Ministry of Forests will provide Cowichan Tribes with a direct award Timber Sale of 2,000 cubic metres, for training and capacity-building for Cowichan Tribes members.

8.6 The direct award under section 8.5 is subject to the South Island Forest District determining, in consultation with Cowichan Tribes, a suitable area from within the area highlighted in Appendix B and within an approved block on the 2001-2005 Small Business Forest Enterprise Program Forest Development Plan, once approved.

## 9. DISPUTE RESOLUTION

- 9.1 British Columbia and the Cowichan Tribes are committed to using all reasonable efforts to reach Consensus on any decisions or recommendations arising from the implementation of this Agreement.
- 9.2 If Consensus cannot be reached on a decision or recommendation of the Hw'te shutsun Joint Implementation Council or on the interpretation of this Agreement, then British Columbia and the Cowichan Tribes will:
- (a) table the matter in dispute with the Chief Councillor of the Cowichan Tribes or her designate and the Chief Treaty Negotiator for British Columbia or his designate for possible resolution; and
  - (b) if the matter still remains unresolved, then consider jointly appointing a facilitator or mediator to assist the British Columbia and the Cowichan Tribes to resolve the matter in dispute; and
  - (c) if the facilitation/mediation process does not resolve the matter in dispute, or if British Columbia and the Cowichan Tribes do not appoint a facilitator or mediator, then place the matter on the agenda for the next Intergovernmental Meeting for possible resolution.
- 9.3 Once the matter in dispute is tabled under subsection 9.2(a), British Columbia and the Cowichan Tribes will have 60 days to attempt to resolve the dispute, following the steps set out under subsection 9.2. If at the end of 60 days the dispute remains unresolved, then British Columbia or the Cowichan Tribes may call an Intergovernmental Meeting to consider the matter in dispute, by giving the other 30 days notice in writing.

- 9.4 If Consensus cannot be reached on a decision or recommendation arising from consideration of a matter in dispute at an Intergovernmental Meeting, then the British Columbia and the Cowichan Tribes must provide each other with written reasons for the differing positions on the matter in dispute. These written reasons will be available to the public.
- 9.5 Nothing in this Agreement precludes the Cowichan Tribes from pursuing resolution of a disputed matter through applicable appeal processes.
- 9.6 This Agreement does not replace appeal processes available by legislation concerning a matter in dispute.

## 10. GENERAL

- 10.1 This Agreement is a statement of political intent by the Parties and is not legally binding. It is not intended to define, create, recognize, deny or amend any of the rights of the Parties. This Agreement is not intended to be a treaty or a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.
- 10.2 Nothing in this Agreement is intended to derogate from any rights of British Columbia or Canada, nor is it intended to derogate from any statutory, regulatory or delegated authority under the Statutes of British Columbia or Canada as amended from time to time.
- 10.3 No provision of this Agreement or any workplan or other record created pursuant to this Agreement is intended to define, create, recognize, limit, extinguish or derogate from any aboriginal right, including aboriginal title, of the Cowichan Tribes, and this Agreement is without prejudice to any aboriginal rights, including aboriginal title, of other First Nations that may claim overlapping asserted traditional territory with the Cowichan Tribes.

- 10.4 This Agreement and the relationships it establishes, and any workplans or other records created pursuant to this Agreement are without prejudice to any position any Party may take with respect to future negotiations, agreements or treaties. In addition, this Agreement, all related records, and the discussions and negotiations leading up to or carried out pursuant to this Agreement, are without prejudice to any legal positions that have been or may be taken by any Party in any court proceeding, process or otherwise, and shall not be construed as an admission of fact or liability in any such proceeding or process.
- 10.5 Issues requiring changes to existing policy, legislation and regulation which are beyond the scope of this Agreement, may be brought by the Cowichan Tribes to the attention of British Columbia and Canada for consideration through other processes.
- 10.6 The map labeled "■", which is attached to this Agreement as Appendix A, is used for the purposes of discussion and negotiation between the Parties and to define the territorial scope of the application of this Agreement only. It is not to be construed as a final and definitive assertion by the Cowichan Tribes of the extent of its traditional territory. Nor will the use of this map for the purposes of this Agreement be construed as an acceptance by British Columbia or Canada that the map defines an area where aboriginal title or rights may be present or that the area was traditionally used by Cowichan Tribes.
- 10.7 Canada and British Columbia will fulfil their obligations under this Agreement subject to existing policy, legislation, and regulations, as amended from time to time, and available appropriations.
- 10.8 This Agreement shall not be interpreted or implemented in a manner which fetters the discretion of statutory decision makers.

## 11. TERM OF THE AGREEMENT

- 11.1 Cowichan Tribes agree that during the term of this Agreement, Cowichan Tribes will participate in agency referral processes regarding land and resource developments, including mineral and petroleum and natural gas disposition, exploration and development, dispositions under the *Land Act* and forestry activities, within Cowichan's asserted traditional territory, in a timely manner and will not unreasonably obstruct the business of British Columbia, provided that the said agency referral processes are carried out in a manner that is consistent with any administrative, legislative or substantive legal obligations British Columbia may have to consult with Cowichan Tribes in relation to any agency referral.
- 11.2 For greater certainty, section 11.1 shall not be interpreted in a manner which diminishes, alters in any way, or derogates from any duty of British Columbia to fulfil any administrative, legislative, or substantive legal obligations it may have to consult with Cowichan Tribes in relation to any referral.
- 11.3 The term of this Agreement is from the date it is signed by all Parties until the earlier of:
- (a) the effective date of a Hul'qumi'num Final Agreement;
  - (b) the suspension by any one Party of Treaty Negotiations;
  - (c) the termination by any one Party of Treaty Negotiations;
  - (d) the commencement of litigation involving the assertion of aboriginal rights or title by Cowichan in their asserted traditional territory which Canada and British Columbia agree precludes effective treaty negotiations with the Hul'qumi'num or Cowichan;

(e) one of the Parties gives the other Parties 90 days notice of termination of its participation in this Agreement; or

(f) March 31, 2006.

11.4 The provisions of this Agreement may only be amended by written agreement of the Parties.

**IN WITNESS WHERE OF the Parties have executed this Agreement on the date as set out below.**

SIGNED AND DELIVERED by  
CHIEF COUNCILLOR LYDIA  
HWITSUM on  
\_\_\_\_\_, for and  
on behalf of COWICHAN TRIBES in  
the presence of:

) COWICHAN TRIBES

) Per:

\_\_\_\_\_  
As to the signatory of the Chief  
Councillor of COWICHAN TRIBES

) \_\_\_\_\_  
) Lydia Hwitsum

SIGNED AND DELIVERED on  
\_\_\_\_\_ by the  
Minister of Forests in the presence  
of:

) HER MAJESTY THE QUEEN IN  
) RIGHT OF THE PROVINCE OF  
) BRITISH COLUMBIA, as  
) represented by the Minister of  
) Forests

\_\_\_\_\_  
As to the signature of Gordon Wilson,  
Minister of Forests

) \_\_\_\_\_  
) The Honourable Gordon Wilson



SIGNED AND DELIVERED on \_\_\_\_\_  
by the  
**Minister of Aboriginal Affairs** in the  
presence of:

) **HER MAJESTY THE QUEEN IN**  
) **RIGHT OF THE PROVINCE OF**  
) **BRITISH COLUMBIA, as**  
) **represented by the Minister of**  
) **Aboriginal Affairs**  
)  
)  
)  
)  
)

\_\_\_\_\_  
As to the signature of David Zirnhelt,  
Minister of Aboriginal Affairs

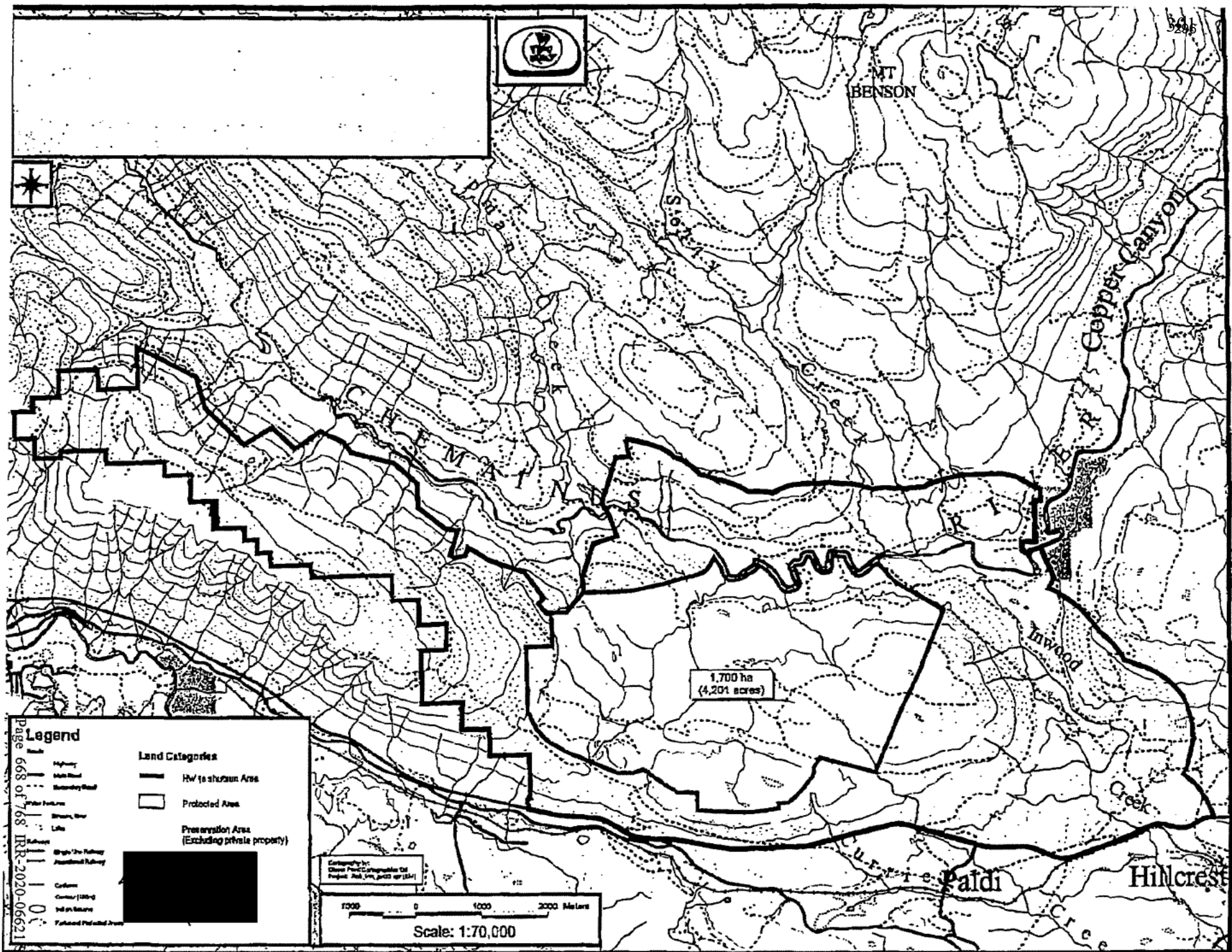
) \_\_\_\_\_  
) **The Honourable David Zirnhelt**  
)

SIGNED AND DELIVERED on \_\_\_\_\_  
by the  
**Minister of Indian Affairs and**  
**Northern Development** in the  
presence of:

) **HER MAJESTY THE QUEEN IN**  
) **RIGHT OF CANADA, as**  
) **represented by the Minister of**  
) **Indian Affairs and Northern**  
) **Development**  
)  
)  
)  
)  
)

\_\_\_\_\_  
As to the signature of Robert Nault,  
Minister of Indian Affairs and  
Northern Development

) \_\_\_\_\_  
) **The Honourable Robert Nault**  
)



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**Legend**

Land Categories	
	HW to stream Area
	Protected Area
	Preservation Area (Excluding private property)

Highway  
 Main Road  
 Secondary Road  
 Other Features  
 Stream, River  
 Lake  
 Railway  
 Single/Double Track  
 Aerial Railway  
 Contour  
 Contour (100m)  
 100m Square  
 Faded Protected Area

Contour by:  
 100m  
 200m  
 300m  
 400m  
 500m  
 600m  
 700m  
 800m  
 900m  
 1000m

0 1000 2000 Meters  
 Scale: 1:70,000

*Treaty Related Measure: Land Protection*

This Memorandum of Understanding (this "Understanding") is made as of the \_\_\_\_ day of February, 2001.

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA,**  
as represented by the Minister of Indian Affairs and Northern  
Development

("Canada")

**AND:**

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
BRITISH COLUMBIA,** as represented by the Minister of Aboriginal Affairs

("British Columbia")

**AND:**

**The HUL'QUMI'NUM TREATY GROUP,** representing Chemainus First  
Nation, Cowichan Tribes, Halalt First Nation, Lake Cowichan First Nation,  
Lyackson First Nation and Penelakut Tribe

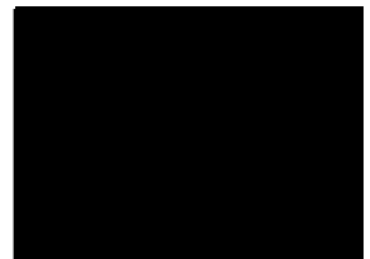
("Hul'qumi'num")

**AND:**

**COWICHAN INDIAN BAND,** also known as  
**COWICHAN TRIBES**

("Cowichan")

(collectively the "Parties")



*Treaty Related Measure: Land Protection***BACKGROUND:**

- A. Hul'qumi'num, British Columbia and Canada are presently involved in treaty negotiations in the BCTC Process. Cowichan, as a member of Hul'qumi'num, is part of this process.
- B. Hul'qumi'num, British Columbia and Canada signed the Framework Agreement.
- C. During the course of treaty negotiations, Cowichan, as a member of Hul'qumi'num, has indicated that the Land is essential to a Hul'qumi'num Final Agreement and has requested that the Land be made available as a benefit under the terms of the Hul'qumi'num Final Agreement.

Now therefore the Parties understand as follows:

1. In this Understanding:
  - (a) "BCTC Process" means the British Columbia Treaty Process;
  - (b) "Framework Agreement" means the Framework Agreement signed by Hul'qumi'num, British Columbia and Canada on December 19, 1997;
  - (c) "Hul'qumi'num Final Agreement" means the agreement signed, ratified and brought into effect by Hul'qumi'num, British Columbia and Canada at the end of Stage 5 of the BCTC Process;
  - (d) "Interests" includes estates, interests, charges, mineral and placer claims, leases, encumbrances, licences, permits, reservations and conditions; and
  - (e) "Land" means the land, being approximately 1700 hectares, which is shown on Appendix A to this Understanding.
2. The Parties acknowledge that based on Hul'qumi'num's and Cowichan's strong interest in the Land, a treaty related measure to protect the Land in accordance with the terms of this Understanding would assist them in furthering treaty negotiations.
3. Hul'qumi'num and Cowichan understand that, should the Land be offered by Canada and British Columbia as a part of the land and cash offered to Hul'qumi'num, the Land will be included in the settlement of the Hul'qumi'num Final Agreement.
4. Hul'qumi'num and Cowichan intend that the Land will be included in Cowichan's portion of any settlement of the Hul'qumi'num Final Agreement.

*Treaty Related Measure: Land Protection*

5. As soon as reasonably practical following execution of this Understanding, the Minister of Aboriginal Affairs will request that the appropriate ministers take the necessary statutory and administrative steps to implement the following measures under the appropriate provincial legislation:
- (a) to not issue or to suspend cutting authorities on the Land;
  - (b) to prohibit staking of minerals owned by British Columbia on or under the Land;
  - (c) to place a no disposition notation for petroleum and natural gas owned by British Columbia on or under the Land; and
  - (d) to withdraw the Land from disposition under the *Land Act*.
6. British Columbia will, during the term of this Understanding:
- (a) retain ownership of the Land, and
  - (b) administer, manage, maintain and operate the Land at its discretion.
7. The Land will continue to be subject to all existing Interests, including those described in Appendix B, and any renewal, extension, amendment or replacement of those Interests.
8. Cowichan and Hul'qumi'num acknowledge that privately held subsurface Interests may exist on and under the Land and this Understanding does not affect those Interests or the ability of the owners of those Interests to access the Land.
9. For greater certainty, this Understanding does not affect existing access to and across the Land, and British Columbia may, during the term of this Understanding, provide access to or across the Land, including access:
- (a) to Interests on or under the Land,
  - (b) to Interests on or under adjacent lands,
  - (c) on or over the Land for emergency purposes, or
  - (d) for the general public for recreational purposes.
10. This Understanding is subject to annual appropriations by the Parliament of Canada and the Legislature of British Columbia.

*Treaty Related Measure: Land Protection*

11. Nothing in this Understanding is intended to have nor is to be interpreted as having the effect of establishing the Land as a "reserve" as defined in the *Indian Act*, or as "lands reserved for the Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*.

12. This Understanding is not intended to nor is it to be interpreted to create, recognize, affirm, limit or deny aboriginal rights, including title or treaty rights.

13. Nothing in this Understanding is intended to create nor is to be interpreted as creating a trust in favour of Hul'qumi'num or Cowichan, nor does this Understanding create fiduciary duties among the Parties with respect to the use, management or disposition of the Land, or otherwise.

14. This Understanding does not create, grant, authorize or recognize any rights of occupation to the Land for Cowichan or Hul'qumi'num.

15. This Understanding, and all statements and related documents prepared by one or more of the Parties for the purpose of entering into and implementing this Understanding:

(a) shall not be construed as an admission of fact or liability in court proceedings or any other forum, and

(b) are without prejudice to the legal positions that may be taken by the Parties in court or the positions taken during the course of negotiations in the BCTC Process or in any other forum.

16. This Understanding is not legally enforceable, and shall not constitute or be deemed to constitute the creation, recognition, affirmation, denial or amendment of rights and obligations.

17. The term of this Understanding is from the date it is signed by all Parties until the earlier of:

(a) the effective date of the Hul'qumi'num Final Agreement;

(b) the suspension by any one Party of treaty negotiations in the BCTC Process in accordance with the Framework Agreement;

(c) the termination by any one Party of treaty negotiations in the BCTC Process;

(d) the commencement of litigation involving the assertion of aboriginal rights

*Treaty Related Measure: Land Protection*

or title by Hul'qumi'num or Cowichan in their asserted traditional territory which Canada and British Columbia agree precludes effective treaty negotiations with Hul'qumi'num or Cowichan; or

(e) March 31, 2003.

18. A Party will notify the other Parties to this Understanding forthwith and in writing in the event of an occurrence under paragraph 17 (b), (c) or (d).

19. If this Understanding terminates in accordance with paragraph 17 (e), Canada and British Columbia will seek the necessary approvals to extend the term of this Understanding provided that Canada, British Columbia, and Cowichan, as a member of Hul'qumi'num, are participating in treaty negotiations in the BCTC Process.

20. The Parties may renew or otherwise amend this Understanding by mutual agreement in writing.

21. Cowichan agrees that during the term of this Understanding, Cowichan will participate in agency referral processes regarding land and resource developments, including mineral and petroleum and natural gas disposition, exploration and development, dispositions under the *Land Act* and forestry activities, within Cowichan's asserted traditional territory, in a timely manner and will not unreasonably obstruct the business of British Columbia, provided that the said agency referral processes are carried out in a manner that is consistent with any administrative, legislative or substantive legal obligations British Columbia may have to consult with Cowichan in relation to any agency referral.

22. For greater certainty, paragraph 21 shall not be interpreted in a manner which diminishes, alters in any way, or derogates from any duty of British Columbia to fulfil any administrative, legislative, or substantive legal obligations it may have to consult with Cowichan in relation to any referral.

*Treaty Related Measure: Land Protection*

23. For the convenience of the Parties, this Understanding may be executed in one or more counterparts and by facsimile, each of which shall be deemed to be an original for all purposes, and such counterparts together will constitute one and the same instrument.

**FOR COWICHAN INDIAN BAND,  
ALSO KNOWN AS COWICHAN TRIBES**

\_\_\_\_\_  
Lydia Hwitsum  
Chief  
Date:

**FOR HUL'QUMI'NUM TREATY GROUP**

\_\_\_\_\_  
Robert Morales  
Chief Negotiator  
Date:

**FOR HER MAJESTY THE QUEEN IN RIGHT  
OF THE PROVINCE OF BRITISH COLUMBIA**

\_\_\_\_\_  
Philip Steenkamp, Deputy Minister  
Ministry of Aboriginal Affairs  
Date:

**FOR HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

\_\_\_\_\_  
John Watson, Regional Director General  
Department of Indian Affairs and Northern Development  
Date:

*Treaty Related Measure: Land Protection*

**Appendix B**

***Note: this list is still under provincial review.***

Tree Farm Licence 46

Privately held subsurface interests, if any, and the rights of the holders to enter on the Land

Mineral claims existing before the measure referred to in paragraph 5 (b) takes effect

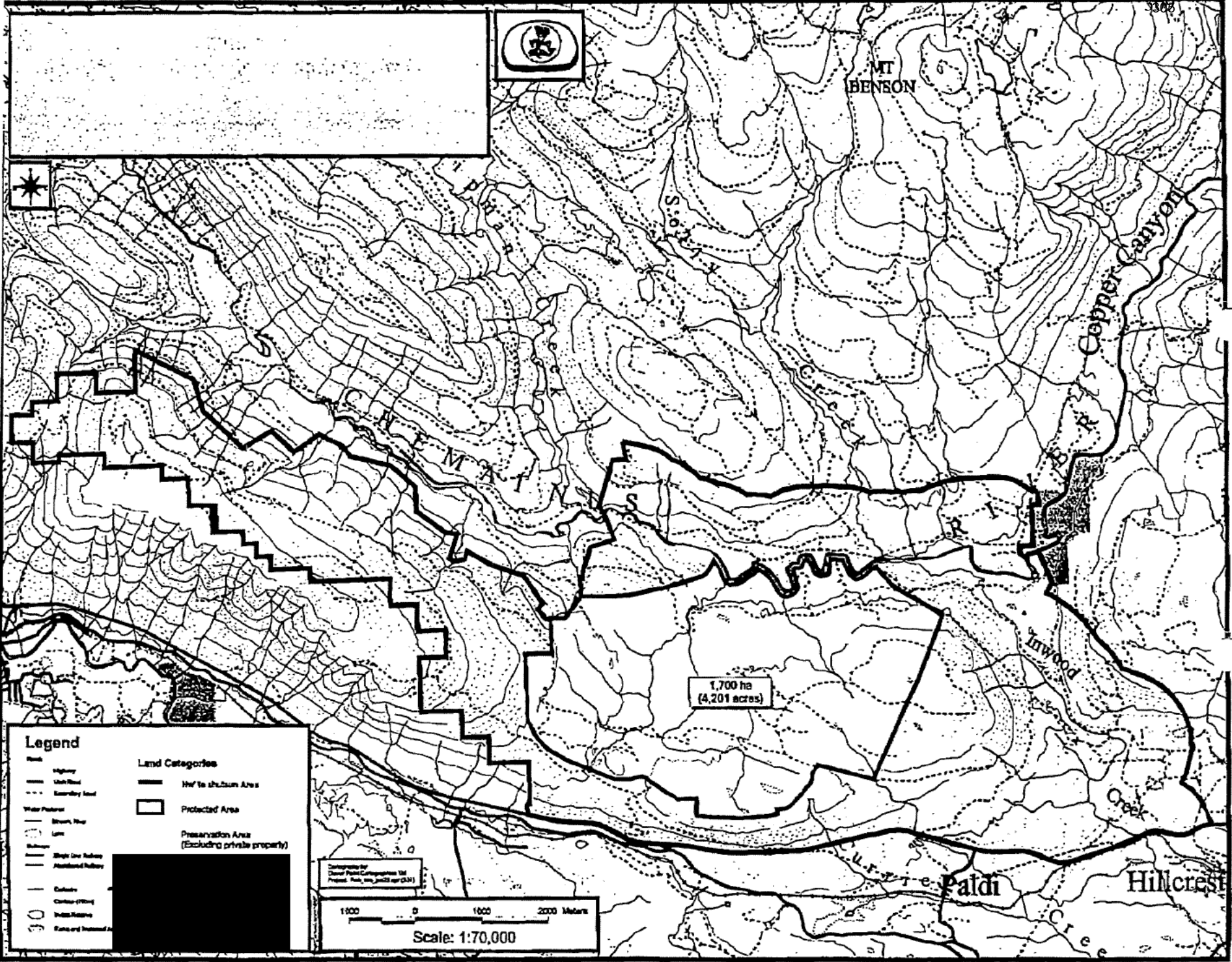
Map reserve for environmental conservation and recreation / watershed reserve

Railway rights of way

Utility/electric power line rights of way

Map reserve for environmental conservation and recreation / watershed reserve

Conditional or final water licences issued under the *Water Act*, if any, and the rights of the holders to enter on the Land



**Legend**

	Highway		Mt to Shubun Area
	State Road		Protected Area
	Boundary Road		Preservation Area (Excluding private property)
	Water Feature		
	Stream, River		
	Lake		
	Single Line Railway		
	Abandoned Railway		
	Contour (10m)		
	Contour (50m)		
	Contour (100m)		
	Contour (200m)		

Digitized by  
David Paul Cartwright for  
Project: Feb. 1992 (map 021)

1000 0 1000 2000 Meters

Scale: 1:70,000



## NEWS RELEASE

For Immediate Release  
March 7, 2001

Ministry of Aboriginal Affairs

### **HISTORIC LAND PROTECTION AGREEMENT SIGNED**

**NORTH VANCOUVER** – A historic land protection agreement was announced today by the Cowichan Tribes, Hul'qumi'num Treaty Group and the governments of British Columbia and Canada.

“This is the most significant land protection treaty-related measure in B.C. and demonstrates to First Nations the provincial government’s commitment to the negotiation of all types of treaty-related measures, including protection measures,” said Aboriginal Affairs Minister David Zirnelt.

The agreement will protect 1,700 hectares of Crown land near Duncan and Cowichan Lake. It covers part of an area of Hill 60, known as Hw'te shutsun to the Cowichan, and is within TimberWest’s Tree Farm Licence 46. The land will be held for two years, with renewal clauses, and is intended to be part of an eventual treaty settlement with the Hul'qumi'num Treaty Group, of which the Cowichan are members.

In conjunction with the land protection agreement, the Cowichan Tribes, B.C. and Canada also reached an interim measures agreement that supports the Cowichan Tribes in their efforts to become more involved in the forest industry. As well as receiving direct financial support to participate in the forest sector, the Cowichan will be invited to submit a proposal for a community forest pilot agreement.

“By giving the Cowichan a bigger stake in the forest sector, we are strengthening the relationships between the Cowichan and local industry and communities,” said Zirnelt. “Interim measures like this create opportunities for all B.C. communities and families.”

The interim measure also makes it possible for the Cowichan to preserve areas that are culturally significant.

Rob Morales, chief negotiator for the Hul'qumi'num Treaty Group, said his group is pleased with the progress made on land protection and economic development. “We view this as a positive step in advancing the treaty process,” he said.

“The conclusion of these land protection and economic development measures is an important first step,” said Cowichan Chief Lydia Hwitsum. “Successful implementation will reinforce the connection of my people to the land, begin addressing the high level of unemployment in my community, and demonstrate to the largest Indian band in B.C. that there are concrete benefits from the treaty process.

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"These agreements were reached with good faith, hard work and give and take on all sides," added Hwitsum. "The Crown has put its honour at stake in these agreements, and the Cowichan Tribes are hopeful that -- unlike in the past -- implementation of these agreements will see that honor upheld. My council, my community and my elders are watching."

Miles Richardson, chief commissioner of the B.C. Treaty Commission, said he hoped the agreement would give momentum to the parties in the Hul'qumi'num treaty negotiations. "It's a breakthrough that land of special significance to a First Nation is being protected while negotiations are continuing," Richardson said.

NOTE: *Backgrounder Available*

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### *Backgrounder*

#### **Cowichan Tribes, Hul'qumi'num Treaty-Related Measures and Cowichan Tribes Interim Measures Agreements**

The Cowichan Tribes, with over 3,000 members, is the largest of five tribes that make up the Hul'qumi'num Treaty Group. In May 2000, the Cowichan Tribes tabled a treaty-related measure proposal with British Columbia and Canada that protected both Hill 60 – known as Hw'te shutsun to the Cowichan Tribes – and their forest interests outside Hill 60.

Subsequent negotiations resulted in the conclusion of the treaty related measure among B.C., Canada, the Cowichan Tribes and the Hul'qumi'num Treaty Group and an interim measures agreement among B.C., Canada, and the Cowichan Tribes.

The protection of this area of the Hw'te shutsun is significant for the treaty negotiation process. The Hw'te shutsun has great cultural, spiritual, and historical significance for the Cowichan people. This area also represents part of the limited Crown land available in the Cowichan region that can be set aside for the purposes of treaty negotiations.

The treaty-related measure protects 1,700 hectares of Crown land in the Cowichan Tribes' traditional territory. The specific protections in place will prevent the sale of Crown land in the protected area, any new staking of mineral claims, new forestry development, and the extraction of oil and gas. Existing interests in the protected area will be respected and the area is still open to the public for recreational use.

The interim measures agreement negotiated along with the treaty-related measures responds to the Cowichan Tribes' concerns about the preservation of culturally significant attributes of the Hw'te shutsun. Under the terms of this agreement, efforts will be made to preserve areas significant to the Cowichan Tribes both within and beyond the 1,700-hectare protected area. Steps to be taken include the exercising existing legislation, and improving education, communications, and co-operation among the Cowichan, British Columbia and industry with interests in the area.

The interim measures agreement includes measures to support the Cowichan Tribes in its endeavours to increase its participation in the forest sector economy. Under the terms of the agreement, the Cowichan Tribes will be directly awarded a 2,000-cubic-metre tenure for the purpose of training for Cowichan Tribes members. The Cowichan Tribes will also be invited to submit a proposal for a community forest pilot agreement of 10,000 cubic metres per year. British Columbia will make every reasonable effort to assist the Cowichan Tribes in its efforts to secure more timber, with a target of 50,000 cubic metres per year.

The \$3.3 million forest sector fund established under the interim measures agreement will further support the Cowichan Tribes' forest sector activities. British Columbia and Canada will contribute \$250,000 each to this fund in the 2000-2001 fiscal year, followed by a \$250,000 contribution from the Cowichan Tribes in fiscal 2001-2002. For the remaining years of the agreement, British Columbia, Canada, and the Cowichan Tribes will make every reasonable effort to contribute \$200,000 each per year, with Canada committed to making efforts to find \$500,000 in 2001-2002.