CHAPTER 6

ENCOUNTERING INDIGENOUS LAW IN CANADA

BRIAN THOM

Drawing out Indigenous law Through Ethnography

This chapter reflects on the work happening at the intersection of anthropology and law in Canada, in particular with respect to the interlegalities (de Sousa Santos 2002) of Indigenous peoples' rights, title, governance, and Indigenous legal orders. In my view, we are at a moment of profound change and innovation in both Indigenous legal discourses and anthropology's engagement with them. Key in this moment of change is the effort to move beyond merely making sense of Indigenous law through the lens of recognition in terms of Western equivalents, and to understand in their own terms how Indigenous laws continue to address local moral and social priorities and practices, and their implications alongside state-ordered law. The chapter develops a brief ethnographic case-study involving several closely related Island Hul'q'umi'num' (Coast Salish) communities on the east coast of Vancouver Island (British Columbia) as they work to mobilize longstanding Indigenous principles and understandings of land tenure and harvest rights among themselves in a complex, state-regulated environment of shellfish harvesting. The purpose of the case-study is to highlight a path of anthropological engagement with contemporary Indigenous law, working both to appreciate the ways Indigenous and state legal orders are brought to life concurrently over time, and to reflect on the on-the-ground ways legal pluralism is experienced. The case also offers conceptual opportunities to transcend problematic state discourses of 'overlapping claims' and makes space for workable principles of co-existence through Indigenous legal sensibility.

In mainstream Canadian legal discourses, Indigenous legal traditions have come to be recognized as important and valid legal orders, a fundamental part of legal pluralism in Canada alongside legislation, common law, and civil code (Borrows 2005). The recent Truth and Reconciliation Commission (TRC) recognized the promise of Indigenous

law 'to reveal treasured resources for decision making, regulation, and dispute resolution' (TRC 2015: 47). Canada has become a place where the work done by Indigenous communities, judges, legal scholars, and, indeed, anthropologists to grasp Indigenous legal principles and their application to contemporary, real-world problems has heightened relevance. Insights on Indigenous legal orders are highly sought after. In 2018 the University of Victoria launched a four-year *Juris Indigenarum Doctor* programme alongside the conventional *Juris Doctor* that qualifies graduates to practise Canadian law and Indigenous law (see Borrows 2019, especially Chapter 6). As Indigenous legal scholar Val Napolean stated, Indigenous law 'is integrally connected with how we imagine and manage ourselves both collectively and individually. ... [It] is about building citizenship, responsibility and governance, challenging internal and external oppressions, safety and protection, lands and resources, and external political relations with other Indigenous peoples and the state' (Napoleon 2013: 34). While these have long been important conversations within communities (despite the imposition of colonial and state power and structures and the forcible marginalization of Indigenous peoples' autonomy and territory), in the resurgence of Indigenous legal traditions alongside state law in Canada, there is still rarely consensus on how issues of Indigenous jurisdiction, authority, procedure, and enforcement manifest in the society at large (see also ICHRP 2009: 95). As the legal community is turning its attention to matters of how Indigenous law can be incorporated more broadly into social, political, and economic life, it is a remarkable time and place to be an anthropologist engaged in dialogues on the principles and theories of Indigenous law (for some examples of significant Canadian anthropological work in this area, see Asch 2014; Feltes 2015; Fiske and Patrick 2000; Miller 2016: Part III; Mills 1994; Noble 2007, 2008; Reagan 2009).

One particularly important space for the emergence of Indigenous legal traditions has been in defining the legal foundations of Indigenous land title and territorial rights in Canada. Over the past twenty years, the resurgence of Indigenous law has come alongside findings from Canada's Supreme Court that recognize how Indigenous law is essential to reconciling the exercise of state sovereignty and the pre-existing social and legal orders of Indigenous peoples. This has been particularly true in the Supreme Court's characterization of Aboriginal title, a *sui generis* property right that is recognized and affirmed by the Canadian Constitution. Aboriginal title, wrote the Supreme Court, 'arises from the prior occupation of Canada by aboriginal peoples ... [including] the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law, ... [and because it] arises from possession before the assertion of British sovereignty. ... What this suggests is a second source for aboriginal title—the relationship between common law and pre-existing systems of aboriginal law.'[1] Legal scholars have argued that this finding opened the door 'for Indigenous peoples to claim title on the basis of their own laws, as an alternative to occupation-based title' (McNeil 2009: 262).

The Gitksan peoples in the *Delgamuukw* case argued that judges must not only look at evidence of the physical occupation of the land in question—a common law test for title which has significant methodological burdens when extending the evidence to the

time before the European assertion of sovereignty—but that Aboriginal title may in part be established by reference to 'the pattern of land holdings under aboriginal law'.[2] The Supreme Court Chief Justice incorporated this argument into the test for proof of Aboriginal title, saying that 'if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.'[3] Indeed, in the *Delgamuukw* case, the courts had the thoughtful and engaged work of anthropologists Richard Daly (2005) and Antonia Mills (1994), along with the extensive oral histories and testimonies of elders and leaders from the plaintiff communities, which set out Indigenous principles of land tenure for the judge.

Despite the opening for the incorporation of Indigenous legal orders into defining landscapes of property and jurisdiction, much of the work by anthropologists in the years following *Delgamuukw* served to develop the ethnography of indigenous practice in terms that the state's political and legal apparatus would readily be able to make sense of. Much of this has been in the vein of land use and occupancy mapping, working to satisfy common law principles of land holding through, documenting map biographies, detailing itineraries of place names, and accumulating other forms of Indigenous knowledge in cartographic terms, which in turn highlights the incompatibility of industrial/extractive political-economic systems and indigenous ways of life (see e.g. Bryan and Wood 2015; Freeman 2011; McIlwraith and Cormier 2015/2016; Natcher 2001). Done well, these research approaches can admirably demonstrate past and present territorial land use and occupancy as familiar categories to common law systems of legal reasoning. Researchers, in collaboration with their Indigenous counterparts, produce maps that have become commonplace in state-led processes such as consultation over resource development, and help to address such questions as: To what extent were the lands proposed for this development used or occupied by your community? Where could the state better locate this industrial development to avoid conflict? However, this kind of approach tends to frame Indigenous land tenure as a kind of artefact or as pieces of evidence that 'can be tested for their veracity and accuracy as descriptions of past practices (or rejected as mythology) rather than themselves practices embedded within legal institutions' (Anker 2018: 30). This approach of site-by-site cartographic inscription leaves the literal and metaphorical 'white spaces' on maps of Indigenous territories and omits the ways that Indigenous peoples articulate their jurisdictions and arrangements around these places.

In the years since *Delgamuukw* brought this principle of dual perspectives of common law and Indigenous law as a founding principle for articulating Indigenous rights into the legal mainstream, the Supreme Court has further stressed the notion that Indigenous peoples' own perspectives need to be fully appreciated to incorporate Indigenous law as a foundation for Aboriginal title and rights.[4] In discussing this, Indigenous laws need not be seen merely as the equivalents of common law concepts; rather, as the Supreme Courts has suggested, they need to be taken on their own terms: 'This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights'.[5]

In making the very first on-the-ground finding of Aboriginal title in Canada in 2014, the Supreme Court emphasized that the common law idea of 'possession' needs to be understood through the Indigenous peoples' 'laws, practices, size, technological ability and the character of the land'.[6] This approach widened the scope of recognition for Indigenous peoples' property rights and jurisdictions across a broad territory, going far beyond the state's characterization of Indigenous land title as the narrowly circumscribed footprints of villages, fishing spots, hunting trails, or the favoured salt licks of animals. This was a significant moment of recognition of Indigenous legal principles for the plaintiffs of the case, the Tsilhqot'in community, who have since worked to formalize laws, land use designations, and conservation objectives over its title lands. This work has further catalysed the efforts of other communities to carry out field research on Indigenous law.

One example of this can be seen in the efforts of the Tsleil-Waututh Nation (near metro Vancouver) to draw on extensive review of oral histories alongside ethnographic and archaeological research to frame the potential impact of oil pipelines and tankers in their territories (TWN 2016). In particular, this Coast Salish First Nation adopted a formal stewardship policy based on legal principles 'to protect, defend, and steward the water, land, air, and resources of our territory ... to provide the environmental cultural, spiritual, and economic foundation' for future generations (TWN 2016: 52). As sources of law for this stewardship policy, the Tsleil-Waututh Nation drew on *snuw'uyulh* ('the teachings', see also Morales 2016; TRC 2015: 70) of the Creator and core cultural values of reciprocal respect and caring for people, land, animals, ancestors, and supernatural beings in the world to provide the rationale and underpinning for their approach to rejecting the pipeline and tankers (TWN 2016). This framing, alongside more conventional mapping of land use and occupancy and analysis of risks for environmental impacts, is at the centre of an ongoing legal and political challenge to the state's efforts to build large-scale oil pipeline infrastructure in Tsleil-Waututh territories.[7] The Tsleil-Waututh Nation has gone well beyond demonstrating common law principles of 'possession' as a source of their own jurisdictions. Legal proceedings around this nationally important industrial development project continue to unfold in 2021; nevertheless, this very public articulation of Indigenous legal order as the nexus for political action has already gained a significant profile in Canada today.

While the potential of Indigenous legal order to reformulate legal reasoning is high, Indigenous legal scholar Al Hanna has observed that, to date, there have been only a 'few places where Indigenous laws function on their own vis-à-vis state law, and [there is] constant pressure to convert them into a western legal framework' (Hanna 2017: 159). Canadian courts have come to recognize the application of Indigenous law in matters of the internal governance of communities[8] and in a few cases around issues of marriage and adoption (see Grammond 2013: 375–6), but many judges still do not appear to be equipped to think with Indigenous law in formulating their legal reasoning (Hanna

2017: 144, 149; see also Borrows 2019: 22). Notable exceptions with respect to land and resources have included Judge Buller-Bennet's decision in the First Nation Court (a division of the Provincial Court of BC), where sentencing in a hunting case was made through 'an Indigenous legal process carried out in a contemporary setting according to indigenous laws' (Hanna 2017: 152).[9] I have also documented a series of cases on Vancouver Island in which trial judges made findings on hunting rights cases according to the legal principles articulated in court with respect to the appropriate manner to exercise harvesting rights in neighbouring First Nations' territories (Thom 2020).

The challenges of codifying principles of Indigenous legal orders in terms that are broadly recognizable are well understood, and have been experienced in Africa and elsewhere around the world (see e.g. Zenker and Hoehne 2018). Canadian legal scholars like John Borrows have grappled with this, trying not to distil Indigenous law into a fixed form, but rather revealing the way it works by reflecting on a broad range of encounters and experiences that inform and inspire legal reasoning. Borrows retells his community's oral traditions, with all their ambiguity and artistry, alongside explicitly dwelling on 'a grandparent's teachings, a law professor's reflections, an animal's behaviour, an engraved image, and a landscape's contours' (2010a: xiii). He insists that Indigenous law is best not represented through codification of ancient or 'traditional' practices, which freezes any understanding of Indigenous legal principles in time and place (Borrows 1998). Rather, through attending carefully to story, experience, and practice, Indigenous law can continue to be a 'living and dynamic force' (Borrows 2019: 15; see also Borrows 2010a: xiii). Val Napoleon and other Indigenous legal scholars have adapted a common law analysis framework, working through Indigenous stories and oral histories to draw out fundamental principles relating to social values and norms to inform legal reasoning (Friedland and Napoleon 2015; Napoleon 2015). These legal scholars call for attention to be paid to the everyday application and implementation of Indigenous legal principles in order to better grasp how they can be applied to the 'messy' lives of people (see Borrows, quoted in Napoleon and Friedland 2014: 1). It is about 'walking along with people who know what they're doing and us gathering possibilities ... for whatever we're doing' (Borrows quoted in Ball 2018). It is about 'a project that requires not just articulation and recognition, but also mindful, intentional acts of recovery and revitalization' (Friedland and Napoleon 2014). This approach from legal scholars sounds in many ways like a kind of reflexive ethnographic practice, a kind of work to which anthropologists can productively contribute.

But how might anthropology engage with this important, emerging dialogue? As an anthropologist working closely and in long-term relationships with Indigenous communities, I assert that it is possible to attend ethnographically to the ways people articulate and engage with Indigenous legal orders outside formal codification and outside the reasons for decisions provided after extensive, strategic, and expensive engagements in the courts. Anthropology allows us to ask such questions as: How are Indigenous legal principles enacted in everyday life? How do they shape local social and political relations and outcomes? What are the small ways in which Indigenous legal principles operate, not only within Indigenous communities, but at the intersection of Indigenous

and state-ordered legal practice? These are substantive elements that, through ethnographically informed approaches, anthropology can contribute to the important objectives of contemporary Indigenous legal discourses.

Napoleon and Borrows both acknowledge that it is not only Indigenous peoples who can 'draw out' Indigenous law (a term coined by Borrows to reveal the storied process of engaging Indigenous law as a living and dynamic way of being and knowing; see Borrows 2010a). In attending to the principles, metaphors, contexts, and experiences these sources reveal, the goal is to make Indigenous law 'intelligible, accessible, legitimate, and applicable' (Napoleon 2015: 893; see also Borrows 2010b). Indeed, Napoleon has argued that 'we must develop an understanding of law across social boundaries so we can argue on an inter-societal basis' (Napoleon et al. 2013: 26). This has anthropological implications, as the core work of ethnography is also often to develop a sufficient understanding of cultural and social context to see across social boundaries, categories, and metaphors. I agree with Borrows's view that 'law is best understood and practised when we are not mesmerized by its generalized, abstract nature' and that 'law must be lived as well as theorized' (Borrows 2010a: 22). Ethnographic practice provides a critical window into the storied world in which Indigenous peoples' laws may be encountered and entangled. Through walking together and sensing the world, stories, and places, anthropologists come into conversation about the practice of legal principles in everyday life.

Below I provide a brief ethnography of encountering Indigenous legal orders through the contemporary landscape of shellfish harvesting in the Salish Sea, a beautiful archipelago of islands on the west coast of Canada near the cities of Victoria, Vancouver, Nanaimo, and Duncan. The Island Hul'q'umi'num' communities with which I most closely work (including Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, Lyackson First Nation) are Coast Salish peoples—about 7,800 individuals in total—whose territories are deeply rooted in this Island landscape. Island Hul'q'umi'num' peoples, like many other Indigenous peoples in British Columbia, have never signed a treaty with the British Crown or later Canada extinguishing or otherwise modifying their Indigenous title, rights, and governance (Egan 2012). In spite of this, colonial expansion starting in the mid-1800s has taken up much of their territories, most notably though the 'land grab' of 1884, which was carried out to facilitate settlement and economic exploitation of the east coast of Vancouver Island (Thom 2014). These politically independent communities (Thom 2010) have been engaged in various petitions, negotiations, and litigation for the recognition of their rights and title almost continuously since the 1860s, including since 1993 through the Canadian land claims negotiation process (Thom 2014). Today about half the population lives on-reserve—about 6,000 ha in total between these communities, a tiny fraction of the 334,000-hectare territory they claim—while the other half lives off-reserve, mostly in the nearby cities and suburban areas. These historical circumstances of territorial alienation have contributed to the stark economic disparity between Island Hul'q'umi'num' and neighbouring non-Indigenous peoples. Unemployment among the Island Hul'q'umi'num' community is very high (between

32 and 35 per cent), especially in comparison to the provincial rate of 8 per cent, and the 2011 median annual income $11,478 (CAD) on-reserve and $21,556 off-reserve was significantly lower than the provincial median of $28,573. In these economic contexts, harvesting local traditional foods and engaging in small-scale economic practices are critical for the well-being of families and households. They provide a vital context for encountering Indigenous legal orders.

Encountering Indigenous Law at *Wuqw'wuw'qw'* ('Drifted Down Slowly'), Round Island

On a warm fall day in 2000, I piloted my small aluminium boat out of Ladysmith Harbour and went 14 km south to Round Island. Round Island (ca. 3 ha) is one of a number of tiny islands in the Chemainus River estuary, located just off the east coast of Vancouver Island (see Figure 6.1).[10] Round Island is surrounded by several nearby Island Hul'q'umi'num' (Coast Salish) communities. It is a mere 160 m north-west of Halalt Island Indian Reserve (IR) 1 (Halalt First Nation), where the permanent winter village of Xulelthw was located prior to being resettled in the late nineteenth century. It is 1.25 km from the present-day Squaw-hay-one IR 11 community of the Stz'uminus First Nation, and 2.5 km from Tsussie IR 6, a reserve community of the Penelakut Tribe. Title to the island is registered as Crown land, with a 0.85 ha private moorage lease tenure on the north-east side of the island, though Aboriginal title has never been extinguished nor formally recognized by the state. Its close proximity to the ancestral communities and reserve lands of several First Nations and the fact that, through colonial omission, it was never designated as an Indian Reserve make Round Island a good place to think through how Indigenous legal orders around land tenure and resource use are intertwined and practised.

Round Island is one of the many ecologically rich locales in the Island Hul'q'umi'num' landscape. Four large archaeological sites encompass nearly the entire island (these sites have the official state designation DfRw-44, 45, 46, and 109; Eldridge 2016). Round Island is a centre of longstanding intensive shellfish production; the culturally modified trees bear witness to a long history of human inhabitance; and it is a place where Island Hul'q'umi'num' peoples once interred their dead. The name for the Round Island in the Hul'q'umi'num' language is Wuqw'wuw'qw', which the late Lyackson elder Agnes Thorne said means 'drifted down slowly' (Rozen 1985: 122). Given the pulse of tidal and fresh waters over this shallow marine estuary, the place name evokes a sense of how the place is encountered as our small vessel navigates Round Island's landscape. At the beginning of time, the First Ancestors of the Island Hul'q'umi'num' communities fell from the sky

with their knowledge, ceremonial prerogatives, and powers, landing at particular locales and establishing the original villages (Boas [1897] 2002: 140; Thom 2005). Swutun—'the growler'—came noisily down at Tl'elt'qt, another tiny island right beside Wuqw'wuw'qw', making the earth shake when he landed (Curtis 1913: 37; Jenness 1935: 12). He later took the now-famous hereditary name St'uts'un (Rozen 1985: 126), and through his own and his children's marriages came to be closely related to numerous auspicious property-owning founders of other original winter village communities (Thom 2005: 90).

Wuqw'wuw'qw' continues today to be a vital point for Island Hul'q'umi'num' fishers to access the flourishing (but often contaminated) shellfish and crab beds in the Chemainus River estuary. The intertidal foreshore is easily accessible with even the smallest of boats, and during particularly during low tides a person could walk there in rubber boots. It is surrounded by commercial log booms, is in the direct line of agricultural and septic outflow from the Chemainus River valley, and is often swept up in the currents of toxins and effluent from the Crofton pulp and paper mill, located 3.5 km to the south-east. In spite of these contemporary physical

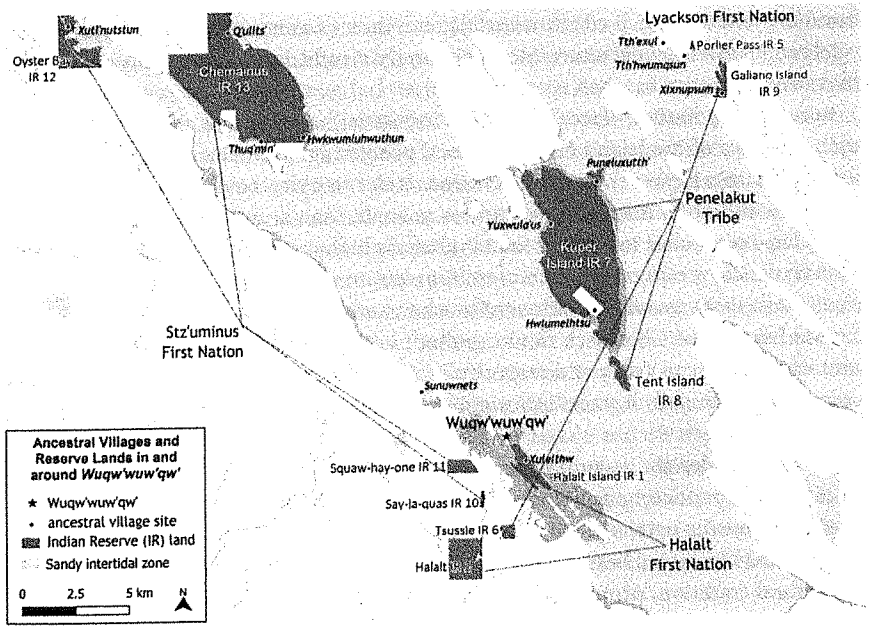

FIGURE 6.1. Round Island and nearby First Nations villages and Reserve lands

Source: Cartography by B Thom, assisted by J Baker. Cadastral and topographic data courtesy of BC Data Catalogue (http://catalogue.data.bc.ca), Open Government Licence—British Columbia (https://www2.gov.bc.ca/gov/content/data/open-data/open-government-licence-bc).

challenges, Round Island's intertidal habitat and location have reinforced its place as a vital locale for ongoing harvesting practices.

The chief of the Penelakut Tribe, Suliisuluq (also known as Earl Jack), had asked my colleague, friend, and Indigenous researcher the late Joey Caro and me to look into Round Island, hoping to help some of his community members to harvest shellfish there. While his community members often harvested along the beaches fronting Penelakut Island (their main reserve about 4 km away across Stuart Channel), those beaches had faced some pressure recently. Given that Round Island is very close to another of their reserve communities at Tsussie on Vancouver Island, Chief Jack was considering how he might support shellfish harvesting there. Strictly speaking, under Canadian fisheries law, all of the wild shellfish stock in the intertidal beaches, including the shellfish in and around Round Island and the Chemainus River estuary, are a 'commons' resource. While recreational licences allow for relatively unrestricted domestic harvest for non-Indigenous harvesters throughout the region, Indigenous harvesters may dig clams for food and social and ceremonial purposes as long as there are no public health or safety closures. Commercial openings for Indigenous harvesters are provided through Federal government licensing schemes that establish opportunities for the landing and sale of defined volumes of shellfish taken on beaches in defined administrative areas.[11] However, the most profitable shellfish harvesting has been through provincially issued foreshore tenures, which effect an enclosure of these commons areas for intensive, privately run shellfish aquaculture companies to have exclusive harvest rights on many of the most productive beaches.

Because of pollution (faecal as well as industrial), a great many of the beaches in the territories of the Island Hul'q'umi'num' peoples are permanently closed to shellfish harvesting. However, in the Chemainus River estuary, the closure does not apply to manila and littleneck clams, oysters, or mussels. Manila and littlenecks tend not to easily bio-accumulate toxins, are found relatively high on the tide line, and are a highly desired delicacy, especially when cooked as 'steamers'. The abundance of a desirable shellfish in this area, along with very low barriers to accessing the foreshore around Round Island, had Chief Jack thinking about how he could help encourage his community members to safely and respectfully access this particular foreshore for an upcoming commercially licenced Aboriginal dig, as well as for their own food needs that winter.

So while under the federal fisheries system Round Island was considered 'open', Chief Jack was concerned about being faithful to the delicate protocols for shared resource harvesting with other First Nations. In this traditional territory of tightly knit, interrelated kin, he is a keen observer of Coast Salish legal principles, and is respectful of cultural tradition, protocol, and practice. He appreciates the teachings in stories of the First Ancestors, and respects how peoples' ancestral names and affiliations connect them to the property rights that flow through descent groups. This small island is very close (less than 0.5 km) to the ancestral village of the neighbouring Halalt First Nation on Willy's Island (Halalt IR 1). Where harvesters from Penelakut taking

shellfish at beaches directly fronting the ancestral Halalt village would be inappropriate without being invited guests, harvesting close by on Round Island may not be unreasonable, given the close proximity of these neighbouring communities and the spirit of reciprocity between them. Indeed, reciprocity among closely related kin is a fundamental lesson often iterated in *snuw'uyulh*, ('the teachings'). The people I work with often refer to this reciprocity principle as *ts'its'uwatul'*—which has a literal sense of 'helping one another', but more than that, it evokes a strong moral grounding for social action, a basis in which to root one's best manners, thoughts, and intentions towards others—and others towards you. *Uy' ye' thut ch 'u' suw ts'its'uwatul' ch*, the proverb goes: 'Be kind, and you help each other' (Thom 2017: 156). *Ts'its'uwatul'* is a 'simple law', as one elder explained to me, but following it has significant implications in lived experience, including Coast Salish engagements with land tenure and resource management.

Chief Jack had spoken several times publicly, and with Joey and me more privately, about how he had ensured that Penelakut beaches were open for other neighbouring Island Hul'q'umi'num' community members to utilize when they were in need. Members of neighbouring First Nations had frequently come over to Penelakut Island by ferry and harvested during open harvesting times. His vision was that, in the spirit of *ts'its'uwatul'*—helping one another—Penelakut members, including those at Tsussie who live walking distance from the Chemainus Estuary, would be welcome to harvest shellfish at Round Island, supported and perhaps joined by neighbouring First Nations such as Halalt. Chief Jack wanted to extend this spirit of reciprocity, but also wanted to avoid 'stepping on anyone's toes' by violating some families' private areas or the territories of a neighbouring First Nation. In this, he was being mindful of another Coast Salish legal principle around land tenure. This principle, which I have taken up in detail elsewhere (Morales and Thom 2020; Thom 2005, 2009, 2014), recognizes that the productive resource locales in the Coast Salish world are generally owned by extended families or held in common by local residence groups. A place like Round Island, which is so close to the ancient village of Xulelthw—the founding community of the neighbouring Halalt First Nation—is also considered to be in Penelakut territory, though how to use this place was not exclusively up to Chief Jack to decide. While individual residents in one of the Penelakut Tribe's villages may be able to exercise their family's harvest rights at places like Round Island, in the present political context Chief Jack recognized Coast Salish land tenure principles, whereby such a decision must be made in concert with the leaders of his neighbouring First Nation communities. This is the way shared exclusive title and jurisdiction (to invoke the language of the Supreme Court in *Delgamuukw v British Columbia*) operates in a place like this.[12]

In looking into Round Island for Chief Jack, Joey and I spoke with the late Abner Thorne, a widely respected Elder from the Island Hul'q'umi'num' community. We asked him how he would navigate the interconnected territorial boundaries of each First Nation in a way that would help explain the rules of access to such a central place

as Round Island. He told us that 'it has to be sorted out between the three groups [Halalt, Penelakut, and Stz'uminus, whose reserves and historic villages are close by, see Figure 6.1]. Their areas are so intertwined that it's too hard to separate them. They [the leaders of these communities] have to come to an agreement that they all co-exist within that area.... It's not only today that we have been interrelated. We've always been interrelated and the governments know that.'[13] Abner elaborated on the depth of these relations, connecting their shared histories through the First Ancestor stories. His implications were clear: while leaders like Chief Jack know very well they must respect the foundations of Coast Salish land tenure and live by the teachings of *ts'its'uwatul'*, the government's licencing and tenure schemes undermine those indigenous legal principles, creating challenges for everyone concerned.

Chief Jack decided to table an 'openness protocol' with other Island Hul'q'umi'num' communities. The protocol restated the well-known foundation of common ancestry and interconnectedness of Island Hul'q'umi'num' communities, and offered recognition of this as the basis for future resource sharing throughout the territory. His idea for a formal protocol soon became the focus of critical attention by other Island Hul'q'umi'num' leaders and community members. In discussing the protocol, they found that, regarding harvesting shellfish for food, social, and ceremonial purposes, there was little controversy. People are always willing to share where there is a need, when a family has to put food on the table. One leader responded, 'I think we can really move towards a document, a protocol document without getting stuck in all the DFO's [Department of Fisheries and Oceans] rules if we say, "We already have a set of rules." And I believe that what we're trying to generate here is a reflection of what the oral history said, a reflection of what our traditional protocols were. And yeah, there's a whole other set of rules and laws, but these ones are ours and that's where we work from.' This leader continued, 'I think if we're going to trump that [DFO] system somehow, it's going to be because we've got strong oral history that says our people harvested according to traditional knowledge in this whole area and then we respect that as *hwulmuhw mustimuhw* [Coast Salish peoples] because we're not going to get the same sort of respect from the Department of Fisheries and Oceans as we could give to each other' (fieldnotes, 2000). Chief Jack was encouraged. These views reinforced his idea that grounding territorial decision-making about resource harvesting in Indigenous land tenure and knowledge would be a powerful approach to actualizing Indigenous legal principles and moving forward in a good way.

However, more critical concerns about a formalized protocol were expressed from many other quarters. While digging for food was one thing, the protocol also connected to commercial harvesting and the ways it might interact with the terms of the licences for small-scale economic opportunities that the government issued to First Nations in the area. Some leaders were more cautious in their support. As one of them said about the protocol, 'I think that part of what we're doing here concerning... us trying to come up with a protocol that respects our traditional relationship [is good], but we are talking about it in the context of Area 17 [a DFO management area that extends through and beyond Island Hul'q'umi'num' and neighbouring First Nations territories; see Figure 6.2]

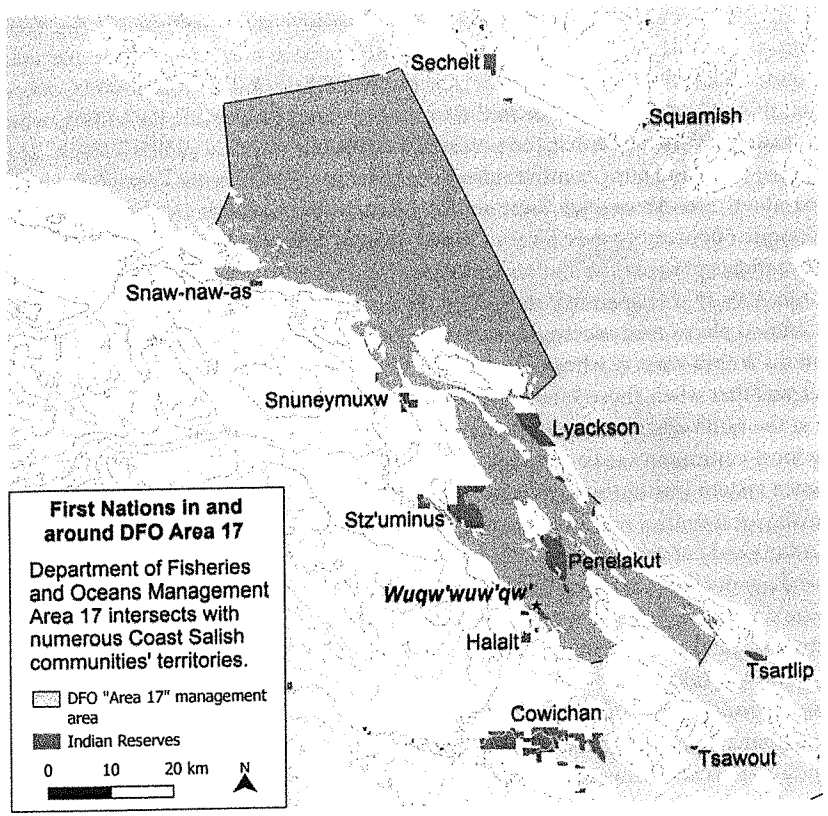

FIGURE 6.2. First Nations in and around the DFO management area 17.

Source: Cartography by B Thom, assisted by J Baker. Cadastral and topographic data courtesy of BC Data Catalogue (http://catalogue.data.bc.ca), Open Government Licence—British Columbia (https://www2.gov.bc.ca/gov/content/data/open-data/open-government-licence-bc).

and those are two different sides.' There are hazards, his words cautioned, in the concurrent exercise of state law and Indigenous law.

Initial concerns were expressed that formalizing protocols around resource access and territorial recognition—in other words, codifying these principles—would create unwanted and unwelcome complications for how Coast Salish principles of respectful reciprocity actually work on the ground. If areas such as DFO Area 17 are declared 'open' to members of other First Nations through a formalized agreement, it could very well undermine local mechanisms that allow families and local leadership to guard against over-harvesting at a particular beach, or change the expectation that reciprocity is a two-way street.

Where shellfish are concerned, there is always the apprehension that a given beach may have too many people harvesting on it, which puts too much pressure on the

resource. This is particularly the case for more readily accessible beaches like Round Island, as most Island Hul'q'umi'num' people do not have the capital to buy and maintain small boats that could take them further afield (Thom and Fediuk 2009). Concerns about this are made more acute in the context of commercial-scale harvesting, which, if not carefully managed, has the potential to wipe out the local shellfish stock. At the time the Hul'q'umi'num' communities were considering the protocol, the DFO had issued about 250 Aboriginal Commercial Licences to harvesters looking to have an economic opportunity over a very limited number of low-tide events (about seven to twelve nights per year). With these licences, any uncontaminated and untenured beach within Area 17 was open to commercial digging. There are very few uncontaminated, untenured places easily accessible without a boat. The experience of several other First Nations within Area 17 whose beaches fronting reserve lands were accessible by car or foot was that when those kinds of permissions were granted, 250 people would show up at the same low tide, creating incredible pressure on the resource and diminishing the local community's economic opportunities through competition. The 'commons' licence system introduced by Canada potentially throws open Coast Salish lands, removing local control and undermining the Coast Salish legal principle of *ts'its'uwatul'*.

Additional concerns were expressed about keeping the spirit, power, and flexibility of Indigenous law and social orders. Some people feared that such a protocol could create unwanted, binding state law-based obligations between First Nations that might transcend these more relational connections and decision-making processes. A related concern was that formalizing such a protocol could formally transpose authority for making decisions regarding traditionally owned resources from families to the elected band councils that govern the affairs of First Nations on-reserve communities. While band councils are, quite pragmatically, the venue for many such decisions today, off-reserve fisheries are by and large not part of their formalized or codified jurisdiction in Island Hul'q'umi'num' communities.

Perhaps even more influential were views expressed by some Island Hul'q'umi'num' leaders that drawing out Indigenous law should not hinder the small but important economic opportunities that the commercial licences provide for their community members. These opportunities include exercising harvesting rights throughout and beyond the traditional territories of any particular First Nation (at the time, DFO Management Area E was the widest zone of commercial harvesting under these licences; see Figure 6.3). These communities face serious poverty, and small-scale commercial shellfish harvesting is a critical way for families to earn much-needed supplemental cash. If commercial licences provided openings in 'the commons', this argument goes, there should not be Indigenous law barriers to accessing those opportunities. As such these leaders were reluctant to exercise their concurrent Indigenous authority, saying, 'I don't want to restrict our people by saying you can only go on these *hwulmuhw* [First Nations] beaches or something, if they're really open. Any beach that's open according to DFO, they could go to.'[14] Another leader emphasized the individual rights of the licence holders: 'I think it is up to the individual licence holders to find out where they could go. I think it is not for us to decide where our Aboriginal Communal Licence persons can go in. I don't think that would be Chief and Council decisions, telling people where they can go digging under their Area E opening. The responsibility is up to the individuals.'[15]

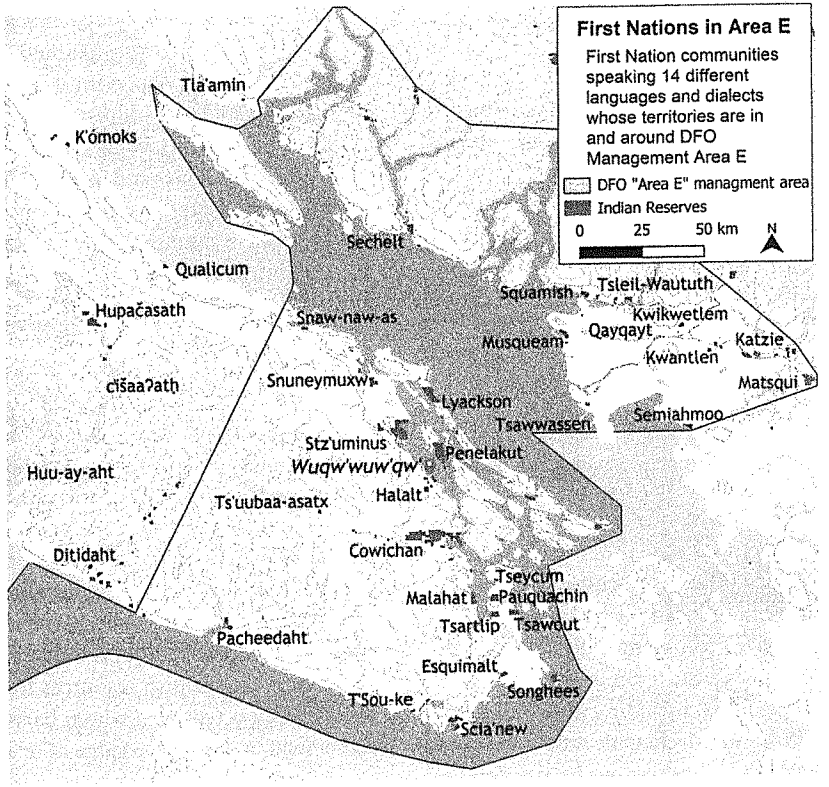

FIGURE 6.3. Map of the numerous First Nations whose territories and jurisdictions intersect with DFO Management Area E

Source: Cartography by B Thom, assisted by J Baker. Cadastral and topographic data courtesy of BC Data Catalogue (http://catalogue.data.bc.ca), Open Government Licence—British Columbia (https://www2.gov.bc.ca/gov/content/data/open-data/open-government-licence-bc).

In the end, the protocol was considered for over a year by the leadership of Island Hul'q'umi'num' communities, but was never signed. Frustrated by the impass, one leader stated, 'We know that the Department of Fisheries and Oceans has got a whole different set of rules that's not consistent with what we believe in as Hul'q'umi'num' people. ... Unless we start saying, "Here's what the real teaching is and here's what the real territory or the harvesting territory of our people is", we're still going to keep banging into a comment like, "You know, who cares about what Hul'q'umi'num' people have agreed on a protocol? I've got my DFO license and I'll go where that license says I can go".'[16] The implication is that jurisdictions that are exercised to implement the federal system for management of commercial shellfish harvesting undermine or operate

at cross-purposes to Indigenous laws that would otherwise mitigate disagreements and conflicts between communities. These are exactly the kinds of challenges pointed out nearly fifteen years later by the TRC, which found that 'Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities' (TRC 2015: 51). What is the point of recognizing Indigenous law if state law simply undermines its logics and intents? New relationships are needed that respect Indigenous communities' attempts to recover and revitalize their legal principles, which in this case include at a minimum the principles of Indigenous land tenure, resource decision-making, and the expectation that Indigenous communities, families, and individuals will be able to realize the full benefits of the land.

Despite the fact that Chief Jack's protocol was not formally codified, Island Hul'q'umi'num' members and leadership have continued to respect the principles he articulated, particularly as they pertain to harvesting on beaches fronting (or near) Indian reserves. First Nations commercial licence holders, though free to dig anywhere within the area of their licence, in practice generally honour local prerogatives. For example, the following winter Cowichan Tribes harvesters stepped back from a commercial dig on Penelakut Island even though it was technically 'open', engaging on-the-ground with the Indigenous legal order being exercised by Penelakut Tribe. This was in spite of the fact that pollution closures, provincial foreshore leases, and challenges in accessing more remote locations had practically reduced the off-reserve areas where harvesters could go for commercial digs to a very limited number of places like Round Island and Nanoose Bay. Such circumstances create intense pressure on shellfish resources from multiple users, including non-Indigenous recreational fishers (some of whom harvest shellfish intensively with little regulation or enforcement, and no knowledge of or responsibility to Indigenous legal orders).

In the last twelve years, several First Nations have organized limited and highly regulated opportunities to harvest and depurate shellfish (i.e. flush toxins out of shellfish in freshwater vats) for commercial sale. In 2006 the Hul'q'umi'num' communities created a joint venture, Qum'ul Seafoods, which obtained a permit to commercially harvest about 11,000 kg of clams near Round Island (Hill 2006: 3). While there was initially great hope that the joint venture would be a commercial success, it faced many challenges. Taking up a different strategy, individual First Nations started to register exclusive shellfish tenures for beaches near their reserve lands (in many cases holding their noses at the act, as Elders had often pointed out the seeming injustice of having to ask the province for a tenure for their own lands). The Halalt First Nation and Halalt Shellfish Development Corporation registered three commercial shellfish aquaculture tenures for exclusive harvesting near Round Island, while Penelakut and Stz'uminus First Nations obtained similar tenures, mainly in areas fronting their reserves (see Figure 6.4). In many ways, these actions in the years following Chief Jack's call for a protocol have effected a hardening of borders and an enclosure of Indigenous inter-tidal lands, though the terms are carefully crafted with legal counsel to be without prejudice to Indigenous title and rights.

However, even an 'enclosure' like an aquaculture tenure does not fundamentally change or extinguish Island Hul'q'umi'num' law. In 2011, in a case over water rights in the

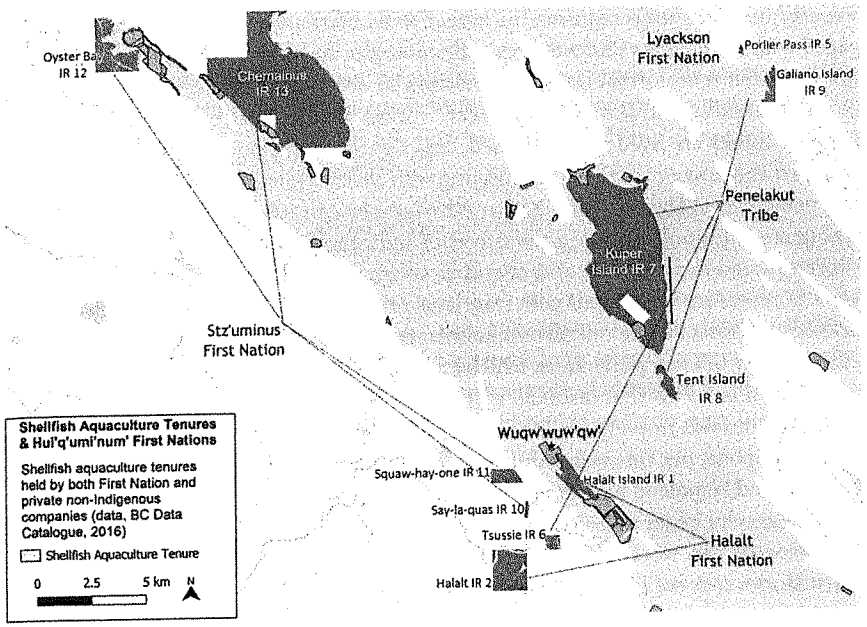

FIGURE 6.4. Shellfish aquaculture tenures held by Island Hul'q'umi'num' and non-Indigenous ventures

Source: Cartography by B Thom, assisted by J Baker. Cadastral and topographic data courtesy of BC Data Catalogue (http://catalogue.data.bc.ca), Open Government Licence—British Columbia (https://www2.gov.bc.ca/gov/content/data/open-data/open-government-licence-bc).

Chemainus River estuary, the BC Supreme Court recognized that the Halalt First Nation and their Island Hul'q'umi'num' neighbours (including Penelakut) had established the prima facie case for shared exclusive Aboriginal title in this area.[17] Rather than leveraging a 'protocol' to effect Indigenous land tenure, the focus of the Island Hul'q'umi'num' leadership has been to continue valuing the practice and the relationships that Indigenous legal orders are rooted in. Island Hul'q'umi'num' leadership use licences and tenures to continue to engage the world with Indigenous legal orders firmly in mind. On the ground, families continue to navigate their subsistence and livelihoods through acting on ancestral prerogatives and embodying *ts'its'uwatul'* in sharing opportunities and resolving disputes.

Anthropology and Indigenous Legal Orders

Anthropology is in a new position with respect to Indigenous law in Canada. Indigenous legal scholars and communities are not looking to anthropologists as

'experts' on Indigenous cultures, but rather as scholars and collaborators who are engaged with Indigenous philosophies and ontologies and are able to comment on these not as frozen museum pieces, but in relation to ordered social life in the present. As in this case-study, anthropologists bear witness to the legal orders of Indigenous peoples as they are lived and expressed, experienced, and entangled in mutual worlds (Dussart and Poirier 2017), while engaging with abstractions of Indigenous legal orders and principles of legal reasoning. Our ethnography can strive to embrace complexity, ambiguity, and multiplicity in narratives of Indigenous legal orders as they are both expressed and experienced, and attend to situated knowledge and practices. We can work to reveal entanglements with state legal orders, and to bring to our analysis questions of the forces of colonialism, neoliberalism, governance, and social order. Such ethnography offers a point from which to reflect on how these legal orders might be understood in terms that resonate with Indigenous values and norms and how legal reasoning unfolds in everyday life. The ethnographic view is, of course, always partial and incomplete, but this situatedness is something that Indigenous legal scholars like Borrows and Napoleon have embraced.

Ethnography raises important questions about the circumstances under which anthropologists can work with Indigenous legal traditions. We need to cautiously ask: What stories may we tell, and how can we situate ourselves within them? What details are important to include, and what is sidelined or silenced? How can we know that we have adequately interpreted local metaphors and concerns in our work of drawing out Indigenous law? Long-term collaborative ethnography can provide a basis for sharing in this work, as we walk the land together, listen to the stories, and become mutually entangled. It can provide a framework of accountability and ethical practice through committed attention to our shared worlds. Anthropologists working in this mode are not tasked with codifying Indigenous law from our partial and fallible positions, steeped in our own personal theoretical, political projects. In the spirit of all good anthropology, such work is offered with humility and often in the spirit of helping illuminate these difficult points of intersection—like 'looking into' clam beaches—in hopes of achieving some measure of social justice in our shared worlds.

Notes

1. Lamer CJ, *Delgamuukw v R* [1997] SCR para. 114.
2. Lamer CJ, *Delgamuukw* [1997] SCR para. 147.
3. Lamer CJ, *Delgamuukw* [1997] SCR para. 148.
4. I use the terms 'Aboriginal title' and 'Aboriginal rights' when referring specifically to the language of the Canadian Constitution and how Canadian courts have defined the nature and scope of these concepts. 'Indigenous' and 'Indigenous rights' are terms used by legal scholars in Canada in a more encompassing way, not only acknowledging these common law notions of Aboriginal title and rights, but also the rights that flow from Indigenous legal orders irrespective of the common law and from international Indigenous rights frameworks.

5. McLaughlan CJ in *Tsilhqot'in v R* [2014] SRC 257, SCC 44 (CanLII) para. 32.
6. McLaughlan CJ in *Tsilhqot'in v R* [2014] SRC paras 41, 49.
7. *Tsleil-Waututh Nation v Attorney General of Canada, et al.*, 2020 CanLII 17604 (SCC), <http://canlii.ca/t/j5pw2>; *Tsleil-Waututh Nation v Canada (Attorney General)* [2018] FCJ No 876 (QL).
8. See e.g. *Pastion v Dene Tha' First Nation*.
9. See also *R v Joseph Thomas* and *R v Christopher Brown*, 2015, First Nations Court, Duncan.
10. Cartography by B Thom, assisted by J Baker. Cadastral and topographic data courtesy of BC Data Catalogue (<http://catalogue.data.bc.ca>), Open Government Licence—British Columbia (<https://www2.gov.bc.ca/gov/content/data/open-data/open-government-licence-bc>).
11. 'Landing' refers to bringing in the harvest for measuring and weighing to ensure that it does not exceed the allowable quota or size regulation.
12. *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1997 CanLII 302 (SCC).
13. Interview with Abner Thone, November 2000.
14. Excerpt from fieldnotes, 2000.
15. Excerpt from fieldnotes, 2001.
16. Excerpt from fieldnotes, 2001.
17. *Halalt First Nation v British Columbia (Environment)* [2011] BCSC 945 (CanLII) paras 486–7.

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
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Oxford University Press in the UK and in certain other countries

First Edition published in 2022

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2022902574

ISBN 978-0-19-884053-4

DOI: 10.1093/oxfordhb/9780198840534.001.0001

Printed and bound in the UK by
TJ Books Limited

THE OXFORD HANDBOOK OF

LAW AND ANTHROPOLOGY

Edited By

MARIE-CLAIRE FOBLETS, MARK GOODALE,
MARIA SAPIGNOLI, OLAF ZENKER

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