

Strait of Georgia **Island Tides**

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Hul'qumi'num seek OAS judgment on E&N lands

The Inter American Commission on Human Rights (IACHR) agreed on October 30, 2009, to hear the petition of the Hul'qumi'num Treaty Group (HTG) concerning the government's allocation of a substantial area of their traditional territories on southeastern Vancouver Island as payment for the building of the E&N Railway in the mid nineteenth century. The construction of the railway was a primary condition of British Columbia joining Canada. While the native bands retained hunting and fishing rights over their public lands and waters within their traditional territories, no treaty was ever signed, and no compensation was ever paid.

The HTG includes the Chemainus, Cowichan, Halalt (south of Chemainus), Penelakut (Kuper Island, Galiano Island), Lake Cowichan, and Lyackson (Valdez Island) First Nations.

The Commission is a part of the Organization of American States (OAS), and most of its human rights cases concern disputes in Central and South America. This case may well be the first involving Canada.

The traditional territories of the HTG include much of

southeastern Vancouver Island, most of the Southern Gulf Islands, and extend across the Strait of Georgia to the Fraser River delta. The dispute referred to the Commission includes E&N lands on Vancouver Island south of Nanaimo and north of Victoria and Saanich, but does not include any of the Gulf Islands or any land on the BC mainland.

History

The nascent Colonies of British Columbia and Vancouver Island were merged in 1866, and entered Confederation in 1871. Prior to that time, settlers had pre-empted lands (at 160 acres per family) on southern Vancouver Island under the administration of James Douglas. Between 1850 and 1854 Douglas, as agent of the Hudsons Bay Company, had negotiated treaties for settlement lands in and around Victoria (the 'Douglas Treaties') with eleven Indian bands covering Songhees, Esquimalt, Klallam, Sooke, and Saanich. He had also completed treaties with the Sarlequun in Nanaimo, and two bands in Prince Rupert. Payment was made in Hudsons Bay blankets. The conditions of these treaties granted only the actual village sites to the bands, but all other lands became the 'property of the white people for ever'. It was also understood that band members were 'at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly'.

None of the Douglas Treaties are involved in the HTG petition to the IACHR, and the E&N lands do not overlap with Douglas Treaty lands.

Probably the most important condition of British Columbia joining confederation was the building of a railway from the east to the 'seaboard' of British Columbia. With the initial assumption that the transcontinental railway would cross Seymour Narrows to reach Vancouver Island, the E&N Railway land grant reserve was first defined in 1874 as 'a strip of land Twenty Miles in width along the Eastern Coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt'. In 1884, in the Settlement Act, the first formal E&N land grant to the Dominion included some 1.8 million acres, and was defined as 'On the South, by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca; On the West, by a straight line drawn from Muir Creek, aforesaid, to Crown Mountain; On the North by a straight line drawn from Crown Mountain towards Seymour Narrows, to the 50th parallel of latitude, to a point on the coast opposite Cape Mudge; and On the East, by the coast line of Vancouver Island to the Point of Commencement.' This makes it quite clear that the Gulf Islands are not included in the E&N grants.

The grant, however, did not include previously pre-empted private lands, and this pre-emption activity continued throughout the negotiation and railway-building period, as a necessary consequence of settlers arriving in the area. The colonial, later provincial, government naturally encouraged this growth. Land north of a line 'running East and West half way

between the mouth of the Courtenay River (Comox District) and Seymour Narrows' was excluded from the first grant. It was intended that these lands would be used to make up lands lost to the railway company by pre-emptions and other alienations.

It was, of course, the Dominion government that was responsible for actually getting the railway built, and it eventually contracted with Robert Dunsmuir (the Esquimalt and Nanaimo Railway Co) for the work, which was carried out between 1884 and 1887. Dunsmuir was interested in the coal deposits in the area, and this resulted in the inclusion in the eventual grant of coal, other ores (not including gold and silver), and timber. (He was also paid \$750,000 in cash.)

Further grants followed; the second, in 1905, totaled 86,000 acres in Sayward district to make up for lands alienated from the railway grant prior to 1884; these lands were located north of the boundary specified above. The third grant (1913), was also to make up for land granted to settlers; the fourth grant (1925) included 10,000 acres on the foreshore of Fanny Bay and Union Bay, and some coal rights in the vicinity.

Obviously, not all the E&N railway grants fall within Hul'qumi'num traditional territory; the Hul'qumi'num Petition estimates the area common to both at 268,000 hectares (about 662,000 acres), or about a third of the eventual E&N grant area.

Current Ownership of the Lands

In 1905, the CPR bought the E&N, paying \$1 million for the railway and \$1.25 million for the remaining unsold land. In 1910, Dunsmuir sold his coal mining interests for \$11 million. Since that time, there have been numerous land transactions; today's major landholders are Timberwest and Island Timberlands. The timber companies, in turn, have started to sell off their privately owned forest lands for residential and urban development.

Decision on the Petition

The Hul'qumi'num Petition to the IACHR essentially claims that the government of Canada, in failing to settle by any means the HTG claim for compensation for their traditional lands which had been included in the E&N grants, has violated the provisions of specific sections of the American Declaration of the Rights and Duties of Man, and of other human rights 'enshrined in international common law'. But Canada argues that the HTG have failed to exhaust all the 'domestic remedies' available to them, as required by the rules of the IAHCRC, and anyway, Canada is not a signatory to some of the documents which form the basis of the allegations.

The HTG, for their part, assert that domestic legislation does not provide for 'adequate and efficient' remedies, and that they have neither the funds nor the time to pursue all the legal and negotiating avenues suggested by Canada (these avenues specifically include the British Columbia Treaty Commission

HUL'QUMI'NUM from page 9

process). And the Treaty Commission process specifically excludes any consideration of lands now privately owned.

The IACHR have concluded that the Petition is 'admissible' with respect to alleged violations of certain articles of the American Declaration. These include Article II (right to equality before the law), Article III (right to profess, manifest and practice a religious faith), Article XIII (right to culture), and XXIII (right to property). As a consequence of Canada's

membership in the OAS, the IACHR deems itself competent to hear the Petition.

The IACHR decision emphasizes that the grounds for admissibility of the Petition are not the same as the grounds for the eventual decision, and that this decision does not prejudice the merits of the case.

It is not clear at this point when the case will be argued. ✎